



Human Rights Law Clinic Papers 2022

Children's Civil and Political Rights: A Case for Standard Setting

To: Ilaria Paolazzi, Child Rights Connect

Submitted by: Megan Middleton and Bethany Fieldhouse

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i) List of Abbreviations

CCPR	Children’s Civil and Political Rights
CRC	United Nations Committee on the Rights of the Child
CO	Concluding Observations
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GC	General Comment
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OHCHR	United Nations Office of the High Commissioner for Human Rights
UNCRC	United Nations Convention on the Rights of the Child
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
UPR	Universal Periodic Review

1. Introduction

In its 2020 publication, 'The Rights of Child Human Rights Defenders: Implementation Guide',¹ Child Rights Connect denounced the historic underdevelopment by international human rights mechanisms of the civil and political rights of children. This oversight has resulted in inadequate elaboration of international standards and subsequent failure by States to *respect, protect, and fulfil* these key human rights for children.

This memorandum aims to inform the development of a proposal by Child Rights Connect to the UN Committee on the Rights of the Child (CRC), recommending that it develops international standards through a dedicated General Comment (GC) on the most neglected civil and political rights of children. According to its Rules of Procedure,² GCs of the CRC act as 'authoritative statements on the implementation, interpretation and meaning of provisions under the UN Convention on the Rights of the Child (UNCRC)'.³ Our research seeks to identify the key legal gaps in the protection of children's civil and political rights (CCPRs) as well as to explore why these gaps exist, in order to persuade the CRC of the importance of clarifying State's obligations under the UNCRC.

At the request of Child Rights Connect, our research will focus on four rights of the UNCRC, namely; the child's right to have their views given due weight (Article 12); the right to freedom of expression (Article 13); the right to freedom of association and to freedom of peaceful assembly (Article 15); and the right of access to information (Article 17). These rights empower children to participate equally in society and to act as human rights defenders, but have been historically overlooked in both interpretation and application.

2. Case studies: Moldova and Russia

This section provides examples of gaps in international standards, by examining two domestic laws which create barriers to children's CCPRs. This demonstrates the effect of gaps in standards, and why it is so important to fill them through clarification of the UNCRC.

2.1 Moldovan Law on Assemblies

¹ L Lundy, 'The Rights of Child Human Rights Defenders: Implementation Guide' (Child Rights Connect, 2020).

² United Nations Committee on the Rights of the Child, CRC/C/4/Rev.4, Rule 77 (1 April 2015).

³ Sheila Varadan, The Principle of Evolving Capacities under the UNCRC, IJCR 27 (2019) 306-388, 308.

Underdeveloped international standards on CCPRs enables States to create barriers to CCPRs within their national laws. An example of this is the Law on Public Assemblies of the Republic of Moldova, which stipulates a minimum age of 14 for organisers of assemblies.⁴ Article 15 UNCRC requires that States, ‘*recognise the rights of the child to freedom of association and to freedom of peaceful assembly*’.⁵ The crucial distinction lies between the right to organise assemblies and the right to participate in assemblies. The CRC’s position as to whether Article 15 affords the right to both is unclear, and other bodies have expressed conflicting positions. The OSCE’s Guidelines on Peaceful Assembly states that, ‘Article 15 of the UNCRC requires State Parties to recognise the right of children *to organise and participate* in peaceful assemblies’.⁶ However, the Guidelines accept the legitimacy of age-based restriction on ‘the right to organise’, on the grounds of the ‘important responsibilities of organisers of assemblies’.⁷ The justification of ‘important responsibilities’ is vague and plays into the notion that children lack the capability to exercise their rights, which has been found to be a primary barrier to the correct implementation of CCPRs.⁸ The OSCE Guidelines also require that restrictions have ‘due regard to the evolving capacity of the child’.⁹ The principle of evolving capacities is defined by the Committee as an ‘enabling principle that addresses the processes of maturation and learning, through which children progressively acquire competencies, understanding and increasing levels of agents to [...] exercise their rights.’¹⁰ The Moldovan law does not consider the progressive acquisition of agency by children to exercise their rights, thus disregarding the principle.

States may also seek to justify a minimum age restriction on the organisation of assemblies on the basis of children’s safety. The Special Rapporteur on Freedom of Association and Assembly has emphasised that a blanket restriction on the participation in public assemblies of individuals below a certain age ‘eliminates the right to participate in peaceful public assemblies for an entire portion of the population, without exception, contrary

⁴ *Moldova: Law No. 26-XVI of 2008 on Assemblies* [Republic of Moldova], 22 February 2008.

⁵ United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNTS 1577 (UNCRC) Art 15.

⁶ OSCE Office for Democratic Institutions and Human Rights (ODIHR), *Guidelines on Freedom of Peaceful Assembly* (2nd edn) OSCE, Warsaw, 2010, 57.

⁷ *ibid* 58.

⁸ L Lundy, ‘The Rights of Child Human Rights Defenders: Implementation Guide’ (Child Rights Connect, 2020) 3.

⁹ OSCE Guidelines on Freedom of Peaceful Assembly (n 6) 58.

¹⁰ United Nations Committee on the Rights of the Child ‘General Comment No 20 on the implementation of the rights of the child during adolescence’ (6 December 2016) CRC/C/GC/20, para 18.

to Article 15'.¹¹ It is noted that the Moldovan law prevents the organisation of public assemblies by minors, not the participation. Therefore, the CRC must clarify its position on whether under Article 15 UNCRC, States are obliged to respect children's right to be involved in the organisation of assemblies as well as the participation. It has also been emphasised by the Human Rights Committee (HRC) that States must 'promote an enabling environment for the exercise of the right of peaceful assembly without discrimination, and put in place a legal and institutional framework within which the right can be exercised effectively'.¹² In the context of children's right to freedom of assembly and association, this 'legal and institutional framework' must include safeguarding measures to protect children. In the case of Moldova, a submission to the 40th Session UPR report noted that, 'protection mechanisms at local and national levels specifically developed to keep children safe are not functioning well - their capacities are weak, and they are lacking trust'.¹³ Without implementation of effective protection mechanisms, which accommodate the unique needs of the child, children will be barred from exercising the CCPRs afforded to them by the Convention.

The CRC must clarify whether blanket age-based restrictions on the exercise of rights is incompatible with States obligations under the Convention, and if so, whether Article 15 UNCRC requires States to respect the rights of children to both organise and participate in peaceful assemblies. In order to do this, States must recognise both the child's 'capabilities and vulnerabilities', in equal measure, and put in place special, 'child-led' resources and legislation that both enable and protect.

2.2 Russian 'Anti-Gay Propaganda Law'

There are multiple examples of States misapplying CCPRs, justified by reasons of protection. One is the 2013 Russian federal law, banning the 'propaganda of non-traditional sexual relations' among minors'¹⁴, referenced in Western media as the 'anti-gay propaganda law'. Russia suggested this law was needed as 'non-traditional people... pose[d] a

¹¹ United Nations Human Rights Council 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai' (2014) A/HRC/26/29, 24.

¹² Lundy (n 1) 64.

¹³ Joint Submission by Child Rights Information Centre (CRIC) and others, '*Human Rights Situation in the Republic of Moldova with focus on the rights of Child Human Rights Defenders*' to Universal Periodic Review, 44th Session (Chisinau, 1st July 2021), para 10.

¹⁴ Miriam Elder, 'Russia passes law banning gay "propaganda"' *The Guardian* (Moscow 11th June 2013) <<https://www.theguardian.com/world/2013/jun/11/russia-law-banning-gay-propaganda>> [Accessed 28th March 2022]

significant threat to traditional values’ and the ‘moral health of the Russian youth’.¹⁵ This denies children the right to access information regarding gender and sexual diversity, which is a direct violation of Article 17 of the UNCRC, as well as limiting children’s freedom of expression. However, the Russian government argued that this law was put in place to protect children, rather than restrict them.¹⁶

This law uses protection of children as ‘an excuse to silence any public discussions or positive messages about LGBT issues’,¹⁷ and highlights how without clarification from bodies such as the CRC, CCPRs can be restricted. As Quenerstedt suggests, ‘a child’s social human rights to welfare, education and health’ were recognised ‘well before any claim’ of CCPRs.¹⁸ The fact that welfare rights were established for children before their civil rights, whereas ‘adult’ human rights ‘establish[ed]... initial civil rights’¹⁹ first, indicates that children’s welfare has always been prioritised above the recognition of their CCPRs. This creates a hierarchy of rights, and the underdevelopment of these specific rights by the CRC leaves gaps for legislation such as the anti-gay propaganda law, under the guise of protecting children.

It is notable that the European Court of Human Rights heard a case on this law, *Bayev and Others v. Russia* in 2017. The applicants believed that the ‘legislative ban’ on discussion of gay relations ‘violated their right to freedom of expression and was discriminatory’.²⁰ The Court found violations of Articles 10 and 14 ECHR and required Russia pay reparations to the applicants. The Court applied a narrow margin of appreciation in this case, despite the dissenting opinion of Judge Dedov who suggested a wider margin of appreciation, in ‘respect of public morals, decency and religion’.²¹ We cannot determine whether the ruling would be the same had the applicants been children and the issue of protection been raised in order to legitimise the interference.

¹⁵ Justine De Kerf, ‘Anti-Gay Propaganda Laws: Time for the European Court of Human Rights to Overcome Her Fear of Commitment’ (2017) 4 DiGeSt Journal of Diversity and Gender Studies, 36.

¹⁶ Human Rights Watch, ‘No Support: Russia’s ‘Gay Propaganda’ Law Imperils Youth’, 11th December 2018 <<https://www.hrw.org/report/2018/12/12/no-support/russias-gay-propaganda-law-imperils-lgbt-youth>> [Accessed 28th March 2022]

¹⁷ Child Rights International Network, ‘Russia: ‘Gay Propaganda’ law remains in place, but complaints against it continue’ <<https://home.crin.org/latest/russia-gay-propaganda-law>> [Accessed 30th March 2022]

¹⁸ Ann Quenerstedt, ‘Children, But Not Really Humans? Critical Reflections of the Hampering Effect of the “3 p’s”’ (2010) 18 International Journal of Children’s Rights, 629.

¹⁹ *ibid* 628.

²⁰ *Bayev and Others v. Russia* App no. 67667/09 (ECtHR, 20th June 2017) para 3.

²¹ Dissenting Opinion of Judge Dedov in *Bayev* (n 20).

Russia's anti-gay propaganda law exemplifies the legal gaps that exist due to the CRC's lack of clarity surrounding CCPRs. In order for these gaps to be filled and to limit State manipulation of these gaps, the CRC must provide clarification of CCPRs through a dedicated General Comment.

3. Drafting History of the UNCRC

This section will explore the drafting history of the Convention, by drawing on the *travaux préparatoires*, as well as work done in 2007 by the Office of the United Nations High Commissioner for Human Rights on the legislative history of the Convention.²² To supplement the existing literature, we conducted an interview with Nigel Cantwell, an expert who participated in the drafting process. This section attempts to identify where the origin of the gaps in international standards lie.

3.1 Analysis of the UNCRC *Travaux Préparatoires*

To fully understand the extent of the legal gaps that exist in relation to CCPRs in the UNCRC, we must examine why these gaps exist. To do this, we explored the drafting history of the Convention, using the OHCHR's 'Legislative History on the Convention on the Rights of the Child', which examines official documentation and the *travaux préparatoires*. We systematically worked through the OHCHR's legislative history for mentions of CCPRs with a specific focus on Articles 12, 13, 15 and 17. Any mention of CCPRs in the OHCHR's work was then checked against the *travaux préparatoires* for wording specificities and to check nothing had been missed. Due to time constraints, we streamlined this work by predominantly focusing on any initial mentions of CCPRs in the Convention, of which there was very little, as well as how the four provisions were developed. We have highlighted three *travaux préparatoires* documents in this piece, as they were the only reports that added anything meaningful to the discussion of CCPRs in the drafting process.

In 1978, the Polish Government requested that the UN Commission on Human Rights 'include the issue of a draft convention on [children's rights in] the Commission's agenda'.²³ The draft convention was influenced by Poland's cultural sensitivity 'to the

²² Office of the United Nations High Commissioner for Human Rights, 'Legislative History of the Convention on the Rights of the Child', United Nations, New York and Geneva, 2007.

²³ *ibid* xxxvii.

suffering and misery of children', experienced on Polish territory during the war.²⁴ This historical context is significant, as much of the drafting process focused on the protection of children's welfare, and 'civil and political rights were accordingly not on the agenda'²⁵ at this point.

The first proposal to include CCPRs in the convention was made by the United States delegation in the 1985 Working Group, nearly seven years into the drafting process. The proposal outlined that the 'child shall enjoy civil and political rights and freedoms in public life to the fullest extent commensurate with his age'.²⁶ The proposal emphasised 'freedom from arbitrary governmental interference with privacy, family, home or correspondence' as well as the 'right to petition for redress of grievances'²⁷ when discussing CCPRs, suggesting these were of particular importance to the US delegation. There is no evidence within the *travaux préparatoires* as to how this initial suggestion of children's civil and political rights were received.

Despite the US delegation's attempted introduction of CCPRs into the draft convention, these rights were a serious point of contention throughout the drafting process.²⁸ According to the OHCHR's Legislative History, much deliberation surrounded the formulation of Articles 12, 13, 14 and 17. However, there is actually very little evidence of this within the *travaux préparatoires* themselves. In relation to Article 17, the drafters struggled to find a balance between the 'free flow of information' and 'protection of the child from information and material injurious to his or her well-being'.²⁹ This was seen in the Report from the Working Group in 1981, when 'differing views were expressed' on the 'extent to which State parties should ensure the protection of the child against harmful influences' from media such as 'radio, film, television, printed materials and exhibitions', although no mention of what the differing views expressed were.³⁰ Unfortunately, this is the only evidence within the *travaux préparatoires* of discussions surrounding Article 17, despite the right being a 'serious point of contention'.³¹

²⁴ *ibid.*

²⁵ Quennerstedt (n 18) 627.

²⁶ Report of the Working Group on a Draft Convention on the Rights of the Child (1985) E/CN.4/1985/64 Annex II, para 3 (v).

²⁷ *ibid.*

²⁸ OHCHR Report (n 20) xli.

²⁹ *ibid.*

³⁰ Report of the Working Group on a Draft Convention on the Rights of the Child (1981) E/CN.4/L.1575, para 119.

³¹ *ibid* (n 28).

It is important to note some proposed provisions that were discussed but not adopted at the end of the drafting process. During the 45th Session of the Economic and Social Council, the Working Group reported on the discussions and proposals made during this time. A proposal by the delegation of the Federal Republic of Germany (FRG) suggested that Article 2 be expanded to include that 'general human rights as enshrined in the International Covenant on Civil and Political Rights even apply to children, if a State Party to the present Convention is not a Party to the Covenant',³² This proposal could have diminished the legal gaps evident between the UNCRC and the ICCPR. However, other delegations suggested it was 'too late to adopt the proposal'³³ as its 'acceptance would only serve to delay adoption of the Convention'.³⁴

One of the main problems within the proposal was the reality of getting States to ratify a convention that referenced and linked to other treaties they had not ratified. This proposal undoubtedly raised questions of state sovereignty and whilst this explains why it was not adopted, it is clear how legal gaps were formed as a result of this lack of general application of other treaties. Had this proposal been adopted there would have been clearer links between the interpretations and standards set within the ICCPR and the UNCRC.

Above all, analysis of the drafting process highlights the drafters' intent to focus on protecting children's welfare and promoting this above children's civil and political rights. This suggests that the drafting process led to a hierarchy in which welfare and social rights were prioritised above CCPRs. This clear hierarchy helped to form the legal gaps that are evident in CCPRs today.

3.2 Interview with Nigel Cantwell

To gain a wider understanding of the drafting process of the UNCRC we conducted an interview with Nigel Cantwell, whose role as spokesperson for the NGO groups involved in the drafting process provided insights into the intentions and priorities of the drafters. Cantwell, who founded the organisation Defence for Children in 1979, helped to coordinate the NGO contribution that had been 'chaotic' during the initial years.³⁵

³² Report of the Working Group on a Draft Convention on the Rights of the Child (1989) E/CN.4/1989/48, para 695.

³³ *ibid* para 700.

³⁴ *ibid* para 697.

³⁵ Interview with Nigel Cantwell, Child Protection Policy Consultant, University of Geneva (28th March 2022).

Upon discussion with Cantwell, it was clear that the drafter's intention was for the UNCRC to focus on child specific issues that were more welfare-oriented, as CCPRs for children were already covered under the ICCPR. However, there was a real issue with governments involved in the drafting process failing to recognise that the ICCPR was not just limited to adults. Cantwell suggested that in his experience, rights were not distinguished into categories of civil and political rights, and economic, social and cultural rights, but rather 'those that protect', and 'those that enable', with priority given to 'those that protect'. This supports our findings from analysis of the *travaux préparatoires*, that a hierarchy of rights was created, and that child welfare was given priority.

Cantwell highlighted his satisfaction with the final version of the UNCRC as well as surprise as to what they managed to achieve. Understandably, it was seen as a 'fantastic boost to child participation' by Cantwell and others involved in the drafting process, but he believed these 'shouldn't be the last words on child's rights'.³⁶ Cantwell emphasised the importance of the time in which the draft was formulated, suggesting that had the draft been formulated now, the priorities would be different to those in 1979.

4. Current Standards

This section will examine how provisions of the UNCRC have been interpreted by the Committee. It will first identify a key phrase within Article 12 UNCRC which must be clarified in order to progress its interpretation, to empower children's rights to have their views heard in the public sphere. It will go on to look at how the CRC has interpreted UNCRC standards in the State reporting process, using examples of concluding observations from Eritrea and Vietnam. This is in order to identify where gaps in interpretation may create barriers to the realisation of children's rights, and suggest how provisions may be clarified to close the gaps.

4.1 Towards a progressive interpretation of Article 12 UNCRC

A key issue preventing meaningful implementation of CCPRs is the lack of language setting standards on the political participation of children within the UNCRC. Unlike the ICCPR, the CCPRs contained within the UNCRC are not understood as creating an analogous obligation for states to grant rights to active participation for children, as there is no closely corresponding article to Article 25 ICCPR. Article 25 ICCPR creates 'the right to and the

³⁶ *ibid.*

opportunity [...] to take part in the conduct of public affairs, directly or through freely chosen representatives'.³⁷ The explicit active language of 'take part' and 'conduct' is powerful and has been argued to create rights not only for citizens to take an active role within domestic law-making, but gives the 'global citizen a right to take part in international law-making'.³⁸ This affords a powerful right for the individual and civil society organisations to have a meaningful political impact and the lack of a corresponding article or language in the UNCRC has led to a 'general misunderstanding that Article 25 ICCPR on the right to participate in public affairs does not apply to children'.³⁹ This has been used to 'justify systematic restriction of children's participation in public affairs, such as the right to vote'.⁴⁰

It has been suggested that children's right to political participation could be read into the UNCRC by adopting a more progressive interpretation of Article 12 UNCRC. This would afford children the right to freely express their views in all matters affecting them, and for those views to be given due weight.

In order to do this, the Committee must clarify its interpretation of Article 12. The key issue lies in the phrase, 'all matters affecting the child'⁴¹. The CRC must clarify whether this refers to matters affecting an individual child, for instance decisions related to care proceedings and residency orders, or whether a wider interpretation can be made, such as public policy and political decisions impacting children. This would be significant for elaborating the political participation rights of children, as argued by Child Rights Connect, there are very few 'child-neutral' decisions.

The intention of the original drafters of the UNCRC was clearly for Article 12 to be interpreted as the right for a child's views to be given due weight in matters related to a specific child. This is clear in the *travaux préparatoires* of the Convention, according to which Article 12 (at the time referred to as Article 7) originally read:

³⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 25(a).

³⁸ Nahuel Maisley, 'The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making' [2017] EJIL 28 1, 89.

³⁹ Child Rights Connect and its Working Group on Child Participation, 'Call for input on report on good practices and challenges using the Guidelines on Participation' (September 2021), 1.

⁴⁰ *ibid.*

⁴¹ United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNTS 1577 (UNCRC) Art 12.

*Article 7: The States parties to the present Convention shall enable the child who is capable of forming his own views the right to express his opinion in matters concerning **his own person**, and, in particular, marriage, choice of occupation, medical treatment, education and recreation.*

The phrase ‘matters concerning his own person’ conveys the drafter’s intention that the right to have their views given due weight is owed to the child in relation to individual issues. The list of examples was heavily debated in the drafting process, with numerous State representatives suggesting revisions to include more. However, the Working Group eventually rejected this, as ‘most delegations felt that the matters concerning the child in which the State parties to the convention would enable him to express his opinion should not be subject to the limits of a list’.⁴² Although this suggests that a wide scope of ‘matters’ was intended, it is still clear that the article was intended to embolden children within the realm of their individual lives.

It is not clear within the *travaux préparatoires* when the article was revised from ‘matters concerning his own person’ to the final draft version of ‘all matters affecting the child’, but the use of ‘the child’ rather than ‘children’ still indicates the intention of an individualistic interpretation of the right. Similarly, the reference to ‘judicial and administrative proceedings affecting the child’⁴³ clearly indicates the original intended meaning. In discussion with Cantwell, he was clear that this was the intended interpretation of the State’s obligation under Article 12. Cantwell believed that extending the scope of Article 12 was fundamentally incorrect and insisted that the right of children to participate within the political sphere could be read into the right to freedom of expression under Article 13 UNCRC.

Despite this, within the wording of Article 12 UNCRC, there is scope for a wider interpretation which would enhance children’s rights to access and participate in public life. Human rights treaties are living instruments, and the Committee need not be entirely hampered by consideration of the drafter’s intention. However, the Committee’s previous discussion on the scope of Article 12 is contradictory, and it must clarify in a dedicated GC, whether States are obliged to ensure that children have the right to have their views given due weight in wider matters or whether the right is limited. Previous discussion on the matter can be found in the CRC’s General Comment 12 (2009), and its General Comment 20

⁴² Report of the Working Group on a Draft Convention on the Rights of the Child (1981) (n 30), para 78.

⁴³ United Nations Convention on the Rights of the Child (n 5)

(2016). In these GC's, the CRC appears to lean towards a wide interpretation of Article 12, but its position is unclear.

GC 12 notes that, 'a widespread practice has emerged in recent years, which has broadly been conceptualised as "participation", although this term itself does not appear in the text of Article 12.⁴⁴ This supports an understanding of Article 12 that encompasses political participation of children. Paragraph 9 of GC 12 makes it clear that the Committee makes a distinction between, 'the right to be heard of an individual child and the right to be heard as applied to a group of children'.⁴⁵ However, it is not clear whether this is the same distinction as that which we are discussing. The Committee provides examples of 'groups of children', in which it includes 'the children of a country'.⁴⁶ This may indicate an intention to widen the scope of 'matters' under Article 12 to issues affecting children in general. This requires further clarification. Paragraph 12 of GC 12 notes that, 'the views expressed by children may add relevant perspectives and experiences and should be considered in decision-making, policymaking and preparation of laws and/or measures'.⁴⁷ This certainly supports the interpretation that children's views should be given due weight in a wide range of public decision-making activities.

The Committee goes on to discuss the crucial 'affecting the child' phrase, noting that, 'while the Committee supports a broad definition of 'matters', it recognises the clause 'affecting the child', which was added in order to clarify that 'no general political mandate was intended'.⁴⁸ It is very unclear what the CRC means by 'general political mandate', although it suggests an obligation of States to assure a right to children to have their views heard in a wide range of public issues. However, to confuse matters further, the GC goes on to emphasise that:

The practice, however, demonstrates that a wide interpretation of matters affecting the child and children helps to include children in the social processes of their community and society. Thus, State parties should

⁴⁴ United Nations Committee on the Rights of the Child 'General Comment No 12 on the right of the child to be heard' (20 July 2009) CRC/C/GC/12, para 3.

⁴⁵ United Nations Committee on the Rights of the Child 'General Comment No 12 on the right of the child to be heard' (20 July 2009) CRC/C/GC/12, para 9.

⁴⁶ *ibid*,

⁴⁷ United Nations Committee on the Rights of the Child 'General Comment No 12 on the right of the child to be heard' (20 July 2009) CRC/C/GC/12, para 12.

⁴⁸ United Nations Committee on the Rights of the Child 'General Comment No 12 on the right of the child to be heard' (20 July 2009) CRC/C/GC/12, para 27.

carefully listen to children's views wherever their perspective can enhance the quality of solutions.⁴⁹

Despite the vagueness of this phrase, this supports a wide interpretation of 'matters affecting the child' under Article 12, going beyond decisions related to the individual child. In GC 12 the CRC also discusses 'the implementation of the right to be heard in different setting and situations'⁵⁰ including 'national and international settings'⁵¹. The explicit welcoming by the Committee of 'the growing number of local youth parliaments, children's councils [...] where children can voice their views in the decision-making processes',⁵² represents a desire of the Committee to interpret Article 12 in a way which enhances the rights of children to have their voices heard in matters of general political policy making.

In 2016, the Committee had another opportunity to finally clarify its interpretation of Article 12, in General Comment 20 on the implementation of the rights of the child during adolescence.⁵³ In this GC, the CRC again leans towards a wide interpretation of Article 12, but fails to effectively clarify its position. Firstly, the CRC states that according to Article 12, State parties should 'introduce measures to guarantee adolescents the right to express views on all matters of concern to them'.⁵⁴ The use of 'adolescents' suggests a collective right, but the reference to 'on all matters of concern to them' provides no greater clarification as to whether this right refers to the individual child, or to children in general. The GC goes on to provide an exemplary list of relevant matters, including 'education, health, sexuality, family life and judicial and administrative proceedings'.⁵⁵ This again does not clarify whether the obligation upon the State refers to individual administrative proceedings, or issues of, for example, public health.

GC 20 requires that 'States should ensure that adolescents are involved in the development, implementation and monitoring of all relevant legislation, policies, services and programmes affecting their lives, *at school and at the community, local, national and*

⁴⁹ *ibid.*

⁵⁰ United Nations Committee on the Rights of the Child 'General Comment No 12 on the right of the child to be heard' (20 July 2009) CRC/C/GC/12, para 89.

⁵¹ United Nations Committee on the Rights of the Child 'General Comment No 12 on the right of the child to be heard' (20 July 2009) CRC/C/GC/12, para 127.

⁵² *ibid.*

⁵³ United Nations Committee on the Rights of the Child 'General Comment No 20 on the implementation of the rights of the child during adolescence' (6th December 2016) CRC/C/GC/20.

⁵⁴ *ibid* para 23.

⁵⁵ *ibid.*

international levels'.⁵⁶ The inclusion of decision making at 'local, national and international levels' clearly implies that the CRC's interpretation of Article 12 includes decision making that is external to and wider than the individual child's life. Perhaps the most explicit evidence of a desire of the CRC to embolden the political participation rights of children can be found within the next paragraph of GC 20, in which it, 'emphasises the importance of participation as a means of political and civic engagement through which adolescents can negotiation and advocate for the realisation of their rights.'⁵⁷

However, the sole focus on adolescents within GC 20 as active subjects of these rights rather than children as a whole is restrictive. Whilst GC 20 does not put an age limit on what is considered an adolescent, it could be suggested that GC 12 is less restrictive in terms of subject as it uses the term children – which is widely considered anyone under 18. This failure to 'precisely define' may have been an attempt to not use blanket age restrictions, however, it has in fact left a gap that allows restrictive interpretations. In this regard, it is worth noting that WHO has said that adolescence is from the ages of 10-19,⁵⁸ which could be applicable.

In GC 12, the Committee emphasised the need for 'a better understanding of what Article 12 entails and how to fully implement it'.⁵⁹ Thirteen years on, this is still required. There is clearly a will within the CRC to enhance the rights of children to participate within civic and political life. There is scope for the CRC to make a progressive interpretation of Article 12, which would afford children the right for their views to be given due weight in the sphere of public policy decision making. However, the CRC needs to clarify that the phrase within the article, 'in all matters affecting the child', goes further than that originally intended, to include matters which impact upon children generally.

4.2 Concluding Observations of the CRC

When considering the current standards adopted by the CRC on children's civil and political rights, it is important to note how it has interpreted these standards during the state reporting process. To do this effectively we narrowed the concluding observations down by topic and

⁵⁶ *ibid.*

⁵⁷ United Nations Committee on the Rights of the Child 'General Comment No 20 on the implementation of the rights of the child during adolescence' (n 52), para 24.

⁵⁸ World Health Organisation, 'Adolescent Health' <https://www.who.int/health-topics/adolescent-health#tab=tab_1> [Accessed 30th March 2022]

⁵⁹ United Nations Committee on the Rights of the Child 'General Comment No 12 on the right of the child to be heard' (20 July 2009) CRC/C/GC/12, para 4.

right using the OHCHR UN Treaty Body Database.⁶⁰ The topics were freedom of expression, freedom of association and freedom of information, the search showing nearly double the amount of results for association and information than there were for expression. It may be interesting to consider this alongside Cantwell's argument that child political participation is based upon the right to freedom of expression, as it may suggest that the Committee in fact puts greater importance on the proper implementation of the right to association and assembly.

All of the results for state reports on Article 17 (the right to access to information) were concerned with a lack of monitoring mechanisms to protect children from harmful information such as digital pornography, as well as reports on states such as Bangladesh highlighting that the 'socio-economic realities of the country' mean not all children have 'equal access to information and the media'.⁶¹ For this reason, we have chosen to not use any of these concluding observations as they were the result of socio-economic realities rather than a fundamental lack of compliance with the CRC. In general, very few concluding observations (CO) focused on freedom of expression, which highlights the treaty bodies' general lack of concern or focus on children's freedom of expression. Of these results, we decided to choose results from different geographical regions to examples already discussed in this memorandum as well as CO's with comments on specific laws. We chose to focus on concluding observations concerning Eritrea and Vietnam as both of these examples raised questions on either the term 'all matters affecting the child' or whether a child or adolescent is able to form associations under the UNCRC.

The CRC found issue with Eritrea's Transitional Civil Code that 'guarantees the right to be heard only to children who have attained the age of 15' as well as highlighting the restrictions that 'traditional practices and attitudes' place on the full implementation of Article 12, particularly for girls.⁶² Suggestions were made to amend the legislation to 'fully reflect Article 12' by removing the age limit and instead using the phrase 'any child "who is capable of forming his or her own views" can express those views freely'.⁶³ In this regard, we can see

⁶⁰ Available at:

https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/SessionsList.aspx?Treaty=CRC.

⁶¹ United Nations Committee on the Rights of the Child 'Concluding Observations of the Committee on the Rights of the Child: Bangladesh' (26th June 2009) CRC/C/BGD/CO/4, para 42.

⁶² United Nations Committee on the Rights of the Child, 'Concluding Observations: Eritrea' (2nd July 2003) CRC/C/15/Add.204, para 25.

⁶³ *ibid* para 26.

the CRC has set a standard for Eritrea that would bring it in line with Article 12.⁶⁴ However, the CRC has only explicitly mentioned ‘all administrative and judicial proceedings affecting them’⁶⁵ as opportunities for Article 12 in this CO and whilst this is not an exhaustive list, the lack of the term ‘all matters affecting them’ in the CO does raise questions as to whether the CRC mean for this term to focus more on matters affecting the individual child rather than matters affecting children as a whole.

Similarly, concluding observations from Vietnam in 2012 highlight that whilst children have the ‘formal possibility to form associations in the State party’, in practice it is ‘severely restricted’ and there is also an ‘extensive limitation on the freedom of expression’⁶⁶. The Committee urged the State to ‘alter its legislation’ and take ‘effective measures’ to remove all restrictions to ensure the CCPRs of a child are protected and ensured.⁶⁷ This does highlight the lack of clarity within the CRC as this CO suggests children are able to form associations, whereas GC 20 suggests instead that adolescents are the subjects of this, not all children.

5. Comparison to Other Treaty Bodies

This section will look at the interpretation of other human rights instruments, namely the Convention on the Rights of Persons with Disabilities (UNCRPD), and the International Covenant on Civil and Political Rights. It will compare analogous provisions of the ICCPR with the UNCRC, to highlight transferable principles which could assist in making a progressive interpretation of the UNCRC.

5.1 UN Convention on the Rights of Persons with Disabilities

In the case of standard-setting it is vital to look at other treaty bodies to analyse the language and interpretations they have used for children’s civil and political rights. The UN Convention on the Rights of Persons with Disabilities⁶⁸ is of particular note, as the language used is both expansive and clearly applicable to both adults and children with disabilities. Both CRPD and UNCRC are for people with increased vulnerability and so the parallels

⁶⁴ United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNTS 1577 (UNCRC) Art 12.

⁶⁵ *ibid.*

⁶⁶ United Nations Committee on the Rights of the Child, ‘Concluding Observations: Viet Nam’ (22nd August 2012) CRC/C/VNM/CO/3-4, para 41.

⁶⁷ *ibid* para 42.

⁶⁸ United Nations Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UNTS 2515 (CRPD).

between the two conventions are important. The CRPD's GC 7, suggests that 'children with disabilities are themselves are best placed to express their own requirements and experiences'⁶⁹. Whilst the language used here is mirroring that of Article 12, the UNCRPD seems to be placing more weight on why people with disabilities should be involved in matters affecting them and not just suggesting that they should be like the CRC. This phrasing suggests that children should be able to express their views on all matters concerning them with the CRPD recognising the autonomy of children with disabilities and placing importance on their expressions so it is less of a 'mere formality'.⁷⁰ GC 20 uses the phrase 'given due weight' which also recognises the importance of adolescents' expressions. However, the CRPD provides clarity by emphasising that States must go beyond 'mere formal[ities]' and 'tokenistic approach'⁷¹ and, thus, bridges a gap that States may have otherwise manipulated.

GC 7 also suggests that the formation of organisations is key to 'facilitating, promoting and securing the individual autonomy and active participation of children with disabilities'.⁷² This wording is similar to the phrasing in CRC's GC 20 which focuses on the importance of political participation for adolescents as a 'means of political and civil engagement'.⁷³ However, the phrasing of 'individual autonomy' could be considered a term that is more expansive and one that does not require there to be a matter actively affecting the child in order for them to participate. It also recognises that children's political participation is just as important as the protection of their welfare, which is not necessarily reflected in the standard-setting materials from the CRC.

5.2 Human Rights Committee Application of the ICCPR - Article 19 ICCPR

It is possible to find analogous provisions to those we are discussing, within the ICCPR. Specifically, the civil and political rights afforded by Article 18 (freedom of thought, conscience and religion), Article 19 (the right to hold opinions and to freedom of expression), Article 21 (the right of peaceful assembly), Article 22 (the right to freedom of association), and Article 25 (the right to take part in the conduct of public affairs, and the right to vote). It is

⁶⁹ United Nations Committee on the Rights of Persons with Disabilities, 'General Comment No 7 on the participation of persons with disabilities, including children with disabilities, through their representative organisations, in the implementation and monitoring of the Convention' (2018) CRPD/C/GC/7, para 25.

⁷⁰ *ibid* para 48.

⁷¹ *ibid*.

⁷² *ibid* para 24.

⁷³ United Nations Committee on the Rights of the Child 'General Comment No 20 on the implementation of the rights of the child during adolescence' (n 55) para 45.

useful to examine how the HRC has interpreted these provisions, to consider whether this is transferable to the interpretation of the CCPRs under the UNCRC, in order to provide a more progressive interpretation for children. This subsection will focus on the HRC's interpretation of the obligations under Article 19 ICCPR, and attempt to draw transferable principles that are relevant to Article 13 UNCRC.

Article 19 of the ICCPR affords the right to 'hold opinions without interference'⁷⁴ and the right to 'freedom of expression'⁷⁵, including 'freedom to seek, receive and impart information and ideas of all kinds'.⁷⁶ Article 13 UNCRC affords children the right to 'freedom of expression'⁷⁷, including 'freedom to seek, receive and impart information and ideas of all kinds'.⁷⁸ Linguistically, these provisions are almost identical, the notable difference being that Article 13 UNCRC does not include a right to hold opinions without interference. The interpretation by their relevant treaty bodies of these articles and the obligations they create, however, are notably different. The HRC has elaborated upon Article 19 ICCPR to a far greater degree than the CRC has on Article 13 UNCRC. We can look to the HRC's General Comment No 34,⁷⁹ which is dedicated to Article 19 ICCPR, to examine how State obligations under the provision should be interpreted.

For instance, GC 34 explicitly specifies that Article 19 'includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching and religious discourse'.⁸⁰ The CRC have not dedicated a GC to the right to freedom of expression and any brief discussion within other GCs focus either on the responsibility of the parents to respect child rights,⁸¹ or limiting restrictions to the right,⁸² rather than elaborating what the right includes. If the CRC

⁷⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 19(1).

⁷⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 19(2).

⁷⁶ *ibid.*

⁷⁷ United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNTS 1577 (UNCRC) Art 13.

⁷⁸ *ibid.*

⁷⁹ United Nations Human Rights Committee, 'General Comment No 34 on Article 19: Freedoms of opinion and expression' (12 September 2011) CCPR/C/GC/34.

⁸⁰ *Ibid* para 11.

⁸¹ See paragraph 42, section VIII on 'Civil rights and freedoms' of United Nations Committee on the Rights of the Child 'General Comment No 20 on the implementation of the rights of the child during adolescence' (6 December 2016) CRC/C/GC/20.

⁸² See paragraph 59, section B on 'Freedom of expression' of United Nations Committee on the Rights of the Child, 'General Comment No 24 on children's rights in relation to the digital environment' (2 March 2021) CRC/C/GC/25.

would clarify in a dedicated GC that Article 13 UNCRC should be interpreted to include political discourse and commentary on public affairs, as the HRC does in Article 19 of the ICCPR, this would significantly develop international standards on children's rights in this context.

In 2014, the UN Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression produced a report focusing on the right of the child to freedom of expression. In this report, De Rue noted a number of ways in which the Committee has already progressively interpreted Article 13 UNCRC to empower children's freedom of expression with the public political sphere. For instance, the report notes the wide scope of the right, which includes 'in the community, in school, in public policy decisions and in society',⁸³ and when discussing the importance of seeking and accessing information, La Rue highlights that 'the [Committee] has construed this right as imposing positive obligation on States to provide access to information held by public authorities'.⁸⁴ This shows there is will within the Committee to include access to political and public life within children's right to freedom of expression, as well as support from the Special Rapporteur to do so. Additionally, Nigel Cantwell suggested that '*issues such as climate change fall under Article 13 UNCRC*'.⁸⁵ It appears that there is will across the board to develop standards in this way, and therefore the Committee should strengthen this, by clarifying explicitly that political discourse is to be included within the interpretation of States' obligations under Article 13 UNCRC.

5.3 Comparison with other provisions of the ICCPR

Article 15 UNCRC combines freedom of association and peaceful assembly into one provision, whereas the ICCPR splits this right between Articles 21 and 22. Whilst this was predominately to ensure the 'right to form and join trade unions'⁸⁶ was embedded in the right to freedom of association, it does raise questions as to whether there needs to be greater separation of the two aspects in a dedicated General Comment from the CRC.

⁸³ United Nations General Assembly, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression, Frank La Rue' (21 August 2013) A/69/335, at para 15.

⁸⁴ *ibid* at para 18.

⁸⁵ Interview with Nigel Cantwell (n 34).

⁸⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 22.

Article 15 UNCRC ‘recognises’ the right of the child to freedom of association and peaceful assembly.⁸⁷ However, there is no clarity as to whether this is limited only to joining associations or extends to forming them too. Whilst the concluding observations on Vietnam from 2012 highlight that the Committee are enforcing the right for children to form associations this is then limited again in GC 20 as the Committee recommended that ‘legal recognition should be afforded to adolescents to establish their own associations [...], and join or form their own trade unions’, adding to the lack of clarity.⁸⁸ The will of the Committee to set this standard is clearly there as reflected in GC 20, however the emphasis on adolescents in GC 20 further widens the legal gaps that led to issues such as the Moldovan law on assemblies, as mentioned above.

Unlike Article 15, Article 17 UNCRC on the right to access information has no direct comparator in the ICCPR. Instead, this right is linked with Article 19 ICCPR that confirms the right ‘to receive and impart information and ideas of all kinds’⁸⁹. Article 17 UNCRC includes the ‘protection of the child from information and material injurious to his or her well-being’⁹⁰, which has been manipulated by states to include information they do not agree with, such as Russia’s anti-gay propaganda law. As this specific protection clause is not reflected in the ICCPR, the risk of states manipulating this in order to legitimise the restriction of CCPRs is limited to children.

6. Conclusion and Recommendations

This memorandum has highlighted that there is a fundamental lack of standard setting by the CRC regarding CCPRs. This has resulted in numerous legal gaps which impedes the full realisation of these rights in practice.

The above research has highlighted that due to the lack of consideration of CCPRs during the drafting process, these rights were not afforded due respect. It also highlights a hierarchy of children’s rights that formed during the drafting process, one that prioritises welfare and protection over civil and political rights.

⁸⁷ United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNTS 1577 (UNCRC) Art 15.

⁸⁸ United Nations Committee on the Rights of the Child ‘General Comment No 20 on the implementation of the rights of the child during adolescence’ (n 55) para 45.

⁸⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 19.

⁹⁰ United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNTS 1577 (UNCRC) Art 17.

The comparisons between provisions of the UNCRC and the ICCPR highlights that inspiration could be taken from interpretations of the ICCPR, and included within a CRC GC to bridge the gaps left by the drafting process. A GC in particular is advised as we can see similar standards being set for these rights through dedicated GCs from other UN treaty bodies, such as the UNCRPD and HRC. Similarly, it is worth noting that CEDAW plans to focus its next General Comment on ‘women’s equal participation in political and public decision-making and gender stereotypes’. This may provide transferable principles and standards for the CRC to draw on in relation to children, especially if the CEDAW GC develops these standards in relation to girls as well as women.

Finally, it is also notable that in June 2021, the CRC began drafting a new General Comment, on ‘children’s rights and the environment with a special focus on climate change’,⁹¹ through which it explicitly aims to, ‘clarify how children should be able to exercise their rights to information, participation and access to justice to protect against environmental harm’.⁹² This demonstrates a clear will of the CRC to empower children’s participation rights, and a dedicated general comment which clarifies State obligations to assure access to children’s CCPR will empower children in the wider political sphere, beyond just the context of environmental and climate change activism.

⁹¹UN OHCHR, ‘Draft general comment No. 26 on children’s rights and the environment with a special focus on climate change’, (9 December 2021) Available at: <<https://www.ohchr.org/en/documents/general-comments-and-recommendations/draft-general-comment-no-26-childrens-rights-and>>

⁹² UN OHCHR, Committee on the Rights of the Child, ‘Concept note: General comment on children’s rights and the environment with a special focus on climate change’ Available at: <<https://www.ohchr.org/en/treaty-bodies/crc/concept-note-general-comment-childrens-rights-and-environment-special-focus-climate-change>>

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