

THE CHILD'S RIGHT TO LIFE, SURVIVAL AND DEVELOPMENT: EVOLUTION AND PROGRESS

Elaine E Sutherland
LLB (Hons) LLM

Professor of Child and Family Law, Stirling Law School, University of Stirling, Scotland,
and Distinguished Professor of Law, Lewis and Clark Law School, Portland, Oregon

“There is no cause which merits a higher priority than the protection and development of children, on whom the survival, stability and advancement of all nations – and indeed of human civilization – depends.”¹

1 Introduction

It is now over a quarter of a century since the Convention on the Rights of the Child (“CRC”)² was adopted unanimously by the General Assembly of the United Nations. In the intervening years, tremendous progress has been made in realising it is the rights it guarantees to all children. Much remains to be done, of course, and international organisations, national and regional governments, non-governmental organisations, aid agencies, communities, families and individuals all have a role to play in this process. One aspect of ensuring the full realisation of the rights guaranteed by the CRC to all of the world’s children lies in appreciating the precise import and content of these rights and, in this, scholars have a distinct contribution to make.

This analysis focusses on article 6 of the CRC, guaranteeing the child’s right to life, survival and development, and it would be difficult to imagine anything more fundamental in the whole panoply of human rights than recognition of the right to life. Indeed, the United Nations Human Rights Committee (“HRC”) has described it as “the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation.”³ Yet, the right to life is not found in the first Polish draft of what was to become the CRC. That omission was corrected very quickly in the drafting process and article 6 became one of the general principles or fundamental values of the CRC.⁴ By situating the right in a uniquely child-centred setting, the CRC created the opportunity to explore what it means for

¹ Office of the High Commissioner for Human Rights *Manual on Human Rights Reporting under Six Major International Human Rights Instruments* HR/PUB/91/1 (Rev 1) (1997) 426.

² Convention on the Rights of the Child (adopted on 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

³ UNCHR General Comment No. 6: Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies (1982) UN Doc HRI/GEN/1/Rev.6 para 1.

⁴ UNCRC General Comment No. 3: HIV/AIDS and the Rights of the Child Adopted By Human Rights Treaty Bodies (2003) CRC/GC/2003/3 para 5 referring to the “rights embodied in the general principles of the Convention – the right to non-discrimination (art 2), the right of the child to have his/her interest as a primary consideration (art 3), the right to life, survival and development (art 6) and the right to have his/her views respected (art 12).

children and young people, specifically, and to hold States Parties accountable in terms of implementation in that context. The United Nations Committee on the Rights of the Child ("UNCRC") has taken full advantage of this opportunity, elaborating on the content of article 6 in its *General Comments* and evaluating compliance in its *Concluding Observations* on individual States Parties' periodic reports.

In addition to recognising the child's right to life, article 6 enriches the right by the addition of express reference to the right to survival and development. As a result, article 6 bridges a division that has long been present in international human rights – that between civil and political rights, on the one hand, and economic, social and cultural rights, on the other. What is left unresolved, however, is another, related issue in human rights discourse – whether there is a hierarchy of rights. The landmark Vienna Declaration and Programme of Action ("Vienna Declaration")⁵ describes human rights as "universal, indivisible, interdependent, and interrelated,"⁶ but does this universality mean that all human rights are equally important or is it permissible to acknowledge a hierarchy of rights whereby some rights are regarded as more pressing and are prioritised ahead of others?

In seeking an answer to that fundamental question, this article sets the scene for the others that follow in this issue by examining what the drafters sought to achieve in article 6, exploring the obligations it establishes in the wider human rights context and drilling down into its precise content as elaborated upon in the UNCRC's *Concluding Observations* on the initial and periodic reports submitted by States Parties.

2 Drafting

Given the status of article 6 as one of the general principles or fundamental values of the CRC, it is curious that the right to life, survival and development was not mentioned in the first Polish draft of the CRC.⁷ The explanation is that neither the right to life, nor the right to survival, is mentioned expressly in the 1959 Declaration of the Rights of the Child (the "Declaration") on which that draft was based,⁸ albeit the child's developmental needs did find

⁵ Vienna Declaration and Programme of Action UN Doc A/CONF.157/23 (adopted 12 July 1993).

⁶ See para 5 of the Vienna Declaration and, more recently UNCRC General Comment No. 7: Implementing Child Rights in Early Childhood adopted by Human Rights Treaty Bodies (2005) UN Doc CRC/C/GC/Rev.1 para 3:

"The Committee reaffirms that the Convention on the Rights of the Child is to be applied holistically in early childhood, taking account of the principle of the universality, indivisibility and interdependence of all human rights."

⁷ Save the Children Sweden and the Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child I* (2007) 132-135 ("Legislative History"). The *Legislative History* was published in two volumes and can be found at <<http://www.ohchr.org/Documents/Publications/LegislativeHistorycrlen.pdf>> and <<http://www.ohchr.org/Documents/Publications/LegislativeHistoryc2en.pdf>>. The complete *travaux préparatoires* to the Convention have never been published, but insights were available from its early days of operation. See S Detrick (ed) *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (1992).

⁸ UNGA Res 14/1386 (20 November 1959) UN Doc A/RES/14/1386.

expression in the Universal Declaration of Human Rights (“UDHR”).⁹ Why such fundamental rights should be absent from the Declaration is not entirely clear, but it may be that its authors felt the Preamble reference to the UDHR, itself guaranteeing the “right to life, liberty and security of person”, covered the matter.¹⁰

In any event, in its comments on the first Polish draft, Barbados flagged up the omission¹¹ and the Indian delegation proposed to the Working Group established to draft the CRC the following version of what was to become article 6:

“The States Parties to the present Convention undertake to create an environment, within their capacities and constitutional processes, which ensures, to the maximum extent possible, the survival and healthy development of the child.”¹²

Article 6 generated less debate during the drafting process than many other articles in the CRC and that stems, at least in part, from universal acceptance of what it was seeking to achieve since the right to life had already been guaranteed to all people by other international¹³ and regional¹⁴ instruments

⁹ Art 2 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 (III) (“Universal Declaration of Human Rights”) provides that:

“The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration” encapsulating not only development rights, but also one of the other general principles of the CRC, the importance of the best interests of the child.

¹⁰ Art 3 of the Universal Declaration of Human Rights.

¹¹ OHCHR *Legislative History* I 364 reported at E/CN.4/1324.

¹² OHCHR *Legislative History* I 364, reported at E/CN.4/1988/WG.1/WP.13. It was known as art 1 *bis* throughout the First and Second Reading stages.

¹³ See art 3 of the Universal Declaration of Human Rights “Everyone has the right to life, liberty and security of the person”; art 6 of the International Convention on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

¹⁴ See art 2(1) of the European Convention on Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221:

“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”

art 4(1) of the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143:

“Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life”

art 4 of the African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217:

“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”

art 3(2) of the Asian Human Rights Charter: A People’s Charter (adopted on 17 May 1998):

“Foremost among rights is the right to life, from which flow other rights and freedoms”; and

art 5 of the Arab Charter on Human Rights (adopted on 15 September 1994 entered into force 15 March 2008) 12 IHRR 893:

“1. Every human being has an inherent right to life. 2. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

and in numerous domestic constitutional documents.¹⁵

By guaranteeing the right to survival and development, article 6 goes further and, in this, it bridges a division in international human rights. That division stems from the criticism, levelled at international law more generally,¹⁶ that international human rights norms are European or western constructs, tainted by the stain of colonialism.¹⁷ While numerous commentators warn against over-emphasising this shortcoming,¹⁸ the danger is that these norms will fail to accommodate the ideological and cultural contexts of non-western societies, particularly in Africa and Asia. Nor do ideological differences relate only to the content of the rights since they extend to the relative importance accorded to them. The western approach, attaching primacy to civil and political rights and placing them ahead of economic, social and cultural rights, is often seen as failing to address the importance, in post-colonial countries, of the latter group of rights as vehicles that can be of assistance in achieving economic stability and equality.

The African Charter on Human and Peoples' Rights¹⁹ illustrates this point in its Preamble, stressing that:

"civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."

¹⁵ United States Declaration of Independence of 1776 referring to the inalienable rights with which all men are endowed, notes that "among these are life, liberty, and the pursuit of happiness." and s 7 of the Canadian Charter of Rights and Freedoms of 1982: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." It is, of course, found in later constitutions: see s 11 of the Constitution of the Republic of South Africa, 1996 "Everyone has the right to life."

¹⁶ M Shaw *International Law* 6 ed (2008) 39-42; JT Gathii "International Law and Eurocentricity" (1998) 9 *Eur J Int L* 184 184-211; KB Nunn "Law as a Eurocentric Enterprise" (1997) 15 *L & Ineq* 323 323-372.

¹⁷ J Alves "The Declaration of Human Rights in Postmodernity" (2000) 22 *Hum Rts Q* 478 478-500; M Mutua "Savages, Victims and Saviors: The Metaphor of Human Rights" (2001) 42 *Harv Int'l LJ* 201 201-246.

¹⁸ Those who warn against over-emphasising cultural differences note that many traditional cultural value systems often include principles parallel to modern human rights norms: see, for example, RT Nhlapo "International Protection of Human Rights and the Family: African Variations on a Common Theme" (1989) 3 *Int'l J L & Fam* 1 4-5 "traditional African society recognized human-rights norms of many types, some of which coincide squarely with modern ones." Others point out that traditional cultural beliefs themselves are not static, determined in the past and frozen for all time: see, for example, T Kaime "The Convention on the Rights of the Child and the Cultural Legitimacy of Children's Rights in Africa: Some Reflections" (2005) 5 *Afr Hum Rts LJ* 221 221 233 "traditional cultural beliefs are neither monolithic nor unchanging ... one of the paradoxes of culture is the way it combines stability with dynamic and continuous change." This can create the danger that, "[t]he traditional culture advanced to justify cultural relativism far too often no longer exists – if it ever did in the idealized form in which it is typically presented." J Donnelly *Universal Human Rights in Theory and Practice* 2 ed (2003) 101. Yet, others express the concern that appeals to cultural differences can be abused by authoritarian regimes as an excuse for non-compliance with human rights standards: see, for example, A Pollis "Cultural Relativism Revisited: Through a State Prism" (1996) 18 *Hum Rts Q* 316 332 "Repressive states frequently contend that the cultural distinctiveness of their societies in which norms and values differ from those in the West necessitate different standards."

¹⁹ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

The Preamble to the American Convention on Human Rights²⁰ and the Asian Human Rights Charter express a similar sentiment.²¹

By referring to the right to survival and development, article 6 embraces these very social and cultural rights, both in terms, and through the link it creates to what are sometimes described as “sectoral” provisions: that is, subject-specific guarantees relating to health, to education, to an adequate standard of living and so forth. Little wonder, then, that the nations of the world, whether developed or developing, were able to embrace it.

A second reason for the comparative brevity of the debate over article 6 is the fact that during the discussion of article 1, defining “a child”, there had already been a bruising battle over the issue of “when life begins”. A sense of just how contentious that matter had been can be gleaned from the following forthright observation from Adam Lopatka, the Chairman/Rapporteur of the Working Group:

“Work on many articles of the Convention proceeded relatively harmoniously. In several other cases, however, the draft text of the Convention was discussed many times over, often in a strained atmosphere. When it seemed that consensus had finally been reached on certain matters, delegates of some States or international organizations suddenly reverted to the controversial points. The definition of the child (article 1) was the most contentious of all – it caused a great deal of disagreement and argument and was discussed at length.”²²

At the heart of the disagreement lay the unbridgeable chasm between those who regarded life as beginning at conception and others who viewed it as starting with live birth, a matter which has enormous implications for foetal rights and, of course, for the availability of abortion. Since there is, in truth, no compromise position between the competing views, the CRC defines “a child” only in terms of the end of childhood, being “the age of 18 years,” and does not refer to the beginning.²³ In the attempt to mollify those subscribing to the view that life begins at conception, the Preamble to the CRC refers to the child’s need for “appropriate legal protection before as well as after birth.”

²⁰ Preamble of the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143:

“the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights”.

²¹ Art 2(2) of the Asian Human Rights Charter: A People’s Charter (adopted on 17 May 1998):

“We also believe that rights and freedoms are indivisible and it is a fallacy to suppose that some types of rights can be suppressed in the name of other rights. Human beings have social, cultural and economic needs and aspirations that cannot be fragmented or compartmentalised, but are mutually dependent. Civil, political and cultural rights have little meaning unless there are the economic resources to exercise and enjoy them. Equally, the pursuit and acquisition of material wealth is sterile and self-defeating without political freedoms, the opportunity to develop and express one’s personality and to engage in cultural and other discourses.”

²² OHCHR *Legislative History* “Introduction” xli.

²³ Art 1. This omission is replicated in almost all regional human rights instruments. The American Convention on Human Rights is a notable exception, with art 4(1) extending protection of the right to life “in general, from the moment of conception.”

That has not prevented a number of countries from entering declarations or reservations to the CRC on the matter.²⁴

The Working Group was most emphatically anxious not to return to that debate in the context of article 6 and, when the Italian delegate appeared to broach the matter, "[o]thers observed that, in discussing the inclusion of a child's right to life, the Working Group had agreed not to reopen the discussion concerning the moment at which life begins."²⁵ That did not stop the observer for the Holy See from reiterating the position of the Roman Catholic Church – essentially, that life begins at conception – and one has the impression that other members of the Working Group listened courteously without engaging with him on the issue.²⁶

In any event, most of the discussion of article 6 centred on the survival and development aspects and a host of different forms of words were proposed by the various delegations, some making reference to both survival and development and others including one term or the other.²⁷ As discussions progressed, it became apparent that the real sticking point was the use of the word "survival". For many delegates, the right to life and the right to survival were complementary concepts,²⁸ albeit the right to survival carried with it a more proactive connotation than the right to life, meaning "the right to have positive steps taken to prolong the life of the child."²⁹ The representative from Venezuela expressed concern that reference to survival might diminish the obligations under the right to development³⁰ and the chairperson invited the observer from UNICEF to explain what the Fund understood by survival.³¹ In the light of this explanation, the Indian representative pressed for inclusion of the right to survival, supplemented by a right to healthy development, as an acknowledgement of the fact that so many children died from preventable causes.³²

The chairman proposed that a small drafting group, comprising Argentina, Bulgaria, India, Italy, Norway, UNICEF and the United Kingdom,³³ should work on a compromise form of words and it produced the following text:

²⁴ Some states, including Cuba and the United Kingdom entered a reservation to the effect that it regards the Convention as applying only following live birth. Others, including Argentina, Guatemala and the Holy See, assert that they regard life as beginning at conception. Yet other states, including Botswana and Indonesia, note that article 1 conflicts with their national law but do not elaborate. For current declarations and reservations, see Office for the High Commission of Human Rights "Status of Ratification, Reservations and Declarations" *Office for the High Commission of Human Rights* <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>> (accessed 26-06-2015).

²⁵ OHCHR *Legislative History* 365 para 18.

²⁶ OHCHR *Legislative History* 366 para 25.

²⁷ OHCHR *Legislative History* 365 para 15.

²⁸ OHCHR *Legislative History* 365 para 19.

²⁹ OHCHR *Legislative History* 365 para 18.

³⁰ While the *Legislative History* does not attribute the concern to a specific individual (364 para 15), the later reference to an alternative text proposed by the representative of Venezuela (367 para 87) and her subsequent withdrawal of it (367 para 90) makes the source clear. She was not alone, however, since there is reference to "two speakers" having "serious doubts" about the inclusion of the word survival (365 para 19).

³¹ OHCHR *Legislative History* 365 para 17.

³² OHCHR *Legislative History* 365 para 16.

³³ OHCHR *Legislative History* 365 para 21.

- “1. The States Parties to the present Convention recognize that every child has the inherent right to life.
2. States Parties shall ensure, to the maximum extent possible, the survival and development of the child.”³⁴

The representative of Venezuela again raised her concern over what she saw as the potential for limitation posed by the use of the word survival. However, “after extensive discussion,” she yielded to the Working Group, “simply and solely to enable work to go forward on the text of the convention”,³⁵ and the small working group’s text was adopted by the (main) Working Group in 1988.³⁶

The following year, during the Second Reading stage, the representative of Venezuela returned to the issue “survival,” this time proposing another text, omitting the word and substituting the term “healthy growth”.³⁷ That failed to garner support when the observer for the World Health Organization explained that the term “survival” had a special meaning within the United Nations context and included growth monitoring, oral rehydration and disease control, breastfeeding, immunisation, child spacing, food and female literacy. Since the term “growth” represented only a part of the concept of survival, he expressed the view that “the change would be a step backwards from standards already accepted.”³⁸ Delegates from Australia, Norway, Italy, Sweden and India stated their preference for the retention of the word “survival”³⁹ and the representative of Venezuela withdrew her amendment.⁴⁰ The final text of article 6 is as follows:

- “1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.”⁴¹

3 Article 6 in the human rights context

The relative lack of controversy generated during the drafting stage of article 6 is in marked contrast to the attempts to amplify its content that have followed. A host of United Nations and other international gatherings

³⁴ OHCHR *Legislative History* 366 para 22.

³⁵ OHCHR *Legislative History* 366 para 24.

³⁶ OHCHR *Legislative History* 366 para 26.

³⁷ Her proposal (E/CN.4/1989/WG.1/WP.10) was to merge article 1 with article 1 *bis* to form a single article 1 reading:

- “1. For the purposes of the present Convention, ‘child’ means every human being up to the age of 18 years unless, under the law of his State, he has attained the age of majority earlier.
2. The States Parties to the present Convention recognize that every child has the inherent right to life.
3. States Parties shall ensure to the maximum extent possible the healthy growth and development of the child.”

See OHCHR *Legislative History* 366 note XX quoting from para 87 of the 1989 *Report of the Working Group to the Commission on Human Rights* E/CN.4/1989/48.

³⁸ OHCHR *Legislative History* 367 quoting from para 88 of the 1989 *Report of the Working Group to the Commission on Human Rights* E/CN.4/1989/48.

³⁹ OHCHR *Legislative History* 367 quoting from para 89 of the 1989 *Report of the Working Group to the Commission on Human Rights* E/CN.4/1989/48.

⁴⁰ OHCHR *Legislative History* 367 quoting from para 90 of the 1989 *Report of the Working Group to the Commission on Human Rights* E/CN.4/1989/48.

⁴¹ Art 6 of the CRC.

have devoted attention to it; the UNCRC has offered further guidance, both through its *General Comments* and in its *Concluding Observations* on States Parties' initial and periodic reports; and whole forests have been sacrificed to the outputs of research bodies like the Innocenti Centre.⁴²

Yet millions of children around the world continue to suffer avoidable death or are denied access to the basic essentials of life. Many more do not receive the health care, education or a standard of living that would optimise their opportunities for development. If the promises of article 6 are to be fulfilled, a first step is to understand the real content of what it guarantees to the world's children and the nature of the obligations it places on States Parties. That enquiry necessarily involves setting article 6 in the broader context of human rights obligations.

3 1 Right to life

The right to life, applying to adults and children alike, has been characterised by the HRC as "the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation."⁴³ At first glance, this statement might be thought to convey the notion that the right to life is absolute, brooking no exception. However, when one remembers that the International Covenant on Civil and Political Rights ("ICCPR")⁴⁴ itself countenances the use of the death penalty as a criminal sanction, it becomes apparent that such a reading would be to overstate the position. Certainly, the ICCPR attempted to limit the circumstances in which the death penalty could be imposed and to ensure due process protection in its application⁴⁵ and the Second Optional Protocol to the Covenant sought to secure its abolition (but, of course, only in states that have ratified it).⁴⁶

The position is different for children since, from the outset, the ICCPR prohibited the imposition of the death penalty "for crimes committed by persons below eighteen years of age".⁴⁷ The UN Convention repeats the prohibition in article 37(a)⁴⁸ again emphasising that it is the child's age at the time the offence was committed, not at the time of sentencing, that is relevant, elaborating on that point in General Comment 10: Children's Rights in Juvenile

⁴² Much of the Centre's work on article 6 focusses on its application in specific contexts or geographic locations. See for example *Poverty and Exclusion among Urban Children* (2003); *Ensuring the rights of Indigenous Children* (2004); *Child Mortality and Injury in Asia: Policy and Programme Implications* (2007); *Child Trafficking in Europe: A broad vision to put children first* (2007); *The Challenges of Climate Change: Children on the front line* (2014).

⁴³ Para 1 of the UNCHR General Comment No. 6: Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies (1982) UN Doc HRI/GEN/1/Rev.6.

⁴⁴ Art 1 of the International Convention on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171.

⁴⁵ Art 6(2).

⁴⁶ Art 1 of the Second Optional Protocol to the International Covenant on Civil and Political Rights (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414.

⁴⁷ Art 6(5) of the International Convention on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 (which also prohibits the execution of pregnant women).

⁴⁸ Article 37(a) provides that:

"Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age."

Justice.⁴⁹ It is clear, then, that in the sense of the negative obligations on the state – the things it must not do – the right to life for children is absolute.

What of the positive obligations on states? Only a few years before the drafting of the UN Convention, the HRC published its *General Comment* on the right to life in the context of the International Covenant on Civil and Political Rights.⁵⁰ It “noted that the right to life has been too often narrowly interpreted. The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.”⁵¹ Granted, it then went on to focus on the things states should *not* be doing, including genocide, acts of mass violence and state-sanctioned “disappearance”, as well as the serious limitations on imposing the death penalty. It was, however, making clear that there are positive, as well as negative, obligations flowing from the right to life, including the requirement on states “to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.”⁵²

Yet the drafters of the CRC remained concerned that the right to life should be viewed more positively and proactively than had been the case in international instruments hitherto. Summing up the First Reading debate, the Chairman–Rapporteur expressed the goal thus:

“The approach to the right to life in the Covenants was rather negative, while that of the convention should be positive and should take into account economic, social and cultural conditions.”⁵³

The general acceptance of the child’s right to life and exploration by other bodies of the positive obligations it creates may explain the UNCRC’s lack of detailed comment on it, something that can be contrasted with its more expansive discussion of the right to survival and development. The *Manual on Human Rights Reporting* (the “*Manual*”), published by the Office of the High Commissioner for Human Rights, however, addresses what is expected of states in respect of the right to life under article 6 of the CRC. It adopts the HRC’s framework of negative and positive measures. The negative measures require the state “to refrain from any action that may intentionally take life away” and the *Manual* gives much the same examples, as did the HRC.⁵⁴ When it turns to positive measures, described as “designed to protect life”, it

⁴⁹ Para 75 of the UNCRC General Comment No. 10: Children’s Rights in Juvenile Justice (2007) UN Doc CRC/C/GC/10 states that:

“Although the text is clear, there are States parties that assume that the rule only prohibits the execution of persons below the age of 18 years. However, under this rule the explicit and decisive criteria is the age at the time of the commission of the offence. It means that a death penalty may not be imposed for a crime committed by a person under 18 regardless of his/her age at the time of the trial or sentencing or of the execution of the sanction.”

⁵⁰ UNCHR General Comment No. 6: Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies (2008) UN Doc HRI/GEN/1/Rev.9 (Vol 1).

⁵¹ Para 5.

⁵² Para 5.

⁵³ OHCHR *Legislative History* 365 para 21.

⁵⁴ OHCHR *Manual on Human Rights Reporting under Six Major International Human Rights Instruments* (1997) HR/PUB/91/1 (Rev.1) “namely by prohibiting and preventing death penalty, extra-legal, arbitrary or summary executions or any situation of enforced disappearance”.

includes “increasing life expectancy, diminishing infant and child mortality, combating diseases and rehabilitating health, providing adequate nutritious foods and clean drinking water”.⁵⁵

These positive measures share the common characteristic of being the essentials for the preservation and continuation of life and, thus, it is unsurprising to find them being classified as flowing from the right to life. Does it follow, then, that they are as absolute as the negative obligations attached to the right to life, at least for children? Answering that question may be important when it is appreciated that these positive measures look remarkably like the measures one would take to secure survival and, in this, there is a clear overlap between the right to life and the right to survival. Whether a measure is classified as falling under one or the other right would only be significant if there is a difference in the obligation placed on States Parties to implement one kind of measure as opposed to another.

3.2 Right to survival and development

One gets a flavour of the potential breadth of the right to survival and development under article 6 from the *Manual* which describes it as “adding a new dimension to life” that:

“stresses the need to enhance children’s health, to ensure preventive health-care measures, including immunization, the provision of adequate information or knowledge on nutrition, stresses the need to enhance children’s health, to ensure preventive health-care measures, including immunization, the provision of adequate information or knowledge on nutrition, hygiene and environmental sanitation.”⁵⁶

Nor is the state’s obligation confined to these areas, since the *Manual* includes “the need to ensure a full and harmonious development of the child, including at the spiritual, moral and social levels, where education will play a key role.” Lest we be in any doubt of the magnitude of what is involved, it continues:

“The promotion of survival and development therefore means to gain another and deeper challenge of self-betterment of the child, ensuring the capacity of developing talents and abilities to their fullest potential, preparing the child for responsible life in a free society and ensuring him or her the essential feeling of belonging to a world made of solidarity where there is no place for indifference or passivity.”⁵⁷

The UN Committee has taken a similarly expansive view of development, stating that it:

“expects States to interpret ‘development’ in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development. Implementation measures should be aimed at achieving the optimal development for all children.”⁵⁸

⁵⁵ OHCHR *Manual on Human Rights Reporting under Six Major International Human Rights Instruments* (1997) HR/PUB/91/1 (Rev.1).

⁵⁶ OHCHR *Manual on Human Rights Reporting under Six Major International Human Rights Instruments* (1997) HR/PUB/91/1 (Rev.1).

⁵⁷ OHCHR *Manual on Human Rights Reporting under Six Major International Human Rights Instruments* (1997) HR/PUB/91/1 (Rev.1).

⁵⁸ Para 12 of the UNCRC General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child (2003) UN Doc CRC/GC/2003/5.

More recently, the Committee restated its position thus: “States must create an environment that respects human dignity and ensures the holistic development of every child.”⁵⁹

It becomes apparent, then, that article 6(2) has the potential to touch all areas of a child’s life and places a vast array of obligations on states. The danger of a provision that seeks to address “everything” is that its very breadth might so fragment efforts that it comes to mean nothing, particularly in countries with very limited resources. The UN Convention acknowledges this in article 6(2) itself when it requires states to ensure the survival and development of the child “to the maximum extent possible,” a caveat not applied to the right to life. Is the right to survival and development being accorded a lesser status than the right to life? The CRC certainly opens the door to the possibility in article 4, requiring States Parties to “undertake all appropriate legislative, administrative and other means” in implementing CRC rights, since it qualifies the obligation in respect of economic, social and cultural rights by requiring measures be taken “to the maximum extent of [the state’s] available resources”.

Further insight into the import of these qualifications on the right to survival and development can be gleaned from the concept of “progressive realisation” and, related to it, the term “maximum extent of available resources”, how they have been understood in other international human rights instruments and how the UNCRC views their application in the children’s rights context.

3.3 Progressive realisation

The International Law Commission has drawn a distinction between “obligations of content” and “obligations of result”.⁶⁰ When it sought to amplify the obligations placed on States Parties by the International Covenant on Economic, Social and Cultural Rights (“ICESCR”),⁶¹ the UN Committee on Economic, Social and Cultural Rights (“CESCR”) accepted that distinction and stressed that ICESCR contained both kinds of obligations.⁶² In the context of obligations of result, it explored the concept of “progressive realisation”,⁶³ which it explained as “a recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved

⁵⁹ Para 42 of the UNCRC General Comment No. 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (2013) UN Doc CRC/C/GC/14. See also E Wicks “The Meaning of ‘Life’: Dignity and the Right to Life in International Human Rights Treaties” (2012) 12 *Hum Rts L Rev* 199 219, arguing that while the state is not always required to act to preserve human life, it is required to govern in a way compatible with the idea of dignity in human life.

⁶⁰ United Nations *Yearbook of the International Law Commission* II (1977) 8.

“One might be tempted to characterize as ‘international obligations of conduct’ those obligations which require a State to adopt a specific course of conduct, whether an action or an omission, as opposed to those obligations which impose on the State the generic requirement that it should bring about a certain result but leave to it the choice of the ways and means by which the results are to be achieved, and which could be characterized as ‘obligations of result’. That would simply be following the model furnished by the systems of internal private law originating in Roman law.”

⁶¹ International Convention on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3.

⁶² Committee on Economic, Social and Cultural Rights General Comment No. 3: The Nature of States Parties’ obligations (1991) UN Doc E/1991/23 annex III 86 para 1.

⁶³ International Covenant on Economic, Social and Cultural Rights, art 2(1).

in a short period of time.”⁶⁴ It was at pains to point out, however, that this should not be “misinterpreted as depriving the obligation of all meaningful content” since the overall goal remains full realisation and states are under an obligation to “move as expeditiously and effectively as possible” towards it.⁶⁵

Based on its (then) ten years of experience of examining reports from States Parties and alongside what it meant by “maximum available resources” discussed below, the CESCR developed the concept of “minimum core obligations” – to essential foodstuffs and primary health care, basic shelter, housing and education – which states were generally expected to meet.⁶⁶ The concept has come in for considerable criticism.⁶⁷ By 2000, the CESCR was taking a stronger line on core obligations and, at least in respect of the right to the highest attainable standard of health, stated that “a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations [in respect of health and set out in an earlier paragraph] which are non-derogable.”⁶⁸

Unlike the ICESCR, the CRC does not refer to realising rights progressively but, since it addresses economic, social and cultural rights, the concept is applicable. Certainly, like the CESCR before it, the UNCRC was concerned that progressive realisation might be misunderstood. The UNCRC devoted its *Day of General Discussion*, in 2007, to “Resources for the Rights of the Child – Responsibility of States”⁶⁹ and made clear that it would be erroneous to interpret the concept as meaning “that those rights are not immediately applicable and are merely of aspirational character.”⁷⁰ Rather, in its view, progressive realisation imposes “an immediate obligation for States parties to the Convention to undertake targeted measures to move as expeditiously and effectively as possible towards the full realization of economic, social and cultural rights of children.”⁷¹ In this, it made express reference to – and

⁶⁴ Committee on Economic, Social and Cultural Rights General Comment No. 3: The Nature of States Parties’ obligations (1991) UN Doc E/1991/23 para 9.

⁶⁵ Para 9.

⁶⁶ Para 10. CESCR expressed the obligation in terms of how a state might justify a failure to provide these essentials.

⁶⁷ For a very full discussion of the criticisms and a possible way forward, see KG Young “The Minimum Core of Economic and Social Rights: A Concept in Search of Content” (2008) 33 *Yale J Int’l L* 113-175.

⁶⁸ Committee on Economic, Social and Cultural Rights General Comment No 14: The Right to the Highest Attainable Standard of Health (2000) UN Doc E/C12/2000/4 para 47.

⁶⁹ Office for the High Commissioner for Human Rights “Resources for the Rights of the Child – Responsibility of States” (2007) *United Nations Human Rights* <<http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/Recommendations/Recommendations2007.doc>> (accessed 03-03-2015).

⁷⁰ Office for the High Commissioner for Human Rights “Resources for the Rights of the Child – Responsibility of States” (2007) *United Nations Human Rights* para 46.

⁷¹ Office for the High Commissioner for Human Rights “Resources for the Rights of the Child – Responsibility of States” (2007) *United Nations Human Rights* para 47.

endorsed – the concept of core minimum content of the obligation.⁷²

During the 20th anniversary celebration of the CRC, organised by the UN Committee and the Office of the High Commissioner for Human Rights, in 2009, Working Group 3 addressed “States parties’ obligations: realizing economic, social and cultural rights” and had the ominous sub-title, “Are children’s rights a luxury during an economic crisis?”⁷³ That question was answered in the negative, of course, but the group took the opportunity to dispel what it described as “The Myth” and the potential misunderstanding of “progressive realisation” resulting from it:

“based partially on a historical fallacy of a hierarchical distinction between civil and political rights on one hand and economic, social and cultural rights on the other, some States have unfortunately understood progressive realization to mean that their obligations to implement economic, social and cultural rights are of a less urgent nature and can be postponed until a more economically prosperous time.”

Not surprisingly, the Working Group found this belief particularly troubling during a global economic crisis.

3 4 To the maximum extent of available resources

Related to the concept of progressive realisation is the state’s obligation to implement economic, social and cultural rights “to the maximum extent of available resources”.⁷⁴ In 2007, this time in a *Statement*,⁷⁵ the CESCR sought to explain the term as it is used in the ICESCR. While it acknowledged that the concept was “an important qualifier on the obligation to take steps”, it was at pains to make clear that, it did “not alter the immediacy of the obligation, nor can resource constraints alone justify inaction”. It stressed the need, in times of severe resource constraints “to protect the most disadvantaged and marginalized members of groups of society by adopting relatively low-cost

⁷² Office for the High Commissioner for Human Rights “Resources for the Rights of the Child – Responsibility of States” (2007) *United Nations Human Rights* para 48:

“Standing parallel to the concept of progressive realization is the idea of ‘minimum core obligations’ of States. Core obligations are intended to ensure, at the very least, the minimum conditions under which one can live in dignity. The Committee on Economic, Social and Cultural Rights (CESCR) has systematically underlined this obligation of States, to guarantee at all times, the minimum level of protection (the minimum core content) in the provision of: essential foodstuffs, equal access to primary health care, basic shelter and housing, social security or social assistance coverage, family protection, and basic education. All States, regardless of their level of development, are required to take immediate action to implement these obligations, as a matter of priority.”

⁷³ Committee on the Rights of the Child “States Parties’ Obligations: Realizing Economic, Social and Cultural Rights. Are Child Rights a Luxury During an Economic Crisis?” (2009) *Office for the High Commissioner for Human Rights* <<http://www.ohchr.org/Documents/HRBodies/CRC/20Anniversary/20th/BackDocWG3.doc>> (accessed 26-06-2015).

⁷⁴ See for example art 2(1) of the International Covenant on Economic, Social and Cultural Rights:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

⁷⁵ Committee on Economic, Social and Cultural Rights “An Evaluation of the Obligation to Take Steps to the ‘Maximum Extent of Available Resource’” (2007) UN Doc E/C.12/2007/1.

targeted programmes.”⁷⁶ It pointed out that “available resources” were not only those existing within the state, but included provision from the international community and reminded states of the need to demonstrate that every effort had been made to meet core obligations.⁷⁷ The CESCR also set out criteria it would apply in assessing the adequacy of measures taken by states in the event of an allegation that it had failed to do so or where the state itself was using resource constraints to explain retrogressive steps taken (reversal of implementation or stopping a particular activity).⁷⁸

If anything, the UNCRC states the position in stronger terms. Its starting point is that, “When a State ratifies the Convention on the Rights of the Child, it takes on obligations under international law to implement it”⁷⁹ and, lest states be in any doubt, it emphasises that, “Implementation of the human rights of children must not be seen as a charitable process, bestowing favours on children.”⁸⁰ Like the CESCR, it places the onus on States Parties to demonstrate that they have implemented their obligations “‘to the maximum extent of their available resources’ and, where necessary, have sought international cooperation”, going on to remind states of their obligation to implement the Convention, not only within their own jurisdictions, but globally, through international cooperation.⁸¹

During its 2007 *Day of General Discussion*, the UN Committee endorsed the *Statement* issued earlier in the year by the CESCR⁸² and took the opportunity to explore what implementation “to the maximum extent of available resources” means in the specific context of obligations to children.⁸³ It began by recommending that states take legislative action to allocate a specific proportion of public expenditure to children and to provide for systematic, independent evaluation of expenditure on children. It did not limit resources to simply the economic, but included human, technological, organizational, natural and information resources, and noted that these should be seen in qualitative, as well as quantitative, terms. While the first source of “available resources” is the country concerned, it reminded states to include those available from the international community through international assistance. The Committee recognised that measuring what constituted the

⁷⁶ Para 4.

⁷⁷ Paras 5-6.

⁷⁸ Paras 8-10. Assessment is undertaken on a country-by-country basis and the relevant criteria include “the country’s level of development; the severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant; the country’s current economic situation, in particular whether the country was undergoing a period of economic recession; the existence of other serious claims on the State party’s limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict; whether the State party had sought to identify low-cost options; and whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason.”

⁷⁹ United Nations Committee on the Rights of the Child General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child (2003) CRC/C/GC/5 para 1.

⁸⁰ Para 11.

⁸¹ Para 7.

⁸² Committee on the Rights of the Child “General Discussion: Resources for the Rights of the Child – Responsibility of States” para 49.

⁸³ Paras 24-30.

“maximum extent” was problematic and, in particular, that the indicators used in other human rights contexts may not be applicable in the context of children,⁸⁴ and invited UNICEF to develop child-specific indicators with a view to improving their policy formulation, monitoring and evaluation for the implementation of child rights. In the event, the UN Millennium Declaration⁸⁵ established the Millennium Development Goals and all the constituent parts of the UN system, including UNICEF, were charged to elaborate the nature and extent of their role in achieving these goals. As a result, UNICEF has produced a wide range of performance indicators covering the child’s survival and development rights (and much more).⁸⁶

3.5 A hierarchy of obligations?

The Vienna Declaration is unequivocal in proclaiming human rights to be “universal, indivisible and interdependent and interrelated”.⁸⁷ Modern regional human rights instruments emphasise that economic, social and cultural rights are as important as civil and political rights, firmly rejecting the Western notion that the latter rank above the former. That is not to say, however, that all human rights are identical. As we have seen, a distinction is drawn between “obligations of conduct” – requiring the state to do or desist from doing whatever is at issue immediately – from “obligations of result.” Obligations of result are not necessarily quite so absolute or immediate and compliance with them afforded a degree of latitude based on the notion of progressive realisation and available resources. Where minimum core obligations are at stake, that latitude recedes and the state is again obliged to fulfil the obligation. It becomes apparent, then, that, while the right to life is absolute, it is the nature of the obligation flowing from the right to survival and development that will determine whether derogation is permissible, at least in the short term. While it may not be fashionable, in human rights circles, to make the observation, it is difficult to see this as anything other than acceptance of a hierarchy at least in terms of the pace of implementing rights.

⁸⁴ Para 38:

“The Committee also recognizes the limits of statistical variables and the fact that human rights indicators cannot capture the complexity and specificity of individual human rights in different contexts. However, the Committee underlines the importance of assessment tools in the use of resources and recognizes the need to develop measurable indicators to assist States parties in monitoring and evaluating progress in the implementation of the rights of the child as defined by the Convention.”

In this, it was referring to the indicators developed in respect of the International Covenant on Economic, Social and Cultural Rights.

⁸⁵ General Assembly Resolution 2/55 RES/55/2 (18 September 2000).

⁸⁶ UNICEF Strategic Plan 2014-2017 E/ICEF/2013/21 and the *Final Results Framework for the UNICEF Strategic Plan 2014-2017* E/ICEF/2014/8. These relate to health, HIV/AIDS; water, sanitation and hygiene; nutrition; education; child protection and social inclusion. There are further sub-divisions within some of the indicators.

⁸⁷ Vienna Declaration and Programme of Action (adopted 12 July 1993) UN Doc A/CONF.157/23 n 5 above.

4 The committee on the rights of the child and implementation

Only a few weeks after the CRC entered into force, in 1990, world leaders met together at the *World Summit for Children* in New York. Reaffirming their commitment to its goals, they adopted the *Declaration on the Survival, Protection and Development of Children*⁸⁸ and a ten-point *Plan of Action*⁸⁹ for its implementation, focussing on the survival, health, nutrition, education and protection of children. A decade later, (then) UN Secretary-General Kofi Annan was able to report that “The world has seen more gains against poverty and more progress for children in the last 50 years than in the previous 500”.⁹⁰ Nonetheless, he acknowledged that, “for all the millions of young lives that have been saved or enhanced, many of the survival and development goals set by the World Summit remain unfulfilled”⁹¹ and his report provided an assessment of progress to date.

That report was used as the basis for discussion at the *Special Session on Children* organised by the UN General Assembly the following year at which participants pledged “to complete the unfinished agenda of the World Summit for Children” and endorsed a fresh ten-point list of principles and objectives.⁹² These were somewhat all encompassing and ranged from general goals, like the eradication of poverty and “protecting the earth for children”, to the, more specific, “combat HIV/AIDS” and were expanded further in 24 enumerated points indicating targeted action to be taken.⁹³

2009 brought the twentieth anniversary celebration of the CRC organised by the UN Committee and the Office of the High Commissioner for Human Rights in Geneva⁹⁴ and one of the working groups devoted to addressing *economic, social and cultural rights* asked the question, “Are children’s rights a luxury during an economic crisis?”⁹⁵ As we have seen, unsurprisingly, it answered that question in the negative. Indeed, the UNCRC went further, in a recent *General Comment*, when it returned to the issue of a hierarchy of rights and offered the following, unequivocal statement:

⁸⁸ UNICEF “World Declaration on the Survival, Protection and Development of Children” (30-09-1990) UNICEF <<http://www.unicef.org/wsc/declare.htm>> (accessed 26-06-2015).

⁸⁹ UNICEF “Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990s” UNICEF <<http://www.unicef.org/wsc/plan.htm>> (accessed 26-06-2015).

⁹⁰ Kofi A Annan *We the Children: Meeting the Promises of the World Summit for Children* UNICEF (2001) adapted, updated and abridged version of AS/27-3, *We the Children: End-decade review of the follow-up to the World Summit for Children 2* http://www.unicef.org/specialsession/about/sgreport-pdf/sgreport_adapted_eng.pdf (accessed 26-06-15).

⁹¹ 4.

⁹² General Assembly of the United Nations *A World Fit for Children A/RES/S-27/2* (2002). Encouraging ratification and implementation of the CRC had also been one of the express goals of the *United Nations Millennium Declaration A/RES/55-2* (2000).

⁹³ Para 37.

⁹⁴ See United Nations Human Rights “Celebration of the 20th Anniversary of the Adoption of the Convention on the Rights of the Child 8 – 9 October 2009 Geneva” (2009) *Office of the High Commissioner of Human Rights* <<http://www.ohchr.org/EN/HRBodies/CRC/Pages/20thAnniversary.aspx>> (accessed 26-06-2015).

⁹⁵ See United Nations Human Rights “Working Group 3: States Parties’ Obligations: Realizing Economic, Social and Cultural Rights. Are Child Rights a Luxury During an Economic Crisis? *United Nations Human Rights* <http://www2.ohchr.org/english/bodies/crc/docs/20th/Back_DocWG3.doc> (accessed 26-06-2015).

“The Convention recognizes the interdependence and equal importance of all rights (civil, political, economic, social and cultural) that enable all children to develop their mental and physical abilities, personalities and talents to the fullest extent possible.”⁹⁶

The performance indicators developed by UNICEF in response to the UN Millennium Declaration have clarified expectations further.⁹⁷ More specifically, examples of what states should – or should not – be doing in terms of article 6 can be gleaned from the UNCRC’s *Concluding Observations* on the periodic reports submitted by individual states. In their analysis, published in 2007, Rachael Hodgkin and Peter Newel offer an overview⁹⁸ and reference to more recent *Concluding Observations. General Comments* and other events to provide further insights. What follows is intended simply to give a flavour of some of the issues that have emerged and does not seek to offer a comprehensive analysis.⁹⁹

4 1 Right to Life

Numerous *Concluding Observations* highlight the impact on children of war, civil unrest and politically-motivated violence,¹⁰⁰ sometimes noting the continuing dangers posed by landmines and unexploded ordinance.¹⁰¹ That these problems continue is evidenced by events, recent and ongoing at the time of writing, in Israel-Palestine, Iraq, Nigeria, Syria¹⁰² and Ukraine that have yet to be commented upon in *Concluding Observations*.

The negative obligation imposed on states by article 6 amounts to a prohibition on state participation in the intentional taking away of a child’s life. Thus, the state must not engage in genocide, arbitrary killing or enforced “disappearances” in respect of children.¹⁰³ Adults are protected against such

⁹⁶ United Nations Committee on the Rights of the Child General comment No. 15: “The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health” (2013) CRC/C/GC/15 para 7.

⁹⁷ See n 84 and 85 and accompanying text.

⁹⁸ R Hodgkin & P Newell *Implementation Handbook for the Convention on the Rights of the Child* 3 ed (2007) 83-95.

⁹⁹ See also other articles in this issue, particularly J Doek Article 6 CRC and the Views of the CRC Committee (2015) 2 *Stell LR* 254 254-271.

¹⁰⁰ See for example, the Committee’s *Concluding Observations on Afghanistan* CRC/C/AFG.CO/1 (2011) para 29:

“The Committee expresses deep concern over the death of hundreds of children as well as a result of attacks and air strikes by insurgent groups, international military forces and the Afghan National Army” and Nigeria CRC/C/NGA/CO/3-4 (2010) para 79:

“The Committee is seriously concerned about the impact on children of political violence in recent years, inter-communal and inter-religious unrest and of armed conflict in the Niger Delta and in other parts of the State party.”

¹⁰¹ See for example, the Committee’s *Concluding Observations on Cambodia* CRC/C/KHM/CO/2-3 (2011) para 32:

“The Committee is also deeply concerned that although children continue to be killed and injured as a result of landmines and unexploded ordinance, funding for mine-awareness education has been significantly reduced.”

¹⁰² H Dardagan & H Salama “Stolen Futures: The Hidden Toll of Child Casualties in Syria” (11-2013) *Oxford Research Group* <<http://oxfordresearchgroup.org.uk/sites/default/files/Stolen%20Futures.pdf>> (accessed 26-06-2015).

¹⁰³ *OHCHR Manual on Human Rights Reporting under Six Major International Human Rights Instruments* (1997) HR/PUB/91/1 (Rev. 1) 425 “namely by prohibiting and preventing death penalty, extra-legal, arbitrary or summary executions or any situation of enforced disappearance”.

conduct too, of course, but they are not our primary concern. In addition, rulers and governments who engage in genocide and related conduct face the prospect of being called to account by bodies with very much more substantial powers than those of the UNCRC.¹⁰⁴ It is not enough for the state simply to desist from killing children, since it is under an obligation to control the actions of its current and former agents¹⁰⁵ and to investigate the circumstances surrounding the death of children during times of unrest.¹⁰⁶

As we have seen, another clear example of the negative obligation on states, stemming from article 6, is the prohibition on imposing the death penalty in respect of offences committed while a person was under the age of eighteen.¹⁰⁷ Yet a small number of states retain the death penalty for such persons. In the most recent report from the Special Rapporteur on extrajudicial, summary, or arbitrary executions to address the issue, the (then) Special Rapporteur, Philip Alston, noted that, over the previous two years, he had received reports of the imposition of the death penalty relating to 46 juveniles.¹⁰⁸ While a number of the governments involved simply failed to respond to his enquiries, there is reason to believe that some of the death sentences were carried out.

A particularly poignant example is found in the UN Committee's 2005 *Concluding Observations* on Iran. While the country report claimed that execution of persons for crimes committed before the age of 18 had been suspended, the execution of children continued with a child being executed on the very day the report was considered by the Committee.¹⁰⁹ On a more positive note, again in 2005, the United States Supreme Court declared the imposition of the death penalty in respect of offences committed by persons under the age of eighteen to be unconstitutional.¹¹⁰ Despite the fact that the country has still to ratify the CRC, the convention contributed to the Court's decision.

¹⁰⁴ See for example, arts 25-28 and 5-8 of the Rome Statutes of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 on the ICC's jurisdiction *ratione personae* and *ratione materiae* respectively.

¹⁰⁵ See for example, the Committee's *Concluding Observations on Nigeria* CRC/C/NGA/CO/3-4 (2010) para 32:

"The Committee is gravely concerned about the impact of inter-communal and political violence on children, including reports that children have been victims of extrajudicial killings by law enforcement agencies."

¹⁰⁶ See for example, the Committee's *Concluding Observations on Sri Lanka* CRC/C/LKA/CO/3-4 (2010) para 12:

"The Committee expresses serious concern that insufficient efforts have been made by the State party to investigate the death of hundreds of children during the final five months of the conflict in 2009 as a result, in particular, of alleged shelling and aerial bombardments of civilians, hospitals, schools and humanitarian operations and deliberate deprivation of food, medical care and humanitarian services."

¹⁰⁷ See n 47-49 above and accompanying text.

¹⁰⁸ Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development A/HRC/11/2 (2009) paras 27-42.

¹⁰⁹ *Concluding Observations on the Islamic Republic of Iran* CRC/C/15/Add/254 (2005) para 29.

¹¹⁰ *Roper v. Simmons* 543 U.S. 551 (2005). It had already reached a similar conclusion in respect of under-16 year-old offenders: *Thompson v. Oklahoma*, 487 U.S. 815 (1988), but previously it had refused to extend the protection to 16 and 17 year-olds: *Stanford v. Kentucky*, 492 U.S. 361 (1989).

While a number of countries show improvements, high rates of infant mortality continue to be a source of immense concern.¹¹¹ More specifically, the *Concluding Observations* provide examples of preventable causes of death. Many, including blood feuds,¹¹² gang violence¹¹³ and child suicides,¹¹⁴ have cultural, historical or societal roots. Some, like infanticide¹¹⁵ and so-called “honour killings”,¹¹⁶ have a particular impact on girls and young women. The prevalence of other causes, like drowning, often relates to geographic and climatic condition.¹¹⁷ Again, the obligation placed on states involves an element of proactivity, since the UN Committee expects them to investigate,¹¹⁸ and respond appropriately to,¹¹⁹ the deaths of children.

¹¹¹ See for example, the Committee’s *Concluding Observations on Azerbaijan CRC/C/AZE/CO/3-4* (2012) para 34:

“The Committee is deeply concerned at the high rate of infant mortality in the State party, which is the fifth highest in Europe.”

El Salvador, *CRC/C/SLV/CO/3-4* (2010) para 59:

“Although there was a slight decrease in child mortality rates, malnutrition is still a major cause of children’s death”

and Ukraine *CRC/C/UKR/CO/3-4* (2011) para 31:

“While noting with appreciation current efforts to improve prenatal care and care directly after birth, the Committee expresses concern that infant mortality has been on the rise since 2003.”

¹¹² See for example, the Committee’s *Concluding Observations on Albania CRC/C/ALB/CO/2-4* (2012) para 31:

“The Committee is deeply concerned about the persistence of ‘blood feuds’ resulting from the application of customary law known as ‘Kanun’ and, in particular, the killing of children and the confinement of a large number of children for fear of being killed, especially in the northern areas of the State party. In that regard, the Committee expresses deep concern that in May 2012, a 14-year-old girl was killed in a ‘blood feud’.”

¹¹³ See for example, the Committee’s *Concluding Observations on El Salvador CRC/C/SLV/CO/3-4* (2010) para 6:

“The Committee notes the extremely high level of criminality, violence and insecurity in the State party, whereby one person below 18 is killed each day. In particular, the Committee recognizes the increasing challenge posed by youth gangs ‘maras’, which is the expression of a problem of structural violence and the result of many years of repressive policies.”

¹¹⁴ Japan *CRC/C/JPN/CO/3* (06/2010) para 41:

“While noting the State party’s efforts to address the incidence of suicide among children, particularly adolescents ... the Committee is still concerned at suicides committed by children and adolescents and at the lack of research on the risk factors associated with suicides and attempted suicides.”

¹¹⁵ See for example, the Committee’s *Concluding Observations on China CRC/C/CHN/CO/3-4* (2013) para 27:

“The Committee is further concerned that due to long-standing traditions and cultural influences that perpetuate boy preference and unequal status of girls, sex-selective abortions, female infanticide and abandonment of girls remain widespread, resulting among others in a high male-to-female sex ratio.”

¹¹⁶ See, for example, the Committee’s *Concluding Observations on Turkey CRC/C/TUR/CO/2-3* (07/2012) para 32:

“While noting the State party’s efforts in combating gender-based violence, including “honour killings” and social pressure resulting in suicide, the Committee remains concerned that such practices continue and the significant number of victims are women, including girls.”

¹¹⁷ See for example, the Committee’s *Concluding Observations on Vietnam CRC/C/VNM/CO/ 3-4* (2012) para 33:

“The Committee notes with concern that injuries, many of them preventable, and particularly relating to drowning, road traffic and domestic accidents, are an important cause of child mortality.”

¹¹⁸ See for example, the Committee’s *Concluding Observations on United Kingdom CRC/C/GBR/4* (2008) para 29:

“The State party should also introduce automatic, independent and public reviews of any unexpected death or serious injury involving children – whether in care or in custody.”

¹¹⁹ See for example, the Committee’s *Concluding Observations on Guatemala CRC/C/GTM/CO/3-4* (2010) para 45:

“The Committee is concerned at the extremely high number of killings of children (510 out of 6,498 violent deaths in 2009), and at the lack of effective measures taken by the authorities in this regard. The Committee regrets that these crimes often remain unpunished.”

What of the state creating a legal climate that has implications for the child's right to life? When assisted suicide was made available to persons aged 12 or over in the Netherlands, the UNCRC was confronted with something of a "new issue". There are rigorous qualifications and safeguards in place, of course, but permitting young people access to something that is, in itself, controversial presents children's rights advocates with a dilemma. Is this an example of showing regard for the wishes of young people facing immense difficulties and recognising their agency, as required by article 12 of the CRC, or does it reflect a failure to respect the child's right to life – however intolerable that life may be? The UN Committee was unwilling to condemn the practice out of hand, albeit it sought to ensure that the adequacy of the safeguards in place was kept under review.¹²⁰ As more countries accommodate assisted suicide, it is likely that the UN Committee will return to the matter in the future.¹²¹

4.2 Survival and development

Given the very broad compass of the elements involved in respecting the child's right to survival and development, analysis of its full implications and the statements of the UN Committee relating to it warrants a book, if not several volumes.¹²² Thus, comment here will be confined to two observations. First, the UNCRC expressed a range of concerns affecting females particularly. These include early marriage, teen pregnancy,¹²³ attacks on unmarried mothers and their children¹²⁴ and, while not confined to female

¹²⁰ *Concluding Observations* on the Netherlands CRC/C/NLD/CO/3 (2009) para 31:

"The Committee recommends, in particular, that the State party (b) Take all necessary measures to strengthen control of the practice of euthanasia and prevent non-reporting, and to ensure that the psychological status of the child and parents or guardians requesting termination of life are taken into consideration when determining whether to grant the request."

¹²¹ In 2014 Belgium amended its 2002 law on assisted suicide to make it available to children, subject to strict conditions: C McDonald-Gibson "Belgium Extends Euthanasia Law to Kids" (12-02-2014) *Time* <<http://time.com/7565/belgium-euthanasia-law-children-assisted-suicide/>> (accessed 26-06-2015).

¹²² The only separate monograph located is a 52 page booklet: M Nowak *A Commentary on the United Nations Convention on the Rights of the Child, Article 6: The Right to Life, Survival and Development* (2005).

¹²³ See for example, the Committee's *Concluding Observations* on Namibia CRC/C/NAM/CO/2-3 (2012) para 70:

"The Committee calls upon the State party to pay special attention to the specific vulnerability of girls in street situations to sexual abuse, exploitation and early pregnancy."

¹²⁴ See for example, the Committee's *Concluding Observations* on Algeria CRC/C/DZA/CO3-4 (2012) para 33:

"The Committee is extremely concerned that attacks against single mothers and their children continue to be committed with impunity and that victims of these crimes live with their children in situations of fear and extreme poverty without support being provided by the State party."

victims, sexual exploitation¹²⁵ and trafficking.¹²⁶

Secondly, it is striking that so many of the general comments refer to specific groups of children as being particularly disadvantaged. The United Kingdom has the shameful distinction of attracting the following comment, which includes many of these groups:

“The Committee is concerned that in practice certain groups of children, such as: Roma and Irish Travellers’ children; migrant, asylum-seeking and refugee children; lesbian, bisexual, gay, and transgender children (LGBT) and children belonging to minority groups continue to experience discrimination and social stigmatization.”¹²⁷

It is absolutely no consolation that similar comments have been made in respect of a number of other countries,¹²⁸ or that concern over the ill-treatment of Roma children is a Europe-wide phenomenon,¹²⁹ or that children with disabilities are not mentioned, suggesting that they appear to be faring better in the United Kingdom than elsewhere.¹³⁰ The United Kingdom does not have an indigenous or aboriginal population, as these terms are generally understood, but the plight of these groups also receives special mention in the countries where they are found.¹³¹

5 Conclusions

By bringing together civil and political rights, on the one hand, and economic, social and cultural rights, on the other, article 6 bridges a long-standing division in the human rights community. Yet it leaves a fundamental

¹²⁵ See for example, the Committee’s Concluding Observations on the Holy See CRC/C/OPSC/VAT/CO/1 (2014) para 43:

“The Committee nevertheless expresses deep concern about child sexual abuse committed by members of the Catholic Church operating under the authority of the Holy See, whereby clerics have been involved in the sexual abuse of tens of thousands of children worldwide. The Committee is gravely concerned that the Holy See has not acknowledged the extent of the crimes committed, nor taken the necessary measures to address cases of child sexual abuse and to protect children, and has adopted policies and practices which have enabled the continuation of sexual abuse by clerics and impunity for the perpetrators.”

¹²⁶ See for example, the Committee’s Concluding Observations on Myanmar CRC/C/MMR/CO/3-4 (2012) paras 91-92: While the Committee noted the efforts of the state party to stem human trafficking and the sale of children, it made numerous recommendations for further action.

¹²⁷ General Comment on the United Kingdom CRC/C/GBR/4 (2008) para 24.

¹²⁸ See for example, the Committee’s Concluding Observations on Finland CRC/C/FIN/CO/4 (08/2011) para 25:

“The Committee remains concerned at the prevalence of discrimination against children with disabilities, immigrant and refugee children and children from ethnic minorities, such as Roma children.”

¹²⁹ See for example, the Committee’s Concluding Observations on Czech Republic CRC/C/CZE/CO/3-4 (2011) para 30.

“The Committee is deeply concerned that ... there continue to be serious and widespread issues of discrimination, particularly against the minority Roma children in the State party, including the systemic and unlawful segregation of children of Roma origin from mainstream education.”

¹³⁰ See for example, the Committee’s Concluding Observations on Costa Rica CRC/C/CRI/CO/4 (2011) para 30:

“The Committee urged the state to “strengthen its efforts to eliminate societal discrimination and prejudice against indigenous, Afro-descendant, migrant children and children with disabilities.”

¹³¹ See for example, the Committee’s Concluding Observations on Australia CRC/C/AUS/CO/4 para 29 where the Committee expressed concern over “the serious and widespread discrimination faced by Aboriginal and Torres Strait Islander children, including in terms of provision of and accessibility to basic services and significant overrepresentation in the criminal justice system and in out-of-home care.”

question unanswered: whether there is, nonetheless, a hierarchy of rights. It is wholly understandable that the UNCRC and many other international bodies show such a marked reluctance to acknowledge a hierarchy of rights. The fear is that, were they to do so, rights ranking lower in the hierarchy would simply be forgotten. Yet there is no escaping the fact that some issues are simply more pressing than others. A better approach is that of the CESCR which, rather than ranking the rights themselves, focussed on the pace of realisation. In this, it accepted the International Law Commission's distinction between obligations of conduct (to be implemented immediately) and obligations of result (to be realised progressively). This renders priorities permissible, in respect of economic, social and cultural rights, provided that minimum core obligations are met and that the goal remains full implementation. The precise content of these core obligations has been clarified further through the UNCRC's *General Comments* and *Concluding Observations* on state's periodic reports and the performance indicators developed by UNICEF.

It remains the case that, even in the world's affluent democracies, children are amongst the most disempowered people in any society. This, in turn, can lend a certain invisibility to their unmet needs and, thus, to failure to respect their rights.¹³² Yet, in truth, the failures are there for all to see in our own countries and, thanks to the mass media, worldwide.

Oscar Wilde observed, "[t]o live is the rarest thing in the world. Most people exist, that is all."¹³³ Article 6 of the United Nations Convention on the Rights of the Child seeks to guarantee to all of the world's children that very basic right to exist, but couples it with a keen appreciation that it can – and should – mean so much more. By placing states under the additional obligations to respect the child's right to survival and to development, the CRC seeks to ensure the rich and full childhood that will enable children to grow into competent and contributing adults in their societies and, in turn, to pass that opportunity on to future generations.

SUMMARY

Article 6 of the CRC guarantees to all of the world's children the right to life, survival and development. The right to life has long featured in international, regional and domestic human rights instruments. By including reference to survival and development, article 6 enriches the basic right to life and addresses a long-standing division in international human rights: that between civil and political rights, on the one hand, and economic, social and cultural rights, on the other.

When the content of the obligations under article 6 is examined in the context of human rights more generally, the immense breadth of its compass becomes apparent. The danger is that, by trying to address "everything", efforts may become so fragmented that it comes to mean nothing, particularly in countries with very limited resources. That threat can be addressed by prioritising some rights over others, but such an approach is controversial in human rights discourse. Indeed, the Vienna Declaration describes human rights as "universal, indivisible and interdependent and interrelated."

¹³² One gets a sense of this from the title of UNICEF "The State of the World's Children 2006: Excluded and Invisible" (2006) *UNICEF* <http://www.unicef.org/sowc06/pdfs/sowc06_fullreport.pdf> (accessed 26-06-2015).

¹³³ O Wilde "The Soul of Man under Socialism" (02-1981) *Fortnightly Review* <<https://archive.org/details/soulmanundersoc01wildgoog>> (accessed 26-06-2015).

Does this universality mean that all human rights are equally important, precluding any hierarchy of rights?

In seeking an answer to that core question, this article sets the scene for the other articles that follow in this issue. It examines what the drafters sought to achieve in article 6 and drills down into its precise content by exploring it in the wider human rights context and identifying some of the issues highlighted by the UNCRC in its *Concluding Observations* on States Parties' periodic reports.