

Kid's Talk

Freedom of Expression and the UN Convention on the Rights of the Child

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ACKNOWLEDGMENTS

The main author of this report was Linda Kirschke, a consultant to ARTICLE 19. Jon Lunn, Africa Researcher, wrote the case studies of South Africa, Uganda and Sierra Leone. The analysis of the Convention on the Rights of the Child in Chapter 1 was revised by Toby Mendel, Head of Law Programme, and the whole report was edited by Richard Carver, senior consultant to ARTICLE 19 and formerly Head of Africa Programme.

ARTICLE 19 gratefully acknowledges the financial support received from the United Nations Children's Fund (UNICEF) and the European Commission for the research, writing and publication of this report.

Introduction

The Convention on the Rights of the Child (CRC) was adopted by consensus in 1989 by the United Nations General Assembly and entered into force after ratification by 20 states in September 1990. It has since been ratified by every country except the United States and Somalia, making it probably the most widely adopted international human rights treaty in the world. In the eight years since it entered into force, the CRC has already made a significant contribution to the protection of children's rights in many countries as governments have begun the task of implementing their obligations under the treaty. The Committee on the Rights of the Child, the United Nations body which was established under the CRC to monitor compliance with its provisions, is now well-established and there is a growing body of reports by States Parties which details how they are implementing their obligations. Nevertheless, there is a sense in which the CRC is itself still in its childhood as international law. This is demonstrated by the lack of clear jurisprudence about what key provisions of the CRC should mean. Without such jurisprudential guidance, it is difficult for States Parties to know what they need to do if they are to meet their obligations. In turn, it is difficult for the Committee on the Rights of the Child to monitor implementation in a meaningful fashion.

The relative paucity of clear jurisprudence is perhaps at its starkest with regard to the civil and political rights provisions of the CRC. This includes children's rights to freedom of expression and information, which are guaranteed by Articles 12, 13 and 17. This report seeks to address the implications of this problem for implementation of these articles of the CRC by State Parties. While acknowledging that there are genuine problems in interpreting these articles, it argues that the Committee on the Rights of the Child has nonetheless so far failed to undertake a sufficiently purposive interpretation of these provisions. This has left States Parties largely to work out for themselves what children's rights to freedom of expression and information should mean. Whether by design or default, their interpretations have often been excessively narrow and paternalistic. For example, much more attention has been expended upon how to protect children *from* harmful information than how to increase their access to information from a diversity of sources.

This highlights another issue for the consideration of the Committee on the Rights of the Child and States Parties with regard to interpreting Articles 12, 13 and 17. Interpretations of these provisions should be expansive as well as purposive if the CRC is to be an instrument of social change. The rights to freedom of expression and information are increasingly accepted as two of the cornerstones of peace, democracy and development, the exercise of which is essential if individuals are to participate in society and influence decision-making. These entitlements extend to both adults and children. The rights to freedom of expression and information should be viewed as an essential resource with which children – with help and guidance from their parents, guardians and communities – can build a better future for themselves and without which their horizons can only shrink.

Chapter 1 begins by examining the development of children’s rights to freedom of expression and information during the drafting of the CRC. The chapter then looks at the CRC drafting process with regard to closely-related rights such as the rights to freedom of religion and association. In addition, it addresses these rights in the context of parental rights, with which there is inevitably an underlying tension. Throughout, the chapter weighs the provisions of the CRC against existing provisions in the International Covenant on Civil and Political Rights (ICCPR) and other relevant treaties, such as the African Charter on the Rights and Welfare of the Child. The chapter reaches an assessment of the strengths and weaknesses of the provisions of the CRC with regard to the rights to freedom of expression and information. It concludes that the full potential of Article 12, the right of the child to express his or her views, has not yet been realized, particularly as it imposes positive obligations on states to ensure that children’s views are heard both within public structures and the family. It argues that the relationship of Article 13 with Article 19 of the ICCPR remains unclear, as does the extent to which special restrictions on children’s expression may be justified - for example, to protect them from harm. Similarly, it asserts that both States Parties and the Committee on the Rights of the Child have overly stressed the “protective” aspects of Article 17 while ignoring its potential for guaranteeing children’s right to know.

Chapter 2 analyses the interpretations of the rights to freedom of expression and information and related rights such as the rights to association and assembly which are to be found in the reports

to the Committee on the Rights of the Child of States Parties to the CRC and in the Concluding Observations of the Committee on the Rights of the Child.¹ The chapter argues that although the Committee has made an invaluable contribution to promoting protection of children's rights in many areas, in others its jurisprudence lacks clarity. One such area is children's freedom of expression within the family unit. While the Committee often addresses this issue, it falls short of establishing clearly the obligations of States Parties in this regard. Our analysis shows that while far-reaching limitations on children's rights to freedom of expression are described in a number of States Parties reports, the Committee fails to address this problem in its Concluding Observations. These include restrictions on children's rights to freedom of expression and assembly which States Parties have sought to justify on the basis that children are not sufficiently responsible, either in fact and in law, to exercise these rights; and media laws which are clearly incompatible with this right. Moreover, the chapter shows how other important issues such as the right to freedom of assembly, and the parameters of children's rights to freedom of expression in schools have received relatively limited coverage in the jurisprudence of the Committee. The chapter also considers legal restrictions on children's right to receive information. In doing so, it draws on limitations presented in States Parties reports, as well as on cases from Malawi, the United Kingdom and the United States.

Finally, Chapter 3 addresses some of the practical issues involved in promoting and protecting children's rights to freedom of expression and information in societies riven by internal conflict – particularly those which have actively involved children. In doing so, it looks at three African case studies: South Africa, Uganda and Sierra Leone. It argues that the experience of these countries vividly demonstrates that a failure to listen to children and give them a voice in society can be a major factor in provoking and fuelling internal conflicts. While acknowledging the many positive steps which are being taken towards implementation of the CRC by the governments of these three countries, it claims that none have yet been able to develop a clear

¹. States Parties to the Convention are required to submit reports to the Committee on the Rights of the Child which discuss their implementation of the Convention. They must produce their initial report to the Committee within two years of ratification; after that point they submit periodic reports every five years. The Committee on the Rights of the Child issues Concluding Observations on these reports. However, unlike the Human Rights Committee under the 1st Optional Protocol of the ICCPR, the Committee on the Rights of the Child does not consider individual complaints against States Parties.

The States Parties Reports and Concluding Observations of the Committee on the Rights of the Child are available on-line at: http://www.unhchr.ch/hchr_un.htm, a site maintained by the Office of the High Commissioner for Human Rights.

conceptualization of what children's rights to freedom of expression and information should mean. South Africa, Uganda and Sierra Leone have each, to a greater or lesser extent, dodged awkward questions about child participation and empowerment by adopting excessively narrow and paternalistic interpretations of these rights. The chapter concludes by arguing that the longer these questions are avoided or fudged, the more fragile the foundations for a better future for South Africa, Uganda and Sierra Leone will be.

The conclusion sets out a number of recommendations for the consideration of the Committee on the Rights of the Child with regard to its responsibility to promote and protect children's rights to freedom of expression and information.

This report is not an exhaustive study either of issues concerning children's rights to freedom of expression and information or of the jurisprudence of the Committee on the Rights of the Child. However, ARTICLE 19 hopes that the report will assist efforts to construct a clear and positive interpretative framework on which to base implementation of the CRC so that children's rights to freedom of expression and information can be more effectively promoted and protected throughout the world during the years ahead.

Chapter 1. The Convention on the Rights of the Child: the impact on freedom of expression

The Convention on the Rights of the Child (CRC) was adopted by the United Nations General Assembly in 1989² after a ten-year drafting process. It came into force on 2 September 1990 in accordance with Article 49, after ratification by 20 states. It is probably the most widely ratified international treaty. By June 1992, there were already 119 States Parties and by September 1998, the Convention had been ratified by 191 States, 6 more than the number of members of the United Nations. The only States which have yet to ratify the CRC are the United States and Somalia and the former has at least signed it.

This exceptional record of ratification is slightly tarnished by the fact that a number of countries have entered general reservations against any application of the Convention that is contrary to the principles of either Islam or internal legal provisions.³ These reservations have been widely objected to by both the Committee on the Rights of the Child and other States Parties on the basis that they run counter to the object and purpose of the Convention, contrary to Article 19 of the Vienna Convention on the Law of Treaties.⁴

This chapter reviews the development and current status of a number of rights in the CRC including Article 12 (respect for the views of the child), Article 13 (freedom of expression), Article 14 (freedom of thought, conscience and religion), Article 15 (freedom of association and assembly) and Article 17 (access to information). The analysis will focus primarily on the drafting process of and reservations to each right, but issues such as the way the rights relate to each other and the general body of international human rights law will also be considered.

1.1. From welfare to civil and political rights

The CRC represents a clear departure from earlier instruments dealing with children's rights in

² See Resolution 44/252.

³ Brunei Darussalam, Djibouti, Kuwait, Iran, Malaysia, Oman, Qatar, Saudi Arabia and Syria have all reserved on the basis of Islam while Brunei Darussalam, Kuwait, Indonesia, Malaysia, Oman and Syria have reserved either on the basis of their constitution or local laws.

⁴ Treaty Series No. 58 (1980), in force 27 January 1980.

that it includes a number of civil and political rights such as freedom of expression, information, assembly and religion. The Convention was preceded by the 1924 Declaration of Geneva, adopted by the League of Nations, and the 1959 United Nations Declaration of the Rights of the Child, both non-binding instruments which deal almost exclusively with economic and social rights. The 1924 Declaration focuses on the most basic survival needs of children, calling on States Parties to recognize, for example, that “... the child that is hungry must be fed [and] must be the first to receive relief in times of distress.”⁵ The 1959 United Nations Declaration again focuses on the physical welfare of children but also prohibits discrimination against children “on account of race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status”⁶ and recognizes the right of children to a name and nationality.

The inclusion of civil and political rights in the CRC is perhaps particularly significant given that they must be implemented immediately, unlike economic, social and cultural rights which require only progressive or programmatic implementation. This means that while States must undertake measures to implement economic and social rights, they are required to do so only as far as their resources permit. The idea of progressive implementation is generally provided for in Article 4 of the CRC and has also been explicitly reiterated in respect of certain rights, for example the right to education, guaranteed by Article 28.⁷

A number of other international instruments also provide some protection for children’s rights, some provisions applying simply to “everyone” and others providing explicit protection for children. Most important in this respect for our purposes is the International Covenant on Civil and Political Rights (ICCPR) which guarantees the right of “everyone” to freedom of expression, assembly and a number of other related rights and freedoms. It also refers specifically to children’s rights in a number of provisions, for example relating to the death penalty (Article 6(5)), criminal justice (Articles 10(2), (3) and 14(4)), and nationality, registration of birth and the right to a name (Article 24). Perhaps the most far-reaching provision dealing explicitly with children’s rights in the ICCPR is Article 24(1) which guarantees to children the right to such

⁵ 1924 Declaration of Geneva, Paragraph 2, cited in Sharon Detrick, ed., *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”* (Dordrecht/Boston/London: Martinus Nijhoff Publisher, 1992), p. 641.

⁶ Principle 1, 1959 Declaration of the Rights of the Child.

⁷ Some states, such as Oman and Tunisia, have also entered reservations to this effect.

protection as they may need without discrimination (see below).

The idea of establishing a binding international treaty on the rights of minors was first proposed by Poland in 1978, at the 34th session of the United Nations Commission on Human Rights.⁸ The original Polish proposal closely mirrored the 1959 Declaration of the Rights of the Child and did not initially generate widespread interest. In 1979, the 20th anniversary of the United Nations Declaration of the Rights of the Child, was officially proclaimed as the “International Year of the Child” and the Commission on Human Rights designated a “Working Group” to consider the question of introducing a convention on children’s rights.⁹ In 1980 Poland submitted a more comprehensive draft proposal which became the “basic working document”¹⁰ for the Convention on the Rights of the Child. According to Glenn Mower, despite the revisions, “Western powers, particularly the United States, saw this as an Eastern bloc project principally concerned with economic, social and cultural matters, items that, in their opinion, were ... not really ‘rights’.”¹¹ As the draft was debated and amended between 1980 and 1988, it was this very criticism by Western governments, which participated actively in the drafting process, which ultimately led to the introduction of extensive civil and political rights provisions. The Convention became the first binding international human rights treaty to incorporate both economic and social as well as civil and political rights.¹²

1.2. Freedom of expression in the Convention on the Rights of the Child

The Convention on the Rights of the Child provides extensive protection for the rights to freedom of expression and information and related rights both directly (see Articles 12, 13, 14, 15 and 17) and indirectly (see Articles 2, 9, 10, 22, 23, 24 and 30). Although they now occupy a prominent position within the framework of the Convention, Articles 12-15 and 17 proved to be contentious throughout the drafting process. Some critics have argued that these articles are

⁸ Detrick, *op cit.*, p. 20.

⁹ *Ibid.*

¹⁰ Detrick, *op cit.*, p. 22.

¹¹ Glenn Mower Jr., *The Convention on the Rights of the Child: International Law Support for Children* (Westport and London: Greenwood Press, 1997), p. 5.

¹² See Cynthia Cohen and Susan Kilbourne, *Jurisprudence of the Committee on the Rights of the Child: A guide for Research and Analysis* (New York: ChildRights International Research Institute, 1997), p. 2-3.

“weaker”¹³ than the economic and social provisions in the Convention.¹⁴ Other scholars stress the significance of these provisions as this is the first time that an international treaty has specifically addressed the right to freedom of expression in relation to children. The significance is highlighted by the fact that few if any national courts have much jurisprudence in this area, despite extensive litigation on other freedom of expression issues.¹⁵

1.2.1. Article 12: Respect for the views of the child

The right of the child to respect for his or her views was the subject of some controversy during the drafting process and underwent a number of changes from the original Polish proposal. Article 12, often referred to as “respect for the views of the child”, is one of four “guiding principles” which underlie the whole framework of rights established by the Convention and which are supposed to inform interpretation and understanding of the document as a whole.¹⁶

The final version of Article 12, as included in the CRC, reads as follows:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

¹³ See Lawrence LeBlanc, *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights* (Lincoln and London: University of Nebraska Press, 1995), p. 157.

¹⁴ For an excellent overview of the jurisprudence of the Committee on the Rights of the Child, see Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (New York: UNICEF, 1998).

¹⁵ According to Walter Bennett, children’s rights in the United States were developed only indirectly through constitutional case law and the early Supreme Court rulings involving children, *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) were argued exclusively in terms of parental rights. Walter Bennett, “A Critique of the Emerging Convention on the Rights of the Child” (1987) 20 *Cornell International Law Journal* 1, p. 15.

¹⁶ The United Nations *Human Rights Fact Sheet on the Rights of the Child* notes: “There are four general principles enshrined in the Convention. These are meant to help with the interpretation of the Convention as a whole and thereby guide national programmes of implementation. The four principles are formulated ... in articles 2 [non-discrimination], 3 [best interests of the child], 6 [the right to life, survival and development] and 12

This is considerably different from the original Polish proposal which included only one paragraph, assuring to every child capable of forming views the right to express them in relation to “matters concerning his own person, and in particular, marriage, choice of occupation, medical treatment, education and recreation.”¹⁷ The idea of including a list of matters to which this right applied was the subject of some debate. The United States argued that the right should apply to the child’s fundamental beliefs – such as “religion, political and social beliefs”¹⁸ – rather than the more immediate issues raised by Poland. A consensus was finally reached in 1981 that Article 12 should not delineate specific areas on which the child could express his or her ideas but ought rather to provide general protection for the child’s right to express him or herself.

During the 1981 session, Australia proposed that the Convention should guarantee not only the right of expression but also the assurance that children’s views would be given due consideration. It proposed the following amendment which appears to have been incorporated in substance without resistance: “In all such matters the wishes of the child shall be given due weight in accordance with his age and maturity.”¹⁹ The idea of conditioning a right by reference to the abilities and experience of the child is referred to both explicitly and implicitly in a number of other provisions in the Convention.²⁰ Finland’s proposal for a specific guarantee that children should have a right to be heard in any “judicial and administrative proceedings” directly affecting them was also readily accepted.²¹

The guarantee of respect for the views of the child as set out in Article 12 is significant in a number of respects. It is both broader and narrower than the guarantee of freedom of expression contained in the ICCPR and Article 13 of the CRC, both of which primarily envisage protection from arbitrary government interference. It is narrower in that it only applies to the expression of views and not the rights to seek and receive information and ideas. These latter rights, which have been held, among other things, to require public authorities to take positive action to promote a free press, are a key prerequisite to effective political participation.

[the views of the child].” *Fact Sheet No. 10 (Rev.1)*, (Geneva: High Commissioner for Human Rights, 1997), pp. 2-3.

¹⁷ Basic working text as adopted by the 1980 Working Group, E/CN.4/349, quoted in Detrick, *op cit.*, p. 224.

¹⁸ Detrick, *ibid.*, p. 225.

¹⁹ *Ibid.*, p. 224.

²⁰ For example, it is referred to explicitly in Articles 5 and 14 and implicitly in Articles 32, 38 and 40.

²¹ Detrick, *ibid.*, pp. 226-227.

There is, in addition, a paternalistic ring to Article 12 which is absent from the more general guarantees of freedom of expression. It applies only to the child “who is capable of forming his or her own views” and is further restricted in scope to matters “affecting the child”. The former qualification would appear inclusive, in that it would be impossible to express views if one were not capable of forming them. As Van Bueren notes, the provision does not require that the child be able to articulate clearly his or her ideas in order to enjoy this right, expression being broader than articulation.²² The same might be argued as regards the latter condition, inasmuch as a broad interpretation of “affecting” would include anything about which one bothered to express views. However, a general canon of interpretation militates against completely negating the effect of language in a legal document. Also, children do talk about a wide range of topics and it is perhaps unreasonable to require that due regard be given to everything they say. However, the necessity and even desirability of these limitations has been questioned and it would be in keeping with the general purpose of Article 12 to interpret them narrowly.²³

Article 12 also includes some important innovations. It is unique in that it not only protects children’s right to express their views but also requires that these views be “given due weight in accordance with the age and maturity of the child.” This aspect of the guarantee requires States to take account of children’s views but only to the extent warranted by their age and maturity. The “due weight” requirement imposes a positive obligation on States Parties to actively support minors’ right to freedom of expression by ensuring that they enjoy a meaningful forum in which to express their opinions, particularly in respect of public authorities. This implies that whenever States propose initiatives which are expected to affect either a child or children generally, they must ensure effective input into those decisions by those affected. This is a very significant obligation and many States appear to have underestimated the extent of the changes they will need to introduce to comply with it. For example, it requires that consultative structures exist which allow children input into decision-making processes regarding education, much of the health care system and so on.

²² Van Bueren, G., *The International law on the Rights of the Child* (Dordrecht/Boston: Martinus Nijhoff, 1995), p. 139.

²³ Bennett, *op cit.*, p. 6, asks, “Why should not children, as with all people, enjoy unfettered free speech regardless of capacity?”

Adults, in contrast, have no general right to be heard although they do have democratic rights, such as to vote and to take part in the conduct of public affairs,²⁴ which mitigate this problem. This approach of defining respect for the views of the child as a positive right is further elaborated in Article 12(2), discussed below.

This aspect of the right, however, is qualified by the condition that the weight to be accorded the child's views depends on his or her "age and maturity". Van Bueren notes that "by referring to the two criteria of equal value, the age and maturity of the child, States Parties do not have an unfettered discretion as to when to consider and when to ignore the views of children."²⁵ In this way, the dual factors protect children's rights against a rigid or formalistic approach to the issue of weight as a "young child can be mature beyond his or her years."²⁶ However, the concept of "due weight" is open to a wide range of interpretations and its meaning was not clarified during the deliberations of the Working Group.²⁷ The Office of the High Commissioner for Human Rights does little to clarify the meaning of this phrase, noting simply that "The underlying idea is that children have the right to be heard and to have their views taken *seriously*...."²⁸ (italics added).

Article 12(2) guarantees the right of the child to "be heard in any judicial and administrative proceedings affecting" him or her. Although this is implicit in the general guarantee in Article 12(1), it is probably useful to make it explicit in this way. This guarantee is further developed by Article 9(2) which provides that children must be allowed to participate in proceedings relating to possible separation from their parents and be given an opportunity to make their views known.

Article 12(2) envisages various means by which children might make their views heard, including "either directly, or through a representative or an appropriate body". By including the term "appropriate body", this provision stops short of guaranteeing children a right to be directly represented and allows, for example, for representation by a State agency, court-appointed guardian *ad litem*. This may be contrasted with Article 4(2) of the Charter on the Rights and

²⁴ See ICCPR, Article 25.

²⁵ Van Bueren, *op cit.*, p. 136.

²⁶ *Ibid.*

²⁷ Detrick, *op cit.*, p. 225.

²⁸ *Fact Sheet No. 10 (Rev.1)*, *op cit.*, p. 3.

Welfare of the African Child, adopted by the Organization of African Unity July 1990. Article 4(2) provides that children must be allowed to present their views in any judicial or administrative proceedings affecting them, “either directly or through a disinterested representative as party to the proceedings” (italics added).

Another significant innovation attributed to Article 12 is the possibility of obligations on actors other than the State, particularly parents, to respect the views of children. Article 12 establishes a right to express views “freely *in all matters affecting the child*” (italics added). This right can only really be effective, given children’s fundamental reliance on non-state structures, if it applies to the family, especially to parents, and to other non-state social bodies, for example religious establishments. As Van Bueren notes:

The problem is that the right to freedom of expression which was first expressed in international human rights law in 1948, is a right which is regarded as protected if it is free from “interference by public authority”, however, where children are concerned such a guarantee is necessary but by itself inadequate. Children often require additional assistance in order to be able to exercise their right to freedom of expression.²⁹

It appears to be beyond doubt that Article 12 does extend to views expressed within the family and other social contexts. For example, a number of States have entered formal declarations to the effect that Article 12 should be understood in light of their cultures’ respect for parental authority.³⁰ Although ARTICLE 19 has some concerns about the validity of these claims, they do clearly indicate that these States understand Article 12 as applying to relations between parents and children. Indeed, the original version of Article 12 proposed by Poland highlights issues of relevance to private actors rather than the authorities, such as “marriage, choice of occupation, medical treatment, education and recreation”. Perhaps the most significant evidence that Article 12 relates to views expressed within the family is a number of comments by States in their reports to the Committee on the Rights of the Child and observations on those comments by the Committee. A number of States specifically note legislation in their reports which obliges parents

²⁹ Van Bueren, *op cit.*, pp. 131-132.

³⁰ See, for example, reservations by Kiribati, Poland and Singapore.

to take account of children's views³¹ and the Committee has frequently called on States to give greater attention to the question of respect for the views of the child in family life.³²

It is possible that Article 12 places a direct obligation on parents and other relevant actors and this issue has been addressed by a number of commentators.³³ The idea that an international treaty might place parents under such an obligation is not unknown. Article 24 of the ICCPR provides:

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

The meaning of this provision is somewhat unclear, perhaps because of concern about the implications of extending obligations to non-State actors. However, the Human Rights Committee has significantly clarified much of the uncertainty in a general comment on Article 24 which notes: "Responsibility for guaranteeing children the necessary protection lies with the family, society and the State." Indeed, it was "particularly incumbent on the family" to provide for this right.³⁴ The CRC itself refers to the duties or responsibilities of parents, for example in Articles 3, 5 and 18, but it is unclear whether these are duties under international or national law.

A better interpretation of Article 12 is that it binds only States but that it includes a positive obligation to take appropriate measures to ensure that parents and other relevant actors both allow children to express their views and give due weight to those views. The most important reason for this interpretation is that Article 12 itself specifically refers to States as the obligation bearers. In addition, the tenor of the State reports and Committee observations noted above all

³¹ See, for example, the reports of Cyprus, UN Doc. CRC/C/8/Add.24 (1995), para. 33, Finland, UN Doc. CRC/C/8/Add.22 (1995), para. 166 and Spain, UN Doc. CRC/C/8/Add.26 (1993), para. 106.

³² For example, in the 1996 Bi-Annual Report of the Committee to the General Assembly, UN Doc. A/51/41, the Committee recommended that Denmark, para. 457, Germany, para. 742, the United Kingdom, para. 493 and Yugoslavia, para. 905, take further measures to ensure the participation of children in decisions affecting them in the family and community. Similar comments in the 1998 Bi-Annual Report, UN Doc. A/53/41, relate to Panama, para. 553 and Zimbabwe, para. 89. These issues are discussed further in Chapter 2.

³³ See Bennett, *op cit.*, p. 3 and Gomien, D., "Whose right (and whose duty) is it? An analysis of the substance and implementation of the Convention on the Rights of the Child" (1989) 7 *New York Law School Journal of Human Rights* 161, p. 162.

³⁴ General Comment 17(35), para. 6.

point to an obligation on States rather than directly on other actors. Finally, there is little to be gained by placing a direct international obligation on parents to respect the views of their children. The Committee on the Rights of the Child will undoubtedly be more effective in promoting State activities in this area rather than trying to work directly with parents.

1.2.2. Article 13: Freedom of expression

Like all the articles dealing with civil and political rights, Article 13 was the subject of some controversy during the drafting process and underwent a number of significant changes. The final version of Article 13 reads as follows:

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) for respect of the rights or reputations of others; or

(b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 13 appears to have generated more resistance than Article 12, in part because States appear to have underestimated their obligations under the latter, perhaps as a result of its somewhat paternalistic ring. In contrast, Article 13 establishes a classical political right in that it protects children from illegitimate interference by State authorities. When the proposal which led to Article 13 was first tabled in 1986, it met resistance from a number of States which do not appear to have objected to Article 12.

The original idea for Article 13 came from the United States which proposed to the Working Group in 1985 that the Convention should:

[E]nsure that the child shall enjoy civil and political rights and freedoms in public life to the fullest extent commensurate with his age including in particular, freedom from arbitrary governmental interference with privacy, family, home or correspondence; the right to petition for redress of grievances; and, subject only to such reasonable restrictions provided by law as are necessary for respect of the rights and legally protected interests of others or for the protection of national security, public safety and order, or public health and morals, freedom of association and expression; and the right of peaceful assembly.³⁵

This proposal is a general plea for the inclusion of a number of traditional civil and political rights, similar to those found in the ICCPR and a number of other human rights treaties. The purpose of this proposal, which is quite clear from the language, is to limit State interference in the exercise by citizens of basic rights.

The proposal immediately generated a backlash. According to records of the sessions, “the representative of the USSR stated that he was totally opposed to it and the representatives of Algeria, China, Iraq and Poland stated that it would be difficult for them to accept the proposal.”³⁶ The USSR maintained that the Convention on the Rights of the Child should not cover rights which already were protected by other international human rights treaties. The Chinese delegation suggested that these rights “could not be enjoyed by children in the same way as they are enjoyed by adults because the intellect of a child was not as developed as that of an adult.”³⁷ Sweden proposed greater emphasis on the “evolving capacities of the child”³⁸ and the German Democratic Republic wanted to introduce limitations to the right to freedom of expression “for the protection of ... the spiritual and moral well-being of the child”. All of these objections and proposals were, ultimately, rejected.

Article 13 is almost identical to the corresponding provision in the ICCPR, Article 19, except that the former applies only to children while the latter protects “everyone”. One significant

³⁵ Cited in Detrick, *op cit.*, p. 230.

³⁶ Detrick, *op cit.*, p. 230

³⁷ *Ibid.*, p. 232.

³⁸ Cited in LeBlanc, *op cit.*, p. 174.

difference is that Article 13 does not provide for the right to hold opinions without interference, a right the Human Rights Committee has held is absolute.³⁹

It seems quite clear that “everyone” in Article 19 includes children. This might be contested on the basis that Article 2(1) of the ICCPR, which requires States to respect rights without discrimination, does not include age among the grounds upon which discrimination is prohibited. It is true that certain rights, such as the right to vote, guaranteed by Article 25, do not apply to children. However, there is no warrant for restricting freedom of expression in this way, particularly given that Article 19 incorporates its own regime for restrictions which would permit of special limitations, where justified, in respect of children.

It would appear, therefore, that the main import of Article 13 of the CRC is to reaffirm the protection of Article 19 of the ICCPR in respect of children. It is, however, an important additional safeguard in that many States have not historically taken children’s right to freedom of expression sufficiently seriously. In addition, inclusion of freedom of expression in the CRC enhances implementation in practice as it will be the subject of specific scrutiny by the Committee on the Rights of the Child.

Based on established interpretation of Article 19, it may be noted that Article 13 permits restrictions on freedom of expression, but only where these meet a strict three-part test. Restrictions must be provided by for law, serve one of the listed aims or legitimate interests and be necessary to protect that interest. The latter part of this test, in particular, has been held to pose a high standard for restrictions which requires that they meet a pressing social need which is proportionate to the harm to freedom of expression.

In many countries, special restrictions have been adopted regarding publication and distribution to protect children from information deemed harmful. Neither Article 19 of the ICCPR nor Article 13 of the CRC absolutely precludes special restrictions of this sort but they must meet the strict test outlined above. This raises a question about the relationship of Article 13 with Article 3

³⁹ Human Rights Committee, General Comment 10(19) on Article 19, para. 1. A less important difference is that the reference to freedom of expression carrying with it “special duties and responsibilities”, which precedes the list of exceptions in Article 19, is absent from Article 13. The

which establishes one of the four principles underlying the Convention, namely that “in all actions concerning children ... the best interests of the child shall be a primary consideration.” It is possible to imagine situations in which the best interests test appears to dictate a result that is different from the test for restrictions set out in Article 13. For example, it may be in children’s best interests not to watch violence on television but an absolute restriction on violence could not be justified as necessary to protect any of the interests listed in Article 13. It is unclear how this potential conflict should be resolved but the best interests test may be expected to influence the determination of whether a restriction meets the standard of necessity as set out in Article 13.

It may be noted that Article 13 provides considerably greater protection for freedom of expression than the Charter on the Rights and Welfare of the African Child. Article 7 of the Charter states: “Every child who is freely capable of forming his own views shall be assured the right to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by the law.” Article 7 is similar to Article 9 of the African Charter on Human and Peoples’ rights in that both permit restrictions without condition, as long as they are prescribed by law. The CRC and ICCPR both establish a number of additional conditions for restrictions on freedom of expression, including a closed list of grounds and the requirement that they be necessary. Article 7 also limits protection to the child who is “freely capable of forming his own views”.⁴⁰

The differences between Articles 12 and 13 of the CRC have already been alluded to. Article 13 is broader in scope, guaranteeing the right to seek and receive, as well as simply to impart, information and ideas and lacks the paternalistic overtones of Article 12. On the other hand, it does not include the requirement of “due weight” which imposes a positive obligation on governments to ensure children’s input into decisions which affect them.

As with Article 12, a question arises as to the extent to which Article 13 requires States Parties to

regime of exceptions, however, is identical.

⁴⁰ Alain Olinga argues that this provision does not further restrict the child’s right to freedom of expression: “*On peut toutefois penser que, d’un point de vue pratique, les conséquences sont les mêmes. La capacité de communiquer n’aurait guère de sens si elle signifiait simplement l’usage de la fonction d’élocution. Puisqu’il s’agit pour l’enfant de communiquer des “vues” des “opinions”, la capacité de communiquer doit être entendue comme la capacité intellectuelle d’articuler des propos sensés, cohérents et réfléchis, c’est-à-dire en somme la capacité de discernement.*” See “La charte africaine sur les droits et le bien-être de l’enfant. Essai de présentation” (1996) 820 *Penant: revue de droit des pays d’Afrique* 53, p. 57.

prevent private actors, in particular parents, from interfering with their children's right to freedom of expression. The international right to freedom of expression has been held to engender positive obligations on States, for example to prevent monopolies in the broadcasting sector.⁴¹ On the other hand, an important general goal of human rights is to prevent excessive interference by the State in private affairs and the risk of abuse must be kept in mind. In addition, it is clearly legitimate for parents to restrict their children's freedom of expression in at least some cases which do not meet the international test for State restrictions. For example, parents may require their children to go to bed at a certain time or limit the hours of television they may watch, thereby impeding their ability to seek and receive information.

There are no doubt a number of ways to reconcile these interests. For example, Article 13 might be interpreted as requiring States both to legislate against extreme restrictions by parents and at the same time to devote resources to encouraging respect by parents for children's right to freedom of expression. Activities might include awareness-raising (in both parents and children), providing children with alternative ways of satisfying their freedom expression goals or even establishing a complaints mechanism which could make non-binding recommendations in relation to parents. No doubt States and the Committee on the Rights of the Child might come up with a number of other possibilities. Obviously, specific measures would depend on all the circumstances in a given State.

1.2.3. Articles 14 and 15: Freedom of Religion and Association

Like Article 13, both Article 14 and Article 15 were originally proposed by the United States.⁴² As might be expected, the drafting of Article 14 was dogged by the question of the relationship between children's right to freedom of religion and parents' rights in this area.⁴³ The final version of Article 14 reads as follows:

1. States Parties shall respect the right of the child to freedom of thought,

⁴¹ For example, the European Court of Human Rights has held that a State monopoly over broadcasting breaches the guarantee of freedom of expression. See *Informationsverein Lentia and others v. Austria*, 24 November 1993, No. 276, 17 EHRR 93.

⁴² The original US proposal quoted above covered a number of rights including to freedom of expression, assembly and association.

conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

The proposal to include a right to association in Article 15 was criticized from the same perspective as the Article 13 proposal but, like Article 13, was eventually included in a form very similar to that found in the ICCPR. Article 15 states:

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

As noted, the key issue regarding Article 14 was the extent to which parents should be able to “guide” their children in the area of religion. Article 18 of the ICCPR, which generally guarantees freedom of religion, had set a precedent in this regard, with paragraph 4 requiring States to respect the liberty of parents “to ensure the religious and moral education of their children in conformity with their own convictions.”

The original US proposal provided for very strong guarantees, not only protecting the right to religious freedom but also various forms of observance, for example protecting articles and materials relating to religious rites or customs and days of rest. It did not even mention parents' rights and this provoked some scepticism. Some speakers “expressed doubts as to whether it

⁴³ See Article 18(4) of the ICCPR, discussed below

should be the responsibility of the State to ensure that the child has the right to freedom of thought, conscience and religion.”⁴⁴ Several delegations were concerned that the proposal did not reflect their view that, “In many parts of the world ... a child follows the religion of his parents and does not generally make a choice of his own.”⁴⁵

A proposal to introduce an analogous provision to Article 18(4) of the ICCPR was rejected initially in favour of one which recognized a child’s right to “adopt” a religion of his or her choice but also respected parents’ right to guide their children’s religious education subject to the evolving capacities of the child. However, the debate intensified in 1988 when a number of Islamic countries criticized this proposal as contrary to the principles of Islam.⁴⁶ Bangladesh, for example, stated that the draft article “appears to run counter to the traditions of the major religious systems of the world and in particular to Islam. It appears to infringe upon the sanctioned practice of a child being reared in the religion of his parents.”⁴⁷ This view was reiterated by delegates from Morocco, Algeria, Jordan and Yemen, which were against any guarantee of the child’s right to change his religion. Morocco argued that under Islamic law “the child of a Muslim was bound to be a Muslim.”⁴⁸

According to Van Bueren, disagreements over Article 14 threatened to jeopardize the entire drafting process.⁴⁹ A special drafting group⁵⁰ was convened to redraft the article and notwithstanding their failure to reach a consensus, a draft was proposed. This draft, which was finally adopted, was a compromise which failed to explicitly protect the child’s right to adopt a religion of his or her choice but limited somewhat the degree of parental control envisaged by Article 18(4) of the ICCPR.

The failure of Article 14 to provide explicitly for a right to choose the religion of one’s choice is a serious limitation in comparison to the more general guarantee at Article 18 of the ICCPR. On the other hand, Article 14 is an improvement over Article 18 of the ICCPR in some respects.

⁴⁴ Detrick, *op cit.*, p. 240.

⁴⁵ *Ibid.*

⁴⁶ See LeBlanc, *op cit.*, pp. 169-170.

⁴⁷ Detrick, *op cit.*, p. 244.

⁴⁸ LeBlanc, *op cit.*, p. 169.

⁴⁹ *Op cit.*, p. 155.

⁵⁰ Comprised of representatives from Bangladesh, China, the Holy See, Mexico, Morocco, the Netherlands and Poland.

While Article 14 requires States to respect the rights of parents to provide direction to their children, it also recognizes parental duties and requires such direction to be consistent with the evolving capacities of the child, mirroring Article 12. This provision suggests that parents must allow the child greater freedom in their religious observances as they grow older. Van Bueren, for example, interprets it as meaning that “States Parties to the Convention are under a duty to recognise that parental power to provide direction to children decreases as the child matures.”⁵¹

Inasmuch as Article 18 appears to recognize stronger parental rights, there is some potential for conflict between the two provisions. Indeed, it is hard to disagree with Walter Bennett’s assessment that the result of all these compromises is that “... confusion over the relative prerogatives of the parents and the child to control the child’s religious practices, training, and education, cloud the clarity of the stated right.”⁵²

Article 9 of the Charter on the Rights and Welfare of the African Child, which protects the right of the child to freedom of thought, conscience and religion, also refers to the child’s “evolving capacities” in defining the role of parents. Interestingly, the Charter also requires parents to “facilitate the enjoyment of these rights subject to national law and policies.”⁵³

As regards Article 15, it would appear that a number of delegations expressed misgivings about the extent to which the right to freedom of association should be applied to children. China suggested that the right should hinge on the child’s level of development, proposing the following wording: “The States Parties to the present Convention recognize, in accordance with the child’s age and maturity, his or her right to freedom of association and freedom of peaceful assembly.”⁵⁴ This proposal was rejected on the basis that parents could guide children in their exercise of the right to freedom of association and because there were already “specific age restrictions by law, for example, in the field of employment or admission to a trade union.”⁵⁵

As noted above, Article 15 closely parallels the corresponding provisions of the ICCPR, in

⁵¹ Van Bueren, *op cit.*, p. 152.

⁵² *Op cit.*, p. 7.

⁵³ The Charter also provides greater scope for restrictions, allowing them on the basis of national law and even policy.

⁵⁴ Detrick, *op cit.*, p. 236.

⁵⁵ *Ibid.*, p. 253.

particular Article 21 which protects the right to freedom of assembly.⁵⁶ One significant difference between Article 15 and its ICCPR counterparts is that it does not address children's right to join to trade unions, protected under Article 22 of the ICCPR. The official report of the Working Group proceedings records that delegates specifically noted that freedom of association for children should not extend to "any kind of associations or organizations, such as trade unions...."⁵⁷ This is perhaps not surprising given the restrictions on child labour in Article 32 of the CRC. Article 8 of the African Charter protects freedom of association and assembly but, like Article 7, allows any restrictions imposed "in conformity with the law".

1.2.4. Article 17: Access to information

Article 17 underwent an almost complete transformation during the drafting stage. It started out as a provision on protection against harmful information – essentially a limitation on the right to seek and receive information in Article 13 – and ended up as a positive guarantee of freedom of information. The final version of Article 17 reads as follows:

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage the international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs

⁵⁶ The right to freedom of association is provided for in Article 22 of the ICCPR.

of the child who belongs to a minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being bearing in mind the provisions of articles 13 and 18.

The original Polish proposal for Article 17 focused on the need for the State, parents and social groups to “protect the child against any harmful influence that mass media, and in particular the radio, film, television, printed materials and exhibitions, on account of their contents, may exert on his mental and moral development.”⁵⁸ This gave rise to some debate about the appropriate role of the State in shielding minors from potentially harmful influence in the media. One delegate “felt that the mass media does more good than harm and therefore the article should be phrased in a positive ways, rather than in terms of protecting children from the mass media.”⁵⁹ This led some delegates to focus on a need not only to protect children from harmful information but also to protect their right to access information.

This view eventually held sway and Article 17 now requires States Parties to “ensure that the child has access to information and material from a diversity of national and international sources.” Proposals by two non-governmental organizations, the Baha’i International Community and the International Board on Books for Young People, appear to have been influential in formulating Article 17; many of the provisions in Article 17 are modelled closely on their proposals.⁶⁰

Article 17 is a significant development in that none of the other international treaties specifically elaborates on freedom of information in this way; neither the ICCPR nor the Charter on the Rights and Welfare of the African Child contain analogous provisions to Article 17. The general guarantee of freedom of expression has been held to encompass the public’s right to know⁶¹ and to require States to take measures to promote diversity among the media.⁶² The detail of Article

⁵⁷ Detrick, *op cit.*, p. 253.

⁵⁸ Basic working text as adopted by the 1980 Working Group U.N. Doc. E/CN.4/1349, quoted in Detrick, *op cit.*, p. 278.

⁵⁹ *Ibid.*, p. 279.

⁶⁰ *Ibid.*, pp. 281-282 and 287.

⁶¹ See, for example, the European Court of Human Rights case, *Oberschlick v. Austria*, 23 May 1991, No. 204, 19 EHRR 389, para. 58.

⁶² See *Informationsverein Lentia and others v. Austria*, *op cit.*

17, however, goes far beyond these general statements of principle and places a number of important obligations on States Parties. As Eugen Verhellen notes, Article 17 sets States “a number of ... specific tasks, which, strangely enough, are described in extreme detail.”⁶³

An appropriate balance is provided by the obligation on States to “encourage” rather than require various things of the media and those responsible for the production of books. This may be considered weak, especially in relation to the introductory part of the article which provides that States “shall ensure” access to a diversity of information. However, the scope for State action in this area is limited by the need to respect both the rights of private actors to freedom of expression and the independence of public service broadcasters.

The original Polish idea behind Article 17, to protect children from harmful information, still occupies a place in the final version, albeit a somewhat limited one. The fifth specific task of States under Article 17 is to encourage the development of appropriate guidelines for the protection of the child from harmful information, taking into account Articles 13 and 18 (which recognizes the common responsibility of the parents for the upbringing of the child). It is significant that this provision requires States merely to encourage the *development* of guidelines; this implies that these guidelines would be a voluntary code for the media.

Despite the subsidiary and limited form of the obligation to protect from harmful information, many States focus almost exclusively on this in their reports to the Committee. Indeed, many reports focus specifically on censorship or classification activities by the State rather than the obligation noted above to encourage the development of voluntary media guidelines. This has to some extent been encouraged by the Committee which has arguably devoted undue attention to this aspect of Article 17⁶⁴ although it has also called for greater efforts to secure access to information through the media.⁶⁵

⁶³ *Convention on the rights of the child: Background, motivation, strategies, main themes* (Louven/Apeldorn: Garant, 1994), p. 13.

⁶⁴ See, for example, the Committee’s 1996 Bi-Annual Report, UN Doc. A/51/41, para. 414 (on Jamaica) and para. 542. (on Nicaragua).

⁶⁵ See *ibid.*, para. 795 (on Portugal).

1.3. The Rights of Parents

The question of parental rights, and the potential for conflict with the rights of the child, is an underlying tension in all of the civil and political rights provisions noted above. It has already implicitly been raised, for example, in the discussion about the extent to which Article 13 obliges States to promote respect by parents for children's freedom of expression. Full realization of children's rights clearly involves respect by parents for these rights. On the other hand, parents also have rights which may limit State action in this area. In addition, parents have primary responsibility for raising their children and experience shows that State interference in complex family relations is often ineffective and may even be harmful.⁶⁶

A number of articles in the CRC recognize the primary role of parents. For example, Article 3, establishing the "best interests" test which underlies the whole philosophy of the Convention, provides in paragraph 2 that while protecting children, States shall take into account the rights and duties of parents or legal guardians. Article 18 obliges States to do their best "to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child." Article 5 is significant, requiring States to respect the "responsibilities, rights and duties of parents ... to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

These provisions highlight the key role played by parents and the obligation on States to respect that role when promoting children's rights. At the same time, however, they stress that parents have both rights and duties and the latter clearly include the promotion and protection of children's rights. Furthermore, Article 5 stresses that parental guidance should be conditioned upon the evolving capacity of the child. In other words, as children mature, they should be allowed greater freedom of choice and respect for their ability to fully exercise their rights.

It is suggested that appropriate interpretation of the articles discussed above can resolve much of

⁶⁶ For example, excessive enthusiasm in many countries for taking children away from "problem" parents in the 1980s is now widely recognized to have caused more harm than leaving them with their parents, despite the risks.

the tension between parental and children's rights. The interpretation stressed here is that while States should legislate against extreme restrictions on children's freedom of expression and denials of their right to be heard by parents, the primary focus of State activities should be to encourage and promote respect by parents of children's rights. This positive obligation requires States to be imaginative and active in the promotion of parental respect. What specifically should be done will depend on all the circumstances; what is necessary is that sufficient public attention and resources should be devoted to this issue. And the Committee on the Rights of the Child should be active in monitoring States compliance with their obligation to promote respect by parents and other private actors for children's rights.

1.4. Conclusion

The inclusion of civil and political rights in the Convention on the Rights of the Child – specifically to freedom of expression, religion, association and information – proved to be contentious throughout the drafting process. The result is a number of partially overlapping articles, some entirely new and some close adaptations of rights already elaborated in the ICCPR. The new articles can be criticized for being too weak but this is a problem that can largely be remedied by expansive, purposive interpretation. A perhaps more serious shortcoming is the failure of those provisions incorporated more-or-less wholesale from the ICCPR to take into account the specific problems faced by children. Still, on balance, Articles 12-15 and 17 provide extensive protection for children's rights to freedom of expression, religion, association and information and represent a significant step forward for children.

The question of implementation is proving even more problematical than interpretation of the provisions themselves. The articles considered above establish general obligations and principles regarding freedom of expression and information. However, a number of questions remain regarding the implementation of these principles in practice. Chapter 2 analyses a number of areas where the implications of these guarantees are still quite unclear and potentially controversial.

Chapter 2: Interpreting Freedom of Expression in the CRC: States Parties and the Committee on the Rights of the Child

Several States Parties have formally welcomed the introduction of the rights to freedom of expression, religion, association and assembly for children, as defined by Articles 12, 13, 14 and 15 of the Convention on the Rights of the Child. In its report to the Committee on the Rights of the Child, France described Article 12 as “one of the Convention’s major contributions in France”⁶⁷ and added that “[a]ll studies conducted on young people underscore their demands for greater freedom of expression”.⁶⁸ Madagascar and Honduras have suggested that the provisions of Article 12 have helped to instill a greater understanding of children’s developmental needs. Honduras noted in its report to the Committee that “a failure to ask the child his or her views may have a negative effect, particularly on the definition of his or her personality.”⁶⁹ Madagascar described Article 12 as an “innovation”⁷⁰ which has served as a positive contrast to traditional Malagasy attitudes towards children.⁷¹

Yet despite this recognition of the importance of children’s right to freedom of expression, other countries have raised fundamental questions as to what implementation of this right should mean in practice. Belarus, for example, commented in its report to the Committee that the principle of respect for the views of the child “does not seem specific enough to be applied through legislative or regulatory instruments”.⁷² As to the implications and scope of Article 12, France outlined its understanding of the obligations under the Convention:

A consensus has been established ... expressing a point of view is not the same thing as taking a decision. Respecting a child’s opinions means listening to them, but not necessarily endorsing them. The adult decision maker’s task is to add the child’s

⁶⁷. Para. 182, U.N. Doc. CRC/C/3/Add.15 (1993).

⁶⁸. Para. 199, U.N. Doc. CRC/C/3/Add.15 (1993).

⁶⁹. Para. 36, U.N. Doc. CRC/C/Add.17 (1993).

⁷⁰. Para. 33, U.N. Doc. CRC/C/8/Add.5 (1993).

⁷¹. Madagascar writes on Article 12 in its report to the Committee, “This provision is now part of Malagasy positive law and thus puts a new light on the child’s personality. In the spirit of tradition, the child cannot express his opinions, but must rely on the wisdom of his natural protectors, namely, his family, his mother and father.” Para. 32, U.N. Doc. CRC/C/8/Add.5 (1993).

⁷². Para. 40, U.N. Doc. CRC/C/3/Add.14. (1993).

viewpoint to other elements which might contribute to an enlightened decision.⁷³

In contrast, however, Belgium expressed misgivings about the notion of respect for the views of the child, and suggests that it may not be fully compatible with the “best interests of the child”, another guiding principle of the Convention.⁷⁴

2.1. Children, “traditional attitudes” and freedom of expression in the family

The Convention on the Rights of the Child specifically addresses the problem of children’s rights within the context of the family units to which children belong. Its Preamble affirms the importance of family structures to the child’s development. It states: “*Convinced* that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community. ...” The Convention recognizes that families, this “fundamental group of society”, must be guaranteed freedom and autonomy by States Parties in raising their children. It thereby conceives of the individual rights of children as stemming, in part, from the rights of families. Article 5 emphasizes the relationship between families, children and protection of the rights embodied in the Convention:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.⁷⁵

According to the Convention, parents have both “rights and duties” to assist in protecting the range of children’s rights defined by the Convention. Yet the extent and nature of the parents’

⁷³. Para. 183, U.N. Doc. CRC/C/3/Add.15 (1993).

⁷⁴. Para. 113, U.N. Doc. CRC/C/11/Add.4 (1994).

role are explained only in terms of providing “appropriate direction and guidance” to the child in his or her realization of the rights of the Convention. This provision clearly recognizes the discretion which parents enjoy in making specific decisions regarding their children’s upbringing. Article 5, however, urges parents to take account of the child’s development or “evolving capacities” throughout the process of child rearing.

This emphasis on the impact which parents, as private actors, can have on the implementation of the Convention is further developed by Article 42, which places a positive obligation on States Parties to actively disseminate information about the Convention. Article 42 requires that “states Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.” Read together with Article 5, this suggests that it is important to publicize the Convention not only to inform children of their rights but also in order to encourage their guardians to respect them.

Within this context arises the discussion, throughout the reports of both the States Parties and the Committee on the Rights of the Child, of “attitudes” and “public awareness” of the Convention as issues crucial to the implementation of children’s right to freedom of expression. Some States Parties have presented society’s attitudes towards children’s right to freedom of expression as a positive factor which favours its protection. For example, Costa Rica wrote on Article 12 that “a space has been gained and recognition by the public opinion.”⁷⁶ In addition, Uruguay cited a 1993 study by the non-governmental organization Defence for Children International which found that 96.6% of children and adolescents surveyed believed that their parents encouraged them to express their views.⁷⁷

Yet many countries attribute problems in enforcing Article 12 to the attitudes of society, and therefore of individual families, towards children. Colombia explains that Article 12,

is something ... not widely recognized in the present Colombia cultural context because children are in many cases not seen as persons capable of interpreting the world and its

⁷⁵. Article 5, Convention on the Rights of the Child.

⁷⁶. Para. 86, U.N. Doc. CRC/C/3/Add.8 (1993).

⁷⁷. Para. 131, U.N. Doc. CRC/C/3/Add. 37 (1995).

events ... on the basis of their own experience. They tend to be provided with an opinion by their parents, relatives and other adults around them.⁷⁸

Other countries point specifically to what they call “traditional attitudes” as the main obstacle in preventing full implementation of the Convention. Indonesia wrote, “Traditionally Indonesian parental behaviour is paternalistic. Children have no right to express their views to their parents.”⁷⁹ Togo maintained that Article 12 “may conflict with the traditional behaviour of African parents.”⁸⁰

The Committee on the Rights of the Child has tended to treat these concerns about “attitudes”, particularly within the family, as falling within the scope of the CRC and has specifically addressed them in several of its Concluding Observations. On Togo, for example, the Committee wrote, “With regard to the right of the child to express his or her views (article 12) and his or her right to freedom of expression (article 13), the Committee is concerned at the prevailing attitudes in the family ... that hinder the enjoyment of these rights”⁸¹ It made similar comments on Bangladesh, Honduras, Hong Kong and Ghana in relation to its general implementation of the Convention. The Committee cited “traditional attitudes” as an obstacle to realization of children’s right to freedom of expression in Poland.⁸² Moreover, the Committee recommended that greater steps were needed to promote awareness of Article 12 of the Convention in Cyprus, El Salvador, Finland, Honduras, Mongolia and Germany.

A number of countries have enacted legislation which formally protects the right of children to express their views in relationships with their parents. Cyprus, Finland, Sweden and Portugal require parents to give children an opportunity to express their views on matters concerning them, but only where the child demonstrates “maturity”. According to the report of Cyprus to the Committee, Article 6 of the Relationship between Parents and Children Law specifies that the “child in accordance with its level of maturity and the extent to which it is capable of perceiving

⁷⁸. Para. 79, CRC/C/8/Add.3 (1993).

⁷⁹. Para. 49, U.N. Doc. CRC/C/3/Add.10 (1993).

⁸⁰. Para. 38, U.N. Doc. CRC/C/3/Add.42 (1996).

⁸¹. Para 258, *Concluding Observations of the Committee on the Rights of the Child: Togo*, U.N. Committee on the Rights of the Child, 16th session, U.N. Doc. CRC/C/69 (1997).

⁸². Para. 114, *Concluding Observations of the Committee on the Rights of the Child: Poland*, U.N. Committee on the Rights of the Child, 8th session, U.N. Doc. CRC/C/38 (1995).

must be asked to express its opinion ... before a final decision regarding parental care can be made.”⁸³ Finland accords parents greater discretion in deciding when they must solicit their children’s ideas; this should depend not only on age and maturity but also on “the nature of the matter”.⁸⁴ Peru, which has a more narrowly defined requirement, only compels parents to consult with their children if they are over 16 years of age. It is unclear if such age and “maturity” requirements would be consistent with Article 12(1) of the Convention on the Rights of the Child, since the latter specifically states that every “child *who is capable* of forming his or her own views”(italics added) should be guaranteed “the right to express those views freely *in all matters affecting the child*”(italics added). The Convention refers to age and maturity only as factors to consider in *responding* to the views expressed by the child; these should be “given due weight in accordance with the age and maturity of the child.”⁸⁵

Some States Parties reported laws on freedom of expression within the family which do not appear to hinge on the age or maturity of the child. According to El Salvador, Article 351 of the Family Code “emphasizes a minor’s right ‘to be listened to by his parents, guardians ... to express his views freely on all matters that affect him.’”⁸⁶ The Committee responded positively to this legislation, which it described as “encouraging”.⁸⁷ In addition, Spain stated that according to Article 154 of its Civil Code, “children must always be given a hearing [by their parents] before decisions affecting them are adopted.”⁸⁸

Yet where formal measures exist to protect children’s right to freedom of expression within the family, there arises the far more difficult question of how these can be enforced in practice. This is a problematic area, and one which is rarely addressed either by the States Parties or the Committee on the Rights of the Child. In a number of its Concluding Observations, the Committee has raised concerns about implementation of children’s expression within the family, yet has offered only general recommendations. For example, the Committee wrote on the United Kingdom that there was a need for “further mechanisms to facilitate the participation of children

⁸³. Para. 33, U.N. Doc. CRC/C/8/Add.24 (1995).

⁸⁴. Para. 166, U.N. Doc. CRC/C/8/Add.22 (1995).

⁸⁵. Article 12 (1), Convention on the Rights of the Child.

⁸⁶. Para. 230, U.N. Doc. CRC/C/3/Add.28 (1994).

⁸⁷. Para. 79, *Concluding Observations of the Committee on the Rights of the Child: El Salvador*, U.N. Committee on the Rights of the Child, 4th session, U.N. Doc. CRC/C/20 (1993).

⁸⁸. Para. 106, U.N. Doc. CRC/C/8/Add.26 (1993).

in decisions affecting them, including in the family.”⁸⁹ Similarly, in response to the report by the Federal Republic of Yugoslavia, the Committee advocated the “undertaking of further pro-active measures to encourage children to participate in the family.”⁹⁰ The Committee made similar comments in relation to Panama, Germany and Denmark. It was unclear, however, from the context of the States Parties reports and the observations of the Committee, what type of “mechanisms” or “measures” the Committee believed should be introduced.

In two cases, Zimbabwe and the Holy See, the Committee offered more direct criticism of States Parties’ interpretation of the balance between the freedom and autonomy of parents and the right to freedom of expression which children should enjoy. The Committee wrote on Zimbabwe:

The Committee ... notes that insufficient attention has been paid to the principle of ... respect for the views of the child in ... family life. In this regard, it is noted that, as recognized by the State party, the civil rights and freedoms of the child are to be exercised subject to parental consent or discipline, thus raising doubts as to the compatibility of this practice with the Convention, notably articles 5 and 12.⁹¹

This strong objection to Zimbabwe’s record appeared to be a response to two specific passages from the report of the State Party to the Committee. Zimbabwe wrote on Article 12 that “because of the cultural and societal attitudes and concepts of parental discipline, children are not always awarded the freedom to air their views freely.”⁹² It added: “Freedom of opinion and expression are covered, subject to parental discipline, by section 20 of the Constitution.”⁹³ The Committee was clearly of the view that the idea that the freedom of expression of children is subject to “parental consent or discipline” is inconsistent with the guarantees found in Articles 12 and 13 and therefore represents a potential breach of States Parties’ obligations under the Convention. The Holy See drew criticism from the Committee for its emphasis on the rights of parents over

⁸⁹. Para. 229, *Concluding Observations of the Committee on the Rights of the Child: United Kingdom*, U.N. Committee on the Rights of the Child, 8th session, U.N. Doc. CRC/C/38 (1995).

⁹⁰. Para. 110, *Concluding Observations of the Committee on the Rights of the Child: Federal Republic of Yugoslavia*, U.N. Committee on the Rights of the Child, 11th session, U.N. Doc. CRC/C/50 (1996).

⁹¹. Para. 86, *Concluding Observations of the Committee on the Rights of the Child: Zimbabwe*, U.N. Committee on the Rights of the Child, U.N. Committee on the Rights of the Child, 12th session, U.N. Doc. CRC/C/54 (1996).

⁹². Para. 60, U.N. Doc. CRC/C/3/Add.35 (1995).

⁹³. Para. 63, *ibid.*

the rights of children to freedom of expression. The Committee stated in response to the report of the Holy See that “the rights and prerogatives of the parents may not undermine the rights of the child to express his or her views.”⁹⁴ It also requested that the Holy See provide further information on its understanding of “the relationship between articles 5 and 12 of the Convention”.⁹⁵

Yet these conclusions tend to raise further questions about where to draw the line, in the relationships of parents and children, between “direction and guidance” and “consent”, and at what point the “prerogatives of the parent” are considered to hinder respect for the views of the child. Moreover, these statements leave rather open-ended the whole question of the obligations of the state in the face of these problems. It is clear, both from Article 42 and from comments by the Committee, that states have a general duty to assist indirectly with this process by disseminating information about the rights of children as defined and protected by the Convention on the Rights of the Child. But it fails to articulate whether, beyond this role of public information, states should be required to intervene in the private sphere of parent-child relationships in order to uphold the provisions outlined in Article 12. If so, it remains unclear from the Committee observations at what point states would have such an obligation to intervene, and through exactly what means they should accomplish this.

Interestingly, the possibility of state intervention in order to uphold children’s right to freedom of expression vis-à-vis their parents is introduced in the report submitted by Denmark to the Committee. Denmark seemed to offer a similar reading to Zimbabwe of the ability of parents to control children’s right to exercise freedom of expression, but presented this limitation as stemming from a legal provision rather than from social or cultural practices. The State Party noted in reference to the Legal Incapacity and Guardianship Act, that “parents may ... make a number of restrictions on the child’s opportunities for self-expression, including the exercise of freedom of expression.”⁹⁶ Denmark then raised the “question of how to ensure that parents’ restrictions on the child’s freedom of action are not more radical than necessary...”⁹⁷ It proposed

⁹⁴. Para. 184, *Concluding Observations of the Committee on the Rights of the Child: Holy See*, U.N. Committee on the Rights of the Child, 10th session, U.N. Doc. CRC/C/46 (1995).

⁹⁵. Ibid.

⁹⁶. Para. 83, U.N. Doc. CRC/C/8/Add.8 (1993).

⁹⁷. Para. 85, *ibid.*

that local government authorities could intervene in cases where parental limits on children's expression were deemed to be excessive. Denmark explained, "under the Social Assistance Act there is a municipal council to supervise conditions under which children in the municipality live."⁹⁸

Although Denmark proposed a possible mechanism to protect children from parental restrictions on their right to freedom of expression under Article 12, it explained neither the criteria which would be used to determine whether parents had overstepped the boundaries, nor the exact measures which would be taken by the municipal council in response to the problem. Unfortunately, the Committee did not specifically comment on this proposal. The Committee responded only by conveying general concerns about the State Party's implementation of Article 12; it suggested that in Denmark "further consideration be given to establishing mechanisms to ensure that children may express their views."⁹⁹

2.2. Freedom of expression within schools

States Parties have often maintained that whilst individual families may fail to respect their children's right to freedom of expression in the home, children are systematically guaranteed the right to express their views and associate freely within the state school system. Their reports have addressed student-run publications, representation through school councils, associations, grievance mechanisms and policies which enable parents to withdraw minors from courses on sex education. Some states have even suggested that the very existence of schools is sufficient to demonstrate that children's right to freedom of expression has been fully implemented. In response to these claims, the Committee on the Rights of the Child has made general criticisms of States Parties' failure to ensure freedom of expression within the school structure. Yet rarely has it introduced specific criteria which could be used to assess to what extent States Parties have fulfilled their obligations under Articles 12, 13 and 15 of the Convention on the Rights of the Child.

⁹⁸. Ibid.

⁹⁹. Para 193, *Concluding Observations of the Committee on the Rights of the Child: Denmark*, U.N. Committee on the Rights of the Child, 8th session, U.N. Doc.

Several States Parties have claimed that the pervasive “traditional” attitudes of society which often restrict children’s ability to express their views in the home do not pose a threat to children’s right freedom of expression within the school system. In particular, Ghana, Uganda and Indonesia have all suggested that while parents may frequently deny children the right to freedom of expression, their governments fulfill their obligation under Articles 12 and 13 in offering the child what Indonesia called “the right to express his/her thoughts and wishes in the learning process”.¹⁰⁰ Costa Rica also argued that freedom of expression “is implemented through options available to children to choose a diversified technical or academic education”.¹⁰¹ It cited as examples the use of “competitions, festivals and exhibitions”¹⁰² in schools. Moreover, Croatia made a similar assertion with regard to its realization of Articles 12 and 13. It wrote that children’s right to freedom of expression is protected by their participation in “musical, art, drama, sports ... and other workshops”¹⁰³ during the school day.

Yet clearly these examples do not demonstrate that children’s right to freedom of expression is in fact respected within the school system. Simply allowing children to attend courses and participate in other activities organized by the school administration is clearly insufficient to guarantee children’s right to express their views in relation to schools. Although student-run publications, school councils and grievance mechanisms are certainly important, they are also not enough. What is necessary is that student have an opportunity to articulate their views on matters affecting them in schools and that these views are given due consideration. This implies both the existence of satisfactory fora for this purpose and also that children will not be punished for expressing controversial ideas unless the manner in which these views are expressed represents a real and immediate risk to the orderly conduct of the school.

The Committee on the Rights of the Child has rejected the assumption by States Parties that these school systems are in full compliance with Articles 12 and 13 of the Convention. In fact, where the Committee acknowledged difficulties relating to the child’s freedom of expression within the

CRC/C/38 (1995).

¹⁰⁰. Para. 53, U.N. Doc. CRC/C/3/Add.10 (1993).

¹⁰¹. Para. 109, U.N. Doc. CRC/C/3/Add.8 (1993).

¹⁰². Ibid.

¹⁰³. Para. 137, U.N. Doc. CRC/C/Add.19 (1994).

family, it has tended to conclude that this problem also probably occurs within the school system and in society at large. For example, in a typical Committee response, the Concluding Observation on Hong Kong stated that “the persistence of certain attitudes relating to the perception of the role children should play in the family, school and society may be delaying the full acceptance of the implementation of the provisions of articles 12 and 13.”¹⁰⁴ The Committee made similar statements in relation to Ghana, Denmark, Panama, Togo and Cyprus, suggesting that further steps were needed to protect children’s freedom of expression within the school system.

States Parties reports do not clearly indicate how states view freedom of expression in schools since even when they do mention potentially contentious issues, they often fail to provide much specific information. For example, on the important question of editorial freedom of student publications, Norway wrote that “The Commissioner for Children has received some inquiries ... about censorship of school newspapers, but judging by the number of inquiries, this is a minor problem.”¹⁰⁵ Similarly, Denmark indicated that it had repealed a regulation by the Ministry of Education on student publications because it believed this may have been inconsistent with the Convention on the Rights of the Child.¹⁰⁶ However, it offered no further information on the exact debate which occurred.

In other cases, States Parties have described situations which would appear to merit attention by the Committee but which did not receive a direct response. Poland, for example, described potentially far-reaching limitations on freedom of association in schools. It wrote, “Only those organizations and associations which have been legalized and whose educational goals are not contrary to the values and educational goals set out in the Education Law may function in the educational system.”¹⁰⁷ Clearly this provision would enable school authorities to arbitrarily restrict children’s rights to freedom of expression and association. However, the State Party argued that this measure “is compatible with article 15, paragraph 2, of the Convention on the Rights of the Child, concerning the limitations placed on the exercise of freedom of association

¹⁰⁴ Para. 137, *Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland: Dependent Territories (Hong Kong)*, U.N. Committee on the Rights of the Child, 13th session, U.N. Doc. CRC/C/57 (1996).

¹⁰⁵ Para. 138, U.N. Doc. CRC/C/8/Add.7 (1993).

¹⁰⁶ Para. 79, U.N. Doc. CRC/C/8/Add.8 (1993).

¹⁰⁷ Para. 79, U.N. Doc. CRC/C/8/Add.11 (1994).

and assembly.”¹⁰⁸ In another somewhat ambiguous statement, the United Kingdom wrote that school authorities were obliged to prohibit “the pursuit of partisan political activities by pupils under age 12”.¹⁰⁹ Although the actual extent of the restrictions remain somewhat unclear from these descriptions, both cases would seem to represent a breach of Articles 12, 13 and 15 of the Convention.

The Committee has perhaps made its most specific criticism of the implementation of the right to freedom of expression in the school setting with regard to another issue in the United Kingdom. It wrote that on Article 12, “the Committee is concerned that insufficient attention has been given to the right of the child to express his/her opinion, including in cases where parents in England and Wales have the possibility of withdrawing their children from parts of sex education programmes in schools.”¹¹⁰ However, the Committee did not condemn the procedure whereby parents have the authority to remove their children from sex education classes. Rather, it criticized the United Kingdom for failing to allow the student adequate opportunity to express his or her views about whether or not he or she was to attend the classes. The Committee concluded, “In this as in other decisions, including expulsion from school, the child is not systematically invited to express his or her opinion and those opinions may not be given due weight, as required under article 12 of the Convention.”¹¹¹

If the Committee were to elaborate further guidelines for exercising the right to freedom of expression in schools, it has a variety of national jurisprudence to draw upon, as well as the reports of the States Parties. For example, one question which has arisen in relation to children’s rights to expression and thought, conscience and religion (Article 14), is whether children may be required, against their personal convictions or religious beliefs, to salute the national flag as part of a school ceremony. In Zambia, Canada and the United States, this requirement has led to litigation by students who were penalized by school authorities for their refusal to partake in such activity. In all cases, the plaintiffs were Jehovah’s Witnesses. According to this religion, it is a violation to worship any entity other than Jehovah. In 1943, a United States court decided in

¹⁰⁸. Ibid.

¹⁰⁹. Para. 164, U.N. Doc. CRC/C/11/Add.1 (1994).

¹¹⁰. Para. 216, *Concluding Observations of the Committee on the Rights of the Child: United Kingdom*, U.N. Committee on the Rights of the Child, 8th session, U.N. Doc. CRC/C/38 (1995).

¹¹¹. Ibid.

favour of students in a public school who objected to the requirement that they salute the flag in *West Virginia State Board of Education v. Barnette*.¹¹² Justice Jackson concluded: “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”¹¹³

In Zambia, however, the High Court in 1967 upheld the expulsion of a Jehovah’s Witness student for refusing to salute the flag, and in Canada two Appeal Courts made opposite rulings on analogous cases in their respective jurisdictions in 1943 and 1945. In the Zambian case, *Kachasu v. Attorney-General*,¹¹⁴ which was taken before the High Court, the judge maintained that the requirement for students to salute the flag was vital to “national unity”,¹¹⁵ adding that the “criteria of what is justifiable in a democratic society might vary according to whether that society is long established or newly emergent. Zambia is newly emergent.”¹¹⁶ While not questioning the ‘sincerity of ... [the student’s] views and beliefs’,¹¹⁷ the judge argued that the expulsion of the plaintiff for refusing to salute the flag did not constitute a violation of her right to freedom of religion:

she is only required to do so as a condition ... if she wishes to attend a Government or aided school. ... This seems to me to be reasonable. She is not compelled to attend a Government school. ... It is not really her freedom of religion which is invaded; it is her freedom of education; but that is not a freedom which is guaranteed by the Constitution.¹¹⁸

The judge thereby skirts the issue of the student’s right to freedom of religion by arguing that the student could attend a private school to avoid the requirement of saluting the flag. However, clearly this measure represented a violation of the student’s rights to freedom of religion and expression; it amounted to pressure by the state for the student to participate in the ceremony regardless of her religious beliefs.

¹¹² 319 U.S. 624 (1943) *West Virginia State Board of Education v. Barnette*.

¹¹³ As quoted in James Ogloff, “Children’s Intellectual Rights in Canada: A Comparative Constitutional Approach”, 68 *Nebraska Law Review*. 349 (1989), at 359.

¹¹⁴ *Kachasu v. Attorney General*, High Court of Zambia, 1967 Z.R. 145.

¹¹⁵ *Ibid.*, at 164.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*, at 149.

¹¹⁸ *Ibid.*, at 166.

In the 1943 Canadian case, *Ruman v. Board of Trustees of Lethbridge School District*,¹¹⁹ the Supreme Court of Alberta ruled in favour of school officials who had expelled two Jehovah's Witness students for refusing to partake in the "patriotic exercise"¹²⁰ of saluting the flag. In 1945, the Ontario Court of Appeal ruled in *Donald v. Hamilton Board of Education*,¹²¹ that the dismissal of Jehovah's Witness students who would not salute the flag constituted a breach of Canadian law. The students did not disrupt the ceremony but stood quietly; the judge rejected arguments by the school authorities that the students' actions thereby harmed the "moral tone of the school".¹²² However, there have been no significant cases since then and the Supreme Court of Canada has still not addressed this issue.¹²³ It would, therefore, appear that in practice students who have refused to salute the flag have not been sanctioned. In any case, with the adoption of the Canadian Charter of Rights and Freedoms in 1982, there can be little doubt that students do have the right not to salute the flag.

Another related issue which has been the subject of litigation in Trinidad and Tobago, Kenya and France, is the right of minors during the school day to wear, or refuse to wear, particular clothing as required by their religious beliefs. In the case of *Juma (a minor) v. Siri Guru Singh Sabha Nairobi Registered Trustees and Another* which was brought in Kenya in 1991, the judge upheld the right of the plaintiff, a Muslim student, to wear a religious head-scarf to school. The minor petitioned the court to overturn the school's decision to bar students from wearing head-scarves, and to declare the school's measures a violation of Section 78(1) of the Constitution of Kenya, which guarantees the right to freedom of religion. In his ruling, Judge Akiwumi distinguished this case from a situation where students might refuse to comply with school dress codes more generally. He wrote, "if the plaintiff were to go to school dressed in a manner that is repugnant to the school dress code, then there could be a case for excluding her from the school but not where she is in all respects properly dressed except for her insistence on wearing a head-scarf."¹²⁴ In

¹¹⁹. [1943] 3 W.W.R.

¹²⁰. *Ruman v. Board of Trustees of Lethbridge School District*, [1943] 3 W.W.R. at 340.

¹²¹. [1945] 3 D.L.R.

¹²². *Donald v. Hamilton Board of Education*, *Ibid.*, at 430.

¹²³. James Ogloff, "Children's Intellectual Rights in Canada: A Comparative Constitutional Approach", 68 *Nebraska Law Review*. 349 (1989), 362.

¹²⁴. *Juma (a minor) v. Siri Singh Sabha Nairobi Registered Trustees and Another* [1991] LWR 78. As quoted in John Kabudi Palamagamba, *Human Rights Jurisprudence in East Africa: A Comparative Study of Fundamental Rights and Freedoms of the Individual in Tanzania, Kenya and Uganda* (Berlin: Nomos Verlagsgesellschaft Baden-Baden, 1995), 275.

Sumayyah Mohammed v. Moraine,¹²⁵ at issue was the refusal of a public school in Trinidad and Tobago to allow a student, a Sunni Muslim, to attend school in a uniform which her parents had lengthened to conform to the requirements of the *hijab*, according to which only the face and hands of a girl or woman can be shown. The court upheld the student's complaint.

Perhaps the most controversy surrounding the issue of whether primary and secondary school students should be allowed to wear religious clothing in public schools has occurred in France.¹²⁶ Between 1989 and 1994, in a series of cases widely covered in the media, Muslim students in schools throughout several parts of the country challenged officials who ordered them to remove their head-scarves before attending class. In many instances such confrontations resulted in school officials taking punitive action against the students. For example, in mid-December 1990, three students were expelled from the Jean-Jaurès school in Montfermeil on account of a school regulation, introduced a few months earlier, which stated "the wearing of any distinctive sign, through clothing or other [means], of a religious, political or philosophical nature, is strictly forbidden."¹²⁷ In another case, a student was expelled from the Joachim du Bellay high school in Angers, and the same school refused to admit another student on account of a policy which specifically barred students from entering the classroom with their heads covered. Appeals to the relevant *tribunal administratif* were in both cases unsuccessful. However, in both cases the *Conseil d'État* overturned these rulings, declaring the right of students to express their religious beliefs within schools (see below).¹²⁸

In yet another case, two sisters, 13 and 11 years old, who insisted on wearing their head-scarves throughout the school day, including to gym classes, were expelled from the Xavier-Bichat school in Nantua. In this case upheld the expulsion, but did so on the basis that there were other disciplinary problems involved.¹²⁹ Finally, in October 1996 the *Conseil d'État* reversed the expulsion of a Muslim student from the Jean-Jacques Rousseau high school of Strasbourg. In its ruling, the *Conseil* clearly established that the head-scarf on its own could *not* be considered to

¹²⁵. *Sumayyah Mohammed v. Moraine* [1996] 3 L.R.C.

¹²⁶. See Dominique Le Tourneau, "La laïcité à l'épreuve de l'Islam le cas du port du 'foulard islamique' dans l'école publique en France", 28 *Revue Générale de Droit*. 275 (1997).

¹²⁷. Dominique Le Tourneau, at 283. "le port de tout signe distinctif, vestimentaire ou autre, d'ordre religieux, politique ou philosophique est strictement interdit."

¹²⁸. Dominique Le Tourneau, at 291.

¹²⁹. Dominique Le Tourneau, at 282- 292.

represent “a sign presenting by its nature an ostentatious character ... nor an act of pressure, of proselytizing or of propaganda”.¹³⁰

In each of these cases, the measures were justified on the basis of a number of Ministry decrees which maintained that French public schools must be strictly secular. Schools officials interpreted this requirement to pertain to the student’s expression of religious beliefs. However, in response to the first controversies which emerged in 1989, then Minister of Education Lionel Jospin on 6 November 1989 called for the *Conseil d’État* to review the Ministerial decrees. The *Conseil d’État* declared, on 27 November, that students are guaranteed “the right to express and demonstrate their religious beliefs within school establishments, with respect for pluralism and the freedoms of others.”¹³¹ Moreover, it stressed that the wearing of religious symbols “is not on its own incompatible with the principle of secularism, to the extent that it constitutes the exercise of the rights to freedom of expression and to demonstrate religious beliefs.”¹³² The Conseil, however, prohibited what it called signs which “through their ostentatious character ... would constitute an act of pressure, provocation, proselytizing, or of propaganda ... would disturb the undertaking of school activities.”¹³³ It is difficult in practice to draw the line between the expression of religious beliefs and the display of religious symbols which “would constitute an act of pressure ... or of propaganda”. However, the decision represented a fundamental step towards establishing basic guarantees of students’ rights to express their religious beliefs, where this had not been protected before.

Beyond issues of religious expression, minors also have been penalized for expressing controversial opinions in school through a variety of forums, including by symbolic clothing, fliers and school speeches. In the landmark US Supreme Court case of *Tinker v. Des Moines Independent Community School Dist.*,¹³⁴ the Court ruled that the move by several students to wear black armbands to school in order to express their opposition to US involvement in

¹³⁰ As quoted in Dominique Le Tourneau at 292.

¹³¹ As cited in Dominique Le Tourneau, at 288: “le droit d’exprimer et de manifester leurs croyances religieuses à l’intérieur des établissements scolaires, dans le respect du pluralisme et de la liberté d’autrui.”

¹³² As cited in Le Tourneau, *ibid.*, “n’est pas par lui-même incompatible avec la laïcité, dans la mesure où il constitue l’exercice de la liberté d’expression et de manifestation des croyances religieuses.”

¹³³ *Ibid.* “par leur caractère ostentatoire... constituerait un acte de pression, de provocation, de prosélytisme ou de propagande ... perturberaient le déroulement des activités de l’enseignement.”

¹³⁴ 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed.2d 731 (1969)

Vietnam was protected under the First Amendment. Five students, including three siblings in the Tinker family, of eight, 11, 13 and 15 years, and an 11th grade high school student, were barred from attending school in 1965 while wearing the armbands. The Supreme Court declared, “Where there is no finding and no showing that exercise of forbidden right of expression of opinion would materially and substantially interfere with the requirements of appropriate discipline in operation of the school, the prohibition cannot be sustained.”¹³⁵ Moreover, “fear or apprehension of disturbance is not enough to overcome right to freedom of expression.”¹³⁶ The Supreme Court further ruled that for school authorities to suppress student speech, the institution “must be able to show that its action was caused by something more than mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”.¹³⁷

In *Bethel School District No. 403 v. Fraser*, however, the Supreme Court appeared to lower the standard at which school authorities can legally suppress student speech. The case, which has been widely criticized,¹³⁸ involved a 17-year-old student who was suspended for delivering a speech which contained sexual metaphors during a school assembly. Despite the fact that the speech was given in support of a candidate for student government, the Court concluded that unlike *Tinker*, “the penalties imposed in this case were unrelated to any political viewpoint.”¹³⁹ The Court established in this case that school officials do not need to demonstrate that the speech was likely to cause actual disruption, but instead may censor expression which is deemed to be “inappropriate”. The Court resolved, “Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions.”¹⁴⁰

More recently, in Los Angeles, a 14-year-old student who pinned a condom to her clothing, she said to raise awareness amongst the school population about AIDS, was ordered by school authorities to remove it. Her legal challenge to the decision failed in 1994; U.S. District Judge Terry Hatter argued that “Educators, not children, should be given the right to choose which

¹³⁵. *Tinker v. Des Moines Independent Community School Dist.*, at 733-734.

¹³⁶. *Tinker v. Des Moines Independent Community School Dist.*, at 733.

¹³⁷. *Ibid.*

¹³⁸. See, for example, Craig R. Sellers, “Constitutional Law - First Amendment - Freedom of Speech - *Bethel School District No. 403 v. Fraser*”, 5 *New York Law School Journal of Human Rights*. 189 (1987).

¹³⁹. *Bethel School District No. 403 v. Fraser*, at 3165.

¹⁴⁰. *Bethel School District No. 403 v. Fraser*, at 3164.

values to emphasize and the means by which those values will be instilled in their student.”¹⁴¹

Other incidents have centred on criticism by students of school authorities on school premises. In another case in Los Angeles, a 17-year-old high school student was suspended from Bassett High School on 5 June 1997 after he and some other students distributed fliers at the school to protest against a number of policies which they attributed to school’s principal. The fliers charged that the principal had established a “quasi-fascist dictatorship” similar to “Germany under Hitler, [and] China under Mao”.¹⁴² U.S. District Judge James Idelman ruled in mid-June 1997 that the suspension represented a breach of the student’s right to freedom of expression and compelled the school to lift it immediately.¹⁴³

Yet other cases have dealt with students who have been penalized by school authorities for exercising their right to freedom of expression outside of school forums. In the United Kingdom, a 15-year-old student was expelled from the Queen Elizabeth’s School in Mansfield in July 1997 for criticizing the school in a comment to a local newspaper.¹⁴⁴ The school demanded that she and two other students, who were quoted as stating that the teaching standards were not adequate, retract their comments. While the other two students agreed to do so, she refused and was expelled. Moreover, Government inspectors who visited the school also raised similar criticisms.¹⁴⁵ The student was reinstated in late August following an appeal to the school authorities, and the head teacher eventually resigned. Such pressure by school authorities has also arisen in cases where students have publicly expressed their views on sensitive social and political issues outside school. In Malawi, a high school student was dismissed as a result of her involvement in a demonstration. She filed an appeal against her expulsion, but the High Court refused to overturn the school’s decision.¹⁴⁶

A number of cases have emerged in the United States in which students were censured by school officials because of material they posted on their personal Web sites, constructed during their own time and outside the school facilities. One student at Newport High School in

¹⁴¹. As quoted in Reuters, “Judge Says Student Can’t Wear Condoms to School”, 16 May 1994.

¹⁴². As quoted in Agence France-Presse, “Judge overrules suspension of student who invoked Hitler comparison”, 18 June 1997.

¹⁴³. Agence France-Presse, 18 June 1997, *Ibid.*

¹⁴⁴. David Ward, “Perils of being confident and motivated”, *The Guardian*, 25 July 1997.

¹⁴⁵. John Carvel, “Expelled girl’s views echo inspectors”: “Tight budget led to staff cuts”, *The Guardian*, 25 July 1997.

¹⁴⁶. *Upile Chioza (a minor) suing by Andrew Chioza as next friend v. Board of Governors of Marymount Secondary School*, HC/19/07/96.

Bellevue, Washington State, after a warning by the school principal, failed to remove from his Web site a parody of school officials; other parts of the student's site also contained links to sexually explicit Web sites. The latter responded by faxing a letter on behalf of the school to all the universities to which he had applied, and to the National Merit Scholarship, for which he had been a candidate, declaring that the school withdrew its support of the student's applications. After receiving assistance from the ACLU office in Washington, he received a \$2,000 settlement from the school authorities, as well as an official apology. In another case which was settled in March 1997, a 9th grade student from Athol High School in New England was briefly suspended for deriding school authorities, other students and cafeteria food on his Web site. After legal intervention by the ACLU, the school offered an apology for its measures and withdrew the suspension from the student's record.¹⁴⁷ In Texas, a 13-year-old student who posted a Web site which poked fun at chihuahua dogs received a one day suspension by school authorities in January 1998 after a woman who was offended by the material contacted the school. The school also barred him from his computer classes, but it revoked these measures after the student's lawyer from the ACLU-Texas negotiated a settlement. In yet another case, on 13 April 1998 the Westlake School District in the suburbs of Cleveland agreed to pay \$30,000 to a 17-year-old student who had received an eight-day suspension for his personal Web site which derided the teacher of his high school band. The school also issued an apology to the student. The settlement followed a ruling by a federal judge the previous month which had invalidated the suspension.¹⁴⁸

There appears to be sufficient practical experience for the Committee to begin to elaborate guidelines for the implementation of the right to freedom of expression in schools. There are, of course, limitations on this right, but in practice these will apply largely in cases where the exercise of the right to freedom of expression impinges on the rights of others – for example, if the expression of opinions is sufficiently disruptive that it interferes with the right of other students to receive an education. The exercise of religious or other conscientious opinion and the expression of views outside the immediate school context should be protected in all cases.

¹⁴⁷. "Student back after suspension; New England News Briefs", *The Boston Globe*, 8 March 1997.

¹⁴⁸. "Cleveland Student to Get \$30,000 in Web site Flap", *The Orlando Sentinel*, 15 April 1998 and Terry McManus, "Internet Raises New Rights Issues for Students",

2.3. Children's rights to freedom of expression and association in society

Children's rights to freedom of expression and association within society at large are given a broad definition in the reports of States Parties and the Committee on the Rights of the Child. Article 12(2), the right "to be heard" in judicial and administrative proceedings, has been interpreted to apply to opportunities for children to express their views in cases of adoption, custody disputes, changes in citizenship or name and asylum applications. Both States Parties and the Committee on the Rights of the Child have discussed children's access to the courts in terms of their ability to be a party to civil cases, to give testimony and to have recourse against abuse through complaints mechanisms. States Parties also have raised the principle of Article 12 in connection with minors' direct interactions with state authorities, including through the public welfare system. Some countries have invoked Article 12 more generally in relation to concerns as varied as the right of the child to express his consent to medical procedures and the creation of special telephone hotlines for children. Others have presented implementation of Article 12 in terms of "participatory" projects designed to foster opportunities for children to express their views on a range of issues.

Despite the emphasis given to children's right to freedom of expression in these diverse areas, however, more general limitations on children's rights to freedom of expression and assembly have been presented with less scrutiny by both the States Parties and the Committee on the Rights of the Child. For example, a number of States Parties have placed restrictions on minors' rights to freedom of expression and assembly because they lack the full range of legal and other responsibilities of adults. Other States Parties have denied minors the right to participate in political party activities. In some cases, States Parties have described laws in their reports to the Committee which are clearly inconsistent with the right to freedom of expression.

2.3.1. The right to "be heard" in judicial and administrative proceedings

Article 12(2) pertains to the question of children's ability to have access to the courts or other complaints mechanisms, an issue which underlines the protection of children's rights more

generally. A number of States Parties have outlined policies governing minors' access to the courts in their submissions to the Committee on the Rights of the Child. For example, in Sweden a "child of more than 15 is entitled to speak on its own behalf in judicial and administrative proceedings by which he is affected."¹⁴⁹ Under this age, the child may only address the court directly if it is deemed that the child "will presumably not suffer harm as a result".¹⁵⁰ The Russian Federation maintained that the right of the child to express his or her views hinges on his or her perceived capacity not only to understand but also to articulate views about a given situation. The State Party wrote that according to Russian law, "a child will have the right to be heard during judicial, administrative or other proceedings if by virtue of its level of development, it is able to comprehend what is happening and to express its own views freely."¹⁵¹ Yet Geraldine Van Bueren suggests that such a limitation could represent a breach of Article 12(2). She writes, "the right to be heard applies to all children who are capable of 'forming' views and not only to children who are capable of expressing views."¹⁵²

Italy accords children the right to initiate and participate in legal proceedings "whenever their rights or interests are at stake".¹⁵³ Spain and Norway stipulate that minors may only be party to civil cases alongside an adult, but do not have the power to introduce them independently. Portugal noted that "minors are entitled to seek protection from the courts against abuse of authority either within the family or in institutions where they are in care."¹⁵⁴ Yet it did not specify what particular mechanisms exist for children in need of protection - for example, whether they would have access to court-appointed lawyers in such cases.

Beyond these general provisions regarding access, Article 12(2) has been interpreted by many States Parties to entail a positive obligation to solicit children's views in particular types of judicial proceedings or conflicts before the courts. Adoption, fostering placement, custody disputes and applications for a change of name or nationality are the most frequently cited cases where States Parties have introduced laws requiring the courts to seek the views of the minors

¹⁴⁹ Para. 58, U.N. Doc. CRC/C/3/Add.1 (1992).

¹⁵⁰ Ibid.

¹⁵¹ Para. 67, U.N. Doc. CRC/C/3/Add.5 (1992).

¹⁵² Geraldine Van Bueren, at 39.

¹⁵³ Para. 75, U.N. Doc. CRC/C/8/Add.8 (1995).

¹⁵⁴ Para. 40, U.N. Doc. CRC/C/3/Add.30 (1994).

involved before making a ruling. However, States Parties have taken different approaches to the specific guidelines governing this requirement. Some states, including Denmark, Croatia, Iceland, Mongolia, Romania and the Philippines, establish a particular age beyond which the child must be consulted in custody decisions. The youngest age cited in connection with this requirement appears to be eight years, set by the Philippines. For adoption cases, numerous States Parties have introduced both an age at which the child must be given the opportunity to express his or her views, and an older age at which the child's consent is required before any final decision is pronounced on the case. Yet some countries such as Spain and Sweden stipulate that in addition to this minimum age, in both adoption and custody hearings, the courts must also seek the opinion of any younger child who is considered to possess "sufficient judgement".¹⁵⁵ The United Kingdom does not define any age requirement but has stated that on custody decisions the court must consider the "ascertainable ... wishes and feelings"¹⁵⁶ of the child.

The Committee on the Rights of the Child has emphasized the need for children to be consulted in these administrative and judicial proceedings. It has called for mechanisms to ensure protection of Article 12 in the adoption process in Honduras, Mexico and Costa Rica. The Committee expressed concern about respect for Article 12 in inter-country adoptions involving Paraguayan children. The Committee also stated that Germany's "procedures governing asylum-seeking children"¹⁵⁷ represented a violation of Article 12. Yet the Committee generally has not issued more specific conclusions on the particular national laws governing children's access to the courts. Nor has it generally responded to the specific age or "maturity" requirements established by various States Parties to determine when courts have a positive obligation to seek the views of the child.

In addition to its emphasis on judicial proceedings generally, the Committee on the Rights of the Child has raised concerns about the effectiveness of "complaints procedures" for children in numerous States Parties. It recommended that such structures be introduced in Pakistan, Senegal, China, Cuba and the Federal Republic of Yugoslavia. The Committee urged Colombia and the

¹⁵⁵. Para. 106, U.N. Doc. CRC/C/8/Add.6 (1993).

¹⁵⁶. Para. 28, U.N. Doc. CRC/C/11/Add.1 (1994).

¹⁵⁷. Para 111, *Concluding Observations of the Committee on the Rights of the Child: Germany*, U.N. Committee on the Rights of the Child, 10th session, U.N. Doc. CRC/C/46 (1995).

Philippines to take steps to strengthen their capacity to respond to complaints by children of human rights violations or abuse. In the case of Myanmar (Burma), the Committee rejected the State Party's assertion that it was in compliance with Article 12. Myanmar wrote that according to Section 13 of its Child law, the "Child shall be given the opportunity of making a complaint, being heard and defended in the relevant government department, organization or court either personally or through a representative in accordance with the law, in respect of his rights."¹⁵⁸ Despite this statement, the Committee concluded that in Myanmar "no complaint procedure for children exists."¹⁵⁹

In some instances there has been discussion of the relative weight given to the testimony of minors in the courts. Paraguay wrote that a "statement by a child or adolescent does not constitute sufficient evidence to initiate criminal proceedings for sexual abuse, for which conclusive medical certificates are required."¹⁶⁰ In a similar case, Uganda stated that "a child can give evidence in a judicial matter but this evidence has to be corroborated."¹⁶¹ Uganda cited this practice to support its assertion that the "child's right for his or her views to be respected is supported by judicial practice."¹⁶² The Committee on the Rights of the Child has consistently condemned these absolute or rigid restrictions on children's testimony in its Concluding Observations. In its Preliminary Observations on Paraguay, the Committee argued that the "non-validity of children's statements in cases of alleged sexual abuse ... raises concern as to its compatibility with the spirit and purpose of the Convention."¹⁶³ In a more positive example, Namibia held that a child may give evidence in court, "regardless of the age of the child" provided that he "is able to distinguish truth from falsehood and to understand that it is dangerous and wrong to give false testimony".¹⁶⁴

Beyond these legal cases, a number of States Parties have sought to implement Article 12(2) where children have direct dealings with state structures more generally. One question which

¹⁵⁸ Para. 54, U.N. Doc. CRC/C/8/Add.9 (1995).

¹⁵⁹ Para. 142, *Concluding Observations of the Committee on the Rights of the Child: Myanmar*, U.N. Committee on the Rights of the Child, 14th session, U.N. Doc. CRC/C/62 (1997).

¹⁶⁰ Para. 80, U.N. Doc. CRC/C/3/Add.22 (1993).

¹⁶¹ Para. 48, U.N. Doc. CRC/C/3/Add.40 (1996).

¹⁶² *Ibid.*

¹⁶³ Para. 120, *Preliminary Observations of the Committee on the Rights of the Child: Paraguay*, U.N. Committee on the Rights of the Child, 7th session, U.N. Doc. CRC/C/34 (1994).

¹⁶⁴ Para. 75, U.N. Doc. CRC/C/3/Add.12 (1993).

some States Parties have raised is how to ensure that children are given the opportunity to express their views to welfare authorities. Finland noted that social workers often fail to consult young children in the course of their work, but suggested that this is a problem which stems from the attitudes of individual employees rather than any larger procedural issue. The State Party wrote, “Respect for the child’s views requires the worker to have the time and ability to listen to the child’s message. This cannot be achieved by changing the law. It requires changes among those working with children.”¹⁶⁵ The United Kingdom described a similar pattern within the welfare services. It wrote that in Northern Ireland the “child’s views are currently expressed through the medium of a welfare report, and the older the child, the greater the weight to be attached to his opinion.”¹⁶⁶

Another area which States Parties have addressed is the issue of the child’s opportunity to express his or her views in cases where he or she is under the care of an institution. Finnish law requires that before “decisions regarding ... placing a child in substitute care¹⁶⁷ can be made, every child 12 years or older must “be heard in the presence of a witness.”¹⁶⁸ Cyprus and the United Kingdom both wrote on the need for mechanisms within institutions to offer the child a forum through which to express his ideas. Cyprus maintained that when a child is placed in an institution ... every effort is made to appropriately prepare the child ... and to allow it to participate, depending on its age, in the planning process.”¹⁶⁹ The United Kingdom extended this obligation to private institutions which work with children. The State Party explained, “Voluntary organizations and registered children’s homes are required to set up ... procedures for representations or complaints by or on behalf of children accommodated by them.”¹⁷⁰

2.3.2. “Participatory rights”

Article 12 has given rise to the concept of children’s “participation” through special structures or projects as an important means of promoting respect for their rights more generally.¹⁷¹ However,

¹⁶⁵. Para. 165, U.N. Doc. CRC/C/8/Add.22 (1995).

¹⁶⁶. Para. 144, U.N. Doc. CRC/C/11/Add.1 (1994).

¹⁶⁷. Para. 63, U.N. Doc. CRC/C/8/Add.22 (1995).

¹⁶⁸. Ibid.

¹⁶⁹. Para. 34, U.N. Doc. CRC/C/8/Add.24 (1995).

¹⁷⁰. Para. 134, U.N. Doc. CRC/C/11/Add.1 (1994).

¹⁷¹. See for example Målfrid Grude Flekkøy and Natalie Hevener Kaufman, *The Participation Rights of the Child: Rights and Responsibilities in Family and Society* 49

it may legitimately be asked whether States Parties have interpreted their obligation to encourage children's participation as expansively as they might have done. Participation has often been embodied by high-profile, largely symbolic initiatives rather than through longer-term processes and structures which reflect and impact upon the concerns of the majority of children. Costa Rica, France, Senegal and Spain reported that they had initiated activities to provide children with a forum in which to express their views on a variety of subjects. Costa Rica described a project of "children's elections" in which children were asked to give their views on particular questions relating to children's rights.¹⁷² Senegal wrote of a "Children's Parliament" which is authorized to issue an "advisory opinion" to the government on problems relating to children.¹⁷³ Spain discussed the creation of "child assemblies" in some of the autonomous regions "to encourage free participation and expression by boys and girls ... on topics in their local area that interest them".¹⁷⁴

The Committee on the Rights of the Child has responded with enthusiasm to this type of approach to the implementation of Article 12. For example, on New Zealand the Committee "welcomes the State Party's initiative of convening a Youth Parliament as a means of realizing an important dimension of article 12 of the Convention".¹⁷⁵ The Committee also specifically mentioned the "Children's Parliament" in Senegal as a positive contribution which followed the State Party's ratification of the Convention.¹⁷⁶ Moreover, the Committee wrote on France, "Note is taken of the various initiatives to inform children about their rights and to encourage children to express their opinion through special councils established within schools and the local community."¹⁷⁷ Even Zimbabwe, which the Committee had criticized for its emphasis on parental rights over children's right to express their views, received a positive mention for a "Children's Parliament" project.¹⁷⁸

(London/PA: Jessica Kingsley Publishers, 1997).

¹⁷². Para. 103, U.N. Doc. CRC/C/3/Add.8 (1993).

¹⁷³. Para 59, U.N. Doc. CRC/C/Add.31 (1994).

¹⁷⁴. Para 118, U.N. Doc. CRC/C/8/Add.6 (1993).

¹⁷⁵. Para. 221, *Concluding Observations of the Committee on the Rights of the Child: New Zealand*, U.N. Committee on the Rights of the Child, 14th session, U.N. Doc. CRC/C/62 (1997).

¹⁷⁶. Para. 120, *Concluding Observations of the Committee on the Rights of the Child: Senegal*, U.N. Committee on the Rights of the Child, 10th session, U.N. Doc. CRC/C/46 (1995).

¹⁷⁷. Para. 85, *Concluding Observations of the Committee on the Rights of the Child: France*, U.N. Committee on the Rights of the Child, 6th (special) session, U.N. Doc. CRC/C/29 (1994).

¹⁷⁸. Para. 73, *Concluding Observations of the Committee on the Rights of the Child: Zimbabwe*, U.N. Committee on the Rights of the Child, 12th session, U.N. Doc.

A similar emphasis on child “participation” as a means of realizing Article 12 was demonstrated by Russia and Uganda, which presented projects relating to children’s access to the media. Uganda noted that national newspapers offer children the opportunity to publish and that a national radio station offers minors regular air-time. The State Party also cited a UNICEF-sponsored children’s newspaper, *Straight Talk*, published by the “safeguard Youth from AIDS programme”¹⁷⁹ in which, according to the State Party, children are encouraged to write on sensitive subjects. Russia wrote on a similar initiative, YUNPRESS, which it described as a “children’s news agency”¹⁸⁰ which fosters exchanges between Russian minors and their counterparts in several former Soviet Republics. Yet the State Party alluded to the limitation inherent in such projects in that they can only have an impact on a relatively limited number of children. It noted, “these progressive trends in the communications field lack a proper legal basis.”¹⁸¹

Other diverse issues have been raised in connection with the notion of the child’s right to express his or her views. Spain, for example, presented the introduction of special hotlines for children as one means of enabling children to realize this right. The State Party wrote, “... the Autonomous Communities of Catalonia and the Balearics have each established child hotlines to receive administrative queries and complaints. All the Autonomous Communities have social emergency hotlines available.”¹⁸² Another interesting area, which has been addressed by a number of States Parties, is the concept of children’s active “participation” in cases where they are under medical treatment. For example, Costa Rica wrote that Article 12

... forms part of the health-education strategy, of which the individual is the subject and regarding which he is informed, with due regard for his age, of the features of his illness so that he can participate more effectively in the entire process up to his recovery. This is particularly important in the case of diabetic children or children with congenital or degenerative diseases, where the sick minor’s views and reactions to the treatment are of

CRC/C/54 (1996).

¹⁷⁹ Para. 62, U.N. Doc. CRC/C/3/Add. 40 (1996).

¹⁸⁰ Para. 73, U.N. Doc. CRC/C/3/Add.5 (1992).

¹⁸¹ Ibid.

¹⁸² Para 125, U.N. Doc. CRC/C/8/Add.6 (1993).

the highest importance.¹⁸³

In this context, Article 12 provides a basis for policies which require health care professionals to give greater weight to the views of the child in the treatment process. Costa Rica argued that this approach of actively seeking the views of the child also serves the immediate goal of helping to better monitor the child's response to the course of treatment undertaken.

Croatia and Finland discussed the problem of the child's ability to consent to medical treatment within the framework of Article 12. Croatia noted that "there are no legal provisions that would make it possible for the child, taking into consideration the level of his or her maturity, to express his or her agreement with some of the medical procedures." Yet the State Party maintained that it planned to introduce reforms to reflect "the right of the child to his or her own attitudes".¹⁸⁴ Meanwhile, Finland described legislation which guarantees children the right to take part in decisions about medical treatment. According to Finland, the "treatment of child patients should ascertain and have regard for their opinions. If it is determined that the child has reached the age and level of maturity where he or she is able to decide for himself or herself, medical treatment is provided in agreement with the child."¹⁸⁵ This requirement appears to reflect a more expansive interpretation of Article 12(1) which states that the child must not only be given the opportunity to express his views, but also that those views need to be given "due weight" with respect to his "age and maturity".

2.3.3. The rights to freedom of expression, assembly and association

Despite the breadth of issues presented in connection with children's rights to freedom of expression by both the States Parties and the Committee on the Rights of the Child, other critical problems receive less attention in the reports. A number of States Parties have described laws which are clearly in breach of the right to freedom of expression. For example, Bangladesh has enacted what it calls "reasonable restrictions imposed by law in the interest of friendly relations

¹⁸³. Para. 89, U.N. Doc. CRC/C/3/Add.8 (1993).

¹⁸⁴. Ibid.

¹⁸⁵. This obligation stems from the 1993 Act on the Status and Rights of Patients. Para. 170, U.N. Doc. CRC/C/8/Add.22 (1995).

with foreign states”.¹⁸⁶ Similarly, Honduras wrote that according to the Constitution, “The circulation of publications that have a tendency to undermine the State or the family ... are not permitted.”¹⁸⁷ Yet the Committee on the Rights of the Child has not specifically addressed the problem of arbitrary media laws, despite the fact that these obviously would represent a breach of children’s rights to freedom of expression.

Another issue is the stipulation, by a number of States Parties, that children cannot be fully guaranteed the rights to freedom of expression, association and assembly enjoyed by adults. The Committee, however, has not addressed such restrictions. For example, the Committee made no recommendations on the right to freedom of association in Chile, where persons under 18 are not permitted to become members of a “political party or a community youth organization”¹⁸⁸ because the law “does not recognize their legal capacity to perform civil acts”.¹⁸⁹ The State Party reported that it introduced a bill which would reduce this minimum age to 15 years. Nor did the Committee comment on a parallel problem in Portugal, which reported that it guarantees the right to freedom of association for persons under 18 years of age only in the context of student organizations. The State Party did not cite the reason for this restriction but, like Chile, noted that draft legislation had been proposed which would lower the age requirement.¹⁹⁰ A related issue arises in Finland, under Article 2 of the Public Meetings Act, which provides that there is no age limit required in order to participate in meetings, but a person must be deemed “legally competent, in other words, has attained the age of 18”¹⁹¹ in order to organize a gathering. Moreover, both Finland and Iceland require that persons must be legally competent, over the age of 18 years, in order to serve as editor of a publication.

Other states forbid minors from joining associations with political orientations. Belarus stated that “Children’s organizations shall not engage in political activities”.¹⁹² In addition, Bulgaria noted that “children cannot establish or join political parties”¹⁹³ but maintained that political

¹⁸⁶ Para. 73, U.N. Doc. CRC/C/3/Add.38 (1995).

¹⁸⁷ Para. 47, U.N. Doc. CRC/C/3/Add.17 (1993).

¹⁸⁸ Para 75, U.N. Doc. CRC/C/Add.18 (1993).

¹⁸⁹ Para. 75, U.N. Doc. CRC/C/Add.18 (1993).

¹⁹⁰ Para 79, U.N. Doc. CRC/C/3/Add.20 (1994).

¹⁹¹ Para 235, U.N. Doc. CRC/C/8/Add.22 (1995).

¹⁹² Para. 45, U.N. Doc. CRC/C/3/Add.14 (1993).

¹⁹³ Para. 80, U.N. Doc. CRC/C/8/Add.24 (1995).

parties may create special organizations for adolescents over the age of 16 years. Neither of these restrictions was specifically mentioned by the Committee on the Rights of the Child in its Concluding Observations on these countries.

Moreover, the Committee on the Rights of the Child has given relatively limited coverage to other problems surrounding minors' rights to freedom of association and assembly. As of its 16th session, the Committee had outlined specific criticisms of this issue in only a limited number of States Parties - Indonesia, Myanmar, Australia, Denmark, Germany, Spain, Hungary and Panama - although it made more general remarks about the importance of this right in connection with a number of other countries. The Committee condemned what it called the "excessive violence"¹⁹⁴ by the Indonesian authorities in response to demonstrations by minors in November 1991. In the case of Australia, the Committee also made a very specific criticism of the State Party's record. The Committee noted that it was "concerned by local legislation that allows the local police to remove children and young people congregating, which is an infringement on children's civil rights, including the right to assembly."¹⁹⁵ On Hungary the Committee wrote that it was "concerned about the restriction to the right of freedom of association ... since there is no registry of associations managed by children".¹⁹⁶

2.3.4. Conclusion

The rights to freedom of expression and association as defined by Articles 12, 13 and 15 of the Convention have been interpreted to apply to a wide variety of issues by both States Parties and the Committee on the Rights of the Child. In this respect, Article 12 in particular has great potential to serve as a basis from which to reevaluate children's rights to express their views in relation to matters concerning them. This article places an obligation on States Parties to ensure a forum for children's views in relation to matters such as welfare, state care institutions, the medical system, the courts, and relations with state officials regarding asylum, adoption and

¹⁹⁴. Para 78, *Concluding Observations of the Committee on the Rights of the Child: Indonesia*, U.N. Committee on the Rights of the Child, 7th session, U.N. Doc. CRC/C/34 (1994).

¹⁹⁵. Para 98, *Concluding Observations of the Committee on the Rights of the Child: Australia*, U.N. Committee on the Rights of the Child, 16th session, U.N. Doc. CRC/C/69 (1997).

¹⁹⁶. Para. 15, *Concluding Observations of the Committee on the Rights of the Child: Hungary*, U.N. Committee on the Rights of the Child, 18th session, U.N. Doc. CRC/C/15/Add.87 (1998).

custody hearings. States Parties have discussed the right to be heard in judicial and administrative proceedings affecting the child extensively in their reports but have, by and large, not dealt sufficiently with the larger question of children's views. Similarly, the Committee on the Rights of the Child needs to be more expansive in relation to this aspect of Article 12.

The Committee has placed a strong emphasis on initiatives which aim to provide children with the opportunity to "participate" and express their views through state-sponsored projects, for example through children's assemblies, in connection with Article 12. While such projects may indeed benefit their participants, they are necessarily limited in scope and should not be seen as general indicators of respect for Article 12. They should also not be seen as a form of replacement for the obligation on States to ensure that children's views are heard in general in relation to matters affecting them.

Finally, there are serious omissions in the reports of the Committee on the Rights of the Child in relation to issues rights to free speech. In particular, the Concluding Observations have not tended to address fundamental problems such as national laws of States Parties which clearly violate the rights to freedom of expression and association. The Committee also has failed to criticize measures which bar minors from participating in political activities. Nor has it condemned restrictions, introduced in a number of States Parties, which prevent minors from publishing materials or organizing meetings on the basis that they have not reached the age of criminal liability.

2.4. Information rights of minors

Article 17 generally guarantees children's right to know. In reporting under this article, however, States Parties tend to stress the legal constraints on the right to of children to receive information, purportedly for their protection by virtue of their legal status as minors. While this is one aspect of Article 17, it is clearly secondary to the main goal of ensuring that children have access to information from a variety of sources. A reading of the reports submitted by States Parties to the Committee on the Rights of the Child, however, reveals many instances where restrictions

enacted to “protect” minors from “harmful information” clearly represent a breach of the child’s right to receive information. France described the measures it has taken to shield minors from materials which could prove disturbing to them. According to its State Party report,

The Act of 16 July 1949 on publications intended for young people covers all publications intended for children and adolescents. These publications must not contain “any illustration, story, report, item or insert showing in a favourable light banditry, mendacity, theft, laziness, cowardice, hatred, debauchery or any acts qualified as offences or calculated to demoralize children or young people or to inspire or promote ethnic prejudices”.¹⁹⁷

The contents of this provision are so broad as to potentially preclude almost any piece of fiction or even non-fiction; for example, the depiction of a lead character with any of the above vices, such as “laziness” or “cowardice”, might violate the 1949 law. Moreover, the terms of reference of the prohibited material remain totally unclear. The provision does not clarify what is intended by “showing in a favourable light”, nor exactly what constitutes “hatred, debauchery or any acts qualified as offences or calculated to demoralize children”. Presumably even a documentary on child abuse could be construed as serving to “demoralize” children. According to this law, the Minister of Interior has the power to take the following measures in response to such material: “ban on sale to minors; (2) ban on sale, public display or publicity in the form of posters (3) ban on sale, public display or any form of publicity”.¹⁹⁸

Other States Parties present similar approaches to the notion of “protecting” children. Nigeria has retained legislation similar to the 1949 law in France. Although not discussed in its report to the Committee, Nigeria’s Children and Young Persons (Harmful Publications) Act, No. 52 of 1961 makes it a crime to present as a main part of the publication: “(a.) the commission of crimes; or (b.) acts of violence or cruelty; or (c.) incidents of a repulsive or horrible nature; in such a way that the work as a whole would tend to corrupt a child or young person in to whose hands it

¹⁹⁷. Para. 209, U.N. Doc. CRC/C/3/Add.15 (1993).

¹⁹⁸. Para 213, *ibid.*

might fall.”¹⁹⁹

Indonesia, the Republic of Korea, Malawi and the United Kingdom also have enacted laws and policies which threaten to undermine the child’s right of access to information. In its report to the Committee on the Rights of the Child, Indonesia wrote,

Indonesian children receive appropriate information through various reading materials, radio and television. However, to protect children against hazardous information which is incompatible with the national philosophy and ideology, the Law on Publications restricts certain reading materials, videos and cassettes. ...²⁰⁰

Clearly it is a breach of Articles 13 and 17 of the Convention on the Rights of the Child to limit the child’s right to receive information to material deemed to be consistent with “the national philosophy and ideology”. Such restrictions have no basis in the Convention, and potentially could provide a basis for censorship of any ideas which are considered by the government to be controversial or critical. The Republic of Korea also provides for similar, far-reaching limitations on the child’s right to freedom of information. The State Party wrote in its report to the Committee that, “Under the Child Welfare Act, those who induce a child to see a harmful show, movie or similar public performance, and who make books, publications ... or other materials which might seriously hurt children’s moral character, or who sell, distribute ... exchange, display, narrate orally or broadcast to children or make another do so are also punished.”²⁰¹

Similar issues emerged in the debate over the Communications Decency Act, passed in the United States on 8 February 1996, which barred communications over the Internet which were “obscene or indecent, knowing that the recipient of the communication is under 18 years of age”.²⁰² The Supreme Court ruled in June 1997 that the law was in violation of the Constitution, on the basis that it hindered the First Amendment rights of adults and that it failed to take into account the distinctive features of the Internet as a communication medium. The CDA also

¹⁹⁹. As cited in Yemi Osinbajo and Kedinga Fogam, *Nigerian Media Law*. (Lagos: Gravitas Publishments, 1991), 289-290.

²⁰⁰. Para. 54, U.N. Doc. CRC/C/Add/10 (1993).

²⁰¹. Para. 73, U.N. Doc. CRC/C/8/Add.21 (1994).

²⁰². As cited in *Janet RENO, Attorney General of the United States, et al., Appellants v. American Civil Liberties Union et al. No. 96-511*. 117 S.Ct. 2329 (1997), 2338.

broadened the definition of what was considered obscene to minors. *Ginsberg v. New York*²⁰³ had established that material is considered obscene for minors if it is “patently offensive to prevailing standards in the adult community ... with respect to what is suitable ... for minors”²⁰⁴ and is “utterly without redeeming social importance for minors”.²⁰⁵ The CDA abolished the requirement that material must be devoid of “social importance” in order to be classified as obscene and by applying to the Internet effectively applied the lowest standards of tolerance to the whole country. The Supreme Court thus noted, that under the law “a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community found the material ‘indecent’ or ‘patently offensive’, if the college’s town community thought otherwise.”²⁰⁶

Another important issue which has arisen in a number of countries is the question of restricting children’s access to particular works of literature or subject matters within the context of the school system. In Malawi, Section 47 on “Unsuitable publications” of the Education Act enables the Minister of Education to ban publications from schools. Nor is the Minister under any obligation to attempt to justify such measures through specific criteria, such as pedagogical concerns or on grounds of obscenity. The provision simply states, “The Minister may by notice published in the Gazette declare any publication or periodical publication to be unsuitable for use in schools.” Clearly this enables government authorities to remove literature critical of the government from schools, and represents a serious breach of Articles 13 and 17 of the Convention on the Rights of the Child. In January 1993, the Minister of Education and Culture announced a ban on all plays and other performances by independent groups in public schools and other government educational institutions. Dunduzu Chisiza, an actor who had been granted a contract by the Ministry of Education to perform in a number of government schools filed a suit to challenge the order, arguing that it represented a breach of his right to freedom of expression.²⁰⁷ The judge upheld the complaint, ruling that the move had no basis in the Education Act and affirming that the actor’s right to freedom of expression had been violated.

²⁰³. 390 U.S. 629, 88 S. Ct. 1274, 20 L.Ed.2d. 195 (1968)

²⁰⁴. As quoted in *Janet RENO, Attorney General of the United States, et al. Appellants v. American Civil Liberties Union et al. No. 96-511*, at 2356.

²⁰⁵. *Ibid.*

²⁰⁶. *Ibid.*, at 2348.

²⁰⁷. Shortly before the ban, the actor is reported to have publicly advocated democratic reform. ARTICLE 19, *The ARTICLE 19 Freedom of Expression Handbook* (London: ARTICLE 19, 1993), 106.

Dunduzu Chisiza was granted an award of K17,000 (then U.S. \$4000).²⁰⁸

The question of school authorities who seek to remove books or particular works of literature from school libraries has been a contentious issue in the United States, and the object of much litigation, particularly since the Supreme Court case, *Board of Education v. Pico*.²⁰⁹ The case involved a local school board which sought to remove publications from the school library based on their ideological content, claiming they were “anti-American”.²¹⁰ The Supreme Court ruled that school authorities may remove books from school libraries, but only for pedagogical and not ideological reasons. The Supreme Court declared that school authorities could, for example, remove books which they considered to be “pervasively vulgar”.²¹¹ However, in this case it was demonstrated that the school authorities had acted to suppress particular viewpoints with which they disagreed; the Supreme Court concluded that their actions represented a violation of the students’ right to freedom of expression under the First Amendment to the US Constitution.

Another issue is that of measures which local authorities in the United Kingdom and the United States have introduced to bar state schools from discussing or “promoting” particular ideas. In one particularly striking case, the 1986 Local Government Act of the United Kingdom prohibits teachers from presenting homosexuality in positive terms. Section 28 states: “A local authority shall not ... promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship.”²¹² This is clearly a breach of the rights of children to freedom of expression, and should be repealed. Similar problems have arisen in the United States; in Concord, New Hampshire, the school district of Merrimack moved in August 1995 to introduce a ban on teaching about homosexuality. It prohibited the five public schools within the district from offering “any program or activity that has the purpose or effect of encouraging or supporting homosexuality as a positive lifestyle alternative”.²¹³ The restrictions imposed by the board prohibited school officials from providing students with information on support groups or

²⁰⁸. *Dunduzu Chisiza Jr v. Minister Kate Kainja* (1993).

²⁰⁹. As quoted in: 457 U.S. 853, 73 L.Ed.2d. 435 *Board of Education, Island Trees Union Free School District No. 26 et al., Petitioners, v. Steven A. PICO, by his next friend Frances Pico et al. No. 80-2043.* (1982), at 2803.

²¹⁰. As quoted in *ibid.*, at 2803.

²¹¹. *Ibid.*, at 2810.

²¹². Article 2A(1)a-b, 1986 Local Government Act. This article stems from an amendment introduced in 1988.

²¹³. As quoted in Shirley Leung, “School policy on gays prompts suit; Parents, teachers fight N.H. district’s ban on positive views of homosexuality”, *The Boston Globe*, 16 February 1996.

organizations which offer counselling on homosexual issues. In both the British and the New Hampshire cases, the bans could be construed as preventing teachers even from advocating respect for persons who are homosexual. Teachers, along with parents and students in Merrimack filed a suit against the policy in federal court in February 1996. However, the group dropped the lawsuit after the school board voted to abolish the policy on 3 June.²¹⁴

Despite these problems, the Committee on the Rights of the Child in its analysis of Article 17 has mainly focused on the question of protecting minors from harmful materials, whilst giving relatively little attention to the problem of how to ensure that minors are guaranteed the right to freedom of information. Most of its references to Article 17 in fact have dealt with part (e) which addresses the need for “guidelines” to protect minors from harmful information. Although the Committee expresses concern about access to information for children in Federal Republic of Yugoslavia (Serbia and Montenegro) and in rural areas of Portugal, it criticizes the lack of protection for minors from harmful information in Ghana, Togo, Azerbaijan, the Czech Republic, Jamaica, Panama, and Trinidad and Tobago.

On Jamaica, the Committee declared that “the measures being taken to protect children from information injurious to their well-being are insufficient.”²¹⁵ In its conclusions on Azerbaijan, the Committee specifically criticized the “lack of legislative and other types of measures to protect children from harmful information”.²¹⁶ In Togo the Committee raised the problem of shielding minors from inappropriate materials, and in particular from “media using new technologies”.²¹⁷ In Ghana, despite the enactment of the Cinematography Act which provides for measures of film classification and which the State Party described in its report, the Committee concluded that “no mechanism exists to protect children from being exposed to harmful information, including pornography.”²¹⁸ Former Committee member Thomas Hammarberg has written on Article 17(e),

²¹⁴. Matt McDonald, “Merrimack Group Drops Suit Over ‘Gay’ Policy”, *The Union Leader*, 13 June 1996.

²¹⁵. Para. 150, *Concluding Observations of the Committee on the Rights of the Child: Jamaica*, U.N. Committee on the Rights of the Child, 8th session, U.N. Doc. CRC/C/38 (1995).

²¹⁶. Para. 279, *Concluding Observations of the Committee on the Rights of the Child: Azerbaijan*, U.N. Committee on the Rights of the Child, 15th session, U.N. Doc. CRC/C/66 (1997).

²¹⁷. Para. 280, *Concluding Observations of the Committee on the Rights of the Child: Togo*, U.N. Committee on the Rights of the Child, 16th session, U.N. Doc. CRC/C/69 (1997).

²¹⁸. Para. 91, *Concluding Observations of the Committee on the Rights of the Child: Ghana*, U.N. Committee on the Rights of the Child, 15th session, U.N. Doc. CRC/C/66 (1997).

it is not clear from the wording whose responsibility it is to develop guidelines, only that the State should be encouraging. ...As on several other points, the vagueness of the Convention in this regard can be seen as an invitation to a discussion of objectives rather than offering a prescription of precise methods of implementation.²¹⁹

The Committee on the Rights of the Child hosted a conference in 1996, during its 13th session, on the Child and the Media to discuss issues of concern in this area.²²⁰ The discussions focused on opportunities for children to “participate” in the media, how to protect children from harmful information and how to promote better coverage of children through the media. However, the conclusions and recommendations from the conference did not address problems of media censorship.

Yet is there evidence to suggest that minors are so vulnerable to media influences as to justify such expansive restrictions on their rights to information?²²¹ One scholar, based on a review of literature in developmental psychology, argues emphatically that this is not the case. James Ogloff writes, “Indeed, many people think of young people as being impressionable and incapable of independent thinking and reasoning. ... While some young children are certainly less rational than adults, the level of rationality of most adolescents does not differ significantly from that of adults.”²²² Ogloff writes that studies on the skills of adolescents in the areas of deductive reasoning, inductive reasoning, and moral reasoning support this conclusion, which in turn calls into question the belief underlying much of the censorship that “the younger the person, the more irrational he or she is presumed to be.”²²³

From Zambia and Malawi to Canada, the United Kingdom and the United States (though the latter is not itself party to the Convention), a reading of the cases involving the rights of minors to freedom of expression demonstrates that protection for this right is, at best, still very much a work in progress. Although some achievements have been made through litigation in the United

²¹⁹. Thomas Hammarberg, “Children, the UN Convention on the Rights of the Child and the Media”, unpublished paper.

²²⁰. Paras. 242-257, 13th session of the U.N. Committee on the Rights of the Child, U.N. Doc. CRC/C/57 (1996).

²²¹. See two important works: David Moshman, ed., *Children’s Intellectual Rights* (London/San Francisco: Jossey-Bass Inc., 1986) and David Moshman, *Children, Education and the First Amendment: A Psycholegal Analysis* (Lincoln and London: University of Nebraska, 1989).

²²². James Ogloff, “Children’s Intellectual Rights in Canada: A Comparative Constitutional Approach”, 68 *Nebraska Law Review*. 349 (1989), 366.

²²³. Ogloff, at 366.

States, Kenya, Trinidad and Tobago, and France to uphold children's rights to express religious and political views in state schools, arbitrary restrictions still prevail in many cases. In particular, measures by school officials in the United Kingdom, Malawi and the United States which seek to suppress student speech outside of school fora has the potential to create a chilling effect on the freedom of expression of minors. Legal challenges to such actions are crucial, and in the United States these appear to have succeeded in reversing attempts by school officials to bar students from posting controversial materials in the personal Web sites.

Moreover, minors are subject to arbitrary and far-reaching restrictions on their right to receive information on the basis that such measures are necessary to "protect" them. While this is an emotional topic, careful attention nonetheless must be brought to bear on any steps which purport to limit children's access to information in order to "protect" them. States Parties to the Convention on the Rights of the Child have an obligation to ensure that any measures taken to shield children from particular types of material do not interfere with their fundamental right to "seek, receive and impart" information, as guaranteed by Article 13, and the protection of their right to diverse information, as provided by Article 17. Many of the measures described in States Parties reports represent a flagrant violation of minors' right to receive information, yet the Committee has focused mainly on issues of shielding minors from harmful information. Literature in the field of child development would appear to support the argument that minors' abilities to think rationally, and thus to decipher between positive and negative influences would be greater than often supposed by many of the measures proposed. Minors even more than adults, by virtue of their vulnerable position in society, have a need to enjoy their right to information; any proposals to limit minors' access must be considered with great scrutiny.

Chapter 3: Case Studies – South Africa, Uganda and Sierra Leone

Realizing the right of children to freedom of expression is central to building and sustaining peace, democracy and respect for human rights across the world. It is not simply a matter of morality and altruism that adults should seek to protect and promote children's rights – it is pre-eminently a matter of personal and political self-interest. This chapter seeks to explore this claim through three case studies of countries in sub-Saharan Africa where peace, democracy and respect for human rights have been conspicuous by their absence in the past - South Africa, Uganda and Sierra Leone – and where children have been central to protracted internal conflict, both as victims and as active participants.

The three countries have had varying success in resolving their conflicts. South Africa is engaged in efforts to overcome the legacy of apartheid in all its dimensions. This will be the work of generations. However, the conflict in South Africa has ended. Uganda has been recovering since 1986 from the nightmare of the Amin and Obote periods. But insurgency in the north of the country continues. Finally, Sierra Leone since 1991 has been convulsed by an insurgency covering large swathes of the country. While there is now some optimism that the insurgency in Sierra Leone can be brought to an end, the country has scarcely begun to emerge from its recent experience of generalized conflict.

South Africa and Uganda have begun the task of trying to implement their commitments under the CRC. Sierra Leone is not yet off the starting blocks. What becomes clear from a brief survey of implementation efforts is just how much work remains to be done to develop a more precise conceptualization of what children's right to freedom of expression means in practice.

3.1. South Africa

In South Africa, the rights of the vast majority of the country's children were grossly abused under the apartheid system. Black children were denied access to nutrition, health services, housing and education. Indeed, education became an instrument of subordination for most black

children. From the 1970s onwards, however, black children began to speak out against their oppression and take action against its symbols. The 1976 Soweto rising began with student protests against the introduction of compulsory instruction in Afrikaans. During the insurrections in the townships in the 1980s, a significant number of black children experienced a degree of authority within their own communities for the first time. Yet their “liberation” was double-edged for many adults. Children’s voices were now being heard loud and clear, yet this was sometimes in defiance of parents or guardians and did at points contribute to instances of injustice and brutality – witness the role of the “comrades”, including in the context of “people’s courts”, in township life during this time. The education system also came to a grinding halt during this period in many parts of the country. Many adults felt that any education, however oppressive, was better than no education. Not all children agreed.

The period 1976-94 might be described as a time when black children made some gains in realizing their right to free expression, but not always in directions which necessarily served their individual “best interests” in the long-term. Neither were any of these gains based upon a measured assessment of “evolving capability” or “maturity”. They were by-products of the struggle against apartheid. This does not mean that the changes wrought during the struggle against apartheid were simply an aberration and therefore to be disposed of once the struggle was over. However, it should be clearly recognized that post-apartheid efforts in South Africa to “give children back their childhood”, while seeking to strengthen the voices of children within society and government in the new dispensation, are at the same time in part geared towards reinforcing adult structures of authority, not least within the family and the education system, ending certain modes of participation in public life by children and “de-politicizing” childhood.

Building a new deal for children in South Africa is proving a difficult process, particularly given that there has not been a dramatic improvement in the provision of essential social and educational services to black children. Furthermore, many of those children who, whether by choice or compulsion, put liberation before education, now find themselves hamstrung by their lack of qualifications and skills in a tight labour market. It is not surprising that children are active participants in the crime-wave which is currently obsessing South Africans.

The government has begun to introduce structures, procedures and processes as part of its efforts to discharge its responsibilities under the CRC, which it ratified in 1995. How far and in what ways do they seek to realize children's right to freedom of expression? To what extent do the measures proposed or undertaken reflect a clear conceptualization of what that right should mean?

In 1996, the South African government published its National Programme of Action for Children in South Africa: Framework (NPA). The NPA is described as the instrument through which its commitments under the CRC will be carried out. The overriding principle of the NPA is that of a "first call for children".²²⁴ The policy priorities are set out as nutrition, health, water and sanitation, early childhood development and basic education, social welfare development, leisure and cultural activities and child protection.²²⁵ Under each of these headings there are then set out the goals, relevant articles of the CRC, responsible lead and supporting sectors and national strategies.²²⁶ In general, there is a clearer emphasis in the NPA on social and economic rights than civil and political rights. Where articles encompassing civil and political rights are cited as relevant, there is no clear sense of why they have been so cited. In fact, at times the selection seems rather arbitrary. For example, in relation to child and maternal health, Article 12 is cited but Article 13 is not. With regard to early childhood development and basic education, both are cited.²²⁷ It is also instructive to note that Article 17 has at points been reformulated as access to *appropriate* information.²²⁸ This suggests a focus *de facto* on protection from "harmful" information in preference to an emphasis on access to information from a diversity of sources. This appears to be confirmed by the comments on article 17 in chapter four of South Africa's initial report in 1997 to the Committee on the Rights of the Child. The report looks at civil rights and freedoms, yet its only substantive comment on Article 17 deals with the protection of children from "inappropriate" information.²²⁹ Finally, largely missing is any coverage of what ARTICLE 19 believes is a crucial factor in realizing the right of children to freedom of expression: participation of the child.²³⁰

²²⁴ *National Programme of Action for Children in South Africa: Framework*, 1.

²²⁵ *Ibid.*, 2.

²²⁶ *Ibid.*, 4-12.

²²⁷ *National Programme of Action: Framework*, 5,7.

²²⁸ For example, see *Ibid.*, 4, 5, 7.

²²⁹ *Initial Country Report by South Africa on the Convention of the Rights of the Child* (Pretoria: November 1997), 48-49.

²³⁰ It is interesting to note that the South African Law Commission, in its 1998 issue paper on the Child Care Act, interprets one of the general

Too much should not be read into the NPA document. It is a framework document and could not be expected to be comprehensive. Implementation is still at an early stage and the research and planning process underway in South Africa is in many ways extremely impressive. But the way in which the NPA refers to key articles of the CRC with regard to freedom of expression denotes confusion and uncertainty rather than clarity of conception. The claim, made by the South African government in its initial report to the Committee on the Rights of the Child, that there is conformity between the NPA and CRC, is not wholly born out by the evidence. Indeed, in the same report only a few paragraphs further on, the government acknowledges missed opportunities under the NPA in “giving equal attention to civil rights and freedoms”. It states that future activities must focus on “accelerating children’s participation in the process, especially younger children”.²³¹

The National Child Rights Committee (NCRC), an umbrella group of non-governmental organizations (NGOs) active in the child rights’ field, confirms this view. In an interview with ARTICLE 19, the Executive Director, Mabel Rantla, stated that both the government and people of South Africa are still seeking to work out what the CRC and NPA should mean for the children of the country, not least with regard to articles 12 and 13. She added that adequate structures do not yet really exist at grassroots level to implement the NPA. Another concern which Ms Rantla expressed was that international agencies had forced the pace on the NPA and that a crucial priority - to build understanding and a sense of ownership of the CRC amongst South Africans – had been neglected.²³² The NCRC’s civic education work appears designed to link rights and responsibilities closely together, in part to reassure parents and guardians that children’s rights will not mean chaos and domestic “ungovernability”. It is clear that the battle to persuade the majority of adult South Africans that their children should have civil rights, such as the right to freedom of expression, has yet to be won. The NCRC also aims to set up country-wide structures, culminating in a National Children’s Forum, to improve children’s access to

principles relating to the rights of the child under the CRC, which is usually described as “respect for the views of the child”, instead as “participation of the child”. See *The Review of the Child Care Act* (Issue Paper 13, Pretoria: 18 April 1998), 6.

²³¹ Ibid, 23-24.

²³² Interview with Mrs Mabel Rantla, Executive Director, National Child Rights Committee, 14 September 1998.

public debate. A Youth Commission has also been established, but it too is finding its feet. But for the moment, the means for the vast majority of children to participate in public debate does not really exist. Building understanding and support amongst both parents and children is essential if the likelihood of any “traditionalist” backlash in defence of parental power is to be reduced.

Much has been achieved over the past two years in beginning to map out what the CRC might mean in relation to the right to freedom of expression. For example, within the context of the NPA, the South African Law Commission is currently reviewing the existing inconsistent legal framework with regard to children. In doing so, it is seeking, for example, to strengthen the voice of the child in the juvenile justice process, increasing opportunities for them to express their views and giving them “due weight”. It is also reviewing legislation regarding sexual offences against children and child care legislation with the same goal in mind. Its overall goal is to create a comprehensive Children’s Code fit for the 21st century. The South African Law Commission has produced a series of high-quality issue papers for consultation prior to the formulation of new legislation.²³³

There have also been significant developments in the education field. The 1996 South African Schools Act provides for the right of learners to be represented from eighth grade onwards on the governing bodies of schools and on Learner Representative Councils. Through this route, children have the right to be consulted in the formulation of disciplinary codes of conduct. The outlawing of corporal punishment also helps to enhance a culture of respect for human dignity within schools and beyond.²³⁴ Participatory initiatives such as the NCRC’s South African Children’s Charter and the Southern Africa Children’s Broadcasting Summit have also been important innovations.²³⁵ There are also continuing efforts to lobby for a more child-friendly media. The establishment of a statutorily independent public broadcaster (the South African Broadcasting Corporation) and regulatory authority (the Independent Broadcasting Authority) was a major step forward in this regard. However, in terms of improving children’s access to the

²³³ *Sexual Offences against Children* (Issue Paper 10, Pretoria: 31 May 1997); *Juvenile Justice* (Issue Paper 9, Pretoria: 31 May 1997); *The Review of the Child Care Act* (Issue Paper 13, Pretoria: 18 April 1998).

²³⁴ *Initial Report on the Convention on the Rights of the Child*, 84.

²³⁵ *Ibid*, 44.

media as a means of expression, this should be complemented by encouraging children's access to the independent community broadcasting sector.

Important steps have also been taken in the vital area of developing mechanisms for monitoring implementation of the CRC. South Africa has established in law an independent South African Human Rights Commission. The Deputy Chairperson, Shirley Mabusela, has been given responsibility for heading a children's rights committee within the Commission. Ms Mabusela sits with the South African Law Commission, the NCRC, UNICEF South Africa and ministerial representatives on the NPA Steering Committee, which is due to review the operation of the NPA over the coming months and present recommendations for change or further action. However, further debate is needed about how best to monitor implementation of the CRC. Should there be a national Children's Commissioner? Should each province have a Children's Commissioner, as the Western Cape now has?²³⁶

Nonetheless, despite the significant steps so far taken to articulate what the right to freedom of expression might mean in specific areas of administration and justice, there is as yet no shared conceptualization of that right shaping these initiatives. The voices of parents, let alone their children, remain largely marginal to the debates taking place. The absence of a clear conceptualization is perhaps at its most striking with regard to everyday relations between parents and their children within the family itself. Each of these issues needs to be squarely addressed in the next phase of the NPA if the longer-term process of implementing South Africa's obligations under the CRC is to be founded on popular consent -- and therefore be truly sustainable.

3.2. Uganda

The 1970s and early 1980s saw massive and systematic abuse of human rights in Uganda under Presidents Idi Amin and Milton Obote. Children were the victims no less than adult civilians. The infrastructure of educational and welfare provision collapsed across the country. Many

hoped that the victory in 1986 of Yoweri Museveni and his National Resistance Army (NRA) would be a turning-point for Uganda and its children. Museveni promised peace, development and respect for human rights. These hopes have been only partially fulfilled. This is explained in part by the sheer scale of the challenge which faced Uganda's new rulers. Translating promises into reality in the spheres of judicial, social and educational provision for children has only just begun. But it is also explained by official reluctance to address some of the root causes of internal conflict in Uganda. While internal conflict in the east of the country was eventually resolved by a mixture of military and political means, a brutal insurgency which "feeds on" children has continued largely unabated in northern Uganda since 1986.

The international community failed Uganda's children during the widespread massacres in the "Luwero Triangle" in the early 1980s. The NRA was widely condemned for its recruitment of child soldiers or *kadogos* during its period as an insurgent army. Yet in many cases these children were the orphans of victims of army killings in Luwero. The NRA offered them a home and a means of articulating their hostility to the government. International agencies ran child-oriented activities, such as immunization programmes, in Luwero throughout this period, but failed to provide a voice to the orphaned children and condemn human rights violations by the army. It was only after the NRA took power that assistance was forthcoming to demobilize and school the *kadogos*.

The Lord's Resistance Army in the north of Uganda has systematically sustained its capacity to fight the Ugandan government by forcibly abducting children. Amnesty International has summed up the plight of these children graphically:

Most of those abducted are between 13 and 16 years old. Younger children are generally not strong enough to carry weapons or loads while older children are less malleable to the will of their abductors. Boys outnumber girls. Children are beaten, murdered and forced to fight well-armed government troops. They are chattels "owned" by the LRA leadership. Girls are raped and used as sexual slaves. The abduction of girls and their forced marriage to more senior LRA soldiers is the

²³⁶ *The Review of the Child Care Act, 1955-6.*
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cornerstone of the movement's internal organization. Forced marriage is used as a reward and incentive for male soldiers

But in addition, being abducted leads to being made to abuse others, both inside and outside the movement. The LRA uses violence to terrorize villagers. Thousands of northern Ugandan civilians have been deliberately killed; thousands of women have been raped. The killers and rapists are themselves armed children. They are being abused by being forced to commit human rights abuses. This is deliberate. The children are often traumatized by what they have done and, believing that they are outcasts, become bound to the LRA.²³⁷

In such circumstances, realizing children's right to freedom of expression may appear to be a utopian dream. Other priorities at first sight appear infinitely more pressing – not least, those relating to child survival and protection. This perspective is understandable but far from convincing. In the case of Uganda, it is important to recognize that the conflict in the north has been fuelled by systematic violations of human rights over the past two decades, a central dimension of which has been complex forms of censorship. Ending the conflict requires that this dimension be squarely addressed.

First, many northerners believe that the rest of Uganda is indifferent to their fate. Holding the north responsible for the human rights abuses of the Amin and Obote periods, Ugandans from other parts of the country have largely ignored the human rights abuses which have been committed by all sides since 1986. For its part, the Ugandan government has not done enough to combat the culture of impunity which has reigned since 1986, not least with regard to the north. The sense of grievance which this has led to among northerners has estranged them from the government.²³⁸ They deeply mistrust it. Official promises to invest in the north have been largely unrealized. The communities of the north feel that they are marginalized and their voices ignored.

²³⁷ Amnesty International, *Uganda. "Breaking God's commands": the destruction of childhood by the Lord's Resistance Army* (AI Index: AFR 59/01/97. London: 18 September 1997), summary. See also Human Rights Watch/Africa, *The Scars of Death. Children Abducted by the Lord's Resistance Army in Uganda* (New York: September 1997).

²³⁸ Sessional Committee on Defence and Internal Affairs, Parliament of Uganda, *Parliamentary report on the war in the north* (Kampala: February 1997), 54-56.

The children of the north, particularly those reaching adolescence, are hardly likely to have been unaffected by the attitudes of their parents and elders on these matters.

Second, traditional cultural practices in northern Uganda, which place great emphasis on the principle that children should “know their place” within the family and community, may have increased the frustration of children in times of social turbulence where access to education and employment is especially limited.

The vast majority of children abducted by the LRA have shown no prior enthusiasm for its cause. But some may come to do so, for the same reasons which motivate children involved in other armed conflicts around the world: status, authority and a minimal livelihood.²³⁹ In any case, all interested parties to child welfare and protection in Uganda, including the government, accept that there is a need to work with families and communities across the country to expand the space for children’s voices to be heard more forcefully in future.²⁴⁰ This represents an acknowledgement that the traditional ways of treating children must change if Uganda is to meet its commitments under the CRC. Such change could only contribute positively to efforts to end the conflict in the north.

Finally, there is an urgent need for the Ugandan government to address the sense of injustice and marginalization felt by many people in the north, for example, by establishing a commission of inquiry or “truth commission” to investigate human rights abuses committed by all parties since 1986.²⁴¹ With specific regard to children, international support should continue to be given for rehabilitation and reintegration programmes for former child combatants and other unaccompanied children. Since 1995, two NGOs have been responsible for these programmes – World Vision Uganda and Gulu Support for Children Organisation (GUSCO).²⁴²

²³⁹ Ilene Cohen and Guy S Goodwin-Gill claim that the “vast majority of young soldiers are not forced or coerced into participating in conflict, but are subject to many subtly manipulative motivations and pressures that are all the more difficult to eliminate than blatant forced recruitment”. Quoted from *Child Soldiers: The Role of Children in Armed Conflict* (Clarendon Press, Oxford: 1994), 30.

²⁴⁰ In 1993, the Ugandan Government and UNICEF Uganda jointly commissioned a report entitled, *Children and their rights: Village Perceptions* (Kampala: November 1993). The report, written by PT Kakama, an official in the Ministry of Labour and Social Affairs, vividly illustrated the scale of the challenge of changing traditional relationships between parents and children.

²⁴¹ Amnesty International, “*Breaking God’s commands*”, 37-39.

²⁴² *Ibid.*, 35-37.

The Ugandan government ratified the CRC in 1990. Government-coordinated efforts to realize the rights contained in the CRC bore their first real fruit in the 1992 Uganda National Plan of Action. The 1995 Constitution specifically guarantees children's rights (article 34). A further major step forward came with the promulgation of the Children's Statute in 1996. The Children's Statute sets out a range of important reforms designed to protect children's welfare where they come into contact with local authorities, social service agencies and the judicial system. For example, the statute proposes that all local councils should have a Secretary for Children's Affairs and that Children and Family Courts be established at district level, focusing primarily on civil cases. The statute also establishes that no child below 12 years can be charged with a criminal offence. It provides for a wide-range of non-custodial options for children over 12 years who break the law.²⁴³ Another important recent initiative came in 1997 with the introduction of the first phase of universal primary education. In 1997, almost three million more children started at primary school than in the previous year.²⁴⁴ It is important to note that non-governmental organizations have also played a crucial role in child survival, development and protection work at the level of implementation.

Our main concern here is how far the measures taken so far reflect a clear view of children's right to freedom of expression. The Children's Statute states that a child's needs should always be taken into account and that part of doing so should be listening to the views of the child, while allowing for age and understanding. This directly echoes the provisions of Article 12 of the CRC. The statute also states that parents have the primary responsibility for looking after a child. It follows, therefore, that they have the primary responsibility for listening to their child, notwithstanding the important role of the state in this regard. However, as the Uganda Child Rights NGO Network (UCRNN) stated in 1997, "it will be sometime before children actually enjoy these rights as infrastructure for implementation is still under preparation". It continues: "The family and school are the two institutions where most children will enjoy or be denied respect for their views. Both are under pressure either from tradition or competition, to discipline/suppress children and teach them responsibilities before anything else."²⁴⁵

²⁴³ The Republic of Uganda, *The Children's Statute* (Government Printers, Kampala: 1996).

²⁴⁴ Department for International Development, "Clare Short announces £67 million for education in Uganda" (Press release 54/98, 2 October 1998).

²⁴⁵ UCRNN, *Response to the Government of Uganda Country Report on the implementation of the UN Convention on the Rights of the Child* (Kampala: February 1997), 6.

The idea of children as active participants in society is not strongly developed in the Children's Statute. Yet articles 12 and 13 should be viewed as essential preconditions for children's participation in society. What child participation means in practice will vary depending upon age and maturity and will be to a degree context-specific, but there are also universal requirements which flow from it. The conceptual framework employed in the Children's Statute still largely reflects traditional views of the child as a passive object within society, whose empowerment and participation can only be deeply problematic. There is an urgent need to deepen and extend existing grassroots civic education work with communities, families and their children across Uganda to try to move beyond these views.²⁴⁶

With regard to article 17 of the CRC, the Ugandan government has much to do before it is able to meet its obligation to ensure that children have access to information from a diversity of sources. Its predominant concern in practice has remained the protection of children from "harmful" information. The Ministry of Education and Sports has begun to produce educational materials, including through television and radio, for schools. NGOs also use the broadcast media to produce programmes on aspects of children's rights.²⁴⁷ However, key preconditions for broadening access for information – not just for children, but for all Ugandans – are the establishment of statutorily independent public broadcast media and the encouragement of independent community/local radio beyond the urban centres. This has barely begun to be addressed. An independent broadcasting regulatory framework, including over the public service media, should be established as a matter of priority, with responsibility for ensuring that children's rights and concerns received sufficient airtime. South Africa is far ahead of Uganda in these regards.

Independent monitoring of the performance of public bodies in their provision for children should not be restricted to the sphere of broadcasting. In 1997, the UCRNN called for the establishment of an "effective and sustainable mechanism for monitoring the implementation of

²⁴⁶ GUSCO in northern Uganda has reportedly established Child Rights Clubs as part of its programme of psycho-social counselling and therapy for former child combatants and their communities of origin.

²⁴⁷ UCRNN, *Response to the Government*, 5.

the CRC and enjoyment of rights by children”.²⁴⁸ Such a mechanism could also play a lead role in interpreting what the CRC should mean in Uganda and in setting standards. Whether the mechanism might be created within the Uganda Human Rights Commission or as a free-standing body such as a Commission for Children or an Ombudsperson is a legitimate matter for debate. This debate should now begin. Important as the role of government officials such as district-level Secretaries for Children’s Affairs may be in the future, it is unrealistic to rely upon them to for impartial monitoring of other governmental figures and institutions.

3.3. Sierra Leone

There is universal agreement that there can be no future for Sierra Leone unless the protection and promotion of children's rights is dramatically improved. Sierra Leone ratified the CRC in 1990. As the Minister of Social Welfare, Gender and Children’s Affairs acknowledged during a meeting in July 1998 with ARTICLE 19, so far this has counted for little.²⁴⁹ The odds against realizing the provisions of articles 12, 13 and 17 of the CRC in Sierra Leone seem overwhelming at present. Thousands of children have had their prospects blighted or destroyed by civil war over the past eight years. Lack of opportunities for children and youth - in particular, through the absence of a functioning education system - has been one of the main factors in bringing about the conflict. Children have been both victims and perpetrators in this conflict. To provide hope for its children is the surest means of a building sustainable peace in Sierra Leone.

This challenge has many dimensions. The government of Sierra Leone has promised to ensure that all children under the age of 18 are demobilized from the Civil Defence Forces and that recruitment of children will cease, although UNICEF expressed concern in October 1998 that recruitment was continuing.²⁵⁰ This demobilization process should be completed as rapidly as possible. The announcement that no child will be prosecuted for criminal acts committed in the context of war is also an important step towards reconciliation in Sierra Leone.

²⁴⁸ Ibid, I. The Uganda Human Rights Commission was established in 1996 under the terms of the 1995 Constitution. It is independent of both government and civil society and has wide-ranging investigative, reporting and educational powers. Given these attributes, it would be a suitable organisation to monitor respect for children’s rights in Uganda. However, it lacks resources and is still working out its agenda and priorities.

²⁴⁹ Interview with Mrs Shirley Gbujuma, Minister of Social Welfare, Gender and Children’s Affairs, 24 July 1998.

²⁵⁰ Sierra Leone Web, 3October 1998 (<http://www.Sierra-leone.org/slnews.html>).

However, important as such measures are for trying to end children's involvement in the current conflict in Sierra Leone, they do not address the root causes of that involvement. Studies of the role of youth and children in the current conflict clearly demonstrate that their participation has had a significant freedom of expression dimension.²⁵¹ Their involvement has often produced a sense of empowerment and authority, however illusory it might seem to outside observers. If the roots of the conflict are to be addressed, children must feel that there are other, peaceful and more hopeful avenues through which their views can be given "due weight" by their elders, ways that *genuinely* are in their "best interests". Without this, children involved in the conflict may not be prepared to accept that they cannot expect to exercise their rights in the manner of adults.

It is striking that the first recommendation of a group of Sierra Leonean children brought together to mark the Day of the African Child in 1998 was: "The Government and elders in our communities must listen to us, observe, respect and try to understand what children say and do". The children went on to detail a wide range of other recommendations which are necessary if their rights in future are to be respected and promoted.²⁵² Sierra Leone is a country in which children have traditionally been seen but not heard. Sierra Leoneans need to initiate a wide-ranging and honest public debate about what children's right to freedom of expression should mean for all areas of society and government – for example, within families, within schools, and in judicial and administrative proceedings. Children themselves should be active participants in the debate. In short, there needs to be a new social, economic and cultural compact between adults and children in Sierra Leone.

As part of this process, the government of Sierra Leone should commit itself as a matter of priority to incorporating the CRC into domestic law, as part of a process of reviewing existing child welfare legislation such as the 1960 Children and Young Person's Act to ensure that it fully reflects the country's international obligations. In addition, a review of media laws and practice is currently under way. If this review brings them into line with international standards, children

²⁵¹ See, for example, Paul Richards, *Fighting for the Rain Forest. War Youth and Resource in Sierra Leone* (the International African Institute in association with James Currey, Oxford and Heinemann, New Hampshire: 1996); Ibrahim Abdullah, "Bush path to destruction: the origin and character of the Revolutionary United Front/Sierra Leone", *Journal of Modern African Studies*, 36, 2 (1998).

²⁵² *Day of the African Child (DAC) 1998, Sierra Leone: Final Proposals/Recommendations by us, the Children*. We wish to thank the Ministry of Social Welfare, Gender and Children's Affairs for making this available to ARTICLE 19.

will benefit in terms of their freedom of expression no less than adults.²⁵³

During a visit to Sierra Leone in July 1998, ARTICLE 19 visited a range of local and international NGOs working in the field of the rehabilitation and reintegration of former child soldiers and unaccompanied, displaced and street children. During those visits, it became evident that a key reason as to why children had become caught up in the conflict was that they felt nobody was helping them, listening to them and giving them hope. ARTICLE 19 witnessed concerted efforts to ensure that the children going through rehabilitation and reintegration processes were heard, respected and understood. This was being done through activities, training and counselling which, while giving children a voice, was also sensitive to specific cultural and community contexts.²⁵⁴ ARTICLE 19 has called upon the international community to further increase its support for this vital work and to encourage all those involved to ensure that a children's rights perspective lies at the heart of their activities.

Across Sierra Leonean society as a whole, there is an urgent need for an honest reckoning with the past. ARTICLE 19 has recommended that, at an appropriate time, Sierra Leone should establish a Truth Commission. However, we do not believe that such a Commission should seek to monopolize the truth by undermining other "truth processes" which are underway. For example, it should not require former child combatants to appear before it. For those children, community-based "truth processes" should be the main means of rehabilitation and reintegration into society. However, it might be appropriate in some circumstances for a Truth Commission to collect anonymous testimonies from children where they are willing to give them.²⁵⁵

Despite the excellent work being undertaken by many NGOs in the areas of rehabilitation and reintegration, ARTICLE 19 was concerned that there was currently a degree of unevenness in the coordination of these programmes. Not all NGOs active in the field were part of the coordinating structures which existed - most importantly, the Child Protection Committee, which is convened

²⁵³ For a fuller discussion of media issues in Sierra Leone, see A 19's September 1998 report, *Strengthening the right to freedom of expression in Sierra Leone: ARTICLE 19's recommendations for action by the government of Sierra Leone and the international community*, 5-8.

²⁵⁴ ARTICLE 19 would like to thank in particular the following NGOs involved in this work for the time which they gave its representative during his visit to Sierra Leone: UNICEF-Sierra Leone, Children Associated with the War (CAW); the Christian Brothers, Bo; Lifeline-West African Indigenous Ministries Approved School, Wellington; Kids in Distress; Action contre le faim (ACF); World Vision Uganda.

²⁵⁵ ARTICLE 19, *Strengthening freedom of expression in Sierra Leone*, 11-12.

at a national level by the Ministry of Social Welfare, Gender and Children's Affairs. This needs to be remedied. An audit was urgently required not just of the overall scale of the task but also of the activities being undertaken by each organization in this field. This would also assist in the formulation of codes of conduct and principles of "best practice" – including with regard to children's rights such as freedom of expression - which should inform the activities of each organization.²⁵⁶

More generally, ARTICLE 19 has suggested that in future some sort of statutorily independent body may be required to help protect and promote children's rights in Sierra Leone. This might be achieved through the establishment of an independent human rights commission or, if resources permitted, a separate independent Commission for Children. The independent body would be responsible for setting standards and monitoring the progress and performance of all bodies working in the field of children's rights. Mechanisms would also need to be considered through which the body might enforce standards and take action against those in contravention of them.²⁵⁷

ARTICLE 19 had a further concern regarding some of the programmes for the rehabilitation and reintegration of children – those being conducted by Christian evangelist organizations. Built into the fabric of their philosophy of rehabilitation is the Christian rebirth or conversion of the children who come into their care. A significant proportion of those children are not Christians when they enter these programmes. ARTICLE 19 is not seeking to question the quality of such programmes. They are responding to a desperate need. Nor are we suggesting that children are necessarily "forced" into Christian rebirth or conversion. We simply seek to raise the issue as one which needs debate in the context of a child's right to freedom of thought, religion and conscience under the CRC. This would be an area where the development of codes of conduct and principles of best practice would be valuable.²⁵⁸

Finally, it is vital that the public broadcaster, the Sierra Leone Broadcasting Service, be established as a statutorily independent body with a strong commitment to community access and

²⁵⁶ Ibid, 10.

²⁵⁷ Ibid.

participation. The government has declared that it is committed to doing this. In addition, the private and community broadcasting sectors should be encouraged to expand. In each of these sectors, the question of maximizing the access of children should also be specifically addressed. An important means of seeking to ensure that children are heard, respected and understood would be to develop specific programming for children – and, where possible, by children - for radio and television broadcasting.²⁵⁹

3.4. Conclusion

There are a number of important issues which arise from the three sub-Saharan African case-studies. Article 12 of the CRC may be uncomfortable for many in government and society, but Article 13 has fared much worse. It seems itself to have become a victim of censorship. To a certain extent, the reason for this is understandable. The right to freedom of expression provided for children in Article 13 is virtually identical to that given to adults in Article 19 of the ICCPR.

To cope with the disjuncture between the two, Article 13 has so far largely been refracted – even displaced - in South Africa, Uganda and Sierra Leone through the prism of Article 12, which makes it clear that the rights which children can expect to enjoy will not be identical in extent to those of adults – and, indeed, that older children should have greater independent scope in exercising their right to be listened to than young children. Article 7 of the African Convention on the Rights and Welfare of the Child, which Uganda and Sierra Leone have ratified and South Africa has signed, provides for a “weaker” and in many ways problematic definition of freedom of expression, but its explicit recognition of the importance of a child’s evolving capacity chimes more clearly with Article 12 of the CRC.

However, in placing their emphasis on Article 12, South Africa, Uganda and Sierra Leone have dodged awkward questions about child participation and empowerment by adopting an excessively narrow and paternalistic interpretation of its provisions. As we have argued earlier,

²⁵⁸ Ibid, 10-11.

²⁵⁹ Ibid, 6, 11.

Article 12 should be interpreted in an expansive, purposive way to encompass these concerns. The obligation to give the views of the child “due weight” extends to creating a conducive and appropriate environment for their active participation in society. Such an interpretation of Article 12 goes strongly with the grain of Article 13. The governments of South Africa, Uganda and Sierra Leone should review their approach to Article 12. Further, notwithstanding the problems with Article 13, there can be no justification on their part for sidelining it.

While believers in “traditional” family values may cavil, it is an inescapable fact that in South Africa, Uganda and Sierra Leone, the genie is already out of the bottle. Many children have been active participants in the context of conflicts which have not served their “best interests”. One of the reasons for this tragedy was that such children’s views were not heard and not accorded due weight. New modes and mechanisms for expression by children now require development. The governments of South Africa, Uganda and Sierra Leone and all other bodies involved in implementation of the CRC should start to address this challenge more directly. While there has been some progress in doing so in South Africa, it has so far been achieved rather by the back-door and has not been a clearly articulated objective. In Uganda and Sierra Leone, the process has even further to go. The unease described above with regard to child participation and empowerment in the context of Articles 12 and 13 also applies to a large extent to Article 17 of the CRC, where the emphasis has been excessively on protection of children from harmful information.

In both Sierra Leone and Uganda – as elsewhere in the world – the demobilization of child soldiers and their reintegration into society is the most urgent task with regard to the country’s youth. Both countries illustrate the importance of allowing the active participation of the children themselves in the process by giving full opportunity for them to express their views. This is reflected in the Cape Town Annotated Principles and Best Practice, adopted by participants in a UNICEF-organized symposium in 1997, which deal with the prevention of recruitment of child soldiers in Africa and their demobilization and reintegration into society:

22. The demobilization process should be as short as possible and take into account the human dignity of the child and the need for confidentiality.

- a.Ensure adequate time and appropriate personnel to make children feel secure and comfortable so that they are able to receive information, including about their rights, and to share concerns;
- b.Wherever possible, staff dealing with the children should be nationals;
- c.Special measures must be taken to ensure the protection of children who are in demobilization centres for extended periods of time;
- d.Children should be interviewed individually and away from their superiors and peers;
- e.It is not appropriate to raise sensitive issues in the initial interview. If they are raised subsequently, it must be done only when in the best interest of the child and by a competent person;
- f.Confidentiality must be respected;
- g.All children should be informed throughout the process of the reasons why the information is being collected and that confidentiality will be respected. Children should be further informed about what will happen to them at each step of the process;
- h.Wherever possible, communication and information should be in the mother tongue of the children; Particular attention should be paid to the special needs of girls and special responses should be developed to this end.²⁶⁰

Children's freedom of expression cannot be strengthened in isolation from that of their parents – above all, that of the mother, to whom children are usually most tightly linked, especially in their early years. In all three case-studies, it was clear that the means of encouraging public debate about the rights to freedom of expression and access to information have yet to be fully developed for adults, let alone children. The role of the media is crucial in this regard. Here too, South Africa has gone furthest. But much work remains to be done in terms of grassroots access and participation. In Uganda and Sierra Leone, which both still lack an independent public broadcaster, the task is daunting.

This survey of implementation efforts in South Africa, Uganda and Sierra Leone has demonstrated that there does not yet exist in any of these countries a clear conceptualization of what children's right to freedom of expression can and should mean. At present, there is a tendency to focus on issues of child welfare and protection, areas with which those in authority feel more comfortable. Difficult and fraught as it will be to negotiate such a conception, there is

²⁶⁰ Cape Town Annotated Principles and Best Practice on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social Reintegration of Child Soldiers in Africa, April 1997. The Principles take their cue in significant measure from the influential 1996 report of the expert of the UN Secretary-General, Ms. Graca Machel, on the Impact of Armed Conflict on Children (UN Doc. A/51/306, New

no escaping the need to do so if these countries are eventually to fully meet their obligations under the CRC. The longer it is avoided or fudged, the more fragile the foundations for a better future for South Africa, Uganda and Sierra Leone will be.

4. Conclusion and Recommendations

The Convention on the Rights of the Child has an invaluable role to play in protecting children's right to freedom of expression, both for its broad definition of this right and for its nearly universal ratification by states. However, these very same factors would appear to have contributed to some of the shortcomings in the jurisprudence of the Committee on the Rights of the Child. The overall breadth of the Convention, which covers a vast range of economic, social, civil and political rights, and the overwhelming number of ratifications by States Parties in such a short period have meant that the Committee on the Rights of the Child is responsible for processing an exceptionally large volume of material. Cynthia Price Cohen and Susan Kilbourne note the problem with this:

[A]t the present time, establishing the jurisprudence of the Committee on the Rights of the Child is largely a matter of guess work. It is extremely difficult ... to be able to state with any certainty exactly how the Committee interprets each article of the Convention. It is probably difficult even for members of the Committee themselves.²⁶¹

This observation is perhaps nowhere more evident than in the Concluding Observations of the Committee on Articles 12, 13, 15 and 17. These articles require careful analysis, because of the importance of the rights they guarantee, the significance of their specific application to children, the novel approach they engender and the complex issues they raise. The issues of due weight, state obligations regarding parents, the manner in which children may be assured of a voice in matters affecting them, the differences between the freedom of expression rights of children and adults and the need to ensure children's right to know – all are examples of this novelty and complexity. Both the Committee on the Rights of the Child and States Parties themselves have expressed uncertainty as to how to apply these provisions. The need for the Committee to play a stronger role in clearly interpreting these provisions is particularly crucial since the texts themselves are often unclear. As the analysis in Chapter 1 makes clear, these articles were the

261. Cynthia Price Cohen and Susan Kilbourne, *Jurisprudence of the Committee on the Rights of the Child: A Guide for Research and Analysis* (New York: ChildRights International Research Institute, 1997), 13.

result of intense negotiations and at points the need to compromise to find an acceptable solution has resulted in ambiguity.

It would, however, be unrealistic to assume that the Committee on the Rights of the Child can, on its own, ensure respect for children's rights, particularly as in many cases these issues raise potentially controversial policy issues. Their work needs to be supplemented by the work of UNICEF, NGOs specialising in children's rights and dedicated national children's rights institutions. States can play a particular role as regards the latter. National human rights institutions, provided they meet the standards of independence and impartiality set out in the UN's 1991 Paris Principles, can be a vital and effective way of developing the enforcement of international human rights standards at a national level. Such bodies can promote children's rights in a variety of ways, for example, by critiquing existing or proposed laws, by informing and educating the public, including children, on children's rights and by providing a means for articulating children's views and grievances. These approaches will often be more effective in promoting children's rights, including the right to freedom of expression, than the judicial system. Ideally, a specialized body – an Ombudsman or Children's Commission – should deal with children's issues and such bodies have been established in a number of countries.²⁶² However, general human rights commissions may also include departments with specific responsibility for children's issues as in South Africa.²⁶³

The jurisprudence of the Committee on the Rights of the Child has made an important contribution to our understanding of children's rights. There is, however, room for improvement in at least two areas. First, in a number of cases, the Committee has been reluctant to criticise measures which appear to be clearly in breach of CRC obligations. Examples include measures banning children from organizing meetings or acting as editors, restrictions on children's right to engage in political activities, limitations on freedom of expression relating to schools and too easy acceptance of restrictions on access to information as being in the best interests of the child.

Second, and far more important, the Committee has failed to clarify a number of areas of

²⁶² These include Austria, Costa Rica, Denmark, Germany, Guatemala, Iceland, Israel, New Zealand, Norway, Peru and Sweden.

²⁶³ This is also the case in Hungary, Portugal, Spain and the Ukraine. See generally, Peter Newell, "The Place of Child Rights in a Human Rights

ambiguity and to apply an expansive, purposive interpretation in such cases to ensure full realisation in practice of children's right to freedom of expression. Perhaps most serious in this regard is the failure of the Committee to clearly establish that Article 12 places a positive obligation on States to establish participatory structures and fora through which children may express their views and further to require decision- and policy-makers to take these views into account. This obligation extends to "all matters affecting the child" and implies that public authorities should never take decisions in relation to schools, the medical system, children's welfare issues and so on without ensuring that children's views are represented in the decision-making process. The failure of the Committee to ensure respect for the right to respect for one's views can be seen quite clearly in the discussion relating to schools in Chapter 2 and also in the case studies in Chapter 3. This is perhaps the most radical innovation of the CRC in relation to freedom of expression and it is incumbent on the Committee to ensure that it is understood and respected in practice.

The Committee has also failed to clarify a number of other key issues. It has not, for example, made it clear that the same three-part test as is required under Article 19 of the ICCPR should apply to Article 13 of the CRC. This is necessary to prevent arbitrary restrictions on children's right to freedom of expression. In this regard, the Committee should also elaborate on any differences between the rights of adults and of children to freedom of expression. Another issue which the committee has failed to clarify is the extent to which the CRC protects children's rights within the family and the manner in which such rights should be implemented in practice. We have suggested that while States should legislate against extreme restrictions by parents on children's freedom of expression, the primary obligation in this regard should be to take positive measures to promote children's rights within the family.

Article 17 is an important development inasmuch as it is the first time a UN convention has set out a number of specific obligations on States to respect and promote the right to freedom of information. Given the importance of this development, the reaction of both States and the Committee to this article has been somewhat disappointing. The bulk of the reporting and observations under the Article 17 have been in relation to restrictions on the free flow of

information, purportedly to protect children from harmful information. Article 17 only provides that States should “Encourage the development of appropriate guidelines” and does not itself mandate legal prohibitions or classification systems. Whatever the merits of such measures, the main purport of Article 17 is clearly to promote positive measure to ensure children’s right to know and to encourage the availability of a wide variety of sources of information to children. Far more attention needs to be devoted to this important goal of Article 17.

ARTICLE 19, the International Centre Against Censorship, calls on the Committee on the Rights of the Child to consider the following recommendations.²⁶⁴

It should:

- Issue *General Comments* on its interpretation of specific articles in the Convention on the Rights of the Child, along the lines of those produced by the Human Rights Committee for the ICCPR. These Comments should reflect an expansive, purposive interpretation of these articles which ensures full respect for children’s right to freedom of expression.
- Subject any restrictions on children’s freedom of expression to rigorous scrutiny under the three-part test for restrictions established under Article 19 of the ICCPR and make it clear whether or not such restrictions are legitimate. Any differences in the application of this test to children should be explained clearly.
- Make it clear that Article 12 requires States to take positive action to ensure that children’s views are represented in all decisions taken by public authorities which affect children. This implies both that participatory structures be established and that decision-makers be required to take views into account.
- Elaborate on the extent to which the CRC applies to freedom of expression within the family and on what measures are required to give effect to this aspect of the right.
- Address Article 17 from the perspective of guaranteeing children’s right to access to information and limit recommendations regarding restrictions to what is mandated under Article 17(e), namely to encouraging guidelines.
- Continue to comment on any reservations States have made which are incompatible with the object and purpose of the CRC.
- Recommend that States establish national human rights bodies with specific responsibilities for children’s rights.
- Facilitate an exchange of information on these issues pursuant to Article 45(a) of the CRC which provides that the Committee may invite such bodies as it considers appropriate to provide expert advice on the implementation of the Convention.

²⁶⁴ While these recommendations are directed to the Committee on the Rights of the Child, States Parties to the CRC and NGOs involved in children’s rights issues also have a vital part to play in addressing the points raised by them. Chapter 3, which takes South Africa, Uganda and Sierra Leone as case studies, also includes some specific recommendations for the consideration of government and civil society in those countries. These are not repeated here.