

Based Solely on their Date of Birth? Rethinking Age Discrimination against Children under the Convention on the Rights of the Child

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INTRODUCTION

Almost a decade ago, in commemoration of the twenty-fifth anniversary of the Convention on the Rights of the Child (“CRC” or “the Convention”),¹ the United Nations Children’s Fund (“UNICEF”) posed a question: “does a child born today have better prospects in life than one who was born in 1989?”² The answer was, “yes, but not every child.”³ Discrimination is a perennial issue concerning the well-being of children. Discrimination against children happens in all corners of the world and should be addressed through the full implementation of the Convention.

While the view among adults that children are “mini-human beings with mini-human rights”—a sentiment that suggests that children are either not right holders, or have substandard rights—has subsided, it still persists in one form or another. For example, only sixty-five countries have banned corporal punishment in all settings,⁴ and children continue to be

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1. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

2. United Nations Children’s Fund [hereinafter UNICEF], *25 Years of the Convention on the Rights of the Child: Is the World a Better Place?*, at 7 (Nov. 5, 2014), https://www.unicef.org/media/85681/file/CRC_at_25_Anniversary_Publication_compilation_5Nov2014.pdf. [<https://perma.cc/DEL7-4FMA>].

3. *Id.*

4. *Progress: End Violence Against Children*, END CORPORAL PUNISHMENT (last accessed Apr. 16, 2023), <https://endcorporalpunishment.org/countdown/> [<https://perma.cc/VF68-ZQZZ>].

over-represented in poverty data.⁵ Additionally, status offenses, such as truancy and displaying “unruly behavior,” remain in the law books of a number of countries,⁶ and many children are excluded from accessing essential services for the mere reason of their childhood.⁷

The interpretation of the Convention is not static, and the Committee on the Rights of the Child (“CRC Committee” or “the Committee”), the body of eighteen independent experts that monitors compliance with the Convention, has been at the forefront of efforts to understand its rights and obligations.⁸ In this regard, the Committee has identified the principle of non-discrimination as a general principle of fundamental importance for the implementation of the entire Convention.⁹ Non-discrimination is one of the so-called four cardinal principles (also known as “the four general principles”) that not only declare the object and purpose but also capture the spirit of the treaty as a whole.¹⁰ As such, these have been called “the soul of the treaty.”¹¹ The Committee has indicated that the principle of non-discrimination is applicable irrespective of budgetary resources and to each child within a state party’s jurisdiction.¹²

5. UNICEF, *Child Poverty* (last accessed Apr. 16, 2023), <https://www.unicef.org/social-policy/child-poverty> [https://perma.cc/C3W4-XDLK] (underscoring that “[c]hildren are more likely to live in poverty than adults” and “are also more vulnerable to its effects”); see also Kate O’Donnell et al., *Ending Child Poverty: A Policy Agenda*, END CHILD POVERTY GLOBAL COALITION (Oct. 11, 2022), <http://www.endchildhoodpoverty.org/publications-feed/2022/10/11/briefing-paper> [https://perma.cc/Z39L-GQPX].

6. Committee on the Rights of the Child [hereinafter CRC Committee], General Comment No. 24: On Children’s Rights in the Child Justice System, U.N. Doc. CRC/C/GC/24, ¶ 12 (Sept. 18, 2019).

7. For example, in many countries in the world adolescents struggle to get access to sexual and reproductive health services. Aoife Daly, Rebecca T. Stern & Pernilla Leviner, *UN Convention on the Rights of the Child, Article 2 and Discrimination on the Basis of Childhood*, 91 NORDIC J. INT’L L. 419, 420–21 (2022).

8. The Committee considers states parties’ reports, issues concluding observations, holds days of general discussion, and publishes its evolving interpretation of the Convention’s provisions in the form of general comments on thematic issues. CRC, *supra* note 1, Arts. 42–45; see also United Nations Office of the High Commissioner of Human Rights [hereinafter OHCHR], *Committee on the Rights of the Child* (last accessed Apr. 16, 2023), <https://www.ohchr.org/en/treaty-bodies/crc> [https://perma.cc/84V3-TV5R].

9. Rachel Hodgkin & Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF, at 19 (2007), <https://digitallibrary.un.org/record/620060?ln=EN> [https://perma.cc/P8RD-YCDH]; see also CRC Committee, General Comment No. 3: HIV/AIDS and the Rights of the Child, U.N. Doc. CRC/GC/2003/3, ¶ 5 (Mar. 17, 2003); CRC Committee, General Comment No. 1: The Aims of Education, U.N. Doc. CRC/GC/2001/1, ¶ 6 (Apr. 17, 2001); CRC Committee, General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/5, ¶¶ 4, 12 (Nov. 27, 2003). For criticism of the recognition of the principle of non-discrimination as one of the four cardinal principles, see Bruce Abramson, *A Commentary on the United Nations Convention on the Rights of the Child, Article 2: The Right of Non-Discrimination*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 1, 64 (André Alen et al. eds., 2008).

10. Rebecca Rios-Kohn, *The Convention on the Rights of the Child: Progress and Challenges*, 5 GEO. J. ON FIGHTING POVERTY 139, 143–45 (1998).

11. *Id.* at 143.

12. CRC, *supra* note 1, Art. 2.

Often, the focus of the CRC Committee's jurisprudence on non-discrimination centers on what it describes as children in "marginalized or vulnerable situations,"¹³ or those in "disadvantaged situations,"¹⁴ including girls,¹⁵ children with disabilities,¹⁶ "illegitimate" children and children born outside of wedlock,¹⁷ "children victims of lascivious conduct,"¹⁸ children belonging to indigenous¹⁹ or minority groups,²⁰ children subjected to caste-based discrimination,²¹ children living in rural areas,²² refugee and internally displaced children,²³ children with undetermined citizenship,²⁴ children in street situations,²⁵ and lesbian, gay, bisexual, transgender,²⁶ and intersex children.²⁷ This is to be expected, since the preamble of the CRC recognizes that "in all countries in the world, there are children living in exceptionally difficult conditions, and . . . such children need special consideration[.]"²⁸ Where the Committee does address age-based discrimination, the focus is overwhelmingly on discrimination *among* children (for example between boys and girls, child citizens and foreigners, or children

13. See, e.g., CRC Committee, Concluding Observations, Sri Lanka, U.N. Doc. CRC/C/LKA/CO/5-6, ¶ 16(b) (Mar. 2, 2018).

14. See, e.g., CRC Committee, Concluding Observations, Switzerland, U.N. Doc. CRC/C/CHE/CO/5-6, ¶ 17 (Oct. 22, 2021) (welcoming "the efforts to combat discrimination against children in disadvantaged situations and to expand the grounds on which discrimination is prohibited under article 261 bis of the Criminal Code to include sexual orientation"); CRC Committee, Concluding Observations, Tunisia, U.N. Doc. CRC/C/TUN/CO/4-6, ¶ 14(e) (Sept. 2, 2021).

15. See, e.g., CRC Committee, Concluding Observations, Bahrain, U.N. Doc. CRC/C/BHR/CO/4-6, ¶¶ 17(c), 33(b) (Feb. 27, 2019); CRC Committee, Concluding Observations, Poland, U.N. Doc. CRC/C/POL/CO/5-6, ¶¶ 18(b), 19(a)–(b) (Dec. 6, 2021); CRC Committee, Concluding Observations, Kiribati, U.N. Doc. CRC/C/KIR/CO/2-4, ¶¶ 19(a), 20(a) (Sept. 12, 2022).

16. Concluding Observations, Poland, *supra* note 15, ¶ 19(a).

17. See, e.g., CRC Committee, Concluding Observations, Oman, U.N. Doc. CRC/C/OMN/CO/3-4, ¶ 25 (Mar. 14, 2016); CRC Committee, Concluding Observations, Iraq, U.N. Doc. CRC/C/IRQ/CO/2-4, ¶ 19 (Mar. 3, 2015); CRC Committee, Concluding Observations, Japan, U.N. Doc. CRC/C/JPN/CO/4-5, ¶ 17 (Mar. 5, 2019); Hodgkin & Newell, *supra* note 9, at 24.

18. See, e.g., CRC Committee, Concluding Observations, Jordan, U.N. Doc. CRC/C/JOR/CO/4-5, ¶ 16 (July 8, 2014).

19. Hodgkin & Newell, *supra* note 9, at 25.

20. CRC Committee, Concluding Observations, Russia, U.N. Doc. CRC/C/RUS/CO/4-5, ¶ 22 (Feb. 25, 2014); CRC Committee, Concluding Observations, Croatia, U.N. Doc. CRC/C/HRV/CO/5-6, ¶ 15(a) (June 22, 2022).

21. CRC Committee, Concluding Observations, Nepal, U.N. Doc. CRC/C/15/Add.261, ¶ 67 (Sept. 21, 2005).

22. CRC Committee, Concluding Observations, Lebanon, U.N. Doc. CRC/C/LBN/CO/3, ¶ 27 (June 8, 2006).

23. See, e.g., Concluding Observations, Bahrain, *supra* note 15, ¶ 17(c); Concluding Observations, Croatia, *supra* note 20, ¶ 15(a).

24. CRC Committee, Concluding Observations, Estonia, U.N. Doc. CRC/C/EST/CO/2-4, ¶ 25(a) (Mar. 8, 2017).

25. CRC Committee, General Comment No. 21 on Children in Street Situations, U.N. Doc. CRC/C/GC/21, ¶ 25–27 (June 21, 2017).

26. CRC Committee, General Comment No. 20 on The Implementation of the Rights of the Child During Adolescence, U.N. Doc. CRC/C/GC/20, ¶¶ 33–34 (Dec. 6, 2016); Concluding Observations, Croatia, *supra* note 20, ¶ 15(b); CRC Committee, Concluding Observations, Poland, *supra* note 15, ¶¶ 18(b), 19(a)–(b).

27. CRC Committee, Concluding Observations, Poland, *supra* note 15, ¶¶ 18(b), 19(a)–(b).

28. CRC, *supra* note 1, Preamble.

with disabilities and children without disabilities) and rarely on discrimination *against* children (between children and adults).

Neither the context that motivated the adoption of the CRC, nor the discussion at the time of the negotiation of Article 2 and the subsequently agreed text,²⁹ make it easy to develop jurisprudence on age-based discrimination against children. During the negotiation of Article 2, for example, the prevailing view was that children are “physically and mentally immature,”³⁰ and that legislative measures states adopted in discriminating against children on the basis of their age were therefore warranted. For example, the Dominican Republic, taking the recognition of children’s incapacity explicitly provided in the Preamble as its justification, proposed the deletion of the words “political or other opinion,” seeming to suggest that children are categorically incapable of having political opinions.³¹

As Manfred Liebel, Emeritus Professor of Sociology at Technical University Berlin, asserted in 2014, research around age-based discrimination against children is not well developed, and most initiatives and organizations that address adultism and age-based discrimination are based in the rich world, comprising the minority of countries.³² For example, a framework—such as the Children’s Liberation Movement’s advocacy for complete equality between children and adults³³—is far from useful for the CRC Committee’s development of its jurisprudence on the issue.³⁴ If such a position were to be taken by the Committee, a long list of protection measures which children enjoy and adults do not—for example, the minimum age of criminal responsibility and the prohibition of the death penalty for offenses committed while under the age of eighteen—would not stand up to legal

29. *Id.* Art. 2(1) (“1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”).

30. OHCHR, *Legislative History of the Convention on the Rights of the Child, Volume 1*, U.N. Doc. HR/PUB/07/1, at 314 (2007).

31. The delegation said that “[t]he Dominican Republic, aware not only that, for the reasons stated in the introduction, the child is physically and mentally immature, but also that, for the same biological and mental reasons, legislators in almost every country have created levels of dependency and responsibility such as parental authority and guardianship of children and adolescents, wishes to suggest that in article 1, the words ‘political or other opinion’ should be deleted, since although the child’s incapacity is recognized in the preamble, they could be interpreted as meaning that his opinions would still have some relevance.” *Id.*

32. See Manfred Liebel, *Adultism and Age-Based Discrimination against Children*, in CHILDREN AND NON-DISCRIMINATION: INTERDISCIPLINARY TEXTBOOK 136, 137–38 (Dagmur Kutsar & Hanne Warming eds., 2014).

33. *Id.*; see also *id.* n.32 (providing in part that the notion of full equality between children and adults “can be located in the tradition of the so-called ‘Children’s Liberation Movement’ active in the 1970s, principally in the United States of America”).

34. This is the case because equating children with adults could lead to the absurd conclusion that children should be treated the same—and issues such as the application of the death penalty and full criminal responsibility would apply to children, too.

scrutiny.³⁵ As a result, there is a need for progress which the CRC Committee should make in its quest to characterize discrimination against children as age-based discrimination. Such progress needs to strike a balance between, on the one hand, sustaining the differential treatment to which children are entitled for the sake of their protection and, on the other, underscoring the egregiousness of the age-based discrimination to which children are subjected as a group.

While there is scant literature on the topic,³⁶ this Article is not the first effort to interrogate the CRC Committee's jurisprudence on age-based discrimination against children. For example, scholars Aoife Daly, Rebecca Stern, and Pernilla Leviner recently did precisely this in a qualitative and quantitative analysis of the Committee's concluding observations.³⁷ The authors argued the case for why more recognition should be accorded to "children as a group belong[ing] in the framework of equality and non-discrimination."³⁸ To address some of the jurisprudential gap, they recommend the adoption of a general comment on non-discrimination.³⁹ One of their main conclusions is that "even though child-specific discriminatory practices such as corporal punishment are criticized by the Committee, they are seldom labelled 'discrimination' as such."⁴⁰ The authors also affirm earlier findings by other studies that the potential of Article 2 to address the detrimental treatment of millions of children as compared to adults needs to be tapped more explicitly and systematically.⁴¹

This Article builds on pre-existing literature of this kind, and offers reflections on how the CRC Committee does and should address age-based discrimination against children. This Article prioritizes four topics to which the Committee should pay close attention: (1) guidance to states parties on domestic law, (2) addressing reservations, (3) using the Optional Protocol on a Communications Procedure ("OPIC"), and (4) clarifying the appropriate use of the best-interests-of-the-child principle to address age-based discrimination against children.

35. See General Comment No. 24, *supra* note 6, ¶ 2 ("Children differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualized approach.")

36. See generally Claire Breen, *The Ageing of Article 2(1): The Child's Right To Be Free from Age-Based Discrimination*, in CHILD RIGHTS AND INTERNATIONAL DISCRIMINATION LAW: IMPLEMENTING ARTICLE 2 OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 55 (Marit Skivenes & Karl H. Søvig eds., 2019); Claire Breen, AGE DISCRIMINATION AND CHILDREN'S RIGHTS (2006); Elaine E. Sutherland, *Article 2 of the United Nations Convention on the Rights of the Child: Non-Discrimination and Children's Right*, in CHILD RIGHTS AND INTERNATIONAL DISCRIMINATION LAW 23 (M. Skivenes & Karl H. Søvig eds., 2019); David Archard, *Respecting Age: Discrimination against the Young and the Old*, in CHILD RIGHTS AND INTERNATIONAL DISCRIMINATION LAW 42, 44–45, 52 (M. Skivenes & Karl H. Søvig eds., 2019); Abramson, *supra* note 9.

37. Daly, Stern & Leviner, *supra* note 7, at 419–20.

38. *Id.* at 421.

39. *Id.* at 452.

40. *Id.* at 419.

41. *Id.* at 451.

I. GUIDANCE ON DOMESTIC LAW ON AGE-BASED DISCRIMINATION
AGAINST CHILDREN

The general obligations which states parties to the CRC accept on ratification are contained in Article 4, namely, “[to] undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.”⁴² It is true that since discrimination on the basis of age is not explicitly prohibited in the Convention, the majority of states do not see such an obligation emanating from this treaty. Even if “age” were explicitly mentioned among the prohibited grounds in Article 2, it is unlikely that the majority of states would interpret it to mean a prohibition on age based-discrimination against children. This argument once again finds its strong basis if one looks at the *travaux préparatoires* of the Convention, which confirm that the discussion on Article 2 on non-discrimination was underscored by children’s perceived incapacity, immaturity, and the need to protect in particular children in vulnerable situations such as girls, children born outside of wedlock, and non-citizens.⁴³

Even in instances where the Committee asks states parties to expand the prohibited grounds of discrimination in their domestic laws, such grounds are usually focused on race,⁴⁴ disability,⁴⁵ religion,⁴⁶ sex,⁴⁷ sexual orientation,⁴⁸ social origin or socioeconomic status,⁴⁹ residence,⁵⁰ and the like. It is difficult to find an example where the CRC Committee has recommended in a concluding observation the inclusion of age in expanding the prohibited grounds for discrimination in domestic legislation.⁵¹ On one occasion, the Committee, in its Joint General Comment on harmful practices, recognized that such practices are “grounded in discrimination based on sex, gender and age.”⁵² On other occasions, for example in General Comment

42. CRC, *supra* note 1, Art. 4.

43. OHCHR, *Legislative History of the Convention on the Rights of the Child*, *supra* note 30, at 314, 319–20. With respect to non-citizen children, Australia and Norway had proposed to replace the existing text of Article 5 with, “[a] child resident in the territory of a State Party and who is not a national of that State Party shall enjoy in that territory all the rights provided for in this Convention” and “irrespective of the legality of their parents’ stay[.]” respectively. *Id.* at 320.

44. *See, e.g.*, CRC Committee, Concluding Observations, Brazil, U.N. Doc. CRC/C/BRA/CO/2-4, ¶¶ 23, 24(a) (Oct. 30, 2015).

45. *See, e.g.*, Concluding Observations, Tunisia, *supra* note 14, ¶ 15(a).

46. *Id.*

47. *See, e.g.*, Concluding Observations, Switzerland, *supra* note 14, ¶¶ 17, 18(a); Concluding Observations, Tunisia, *supra* note 14, ¶ 15(a).

48. *See, e.g.*, Concluding Observations, Switzerland, *supra* note 14, ¶¶ 17, 18(a).

49. *See, e.g., id.*; Concluding Observations, Tunisia, *supra* note 14, ¶ 15(a).

50. *See, e.g.*, Concluding Observations, Switzerland, *supra* note 14 ¶¶ 17, 18(a).

51. In preparation for this Article, the Concluding Observations of the CRC Committee for the last ten years were reviewed using three key words: “age,” “discrimination,” and “childhood.”

52. CEDAW Committee & CRC Committee, Joint general recommendation No. 31/general comment No. 18 (2019) on harmful practices U.N. Doc. CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1, ¶ 7 (May 8, 2019).

No. 20, it takes the less direct approach of acknowledging that “[a]dolescence itself can be a source of discrimination.”⁵³

Moreover, the Committee’s jurisprudence shows its willingness to interpret “other status” in an expansive manner so as to include a range of common but also less common grounds.⁵⁴ In respect of the latter, for example, it has expressed concern about “[a]chievement-based discrimination”⁵⁵ in schools and the implementation of a three-child policy as a family planning tool that excludes children after the third child from social service benefits.⁵⁶ In addition, it has recommended the inclusion of “the street situation of a child or his or her parents and other family members” as a prohibited ground.⁵⁷ However, in instances where “other status” has been interpreted to include age, this has been mainly for the purpose of addressing discrimination among children.⁵⁸ This could partly explain why, unlike the many other areas where the Committee’s guidance has grown in sophistication,⁵⁹ it can be argued that its work on age-based discrimination against children may be described as “stagnant.”⁶⁰

By contrast, there is evidence from the jurisprudence of the CRC Committee that the presence of domestic legislation that prohibits age-based discrimination against children can serve as a good basis both for engagement with and improvement of a state party’s protection of children against age-based discrimination.⁶¹ For example, with the United Kingdom having received recommendations on this topic in the past, its recent state party report underscores that it is “committed to eradicating age discrimination and addressing negative public attitudes towards children, legislating where necessary,”⁶² and provides further evidence of its progress on the topic.⁶³

Similarly, regarding New Zealand, the Committee noted that “the Bill of Rights Act 1990 and the Human Rights Act 1993 prohibit discrimina-

53. General Comment No. 20, *supra* note 26, ¶ 21.

54. Some of these include, “children born a twin,” “children born on unlucky day,” and “children born in the breech position.” Hodgkin & Newell, *supra* note 9, at 25.

55. CRC Committee, Concluding Observations, Republic of Korea, U.N. Doc. CRC/C/KOR/CO/5–6, ¶ 16(b) (Oct. 24, 2019).

56. CRC Committee, Concluding Observations, the Former Yugoslav Republic of Macedonia, U.N. Doc. CRC/C/15/Add.118, ¶ 17 (Feb. 23, 2000).

57. General Comment No. 20, *supra* note 26, ¶ 21.

58. *See, e.g.*, CRC Committee, Concluding Observations, Syria, U.N. Doc. CRC/C/SYR/CO/5, ¶ 17(a) (Mar. 6, 2019) (recommending a different age of custody for girls and boys).

59. *See generally*, CRC Committee, General Comment No. 25 on children’s rights in relation to the digital environment, U.N. Doc. CRC/C/GC/25 (Mar. 2, 2021).

60. This is the case because apart from the few countries that have addressed this issue, such as the U.K., Austria, New Zealand, and Sweden, there is no further jurisprudence from the Committee on the topic. For an example of jurisprudence on the topic, see CRC Committee, Concluding Observations, Sweden, U.N. Doc. CRC/C/SWE/CO/6–7, ¶¶ 16(a), 17(a) (Feb. 6, 2023).

61. CRC Committee, Combined Sixth and Seventh Periodic Review, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CRC/C/GBR/6–7, ¶ 83 (Nov. 11, 2022).

62. *Id.*

63. *Id.* ¶¶ 83–87.

tion based on age from sixteen years old only,”⁶⁴ and recommended that “the State party take measures to ensure that children (below sixteen years) who are excluded from the protection of the Bill of Rights Act 1990 and the Human Rights Act 1993 are not unjustly discriminated against on the basis of age.”⁶⁵ In the case of Bolivia, it was recommended that the state investigate “cases of discrimination against children” and “further address discrimination cases amongst children.”⁶⁶ The use of the terms “against children” suggests age-based discrimination against children on the basis of age as differentiated from the terms “amongst children” in the same sentence.⁶⁷ In regard to Sweden, the Committee raised concerns about the “absence of data on discrimination against children disaggregated by age, including for the purpose of identifying and analysing discrimination based on age as provided under the Act.”⁶⁸ It proffered an accompanying recommendation that the state party “[c]ollect data on discrimination against children disaggregated by age, including for the purpose of identifying and analysing discrimination based on age as provided under the Act.”⁶⁹

The presence of legislation at the domestic sphere that explicitly prohibits discrimination against children on the basis of age is rare. It is even more uncommon for such legislation, where it exists, to cover all children: by definition persons under the age of eighteen. While this reality limits the opportunity for the CRC Committee to develop its jurisprudence on the issue, the few examples proffered above highlight that where domestic law provides some form of an entry point, the Committee is increasingly willing to engage on the topic.

II. RESERVATIONS

One factor that limits the capacity of the CRC Committee to make recommendations to improve legislative, administrative, and other measures in respect of age based-discrimination against children relates to reservations.⁷⁰ Despite the commendably large number of ratifications that the CRC enjoys, its implementation is affected by a variety of reservations, some of which go against the object and purpose of the Convention.⁷¹ Some

64. CRC Committee, Concluding Observations, New Zealand, U.N. Doc. CRC/C/NZL/CO/6, ¶ 15 (Feb. 28, 2023).

65. *Id.* ¶ 16.

66. CRC Committee, Concluding Observations, Bolivia, U.N. Doc. CRC/C/BOL/CO/5-6, ¶ 15(b) (Mar. 6, 2023).

67. *Id.*

68. Concluding Observations, Sweden, *supra* note 60, ¶ 16(a) (Feb. 6, 2023).

69. *Id.* ¶ 17(a).

70. For example, the impact of the large number of reservations on the right to freedom religion, codified in Article 14, means that children would be deprived of the opportunity to enjoy such a right as compared to adults. See Hodgkin & Newell, *supra* note 9, at 188–89.

71. William Schabas, *Reservations to the Convention on the Rights of the Child*, 18 HUM. RTS. Q. 471, 474 (1996).

of them are expressed in the form of general declarations or restrictive interpretations.⁷² To date, more than a quarter of (about fifty-two) states parties maintain reservations.⁷³ The majority of specific reservations target the civil and political rights of children (mostly in Articles 13 through 17, and in particular reservations to Article 14 on the right to freedom of religion)⁷⁴ as well as Article 37(c), which concerns the separation of children from adults at the time of deprivation of liberty.⁷⁵

Article 2 of the Convention has few reservations.⁷⁶ Most of these, such as the reservations of the Bahamas and Cook Islands, indicate that, having regard to their constitutions and other legislation, they will not apply the Article as it pertains to the conferment of nationality upon a child.⁷⁷ Belgium too has entered its reservation that the prohibition of discrimination on the basis of “national origin” does not “necessarily imply the obligation for States automatically to guarantee foreigners the same rights as their nationals.”⁷⁸ Notably, none of these reservations relate to age-based discrimination against children or the relatively open-ended scope of “other status.”⁷⁹

However, some of the reservations to the Convention have the effect of instituting or facilitating age-based discrimination against children. For example, the notion of respecting “parental authority” is central to a number of reservations in regard to Articles 12 through 16 by states parties such as Poland, Kiribati, and Singapore.⁸⁰ In fact, Singapore’s extreme view that Articles 19 and 37 do not ban the judicious application of corporal punishment in the best interests of the child is an example of a position that discriminates against children based on their age.⁸¹ The Holy See’s reservations, intended in part to uphold the “inalienable rights of parents,” also have the potential of condoning age-based discrimination against children.⁸² In this respect, references to “customs and traditions regarding the place of the child within and outside the family”⁸³ in these countries seem

72. See, e.g., Convention on the Rights of the Child, UNITED NATIONS TREATY COLLECTION (last accessed July 17, 2023), https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_En#EndDec [<https://perma.cc/XA3J-7E9A>] [hereinafter CRC Parties and Reservations]. Pakistan’s reservation provided that the “provisions of the Convention shall be interpreted in the light of the principles of Islamic law and values.” Fortunately, this reservation was withdrawn in July 1997.

73. CRC Parties and Reservations, *supra* note 72.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* Reservations of the Bahamas and the Cook Islands.

78. *Id.* Reservations of Belgium.

79. *Id.*

80. *Id.* Reservations of Poland, Kiribati, and Singapore.

81. *Id.* Reservations of Singapore.

82. *Id.* Reservations of the Holy See. Especially with respect to freedom of expression and education, discussed in Articles 13 and 28, religion discussed in Article 14, association with others discussed in Article 15, and privacy discussed in Article 16. CRC, *supra* note 1, Arts. 13, 14, 15, 16, 28.

83. *Id.*

to suggest the potential acceptability of treatment that discriminates against children, including on the basis of age.⁸⁴

The general approach of the Committee, in which states parties are asked to “consider withdrawing” reservations and, in exceptional circumstances, “to withdraw”⁸⁵ them, might be too limiting. There is a need to study the individual reservations (as well as declarations) entered into the Convention and assess their impact. Such an assessment should also seek to distinguish between reservations that appear permissible under the Convention and those that go against its object and purpose.⁸⁶ In this regard, the notions of “parental authority,” the “inalienable rights of parents,” and “customs and traditions regarding the place of the child within and outside the family” should be examined from the viewpoint of their implications for age-based discrimination against children. The same can be said of the declarations made by a long list of states parties that have expressed general reservations in the instances where the provisions of the Convention may be contrary to their domestic law⁸⁷ or Islamic *Shari’a*.⁸⁸ Without deliberate, systemic assessment of these reservations, the CRC Committee’s efforts to address age-based discrimination against children are likely to face significant hurdles.

III. OPTIONAL PROTOCOL ON A COMMUNICATIONS PROCEDURE (“OPIC”)

During the drafting of the CRC, the possibility of affording children an opportunity to seek international remedy through a complaints mechanism was broached⁸⁹ but deferred.⁹⁰ Three decades later, the Human Rights Council affirmed,⁹¹ and the General Assembly adopted, the OPIC.⁹² The OPIC currently enjoys the ratification of fifty states parties.⁹³

84. The majority of Poland’s reservations, for example, relate to the civil and political rights of children such as the right to freedom of expression, religion, and assembly. *Id.* Reservations of Poland.

85. If the withdrawal of the reservation appears to have been recommended multiple times before, and the state party does not take any concrete measures.

86. Article 51(2) of the CRC provides that “[a] reservation incompatible with the object and purpose of the present Convention shall not be permitted.” CRC, *supra* note 1, Art. 51(2).

87. *See, e.g.*, CRC Parties and Reservations, *supra* note 72, Reservations of Brunei Darussalam (invoking its Constitution).

88. *Id.* Reservations of Algeria, Bangladesh, Iran, Iraq, Jordan, Maldives, Malaysia, Mali, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Somalia, and the United Arab Emirates.

89. During the negotiations of the CRC, the non-governmental organization *ad hoc* group reportedly insisted on the importance of a positive atmosphere for the implementation of the CRC, one that could be undermined if a complaints procedure were to be established. *See* Yanghee Lee, *Communications procedure under the Convention on the Rights of the Child: 3rd Optional Protocol*, 18 INT’L J. CHILD. RTS. 567, 567 (2010).

90. *See id.* at 581; Patrick Geary, *CRC Complaints Mechanism Toolkit*, CHILD RTS. INT’L NETWORK (2013), <https://home.crin.org/crc-complaints-mechanism-toolkit> [<https://perma.cc/Y8RQ-DW8A>].

91. Hum. Rts. Council Res. 17/1, U.N. Doc. A/HRC/RES/17/1, Preamble, ¶ 3 (July 6, 2011).

92. G.A. Res. 66/138, Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (Dec. 19, 2011).

93. CRC Parties and Reservations, *supra* note 72.

The nature of the cases that could come under the OPIC is broad. After all, the CRC covers an extensive list of civil and political as well as economic, social and cultural rights.⁹⁴ The Committee's jurisprudence in the form of concluding observations spans more than thirty years, in addition to which there are twenty-six general comments.⁹⁵ It was to be expected that cases under the OPIC would be diverse and that some would pose highly complex questions, taking the Committee into less chartered, or even entirely uncharted, territory. More importantly, the OPIC process was to offer an opportunity to further clarify the contents of rights and the nature of states parties' obligations.

Now, with more than 220 cases having been registered⁹⁶ and a little more than 100 decisions adopted (including 39 finding violations),⁹⁷ it is possible to better appreciate the added value that OPIC processes offer. Among other things, cases have covered issues such as age-determination,⁹⁸ non-refoulement,⁹⁹ visitation rights,¹⁰⁰ family reunification, immigration detention,¹⁰¹ the Dublin Regulation III,¹⁰² female genital mutilation,¹⁰³ chil-

94. The Convention covers rights such as the right to freedom of expression, religion, access to information, as well as the rights to education, the highest attainable standard of health, social security, adequate standard of living, etc.

95. The first concluding observations of the CRC Committee were issued during its third regular session held from January 11 through 29, 1993. *Sessions for CRC – Convention on the Rights of the Child*, UN TREATY BODY DATABASE (last accessed May 22, 2023), https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/SessionsList.aspx?Treaty=CRC [<https://perma.cc/CW3W-SJ9X>].

96. As of June 30, 2023. See CRC Committee, *Individual Communications*, <https://www.ohchr.org/en/treaty-bodies/crc/individual-communications> [<https://perma.cc/V9LE-66XD>] (follow “Table of pending cases” hyperlink).

97. OHCHR, Petitions and Urgent Actions Section, CRC Individual Communications Update (Jan. 2023) (internal unpublished document on file with author).

98. See generally, CRC Committee, S.D. et al. v. Spain, U.N. Doc. CRC/C/87/D/70/2019 (July 6, 2021); CRC Committee, H.B. v. Spain, U.N. Doc. CRC/C/87/D/69/2018 (July 6, 2021); CRC Committee, N.A.B. et al. v. Spain, U.N. Doc. CRC/C/87/D/66/2018 (July 6, 2021); CRC Committee, A.C.D. et al. v. Spain, U.N. Doc. CRC/C/87/D/62/2018 (July 6, 2021).

99. The CRC Committee highlighted in a number of cases that Article 19 of the CRC includes a prohibition of non-refoulement, including in *D.R. v Switzerland* where it considered non-refoulement on medical conditions for the first time. Mark Klaassen & Peter Rodrigues, *The Committee on the Rights of the Child on Female Genital Mutilation and Non-Refoulement*, LEIDEN LAW BLOG (Mar. 20, 2018), <https://leidenlawblog.nl/articles/the-committee-on-the-rights-of-the-child-on-female-genital-mutilation> [<https://perma.cc/KQM7-PLTC>]; see CRC Committee, D.R. v. Switzerland, U.N. Doc. CRC/C/87/D/86/2019, ¶ 1.1 (June 16, 2021).

100. See, e.g., CRC Committee, V.W. v. Germany, U.N. Doc. CRC/C/87/D/75/2019, ¶ 6 (July 9, 2021).

101. CRC Committee, K.K and R.H. v. Belgium, U.N. Doc. CRC/C/89/D/73/2019, ¶ 3.1 (Mar. 22, 2022); CRC Committee, E.B. v. Belgium, U.N. Doc. CRC/C/89/D/55/2018, ¶ 1.1 (Mar. 24, 2022).

102. See, e.g., CRC Committee, F.A. v. Slovakia, U.N. Doc. CRC/C/90/D/93/2019, ¶ 3 (July 13, 2022).

103. See, e.g., CRC Committee, A.S.A.M. v. Denmark, U.N. Doc. CRC/C/91/D/85/2019, ¶ 2 (Dec. 14, 2022); CRC Committee, S.M.F. v. Denmark, U.N. Doc. CRC/C/90/D/96/2019, ¶ 3.1 (June 24, 2022).

dren detained in camps in Syria and State's extraterritorial obligations,¹⁰⁴ climate change,¹⁰⁵ and *kafala*.¹⁰⁶

These and other decisions, which have helped to expound on the rights of children and the obligations of states parties in individual cases, show that the OPIC process is no doubt fit for purpose to address cases of age-based discrimination against children. The willingness of the Committee to rely not only on its own jurisprudence but also that of other human rights bodies, as well as to use third-party interventions, bodes well in this regard.¹⁰⁷ This is the case, for example, to benefit from the cross-fertilization of jurisprudence and as much as possible avoid or at least minimize conflicting guidance to states parties. Moreover, third-party interveners could bring much needed up-to-date, local, and specialized expertise that the CRC Committee can benefit from. However, while the Committee has dealt with several cases involving age-determination, to date no communication that invokes age-based discrimination against children has been decided on its merits. One that came close to doing so is *D.C. v. Germany*, a case concerning voting age.¹⁰⁸

In this case, the complainant, a child who was sixteen at the time of the events in question, was a national of Spain and resided in Germany with his family.¹⁰⁹ He alleged that the state party denied him the right to vote in local elections, in effect violating Articles 2(1), 2(3), 2(4), and 12(1) of the CRC.¹¹⁰ The nub of his contention was that he had wanted to vote in mayoral elections in the municipality of Perl, Saarland, in June 2015, but his application to vote was denied by the Perl Municipality Electoral Office.¹¹¹

104. In *L.H. et al. v. France*, involving children detained in camps in Syria, the Committee clarified that “although the State party does not have effective control in the area, it has positive obligations to take all appropriate measures and pursue all legal and diplomatic avenues at its disposal to protect the rights of the children.” CRC Committee, *L.H. et al. v. France*, U.N. Doc. CRC/C/85/D/79/2019–CRC/C/85/D/109/2019, ¶ 8.7 (Nov. 2, 2022). A similar position was taken in *P.N., K.K., & O.M., v. Finland*. See U.N. Doc. CRC/C/91/D/100/2019, ¶ 10.8–10.10 (Oct. 20, 2022).

105. In *Chiara Sacchi et al. v. Argentina et al.*, the Committee held that persons whose rights have been violated due to transboundary damage are under the jurisdiction of the state of origin provided there is “a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory.” U.N. Doc. No. CRC/C/88/D/104/2019, ¶ 4.3 (Oct. 8, 2021).

106. *Kafala* is a form of alternative care which is recognized under Islamic law and that permits a Muslim to provide guardianship for an abandoned child as their biological parents would. It does not provide for the right to a legal parental relationship and for the right to succession. See Hodgkin & Newell, *supra* note 9, at 295–96; CRC Committee, *Y.B. and N.S. v. Belgium*, U.N. Doc. CRC/C/79/D/12/2017 ¶¶ 3.1–3.8 (Nov. 5, 2018) (setting the precedent that *kafala* is recognized as a form of adoption).

107. See generally ANN SKELTON, INTERNATIONAL HUMAN RIGHTS OF CHILDREN 89 (Ursula Kilkelly & Ton Liefwaard eds., 2020) (concluding that “[t]he jurisprudence that has emerged thus far is piecemeal and incoherent. It has not been fully embedded within the values and principles of the CRC, and OPIC opens the door to a future child-centered jurisprudence that will be more coherent and consistent.”).

108. CRC Committee, *D.C. v. Germany*, U.N. Doc. CRC/C/85/D/60/2018, ¶ 1.1 (Mar. 2020).

109. *Id.* ¶ 1.1.

110. *Id.*

111. *Id.* ¶ 2.2.

The reasoning for the denial was that the minimum age for voting is eighteen years as per the local election law.¹¹² His efforts to challenge this decision, first in the Administrative Court of Saarland and later in the Higher Administrative Court of Saarland, were unsuccessful.¹¹³ In his submission to the CRC Committee, the complainant argued that the denial of voting for children “entails arbitrary discrimination on the grounds of age”¹¹⁴ and leads to a situation where the “interests of non-eligible children [are] subordinate to the interests of citizens entitled to vote.”¹¹⁵

Central to the state’s objection was the assertion that the complainant did not exhaust local remedies, as he did not appeal to the Constitutional Court.¹¹⁶ The reasoning provided by the complainant on why he did not appeal his case is that the Constitutional Court would not have provided an effective remedy since it would have ruled on the basis of Article 64 of the Constitution of Saarland, which provides that all Germans over the age of eighteen years are entitled to vote.¹¹⁷ The Committee sided with the state.¹¹⁸ It observed that “mere doubts or assumptions about the success or effectiveness of remedies do not absolve the authors from exhausting them.”¹¹⁹ The argument that a constitutional motion is “bound to fail simply because of the current constitutional texts”¹²⁰ did not find favor, as the complainant did not provide convincing jurisprudence from Constitutional Court of Saarland or the Federal Constitutional Court.¹²¹ As a result, the communication was declared inadmissible for non-exhaustion of local remedies.¹²²

For those who have strongly argued for the Committee to take a position on the right to vote for children,¹²³ this decision could be a “missed opportunity” to make a dent on the issue of age-based discrimination against children. Caution should accompany the assertion by some authors that the reasoning in the decision, as well as recent concluding observations by the Committee on the lowering of the voting age, indicates a strong opportunity to address age-based discrimination against children.¹²⁴ Admittedly, in

112. *Id.* ¶ 2.3.

113. *Id.* ¶¶ 2.5–2.6.

114. *Id.* ¶ 3.3.

115. *Id.* at n.7.

116. *Id.* ¶ 4.1.

117. *Id.* ¶ 6.4.

118. *Id.* ¶¶ 6.5–6.6.

119. *Id.* ¶ 6.5.

120. *Id.* ¶ 6.6.

121. *Id.*

122. *Id.* ¶ 7(a).

123. See generally Nick Munn, *The Trap of Incrementalism in Recognizing Children’s Rights to Vote*, 39 *NORDIC J. HUM. RTS.* 113 (2021); Maura Priest, *Why Children Should be Allowed to Vote*, 30 *PUB. AFFS. Q.* 215 (2016).

124. See, e.g., Daniella Zlotnik Raz, *Exclusion from Voting on the Basis of Age*, LEIDEN CHILDREN’S RIGHTS OBSERVATORY (Sept. 15, 2020), <https://www.childrensrightsobservatory.nl/case-notes/case-note2020-4> [<https://perma.cc/V6QT-EWA6>].

recent times an increasing numbers of states have lowered the minimum age for local or national voting to below eighteen years.¹²⁵ However, these state practices are still too early in their infancy to form a basis for an argument that they constitute elements of customary international law.¹²⁶ More importantly, in instances where the CRC Committee engaged states parties such as Austria,¹²⁷ the United Kingdom (in particular Scotland),¹²⁸ Ireland,¹²⁹ and New Zealand¹³⁰ on the issue of lowering the voting age, this was always because there was domestic-level discussion of, or a measure in existence regarding lowering the voting age.

A look at more recent concluding observations dealing with voting age also sheds light on the cautiousness of the Committee's approach. In February 2023, Ireland and New Zealand received recommendations related to voting age.¹³¹ With the former, the Committee's entry-point for discussion was the state party's expressed commitment to holding a referendum on the issue.¹³² As regards the latter, the review took into account the November 2022 declaration of the Supreme Court of New Zealand that the minimum voting age in the Electoral Act 1993 and Local Electoral Act 2001, set at eighteen and excluding sixteen- and seventeen-year-olds, was unjustified age discrimination.¹³³ On both occasions, the core of the recommendations the two states parties received were neither detailed nor proactive but to the effect merely that the decision to lower the voting age should be supported by "active citizenship and human rights education and measures to prevent undue influence."¹³⁴ It is difficult to argue, on the basis of these and similar concluding observations, that the CRC Committee regards voting ages that

125. These include Austria, Estonia, Cuba, Ecuador, Brazil, Malta, and Scotland. *Youth and Elections*, THE ELECTORAL KNOWLEDGE NETWORK (last accessed May 22, 2023), <https://aceproject.org/ace-n-topics/yt/yt20/lowering-the-voting-age> [<https://perma.cc/DL5H-RXL4>].

126. Michael Wood & Omri Sender, *State Practice*, MAX PLANCK ENCYCLOPAEDIAS OF INTERNATIONAL LAW (Dec. 20, 2020), <https://opil.ouplaw.com/display/10.1093/law/epil/9780199231690/law-9780199231690-e1107> [<https://perma.cc/Y2L9-NKDJ>].

127. The Committee's recommendation in regard to Austria's decision to lower the voting age from eighteen to sixteen years was two-pronged. On the one hand, the state party was recommended to undertake research to monitor the impact of the lowering of the voting age to sixteen years; on the other, the Committee underscored the importance of educating children on the exercise of the right to vote in an effective manner. CRC Committee, Concluding Observations, Austria, U.N. Doc. CRC/C/AUS/CO/4-5, ¶¶ 100, 102 (Dec. 3, 2012).

128. CRC Committee, Concluding Observations, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CRC/C/GBR/CO/5, ¶¶ 32–33 (July 12, 2016).

129. CRC Committee, Concluding Observations, Ireland, U.N. Doc. CRC/C/IRL/CO/5-6, ¶ 18(d) (Feb. 28, 2023).

130. Concluding Observations, New Zealand, *supra* note 64, ¶ 19(e).

131. CRC Committee, Concluding Observations, Ireland, *supra* note 129, ¶ 18(d); Concluding Observations, New Zealand, *supra* note 64, ¶ 19(e).

132. CRC Committee, Concluding Observations, Ireland, U.N. Doc. CRC/C/IRL/CO/5-6, ¶ 18(d) (Feb. 28, 2023).

133. Concluding Observations, New Zealand, *supra* note 64, ¶ 19(e). The case was triggered by an application by a group—Make It 16—who wanted to lower the age for voting to sixteen.

134. Concluding Observations, Ireland, *supra* note 129, ¶ 18(d); Concluding Observations, New Zealand, *supra* note 64, ¶ 19(e).

exclude children as tantamount to age-based discrimination against children.

Had the *D.C. v. Germany* communication been declared admissible in respect of exhaustion of local remedies, it probably still would have been declared inadmissible for lack of sufficient substantiation.¹³⁵ After all, unlike the International Covenant on Civil and Political Rights (“ICCPR”), which provides every citizen with a right to “vote and be elected,”¹³⁶ the CRC provides no right to vote.¹³⁷ While the majority of the recommendations on voting age are provided under the heading of “the views of the child,” in the past the Committee has cautioned that having children’s views heard does not imply “a general political mandate.”¹³⁸ In fact, General Comment No. 5 states, under Article 12 of the CRC, that the absence of children’s right to vote is “all the more reason to ensure respect for the views of unenfranchised children in Government and parliament.”¹³⁹

Given these reasons, a communication under the OPIC which alleges age-based discrimination against children because domestic legislation sets eligibility for voting at eighteen is, arguably, far from an ideal test case for pushing the boundaries on the topic. Apart from the absence of the right to vote in the Convention, the very slow progress globally on lowering the voting age militates against such an approach.¹⁴⁰ As things stand, cases dealing with issues such as corporal punishment or status offenses and framed as age-based discrimination against children might stand a better chance of success under OPIC than those focusing on voting age. This is the case because there is a relatively well developed jurisprudence in the form of General Comments of the Committee that corporal punishment and status offenses constitute discrimination against children on the basis of their age.¹⁴¹

IV. BEST INTERESTS VERSUS NON-DISCRIMINATION

Both “non-discrimination” and “the best interests of the child” have been identified by the CRC Committee as being among the CRC’s so-called

135. G.A. Res. 66/138, Art. 7(f) (Dec. 19, 2011).

136. International Covenant on Civil and Political Rights Art. 25(b), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

137. The one that comes close is Article 12, which gives a child the right to express his or her views freely in all matters affecting the child and “the views of the child given due weight.” CRC, *supra* note 1, Art. 12(1).

138. CRC Committee, General Comment No. 12, U.N. Doc. CRC/C/GC/12, ¶ 27 (July 20, 2009).

139. CRC Committee, General Comment No. 5, *supra* note 9, ¶ 12.

140. Only a handful of countries such as Argentina, Austria, Brazil, Cuba, Ecuador, Germany (only in some local elections), Malta, Nicaragua, Scotland, Indonesia, Democratic People’s Republic of Korea, and Timor-Leste have lowered voting age below eighteen.

141. *See, e.g.*, CRC Committee, General Comment No. 24, *supra* note 6, ¶ 12.

“four cardinal principles.”¹⁴² However, it is undeniable that the best-interests principle has enjoyed a far more prominent role in the work of the CRC Committee¹⁴³ and elsewhere.¹⁴⁴ Stakeholders seem to have noticed this, too. For example, during these early days of the OPIC, it should come as no surprise that, out of fifty-nine pending cases, fifty-seven invoked Article 3 of the CRC on best interests.¹⁴⁵

Alston identifies two roles that the best-interests principle plays in the CRC.¹⁴⁶ First, it is credited as a tool that can “support, justify or clarify a particular approach to issues arising under the Convention.”¹⁴⁷ Secondly, it is said to be a “mediating principle which can assist in resolving conflicts between different rights where these arise within the overall framework of the Convention.”¹⁴⁸ A third role, it may be added, is to serve as a “gap-filling” provision when lacunae are identified.¹⁴⁹ Similarly, the CRC Committee has underscored that the best interests of the child has three aspects: it is a substantive right, an interpretative legal principle, and a rule of procedure which subjects decision-making that affects children to an evaluation in regard to their best interests.¹⁵⁰ Article 3(1) of the CRC enjoins that the best-interests principle be applied “in all actions concerning children.” This oft-quoted phrase is intended to be interpreted broadly so as to encompass any action that directly or indirectly affects children.¹⁵¹ As Freeman observes, “The decision to build a new major road concerns children.”¹⁵² The decision to go to war, decisions taken in relation to global warming,

142. Hodgkin & Newell, *supra* note 9, at 295–96. *See also* CRC Committee, General Comment No. 3, *supra* note 9, ¶ 5; CRC Committee, General Comment No. 1, *supra* note 9, ¶ 6; General Comment No. 5, *supra* note 9, ¶¶ 4, 12. *But see* Abramson, *supra* note 9, at 64 (criticizing the recognition of the principle of non-discrimination as one of the four cardinal principles).

143. Almost every single General Comment has a section on best interests. *See General Comments, Committee on the Rights of the Child*, OHCHR (last accessed May 22, 2022), <https://www.ohchr.org/en/treaty-bodies/crc/general-comments> [https://perma.cc/AD7L-ZN5Z]

144. *See generally* PHILIP ALSTON, *THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS* (1994); Elizabeth P. Miller, *Deboer v. Schmidt and Twigg v. Mays: Does the ‘Best Interests of the Child’ Standard Protect the Best Interests of Children?*, 20 J. CONTEMP. L. 497 (1997); Michael Freeman, *The Best Interests of the Child? Is the Best Interests of the Child in the Best Interests of Children?*, 11 INT’L J. L., POL’Y & FAM. 360 (1997); Michael Freeman, *Article 3: The Best Interests of the Child*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD* 1 (André Alen et al. eds., 2007); Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAMILY STUDIES 337 (2008); Parker, S. *The Best Interests of the Child: Principles and Problems*, 8 INT’L J. L. POL’Y & FAM. 26 (1994).

145. *See* CRC Committee, *Individual Communications*, *supra* note 96 (follow “Table of pending cases” hyperlink).

146. Alston, *supra* note 144, at 15–16.

147. *Id.*

148. *Id.* at 16.

149. Michael Freeman, Article 3, *supra* note 144, at 32 (citing Stephen Parker, *The Best Interests of the Child: Principles and Problems*, 8 INT’L J. L. & FAM. 26 (1994)).

150. CRC Committee, General Comment No. 14, U.N. Doc. CRC/C/GC/14, ¶ 6 (May 29, 2013).

151. During the drafting of the CRC, an early draft of Article 3 read, “[i]n all official actions concerning children,” but the word “official” was dropped to broaden the scope of the provision. *See* OHCHR, *supra* note 30, at 338–39.

152. Michael Freeman, *supra* note 144, at 46.

and the passing of laws about cloning, too, are material to children's interests.¹⁵³ Moreover, surely, the obligation to make the child's best interests a primary consideration is a high enough threshold for protection from various forms of rights violations.¹⁵⁴

What are the implications of these observations in the CRC Committee's efforts to address age-based discrimination against children? This broad approach to the best-interests principle¹⁵⁵—which can be contrasted with the scope of application of Article 2, which has a built-in limitation—could make it appealing in addressing discrimination against children on the basis of age. It is also worth recalling that the obligation of states under Article 2 is to not discriminate in respect of the “the rights recognized in the present Convention.”¹⁵⁶ There are multiple rights not recognized in the Convention—especially political rights, including voting as highlighted above—and to which Article 2 is not applicable.¹⁵⁷ While ICCPR Article 26 states that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination”¹⁵⁸ and indicates that this does not apply only to the rights recognized in the Covenant, a similar provision is not present in the CRC. It should also be underscored that “of any kind” in Article 2 is not to be read in isolation to mean “every possible” ground of differentiation, and that it should be read with the other specified characteristics, such as “religion” or “other status.”¹⁵⁹ In addition, a good deal of age-based discrimination against children takes place through the actions of parents or caregivers. As a result, it could be very useful that the requirement exists that those parents, when

153. *Id.*

154. The prominence of the best interests of the child in the OPIC is apparent. The list of pending cases publicly shared by the CRC Committee shows that no less than seventy-five percent of them invoke the best-interests-of-the-child principle, along with other provisions of the Convention. See CRC Committee, *Individual Communications*, *supra* note 96 (follow “Table of pending cases” hyperlink). In fact, even in rare instances where discrimination is invoked (and to date no case invokes age-based discrimination)—for example, in *Y.B. and N.S. v Belgium*, involving the denial of a humanitarian visa to child C.E. taken in under *kafala* by a Belgian-Moroccan couple and underscoring discrimination on the basis of ethnicity—the submission by the complainants, as well as the reasoning for the CRC Committee's decision, relies predominantly on “best interests”. CRC Committee, *Y.B. and N.S. v. Belgium*, U.N. Doc. CRC/C/79/D/12/2017 ¶¶ 3.3, 8.3 (Nov. 5, 2018)

155. A “broad approach” in the sense that CRC Article 3(1) on best interests is applicable “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies . . .” Also, notably, the obligation to consider children's best interests is referred to in six other places in the Convention: separation from parents (Article 9(1), (3)); parental responsibilities (Article 18(1)); deprivation of family environment (Article 20); adoption (Article 21); restrictions of liberty (Article 37(e)); and court hearings of penal matters (Article 40(2)(b)(iii)). CRC, *supra* note 1.

156. CRC, *supra* note 1, Art. 2(1).

157. For example, the rights to remedies, to stand for public office, and to pre-primary education are not recognized in the Convention. CRC, *supra* note 1.

158. ICCPR, *supra* note 136, Art. 26.

159. Abramson, *supra* note 9, at 64.

exercising their responsibilities, should act in the best interests of the child, which, under Article 18(1) of the CRC, “will be their basic concern.”¹⁶⁰

The jurisprudence of the CRC Committee contains few examples of discrimination against children on the basis of age. These relate, among other things, to unequal access to courts; not being able to undergo any medical treatment without parental consent; children who are parents and unmarried not being able to acknowledge their own child or apply for documents such as a birth certificate; having one’s behavior criminalized through status offenses; and being subjected to corporal punishment.¹⁶¹ The best-interests principle can be, and has been, used to address these and other forms of age-based discrimination against children.¹⁶²

It is worth dwelling on corporal punishment for a moment.¹⁶³ The widespread and traditional acceptance of corporal punishment is in part an indication of its nature as structural discrimination—which, by definition, is discrimination “woven into the ways our societies function, and [that] operates through norms, routines, patterns of attitudes and behavior that create obstacles in achieving equal opportunities and real equality.”¹⁶⁴ To date, the number of countries that have banned corporal punishment in all settings remains at sixty-five.¹⁶⁵ The practice is so systemic and structural that there still are a number of countries that, in law, policy, or practice, maintain that some level of “moderate or reasonable” corporal punishment could be in the best interests of the child.¹⁶⁶ Whether it is in rejecting this self-contradictory argument in respect of “moderate [or] reasonable” chastisement, differentiating between the use of force to protect a child from deliberate and punitive use of force to cause some degree of pain and humiliation, and ensuring that the upholding of the principle of equal protection of children and adults from assault does not lead to unnecessary prosecution of parents or care givers, the best-interests-of-the-child principle offers enough flexibility and force to identify violations and call for reform.¹⁶⁷

160. CRC, *supra* note 1, Art. 18(1).

161. Hodgkin & Newell, *supra* note 9, 295–96.

162. See Alston, *supra* note 144, at 15–16.

163. Because the application of corporal punishment on children continues to be allowed in many jurisdictions whereas the same act inflicted on an adult would constitute battery or other comparable offense. Compare Singapore Penal Code 1871, §§ 319–323 (providing for the offense of “voluntarily causing hurt,” whereby “hurt” is defined simply as “bodily pain,” and whereby causing hurt carries with it a maximum prison term of three years, and/or a \$5,000 fine), with CRC Parties and Reservations, *supra* note 72, Reservations of Singapore (providing for the “judicious application of corporal punishment in the best interest of the child”).

164. Council of Europe, *Intersectionality and Multiple Discrimination* (last accessed July 18, 2023), <https://www.coe.int/en/web/gender-matters/intersectionality-and-multiple-discrimination> [https://perma.cc/7V83-WEPK].

165. End Violence against Children and End Corporal Punishment, *Progress* (last accessed July 18, 2023), <https://endcorporalpunishment.org/countdown/> [https://perma.cc/H5F8-CVTA].

166. See CRC Committee, General Comment No. 8, U.N. Doc. CRC/C/GC/8, ¶ 26 (Mar. 2, 2007).

167. See Alston, *supra* note 144, at 15–16 (1994).

The work of the CRC Committee has also shown that age-based discrimination against children is often compounded by other grounds of discrimination, such as disability and gender, in what is known as “intersectional discrimination.”¹⁶⁸ So the issue of intersectionality is only too prevalent in the context of children and discrimination.¹⁶⁹ As Zermatten puts it, “[C]hildren suffer a double violation of their rights: their rights are violated because they are children, and again because they are black, or migrants, Roma, disabled, girls, soldiers, and the list goes on and on.”¹⁷⁰ As such, given the relatively wide scope offered by Article 3 on best interests, and because of states’ general receptiveness to this principle, it is worth considering if multiple discrimination that involves age-based discrimination against children is better addressed through the concept of discrimination or through that of best interests.¹⁷¹

Despite these arguments, it is critical for the CRC Committee to reflect on and address the unnecessary overreliance on the best-interests principle, as well as closely scrutinize its limitations so as to identify and call out age-based discrimination against children. For example, given the relatively indeterminate nature of the principle, some governments have used it to justify age-based discrimination (such as corporal punishment) against children.¹⁷²

Moreover, there are multiple measures the CRC Committee can undertake to supplement the risk of “overuse” of the best-interests principle to address age-based discrimination against children. One such option is to address the underdeveloped Committee jurisprudence on how to interpret the permissibility of limitations on Convention rights.¹⁷³ Notably, a number of provisions in the Convention where states parties have applied age-based discrimination against children—such as the right to freedoms of expression, religion, and association—have built-in limitations.¹⁷⁴ Where a certain law, policy, or intervention either arbitrarily distinguishes, or fails arbitrarily to distinguish, between children and adults, assessing the permissibility of a limitation based on whether it is (1) provided by law, (2) applied only for the purpose prescribed as a specific limitation ground in the Convention, and (3) “directly related to the specific need on which they

168. See *supra* Section I of this Article (explaining how the focus of the CRC Committee’s jurisprudence on non-discrimination is centered on what it describes as children in “marginalised or vulnerable situations”—which often constitute “intersectional discrimination”).

169. *Id.*

170. Abramson, *supra* note 9, at 64.

171. “Multiple discrimination” which exists in combination with age—such as sex, race, disability. See Council of Europe, *supra* note 164.

172. See, e.g., CRC Parties and Reservations, *supra* note 72, Reservations of Singapore.

173. It is in rare occasions that the CRC Committee uses the common three-part tests for permissibility of limitations of rights—namely, that the interference is provided for by law, that it must pursue a legitimate aim, and that it is necessary (and proportionate) to secure one of those aims. See, e.g., General Comment No. 25, *supra* note 59, ¶ 69.

174. CRC, *supra* note 1, Arts. 13–15.

are predicated,”¹⁷⁵ would be both appropriate and useful.¹⁷⁶ Both the state party review and the OPIC processes have the potential to address this gap.

Also, the CRC Committee should ask whether there are examples which show that remedies are more accessible and, when provided, more comprehensive, if age-based discrimination against children is addressed through a non-discrimination lens as compared to a best-interests one. Does the requirement (within the best-interests framework) that states undertake child-rights impact assessments (“CRIAs”) help to better predict the impact of any proposed policy, legislation, regulation, budget, or other administrative decision that constitutes age-based discrimination against children? The responses to these and other similar queries could help the CRC Committee move a step closer to a more nuanced approach as to when to use a best-interests framework, a non-discrimination framework, or a combination of the two, in its efforts to address age-based discrimination against children.

V. LOOKING AHEAD

Scholars have recognized the importance of non-discrimination and equality. For instance, Ramcharan describes it as “one of the major themes of most UN core human rights treaties,”¹⁷⁷ while Nowak refers to it as “the most important principle imbuing and inspiring the concept of human rights.”¹⁷⁸ The CRC Committee does not give it any less status.¹⁷⁹ However, given the wide range of discriminatory laws and practices found among states parties, it has often been easy for the CRC Committee not to pay the necessary attention to age-based discrimination against children.¹⁸⁰

The time is ripe, nevertheless, for the Committee, and in turn, states parties to the Convention, to give close, systematic scrutiny to the age-based differential treatment to which persons below the age of eighteen are subjected. This is perhaps not too much to expect because, among other

175. Human Rights Committee [hereinafter HRC], General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), U.N. Doc. CCPR/C/21/Rev.1/Add.4, ¶ 8 (July 30, 1993). For a comparable wording, see HRC, General Comment No. 18: Non-Discrimination, ¶ 18 (Nov. 10, 1989).

176. The notion of arbitrariness includes elements of inappropriateness, injustice, lack of predictability and due process of the law, as well as elements of reasonableness, necessity and proportionality. See HRC, General Comment No. 35: Article 9 (Liberty and Security of Person), U.N. Doc. CCPR/C/GC/35, ¶ 12 (Dec. 16, 2014).

177. Bertrand G. Ramcharan, *Equality and Nondiscrimination*, in THE INTERNATIONAL BILL OF RIGHTS. THE COVENANT ON CIVIL AND POLITICAL RIGHTS 246 (Louis Henkin ed., 1981).

178. Manfred Nowak, UNITED NATIONS COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 458 (1st ed. 1993).

179. Since it is one of the four cardinal principles as discussed in the introduction above. Rios-Kohn, *supra* note 10.

180. See *supra* Section I of this Article (explaining how the focus of the CRC Committee’s jurisprudence on non-discrimination is centered on what it describes as children in “marginalised or vulnerable situations”).

reasons, the Convention has been in existence for over three decades; the work of the CRC Committee both under the Convention and OPIC has matured; and there is evidence that discriminatory treatment against children on the basis of their age continues to significantly impede the realization of children's rights in all four corners of the world.

Some of the proposals for progress discussed above, such as providing further systemic guidance on domestic legislation, or developing a solid jurisprudence around the permissibility or otherwise of limitations that discriminate against children on the basis of their age, can lead to quick gains. Also, the extent to which children (and/or their parents) seek remedies or lodge complaints about age-based discrimination against children depends on positive developments around these issues. To conclude, the world fit for all children that the international community strives to create cannot be achieved in our lifetime if children continue to be discriminated against solely on the basis of their dates of birth.

