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**Migration, abduction and children's rights: the relevance of children's rights and the European supranational system to child abduction cases with immigration components**

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PART I  
THE CHILDREN'S RIGHTS  
FRAMEWORK



## 2.1 INTRODUCTION

This chapter discusses the emergence of children's rights, it presents an overview of the conceptualization of children's rights under international law and it draws the contours of a rights-based approach to the rights of children.

The field of children's rights is a relatively new area of research.<sup>1</sup> The United Nations Convention on the Rights of the Child (CRC)<sup>2</sup> is the international legal instrument which contains the most comprehensive set of rights exclusively for children. It has barely reached adulthood having been adopted in 1989, just over 30 years ago. The CRC represents the culmination of the attention to children's rights which entered the international arena at the beginning of the twentieth century, when several binding and non-binding instruments dedicated to them saw the light of day.<sup>3</sup>

Questions on whether children should have rights, and if so which rights or how such rights are to be exercised are still subject to debate. Among the debates, a prominent place is held by the position of children within families and the role of states in relation to children and their families. These debates are not new, they have long predated the CRC, or for that matter any international instrument. Children have formed the object of regulation from antiquity, Middle Ages and modern times. Laws in turn have been informed by different notions of what childhood means. There are marked differences between Roman law – which saw children as objects under the quasi-absolute authority of their fathers – and the CRC which is said to have signalled a paradigm shift in the thinking of children as subjects of rights. These differences notwithstanding, some themes are recurrent in the scholarship on children's rights and go to the core of children's rights debates to this day, more than 30 years after the adoption of the CRC. One of them is the relationship between children and their parents

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1 Quennerstedt 2013, p. 234.

2 UN Commission on Human Rights (46th sess.: 1990: Geneva), *Convention on the Rights of the Child.*, E/CN.4/RES/1990/74, UN Commission on Human Rights, 7 March 1990 entered into force on 2 September 1990.

3 For example, the International Labour Organisation Conventions, as follows C138 – Minimum Age Convention, 1973 (No. 138); R146 – Minimum Age Recommendation, 1973 (No. 146); C182 – Worst Forms of Child Labour Convention, 1999 (No. 182); R190 – Worst Forms of Child Labour Recommendation, 1999 (No. 190).

and how granting rights to children may (negatively) impact the rights of parents. In 1987, commenting on the drafting process of the CRC, Bennett wrote “children’s rights carry a “tripartite” aspect not present in the rights of adults”.<sup>4</sup> As an example of such a “tripartite” relationship he mentioned a child’s versus a parent’s right to choose the place of residence.<sup>5</sup> The nature of parent-child relationship gives rise to many questions, not existing in traditional human rights discourse. How could or should the state intervene in the relationship between the parent and the child? Is the right holder the child or the parent? How could the autonomy of the child be balanced with the state’s or parents’ interests in the child’s well-being? The difficulty of engaging with children’s rights due to the rights of the parents or the family was not a creation of international law but rather came to be discussed in international law from existing debates at the national level. International law and the first instruments concerning children are the product of domestic advocacy and their conceptualization of children is intimately linked with domestic discussions around children and their rights.<sup>6</sup>

Childhood itself as a concept has been debated among historians, psychologists or sociologists to name but a few. Whether or not childhood has existed has prompted discussions in the legal arena on the proper balance, if any, between protection and agency for children.

Against this background, this chapter offers an insight into the triangular relationship parents-children-state as envisaged within the CRC. It further sets out the parameters of the concept of a child-rights approach, thus answering the first sub-question of this dissertation.

This dissertation uses the language of law; however, as laws, both national and international have been informed by societal conceptions, it is believed that a brief historical incursion into the concept of childhood will assist in a better understanding of the way the CRC has framed the triangular relationship mentioned above. For this reason, Section 2.2 focuses on the emergence of the concept of childhood and traces some historical debates on images of childhood. Within Section 2.2, the topic of children as subjects of international law is also addressed. Section 2.3 delves into how the CRC addresses the triangular relationship between children, parents and the state, considering the standards set out by the Convention and amid existing academic debates. On the basis of the CRC, Section 2.4 lays down the foundations of a child rights approach with a focus on judicial decision-making.

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4 Bennett 1987, p. 32.

5 Bennett 1987, p. 32.

6 Marshall 1999, pp 106-108.

## 2.2 CHILDREN AND PARENTS THROUGHOUT HISTORY

### 2.2.1 Images of childhood

The history of childhood is intimately linked to the development of ideas about families and the role of parents.<sup>7</sup> Some researchers have pointed out that the concept of childhood has substantially changed throughout time.<sup>8</sup> In his influential and divisive book *Centuries of Childhood: A Social History of Family Life*, Ariès made the claim that in mediaeval society, childhood, as a distinct phase of human existence, did not exist.<sup>9</sup> Child mortality was high in those times and parents could not be too emotionally attached to their children whose chances of survival during infancy were limited.<sup>10</sup> In Ariès' view, childhood as a distinct phase in human existence emerged in close connection with the affection that parents could give to their children.<sup>11</sup> During the Middle Ages, children spent little time with their parents, most of them leaving home at some point between the ages of seven to fourteen.<sup>12</sup> Children were thus seen more like commodities rather than human beings.<sup>13</sup> In the same vein, Lloyd DeMause points out that "the history of childhood is a nightmare from which we have only begun to awaken".<sup>14</sup> DeMause contends that the farther one goes in history the higher the possibility for children to be abused, killed, beaten, or abandoned.<sup>15</sup> In his view it is the evolution of the parent-child relation which constitutes an independent source of historical change.<sup>16</sup> Tucker, in her research of 16<sup>th</sup> century England has also concluded that children were perceived as untrustworthy and at 'the bottom of the social scale' and that 'childhood was a state to be endured rather than to be enjoyed'.<sup>17</sup> Ariès points to the seventeenth century as the era when the concept of childhood began to emerge in close

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7 This part draws on historical and psychological research conducted mainly in European countries and the United States. These countries have also been primarily involved in the drafting of the Convention on the Rights of the Child, therefore arguably their vision of 'childhood' and existing national debates have permeated the final text of the Convention on the Rights of the Child. Also, as explained in the Introduction to this dissertation, most child abduction cases are decided by jurisdictions in the Global North.

8 Among them Ariès 1976, Shorter 1975, DeMause 1995, Hoyles 1979, Bremner 1976, Weisberg, 1978.

9 Ariès 1976, p. 311.

10 Ariès 1976, p. 17.

11 Ariès 1976, p. 259; Eekelaar 1986, p. 161. Eekelaar also explains that Ariès did not necessarily claim that there was no affection between parents and children in pre-modern times, but rather that there was indifference from parents to children. Even if his work has been later on criticised, Ariès' History of childhood is one of the landmark works in the field.

12 Stone 1977, p. 40.

13 Stone 1977, p. 641.

14 Veerman 1992, p. 6.

15 Veerman 1992, p. 6.

16 Jenks 1982, p. 49 referring to DeMause 1974.

17 Weisberg 1978, p. 43 referring to Tucker 1976, p. 231.

connection with the emergence of the 'nuclear family' as known today.<sup>18</sup> Previously, the interests of the group took priority over the interests of the individual, children being therefore entirely ignored.<sup>19</sup> The claim was not that children were not loved by their parents, but rather that they were considered the property of their parents and 'mini-adults'.<sup>20</sup> Hunt also argued that the French society of the early seventeenth century depicted the child as inferior to the adults and the process of raising children was devalued.<sup>21</sup>

Little by little, the family began to evolve as a separate unit with a need for privacy, and especially the upper- and middle-class societies' started devoting increasing attention to the proper upbringing of their children.<sup>22</sup> These changes also mark the appearance of the private family space (to which children belong) and the public space reserved for adults (mostly men). Stone argues that in the period between 1660 to 1880, the societal structure changed with more emphasis on the family who became child oriented, affectionate and recognizing the uniqueness of each child.<sup>23</sup> Shorter considered that changes in three areas led to the emergence of the modern family: (i) the change in courtship practices; (ii) the change in mother-child relationships with the child becoming the most important being for a mother and (iii) the delineation of the nuclear family from the larger community.<sup>24</sup> It was also considered that these evolutions, i.e. the increase in caring for children, only changed in the eighteenth century for low income families.<sup>25</sup>

These arguments were based on a linear concept of history where things evolved from bad to better.<sup>26</sup> The theses of the aforementioned researchers revolve around the core concept of *change*, where history is looked at as a gradual pattern of unfolding events.<sup>27</sup> These narratives have strongly been contested by other historians who argued that the focus on change was exaggerated and misleading in that human history is characterised more by continuity than by change.<sup>28</sup> For Gillis and Pollock the differences between the distant past and the present are less pronounced than previously claimed.<sup>29</sup> Pollock's main claim was that parents loved children in the same way and to the same extent in the sixteenth century as well, however children's lives were made harder by other ills, among which medicine,

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18 Ariès 1976, p. 226.

19 Stone 1977, p. 118.

20 Pinchbeck, Hewitt 1969, p. 288-305.

21 L Pollock 1985 referring to Hunt 1972. The same claim (not specifically connected to the French Society, but rather to the "Western World") can be found in Weisberg 1978, p. 44.

22 Ariès 1976, pp. 306-307.

23 Stone 1977, p. 405.

24 Vann 1976, p. 107.

25 Vann 1976, p. 106.

26 Veerman 1992, p. 9.

27 Veerman 1992, p. 9.

28 Pollock, 1983, pp. 142-144.

29 Pollock, 1983, pp. 142-144.

social circumstances and the economic condition.<sup>30</sup> Gillis considered that the reasoning behind the focus on change was motivated by the progressive movements of the 1960s and 1970s, rather than by actual historical truth.<sup>31</sup>

Veerman contends that both change and continuity coexist and that it is important not to overstress change to the detriment of continuity in that not every change is an improvement from a past situation.<sup>32</sup> Regardless whether the focus is change or continuity, it could be argued that the debate was more about the delineation of childhood from adulthood and the social and legal consequences thereof, rather than about the idea of childhood itself.<sup>33</sup> For some, the idea of confounding childhood with adulthood, and not having clearly defined boundaries meant greater autonomy for children, more decision-making power, a liberation movement for children from adults.<sup>34</sup> These scholars focused on the child's right to self-determination, or children's autonomy rights. For others, childhood was a golden period which deserved protection in and of itself. Le Shan for example wrote: "It is my belief that we are trying to eliminate childhood and *that* is what is so terrible about being a child today."<sup>35</sup> These scholars emphasised that children's needs of protection derived from their vulnerability. Both points of view utilised the concept of childhood and the relationship between parents and children to emphasise either agency or welfare. In both cases the family was seen as either the promoter or the inhibitor of a particular image of childhood.

As law is a reflection of societal phenomena, it is perhaps not coincidental that the earliest legal recognitions of children's rights intended to limit parental powers.<sup>36</sup> Already in Roman law, the power of the father to discipline children (*patria potestas*) was limited by requirements of *pietas* – i.e. the expectation that parents would take care of their children.<sup>37</sup> In 1641, the first legal code of New England (Massachusetts – *Body of Liberty*) included provisions restricting parental authority to discipline children and to choose their friends.<sup>38</sup> The same code gave children the liberty to complain to the authorities and to obtain redress.<sup>39</sup> However, it was not until the nineteenth century that measurable changes in the treatment of children could be seen.<sup>40</sup> These changes were originally prompted by substantial advances in health care which resulted in decreased mortality at birth as well as in better

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30 Gillis 1985, p. 143.

31 Gillis 1985, pp. 142-144.

32 Veerman 1992, p. 9.

33 Archard 2014, pp. 27-36.

34 Farson 1978, referred to in Byrne 2016, p. 119.

35 Veerman 1992, p. 8

36 Freeman 1997, p. 48.

37 Vuolanto 2016, p. 492.

38 Freeman 1997, p.48

39 Freeman 1997, p. 48.

40 Cohen 1982, p. 370.



life prognosis as vaccinations were discovered and sanitation improved.<sup>41</sup> Gradually, public school education became compulsory, special juvenile courts were set up and protection measures were instituted for mentally ill or poor children.<sup>42</sup> Fass explains that these developments were uneven between Western societies: some countries such as the United States, Sweden, Germany and France outpaced other Western European countries and South and Eastern Europe.<sup>43</sup> Even so, as the middle class expanded, their concerns were centred on ending poverty for children of all classes and children's needs and rights were articulated in universal terms.<sup>44</sup> The language was that of vulnerability, advocacy for children focusing on their welfare, and the means necessary to end the evils that the children found themselves in. As Fass explains, "manifest deprivation became less tolerated by middle-class do-gooders who aspired to have all children, not just the privileged, benefit from the advances taking place. And those who looked to national aims believed that progress required that all nations' children be brought up to a basic level".<sup>45</sup>

### 2.2.2 Children as subjects of international law

It was against this background that the first international instruments emerged. Child labour and exploitation was a significant concern of the beginning of the XXth century, and this was reflected in the 1919 International Labour Organisation's conventions prohibiting children from working in hazardous conditions.<sup>46</sup>

More generally, international advocacy for children's rights which led to the first non-binding documents is closely intertwined with the establishment of the League of Nations in the aftermath of the First World War. The League of Nations became a venue to transpose into an international document the concerns in relation to children which existed up until that point at a national level.<sup>47</sup> This was also legally enabled by the Covenant to the League of Nations which mentioned children in its Article 23. According to the first paragraph of Article 23 "[...] Members of the League [...] will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations."<sup>48</sup>

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41 Fass 2011, pp17-29.

42 Price Cohen 1982, p. 370.

43 Fass 2011, p. 19.

44 Fass 2011, p. 19.

45 Fass 2011, p. 19.

46 Fass 2011, p. 17.

47 Moody 2015, p. 18.

48 League of Nations. The Covenant of the League of Nations, Including Amendments in Force, February 1, 1938.

Other than child labour, concerns over children were closely related to the aftermath of the First World War which left many orphans, without the protection they would otherwise have in times of peace.<sup>49</sup> Thereafter, the discussions extended to more general concerns over child protection.<sup>50</sup> Marshall documents that there was much political resistance to extend the mandate of the League to children in distress.<sup>51</sup> Eglantyne Jebb, the founder of Save the Children, is credited with successfully lobbying for including children on the agenda of the League of Nations which culminated with the adoption in 1924 of the Geneva Declaration of the Rights of the Child (the "(1924 Geneva) Declaration").<sup>52</sup> Part of her success was connected to using film and photo-engraving to depict the sufferings of children so as to create momentum in support of the Declaration.<sup>53</sup>

The Declaration included five principles which all emphasised existing concerns in the aftermath of war. The focus was on the need to protect children from famine, exploitation and disease. None of the principles of the Declaration addresses the relationship between children and parents. The preamble arguably includes an incipient reference to what was to become 'the best interests' standard by providing that "mankind owes to the Child the best that it has to give".

It was its simplicity which made the Declaration successful.<sup>54</sup> An excerpt from a report drafted by Save the Children in 1923 helps clarify the aim of the Declaration at the time:

"The Geneva Declaration is a programme that calls on individual and collective good will and on legislators throughout the world. It sets out the rights of the child, that is the duties of the family and of society towards children, in general terms, without entering into detail, which it leaves to each country to determine in accordance with its level of civilization, its national characteristics and also the current situation of its financial and technical resources."<sup>55</sup>

In the period that followed, the 1924 Geneva Declaration had enjoyed considerable success being accepted among various fora, from welfare organisations to the media to heads of states and leaders of religious communities.<sup>56</sup> In the aftermath of the Geneva Declaration, several general or regional international instruments concerning children had been adopted. Their focus was specifically on the needs of children, and they addressed

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49 Marshall 1999, p. 106.

50 Marshall 1999, p. 108.

51 Marshall 1999, p. 107.

52 Geneva Declaration of the Rights of the Child of 1924, *adopted* Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924).

53 Marshall 1999, p. 132.

54 Marshall 1999, p. 131.

55 Moody 2015, p. 18.

56 Moody 2015, p. 21.

concerns such as human trafficking, sexual exploitation or labour.<sup>57</sup> However, it was the climate after the end of the Second World War that paved the ground for renewed discussions on a general international instrument concerning children. The League of Nations had now been replaced by the United Nations and the Social Commission of the Economic and Social Council (ECOSOC) received a mandate in 1946 to examine the necessity of recasting the 1924 Geneva Declaration.<sup>58</sup> The discussions that led to the adoption of a new Declaration in 1959 were prompted by the International Union for Child Welfare – the successor of Save the Children.<sup>59</sup> As opposed to the 1924 Geneva Declaration, this time the negotiations within the United Nations focused on the relationship between children and their parents, and on the duties and responsibilities of the State and of the parents.<sup>60</sup> The negotiations were carried out along the different ideological lines of the East and West: Warsaw Pact countries were advocating for the idea that the State bore the primary responsibility for children whereas the Western Delegations considered that the primary responsibility for the child lay with the parents.<sup>61</sup> Also, the idea of drafting a binding document did not get sufficient traction, with opposition coming both from the United States which rejected covenants calling for an international supervisory mechanism, and from the Eastern bloc which would agree to binding instruments but reject an international oversight of implementation.<sup>62</sup>

Moody posits that the resulting document, the 1959 United Nations Declaration on the Rights of the Child (the “(1959 Geneva) Declaration”) was essentially drawn up behind closed doors with little input from international organisations.<sup>63</sup> Following its adoption, even though the dissemination efforts were similar to its predecessor the 1959 Declaration has never enjoyed the same success.<sup>64</sup> The reasons vary, ranging from the lack of binding status to the fact that the principles are intertwined with implementing clauses.<sup>65</sup>

In terms of content, the 1959 Geneva Declaration expanded significantly the scope of the 1924 Geneva Declaration. This time several references to the relationship between children and parents permeated the text. Already in the preamble, parents are named as duty bearers, tasked with recognizing,

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57 Bennett 1987, p. 20.

58 Moody 2015, p. 21.

59 Veerman 1992, p. 159. In 1946 Save the Children International merged with another organisation to form the International Union for Child Welfare. The International Save the Children Union of today is the result of the merging in 1977 of several Save the Children organisations which formed the International Save the Children Alliance.

60 Veerman 1992, p. 163

61 Veerman 1992, p. 164.

62 Veerman 1992, p. 166.

63 Moody 2015, p. 21.

64 Moody 2015, p. 24.

65 Moody 2015, p. 24.

and observing the rights of children. Several of the 10 principles make direct references to the child's parents/caregivers. For example, under paragraph 2 of Principle 7 the responsibility for a child's education and guidance lies primarily with the child's parents. Placing responsibility on a person, other than a state in an international instrument was remarkable for the times.<sup>66</sup> Principle 6 deals more in detail with the triangle state-child-parent. It provides:

"The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable."

According to Veerman, discussions leading to the adoption of this principle were extensive and they showcased differences among states in values and norms.<sup>67</sup> Among the areas of concern, Veerman notes precisely the issue of protecting the family unit against outside intervention.<sup>68</sup> The topics subject to debate were for example the age from which the consequences of separating a child from his mother were particularly serious as well as the financial assistance required from states for helping families in need. That separation from the mother had harmful effects on a child's development was not contested in itself, but rather the issues of age or socioeconomic aspects, as mentioned above.<sup>69</sup> Principle 6 of the 1959 Geneva Declaration is of particular importance as it formed the negotiation basis for what was to become Articles 9, 10 and 11 of the CRC. These Articles include the core substantive and procedural children's rights in cases of parental separation and cross-border movements.

According to Freeman, all of the rights included in the 1959 Geneva Declaration are welfare rights, in that they recognize that children cannot provide for themselves and need the care and guidance of adults.<sup>70</sup> Bennett saw the declaration as a dangerous precedent for what was to become the Convention on the Rights of the Child.<sup>71</sup> His critique rests on three aspects, namely that, other in its title, it failed to recognize *rights* of children, that it overemphasised socio-economic rights to the detriment of civil and political

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66 Veerman 1992, p. 173.

67 Veerman 1992, p. 173.

68 Veerman 1992, p. 173.

69 Veerman 1992, p. 173.

70 Freeman 1983, p. 40. In the same vein Bennet-Woodhouse 2002, p. 108.

71 Bennett 1987, p. 18.

rights, and finally that it treated the interests of children as independent and unconnected to the rights and interests of parents and family control and unity.<sup>72</sup>

The decades following the 1959 Geneva Declaration were prolific in the adoption of many binding treaties safeguarding the human rights of minorities.<sup>73</sup> Concerns over children and families were reflected by the inclusion of several articles in the 1966 International Covenant of Civil and Political Rights (the “ICCPR”)<sup>74</sup> and the International Covenant on Economic, Social and Cultural Rights (the “ICESCR”).<sup>75</sup> Article 24 of the ICCPR is the only provision dealing expressly with children. It provides protection to children against discrimination, the right to a name, birth registration and the right to a nationality. The first paragraph deals expressly with the right of the child to protection on the part of his family society and the State. In its General Comment No 17, dated 7 April 1989, the Human Rights Committee addressed specifically Article 24. It emphasised that the primary responsibility for raising children lies with the family (to be understood broadly) and particularly on the parents. Already before the Convention on the Rights of the Child the Human Rights Committee emphasised that “If the marriage is dissolved, steps should be taken, keeping in view the paramount interest of the children, to give them necessary protection and, so far as is possible, to guarantee personal relations with both parents”.<sup>76</sup> The ICESCR also includes several references to children and families from the perspective of socio-economic rights. Article 10 recognizes the family as the fundamental unit of society entitled to the widest protection and assistance from the state. The same Article includes several other references to children focusing on measures of protection and assistance to which they are entitled. Children are also featured in Articles 12 and 13 respectively which concern obligations on the state to ensure the healthy development of the child and the rights of parents to choose schools and educational forms for their children.

Soon after the adoption of these core human rights instruments, which include provisions concerning children but seem to follow the focus on needs of the previous instruments, the Children’s Liberation Movement emerged. This movement advocated for granting children equal rights to adults so as to be autonomous and to be able to fully participate in society.<sup>77</sup> In post-industrial societies the debates around children increasingly used the language of rights, replacing the previous paternalistic language of

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72 Bennett 1987, p. 19.

73 Moody 2015, p. 25.

74 Adopted on 16 December 1966 by General Assembly Resolution 2200A (XXI), entry into force 23 March 1976.

75 Adopted on 16 December 1966 by General Assembly Resolution 2200A (XXI), entry into force 3 January 1976.

76 ICCPR General Comment No. 17: Article 24 (Rights of the child) 7 April 1989, para 6.

77 Hanson 2012.

'children's needs'.<sup>78</sup> This language however was not matched in the work of UNICEF and other INGOs whose concern continued to be that of meeting the most basic needs of children in the non-industrialized world.<sup>79</sup> Two diametrically opposing stances on children seem to have emerged: one aiming for the 'full liberation' of the child from adults, focused on the child's rights and one seeking to protect the child, focused on the child's 'needs'.

This was the context in which the first discussions on the adoption of a binding instrument concerning children were put forth to the UN Commission on Human Rights by Poland, in 1978. The Polish proposal was to cast the 1959 Geneva Declaration into a binding instrument.<sup>80</sup> This proposal was criticised for its indeterminate language, failure to specify concrete rights and duty holders, or absence of a definition of the child.<sup>81</sup> Pressing issues for the time, which according to the Commission on Human Rights, should have been included in the future convention were matters such as apartheid, abortion or family reunification.<sup>82</sup> The Commission on Human Rights appointed an Open-Ended Working Group on the Question of a Convention on the Rights of the Child so as to revise and reformulate the text of the Polish proposal.<sup>83</sup> In the coming 10 years which led to the adoption of the CRC, the Working Group, which was open to UN Member States, met for one week a year to discuss the draft convention.<sup>84</sup> One explanation for the 10-year span of the negotiations lies in the fact that the Working Group operated by consensus, in that no article was adopted unless all of the Working Group Members agreed to it.<sup>85</sup> According to Nigel Cantwell of Defence for Children International, the Convention on the Rights of the Child "was meant to reflect the minimum present-day standards of what things children have rights to; nevertheless, one cannot say that there is a universal approval for the provision therein. [...] The Convention thus reflects a negotiated consensus rather than a real consensus."<sup>86</sup>

The paragraphs above have highlighted the evolution of children's rights, both at national and at international level, along historical lines. It has been argued that children's rights could only have emerged if childhood was recognized as different from adulthood in human existence. For some historians and developmental psychologists, childhood as a different stage in human existence could be traced back to the beginning of the seventeenth century. In this view, childhood only developed as parents changed their attitudes towards children. Other researchers argued that such linear evolu-

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78 Moody 2015, p. 25.

79 Moody 2015, p. 25

80 Detrick 1999, pp. 14-15.

81 Price Cohen 1982, p. 373.

82 Price Cohen 1982, p. 373.

83 Veerman 1992, p. 182.

84 S. Detrick 1999, p. 17.

85 Veerman 1992, p. 183.

86 Veerman 1992, p. 183; Quennerstedt, Robinson, l'Anson 2018, pp. 53-54.

tion in the history of childhood is not supported by evidence. Despite their divergent points, there is agreement that childhood is a social construct. The different conceptions of childhood have resulted in various views over children, whether they should have rights and what having rights actually means. The conceptions of children's rights are intimately connected to different societies' views of families, and this is shown in law as the earliest recognitions of children's rights were enacted as limitations of parental powers. As Price Coen writes: "The proposition that children are individuals who have rights of their own, in addition to their rights as family members, is relatively new; a creature of the last few hundred years." It was chiefly children's need for protection which justified some of the early laws on children's rights. The same conception of children's rights is reflected at the international level where the atrocities of wars and images of despair and hunger paved the way for the first non-binding instruments concerning children. As the scars of war subsided and in tandem with the proliferation of international human rights instruments, advocacy for children's rights shifted from protection to liberation. Liberation, as a movement, aligned the rights of children to those of all the other human beings, claiming that children should have rights in the same way as adults have. These two opposing stances, one focusing on protection, and the other on autonomy coexisted at the time the CRC was drafted. The parents and the state are central to both arguments as they can be seen both as inhibitors and enhancers of children's rights. It is thus the triangle parent-child-state which makes children's rights unique.

## 2.3 CHILDREN, PARENTS AND THE STATE WITHIN THE CRC

### 2.3.1 Standard setting within the CRC

Before delving into the question of how the CRC envisages the triangular relationship between the child, parents and the state, some remarks on the drafting process are necessary to clarify the type of standards set by the Convention as well as their breadth.

As outlined above, the Convention was adopted by consensus which meant that each of its Articles was unanimously approved by the States Parties. One of the underlying reasons for such a working method was to secure widespread agreement and subsequent ratification of the future Convention.<sup>87</sup> Indeed, within a year from its adoption, 130 states had accepted the CRC.<sup>88</sup> To date, the CRC is, without doubt, the most widely ratified international instrument. One consequence of the consensus approach may be

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<sup>87</sup> Dietrick 1999, p. 17.

<sup>88</sup> Hafen/Hafen 1996, p. 449. The authors explain that by 'accepted' both signatures and ratifications were included.

the open-endedness of the Convention's provisions. Bennett has criticised (the draft) Convention at the time, for politicisation of children's rights, by which he meant that the Convention included a set of ideals which were cast as rights resulting in an attempt to implement policy in international law.<sup>89</sup> Other commentators share this view, arguing that in a strictly legal sense, the CRC is an inherently unenforceable document, including a set of ideals and abstract principles. Tobin, whose view was also shared by Cantwell, considered that the Convention reflects "a normative commitment to a conception of childhood".<sup>90</sup>

Contrary to what has been argued above, the claim in this dissertation is that the CRC does contain a set of minimum standards, with the potential to become enforceable.<sup>91</sup> States, though courts, legislators and other actors may choose from a wide range of implementing measures, provided that they comply with the minimum core set out in the Convention. This interpretation is also supported by Article 41 of the CRC according to which

"Nothing in the present Convention shall affect any provisions which are more conducive to the realisation of the rights of the child and which may be contained in: (a) The law of a State party; or (b) International law in force for that State. "

Further, as a counterweight to the claim that the CRC is inherently unenforceable, it should be pointed out that on 19 December 2011 the UN General Assembly adopted the Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure (the "OPIC").<sup>92</sup> The OPIC entered into force on 14 April 2014, and it is open for ratification to all countries of the world. Under the OPCCRC the CRC Committee has the authority to adjudicate on individual complaints brought by children or on behalf of children.<sup>93</sup> Even though the CRC Committee may only render 'Views', which could be considered to have less resonance than the legally binding judgments, these Views do resemble judgments and they have the capacity to add more flesh to the bone to the Convention. Nevertheless, as stated above, it is worth reiterating that, under Article 41 of the CRC, such standard setting represents a minimum guarantee rather than an optimal protection of children's rights. Seen through this lens – that of a document setting out minimum standards for the rights of children and which is capable of being enforced at national level – the CRC is more than merely symbolic affirmation of ideals in the field of children's rights.

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89 Bennett 1987, p. 37.

90 Tobin 2013, p. 419.

91 And indeed, in some jurisdictions courts have relied directly on the CRC to support their reasoning, In this sense, see: Liefwaard, Doek, 2016.

92 Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/66/138 of 19 December 2011.

93 Article 5 CRC. For more information on the mechanism set under OPCRC see among others Hanson 2015.



As shown above, prior to the CRC the existing international instruments solely ascribed protection rights to children. Children as subjects of law were also included in several articles of binding international conventions but their express inclusion was clearly linked to family and protection rights. In short, prior to the CRC children only had the right to protection.<sup>94</sup> Law reflected what was to be considered a paternalistic attitude, positioning the youngest members of society solely as *becomings*, that is individuals whose future is to be secured but whose present existence is largely ignored. That was in stark opposition to traditional human rights where the focus was precisely on individual autonomy and self-determination. The basic human rights framework rests on a sharp distinction between private and public responsibilities with the parents being assigned the responsibility for childcare and the public power which is not supposed to intervene in the private sphere.<sup>95</sup> Within this basic framework, focusing on children's needs and their right to protection is relatively uncontested. It is more difficult however to see children as beings in their own rights, not just *becomings*. The questions behind the conceptualization of children's rights at the time of drafting were raised by Minow: "What exactly is a right that can be exercised by a five-year-old, or a two-year-old-and does it rest on different premises than rights for adults? How are rights for children to be enforced: do they require adult supervision, and if so, by which adults? Won't many adults politically oppose suggestions that children-perhaps their own children-should have legal liberties and powers that constrain the liberty and authority of adults?"<sup>96</sup>

For Freeman, the CRC successfully merged both attitudes towards children by recognizing the best interests of the child (traditionally associated with the child's need of protection) as a core concept and the child's right to participate (advocated by those who put children on an equal footing with adults).<sup>97</sup> Price Cohen wrote in 1993 that the original rights of the child to care and protection enshrined in the 1959 Declaration were supplemented by individual personality rights (where she included the 'adult-style' civil rights such as "speech, religion, association, assembly and the right to privacy").<sup>98</sup>

The rights laid down in the CRC have been widely classified in 3 categories, the so-called 3 Ps: provision of basic needs, protection against neglect and abuse and participation rights.<sup>99</sup> As will be further detailed below, it is generally accepted that the CRC is an attempt to resolve the dilemma of protection versus participation through a developmental approach, under which the balance between protection and autonomy would shift progressively toward the latter as the child grew in age and maturity.<sup>100</sup>

94 In this sense, see also Price Cohen 1993.

95 Minow 1986, p. 7.

96 Minow 1986, p. 7.

97 Freeman 1997, p. 639.

98 Price Cohen 1993, p. 7.

99 Quennerstedt 2010.

100 Smolin 2003, p. 975; Rap/Schmidt/Liefwaard, 2020, p. 4.

### 2.3.2 The approach under the CRC to the relationship children – parents – state

A textual analysis of the Convention shows that children are inextricably linked to their caregivers. 39 Articles of the CRC lay down rights for children; of these no less than 30 Articles mention the child's family, parents, guardians or caregivers.<sup>101</sup> The Preamble makes such references in two recitals. It is thus clear that the child is seen first and foremost within the context of the family and only exceptionally outside it.

The child's parents have the most prominent role in ensuring the realisation of children's socio-economic rights as well as their civil and political rights. Indeed, the Preamble sets out the family as "the fundamental group of society and the natural environment for the growth and well-being of [...] children". It is also recognized that the child should grow up in a family environment "for the full and harmonious development of his or her personality". An overview of the substantive provisions of the Convention indicates that the role of the state is to support the child's caregivers in discharging their duties. For example, Article 3(2) lays down that States are to ensure the protection of the child's wellbeing taking into account the rights and duties of their parents, legal guardians or other individuals legally responsible for the child. Article 18 provides that the primary responsibility for the upbringing and development of the child lies with the parents, or as the case may be, legal guardians. States, in turn, should render appropriate assistance to parents and legal guardians for facilitating the proper exercise of their duties. Under the Convention, the child has, among others, the right to know and be cared for by his or her parents (Article 7), to preserve his or her family relations without unlawful interference (Article 8), to maintain contact and personal relations with both parents on a regular basis and not to be separated from parents against their will (Article 9), to family reunification and contact across borders (Article 10), to not be subjected to unlawful or arbitrary interference with his or her family (Article 17). Parents are also primarily in charge of securing the socio-economic rights of the child, such as the right to development (Article 27) or the right to social security (Article 26).

Doek sees the CRC as "the only [international instrument] in which the rights of parents are clearly recognized and respected and which attaches special importance to the role of the family in the life of the child".<sup>102</sup>

At the same time, – while the CRC evidently highlights the importance of parents and family for children –, it is important to stress that the status of the child as a rights holder places some limitations on the exercise of paren-

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101 The CRC is divided into two parts, the first part including the definition of the child (Article 1) followed by 39 Articles laying down various rights. Article 41 – which is the last Article of the substantive part – does not concern a right, but the relationship of the rights within the CRC with other provisions of national and international law. Hence, there are 39 provisions laying down various substantive rights for children.

102 Doek 2006, p. 203.

tal rights. Arguably, the two most important limitations are those included in Articles 5 and 12 of the CRC. Under Article 5 CRC parents are to provide the child with appropriate direction and guidance in accordance with the child's evolving capacities. A similar reference to evolving capacities is included in Article 14 CRC on freedom of thought, conscience and religion. This Article affirms that parents are to provide direction to the child in the exercise of his or her right to freedom of thought, conscience and religion in a manner consistent with the evolving capacities of the child.

The notion of *evolving capacities* is core to the understanding of the CRC as it places the relationship between parents and children on a gradient scale, ensuring a balancing role between the protection rights and autonomy of the child.<sup>103</sup> This was evident already at the drafting stage of the Convention when some delegations feared that introducing a notion of (evolving) capacities of the child could undermine the rights of the parents and the sanctity of the family.<sup>104</sup> On the other hand, other delegations argued that 'the family' should not be given arbitrary control over the child, but rather that a balance should be sought between protection from the state to the family and protection of the child within the family.<sup>105</sup> The latter approach is the one ultimately taken by the Convention.

Furthermore, it is considered that the way the concept of 'evolving capacities' was introduced in the Convention at the drafting stage markedly differs from how the Committee has interpreted it throughout time.<sup>106</sup> Initially thus, 'evolving capacities' was seen less as a right of the child to exercise rights in accordance with evolving capacities and more as a right to receive appropriate guidance from parents.<sup>107</sup> Later General Comments of the CRC Committee shifted this approach to one where parents no longer have absolute powers in deciding how to provide guidance to children but rather where "parental guidance and direction must be provided in a manner that reflects a child's unique needs [...] and such guidance needs to be adjusted continually to enable the child to exercise progressive levels of agency and responsibility in the exercise of her rights".<sup>108</sup>

The 'evolving capacities' are at the centre of the triangular relationship between parent-child-state; the state has the duty to ensure that the "more the child himself and herself knows [...] the more the parent[s] [...] have to transform direction and guidance into reminders and advice and later to an exchange on an equal footing".<sup>109</sup> Here the link between the evolving capacities of the child and the child's right to be heard becomes evident, in that the child's voice shall weigh heavier the more evolved his capacities

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103 Lansdown 2005.

104 Varadan 2019, p. 315.

105 Working Group Report 1987, para 106.

106 Varadan 2019, p. 308.

107 Varadan 2019, p. 308.

108 Varadan 2019, p. 320.

109 General Comment no 12 (2009): The right of the child to be heard, CRC/C/CG/12, 20 July 2009 (GC 12), para 84.

are assessed to be. Also, within the framework of the Convention, Article 12 on the child's right to be heard is generally credited with bringing about the paradigmatic shift between children as objects of protection to children as rights holders.<sup>110</sup> This notwithstanding, the breadth of Article 12 is rather modest in that it only requires States to ensure the right to express views freely and to have those views given due weight in accordance with the age and maturity of the child. Even though it is ultimately up to adults to decide whether children possess the necessary 'age and maturity', the insertion of participation rights for children represented a shift from the need-based rights for children to acknowledging children's agency. Liebel argued that "stressing the agency aspect of human rights in relation to children also has a power-balancing function, which counteracts the structural ruthlessness against children in contemporary societies, while strengthening their social status and bargaining power."<sup>111</sup>

The provisions of the CRC thus demonstrate that the Convention places considerable emphasis on the role of parents in contributing to the fulfilment of the rights of children. Todres argued that many of these provisions could have been drafted without references to parents, legal guardians or families, but instead, the CRC does recognize the valuable role that parents and families have in the development of children.<sup>112</sup> The limitation on parental rights, which exists in the Convention, most notably through concepts such as evolving capacities and right to be heard – as discussed above – but also through prohibition of violence against children even at the hands of their caregivers as laid down under Article 19, is a recognition that the Convention does not allow parents to act with impunity toward their children.<sup>113</sup> Bennett Woodhouse has also argued that giving rights to children does not take away rights from parents.<sup>114</sup> The focus of the CRC, in line with other international human rights instruments, was the individual right to be free from state oppression.<sup>115</sup> To her, the CRC should rather be seen as empowering parents to protect children against government abuses.<sup>116</sup>

This aspect -the relationship between the rights of children, those of parents and role of the state- has triggered substantial criticisms to the concept of children's rights as enshrined in the Convention. One of the main claims is that the vagueness of the provisions of the CRC, coupled with the insertion of the best interests standard leaves an open door for unwarranted intrusion of the state in family matters.<sup>117</sup> For example, in the United States – also the country from which most criticism to the CRC has arisen- the

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110 Mayall 2013, p. 35.

111 Liebel 2018, p. 621.

112 Todres 2006, p. 21.

113 Todres 2006, p. 27.

114 Bennet Woodhouse 2006, p. 39

115 Bennet Woodhouse 2006, p. 39.

116 Bennet Woodhouse 2006, p. 40.

117 Guggenheim 2005.

best interests standard has been used as a proxy for fast termination of parental rights and placing children with adoptive families.<sup>118</sup> Guggenheim considered that the best interests as a decision-making factor “is a formula for unleashing state power, without any meaningful reassurance of advancing children’s interests”.<sup>119</sup> His concern was that children’s rights, instead of advancing rights for children, have the opposite effect of delineating the power of state officials.<sup>120</sup> It has also been suggested that “the Convention’s autonomy flavour could nudge unsophisticated adults to give undue weight to a child’s desires. Parenthood has taught [...] us that children, even at very young ages, have no difficulty in forming their own views, but children having little idea of their own long term interests may well express views that are inconsistent with reality of their own interests.”<sup>121</sup> It has also been suggested that the excessive autonomy given to children through (primarily) Articles 5 and 12 takes the decision-making power away from the parents to an objective person, such as a judge and this role results in the state substituting itself to the role of a parent.<sup>122</sup> Moreover, the Convention is not so much about what children or their parents wish but rather about the standards that the UN deems necessary for children<sup>123</sup>. Authors endorsing this position claim that the better standard, which the CRC is seeking to replace, is that of parental fitness, which means that unless a parent is demonstrably unfit, state authorities are not competent to assess the best interests of the child.<sup>124</sup>

Further, it should be stressed that commentators criticising the alleged interference of the CRC with the rights of the parents, share the view that all children have the right to care and protection. Moreover, this right to protection is highly valued. Haffen posits that children should be protected against their own immaturity and that essentially parents and not the state are the best to provide such protection.<sup>125</sup> He is also wary that the CRC has created a new and lower threshold for state intervention in families.<sup>126</sup>

A closer look at the criticism of children’s rights appears to stem from a narrow view of rights rooted in the will theory which posits that the main purpose of a right is to curb state interference. Even the main proponent of the will theory, Hart, admits that children have rights but that they need adults to represent them.<sup>127</sup>

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118 Guggenheim 2005, p. 61

119 Guggenheim 2005, p. 41.

120 Guggenheim 2005, pp. 246-247.

121 Haffen 1996, p. 465.

122 Haffen 1996, p. 465.

123 Farris 2010.

124 Haffen 1996, p. 466, McGee 2018, p. 709.

125 Haffen 1996, p. 453.

126 Haffen 1996, p. 464.

127 Liebel 2018, p. 614.

When viewed in this way the difference in positions between proponents and opponents of children's rights in the context of the family is less stark than a cursory reading of their position seems to indicate. Both warn against excessive state intervention into family life. For all commentators, dependency of children on adults is a key factor leading to either denying their status of rights holders or advancing the idea that children have or should have rights. There is agreement that children are indeed dependent on their caregivers. Dependency results in children having a special position and this special position makes recognition and enforceability of their human rights more difficult compared to other human rights. Babies are born entirely dependent on adults and need an adult's care for survival. (Parental) care is essential for their survival and development. Dependency and care do not fit well with traditional rights' discourses focus on autonomy and equal rights. Paternalistic attitudes towards children's rights focus on children's dependency on adults and on them being future persons (becomings).<sup>128</sup> This interpretation of children's rights focuses on their need for special treatment and rights which are necessary to secure children's future well-being.<sup>129</sup>

Clearly, there is a tension between traditional claims of equal justice under the law and children's essential dependency and such tension has pushed advocates for children's rights to construct more varied descriptions of equality.<sup>130</sup> Accepting that children have a special relation within their families and at the same time human rights inherent to all human beings leads to the inescapable conclusion that rights for children require certain modifications to traditional notions of human rights.

Tobin has claimed that the CRC "offers what could be termed a *collaborative* or *cooperative* conception of the relationship between state and family as regards children's upbringing".<sup>131</sup> For him the CRC should be seen as offering a relational -as opposed to individualistic- conception of rights where the more autonomous the child, the less role should parents have in the realisation of children's rights.<sup>132</sup> Proponents of children's rights have seen the Convention as marking a shift between what adults think children need to what children actually need, while recognizing that these needs are sometimes inescapable from those of their caregivers.<sup>133</sup>

The paragraphs above provided a textual analysis to the CRC so as to determine how this instrument construes the parent-child relationship and

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128 Hanson 2012, p. 73.

129 Hanson 2012, p. 73.

130 Bennett Woodhouse 2009.

131 Tobin 2013, p. 426.

132 Tobin 2013, p. 426.

133 Bennett Woodhouse 2009, p. 836.

the role of the state in this area. It has been shown that an overwhelming number of provisions reflects a concern of the Convention not only with the child, but with the child's family as well. At the same time, it has been shown that the critical voices to the Conventions focused on the allegedly wide scope left by its text to unwarranted interventions in family lives. However, it has also been shown that the CRC only lays down minimum standards subject to further refinement by states. This contribution is based on a reading of the Convention that supports the idea that the child is inextricably linked to his or her caregivers and that the rights of the child are to be construed in light of this link with two major limitations to parental rights, as laid down under Articles 5 and 12 of the Convention. The following sections shall delve deeper into the question of what constitutes a child rights approach, as this approach will guide the analysis throughout this entire dissertation.

## 2.4 A RIGHTS-BASED APPROACH TO CHILDREN'S RIGHTS

### 2.4.1 Choice of terminology: child-centred or rights-based?

The field of children's rights could lead to some terminological confusions due to many factors, including that the preoccupation with children exists in sciences other than the legal discipline. Also, even within the legal discipline expressions such as *child law*, *children's rights* or *children's rights law* have different meanings.<sup>134</sup> *Child law* includes all law concerning children and childhood; *children rights* refers to the fundamental human rights of children but not necessarily as a legal category; and *children's rights law* is the narrower category including only the fundamental human rights of children.<sup>135</sup> This dissertation focuses on the last substantive concept: *children's rights law*. In turn, children's rights law primarily focuses on the human rights of children which have been included in national constitutions, international treaties and the CRC.<sup>136</sup>

The concept of *rights-based* approach should similarly be distinguished from the related but sometimes different notions of *child centred* or *child friendly*. The main point of departure is that the *rights* discourse, albeit increasingly used in other disciplines, is rooted in law. The language of law is used to discuss social questions, such as definitions of families, or what parents owe their children, and these questions go to the root of defining a scheme of rights and responsibilities.<sup>137</sup> Tobin has also noted a trend within many legal systems to situate issues concerning children in terms of their rights.<sup>138</sup> Rights-based approaches are also central to judicial decision-

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134 Vandenhole 2015, p. 27.

135 Vandenhole 2015, p. 27.

136 Vandenhole 2015, p. 27.

137 Bennett Woodhouse 2000, p. 2.

138 Tobin 2009, p. 597.

making.<sup>139</sup> At the same time, focusing on a rights discourse for children can at times appear controversial. The sceptics to the use of rights in connection to children readily agree that child centred legislation is necessary and to be encouraged: in the context of legislation children centred being interpreted to mean legislation enacted in consideration of how children will fare by it.<sup>140</sup>

In this dissertation a rights-based approach is followed. The choice of *rights-based* as opposed to *child centred* is also motivated by its use within the CRC Committee's General Comments. So far, the Committee has issued a number of 23 General Comments, two Joint General Comments and one Joint General Recommendation.<sup>141</sup> Recommendations or references to rights-based strategies can be found in 14 General Comments. Conversely, other than two scattered mentions in earlier General Comments, the CRC Committee does not use the term *child centred*.

## 2.4.2 Substance of a rights-based approach

With reference to research, Lundy and McEvoy have noted that the term 'rights-based' is used broadly to describe work influenced by the international human rights standards.<sup>142</sup> In the same vein, Tobin has highlighted that there is no single definition of a rights-based approach.<sup>143</sup>

In the field of children's rights law, additional focus on rights-based approaches may appear at a first glance tautological as children's rights law is necessarily based on international human rights instruments concerning children. The principles of a rights-based approach may be drawn from all international human rights instruments; the CRC however represents the primary but not exclusive source from which the principles of a human rights-based approach for children can be derived.<sup>144</sup>

Perhaps this is also the reason why no precise definition of this concept is provided in any of the General Comments of the CRC Committee. The Committee considers for example that a rights-based national strategy is primarily rooted in the Convention.<sup>145</sup> In other contexts, the CRC Committee underlined that a rights-based strategy is one where the children's best interests are always the starting point for service planning and provision.<sup>146</sup> A human rights perspective for the CRC Committee includes due respect

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139 Tobin 2016, p. 66.

140 Guggenheim 2006, p. 63.

141 As General comments No 18 and 19 do not exist, the total number of such documents, irrespective of their numbering is 23.

142 Lundy/McEvoy 2012, p. 76.

143 Tobin 2016, p.64 referring, among others to Sarelin 2007.

144 Tobin 2016, pp. 67-68.

145 General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5 27 November 2003, para 28.

146 General Comment No. 7 (2005): Implementing Child Rights in Early Childhood, CRC/C/GC/7/Rev.120 September 2006, para 22.



for children's participatory rights.<sup>147</sup> In the juvenile justice contexts, rights-based approaches mean that awareness campaigns should focus on dealing with children alleged of violating the penal law in accordance with the spirit and the letter of CRC.<sup>148</sup> A rights-based approach to child labour includes a focus on education, a basis on the CRC and other relevant international standards.<sup>149</sup> On the relationship between children and caregivers, the CRC Committee highlights that "A child rights-based approach to [...] caregiving and protection requires a paradigm shift towards respecting and promoting the human dignity and the physical and psychological integrity of children as rights-bearing individuals rather than perceiving them primarily as victims".<sup>150</sup> For adolescents as well, a rights-based approach includes the recognition and respect for their dignity and agency.<sup>151</sup>

The references above indicate that the Committee's mentioning of a rights-based approach is intended to shift the focus from protection rights to participatory rights for children. The same view has been shared by commentators who see participation as a key feature of a rights-based approach.<sup>152</sup> In the context of children, it should be noted that participation is modified but does represent a rejection of the previous approaches to focus solely on their welfare.

Notwithstanding the extensive references of the CRC Committee, adopting a rights-based approach to children's rights remains in itself subject to contestation. Similarly to the case of the relationship between children and parents, the divergence is spurred, among others, by the fact that children are dependent on their caregivers, lack the capacity for autonomous decision-making and thus they cannot possess rights in the 'adult sense of the word'.<sup>153</sup> The language of rights implies choices by the rights holders and children are not born autonomous.<sup>154</sup> Rights are rooted in the liberal theory and they presuppose an independent individual as the basic organising principle of polity and citizenship.<sup>155</sup> In family law in particular, rights theories assume equal freedom and opportunity for each individual in soci-

147 GC No 7, para 40; Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices, CEDAW/C/GC/31/REV.1 – CRC/C/GC/18/Rev.1, para 60.

148 General comment No. 10 (2007): Children's Rights in Juvenile Justice CRC/C/GC/10 25 April 2007, para 96.

149 General comment NO. 11 (2009) Indigenous children and their rights under the Convention, CRC/C/GC/11, 12 February 2009, paras 71-72.

150 General comment No. 13 (2011) The right of the child to freedom from all forms of violence, CRC/C/GC/13, 18 April 2011, para 3.

151 General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, CRC/C/GC/20, 6 December 2016, para 4.

152 See among others Tobin 2016; Lundy/McEvoy 2012.

153 Bennet Woodhouse 2001, p. 377.

154 Bennet Woodhouse 2001, p. 378.

155 De Graeve 2015, p. 156.

ety.<sup>156</sup> It has been further contended that a rights discourse is ill-equipped to accommodate the relationship between children and their caregivers which is characterised by the ethics of care, emphasising responsibilities over rights.<sup>157</sup>

As a response to these challenges several commentators have drawn on feminist relational theories and ethics of care to develop a more nuanced approach to rights for children.<sup>158</sup> Most children's rights theorists accept that children are indeed different but they argue that such difference should not result in them being denied rights but rather in adapting the 'rights discourse' in a way that it fits children.<sup>159</sup> The struggle is that of stretching "a more nuanced [...] discourse and a more child-centred perspective on rights."<sup>160</sup> Rights discourses for children need to take into account the interdependency of individuals, families and communities.<sup>161</sup> That being said, the argument is not that the position of children does not fit within rights theories. Rather, these theories should be enriched with strong attention to relationships and their preconditions.<sup>162</sup> Tobin has identified several features of a rights-based approach to children's rights, derived from the more general concept of a rights-based approach to human rights.<sup>163</sup> In his attempt to provide stronger conceptual foundations for such an approach, he has identified (i) core principles; (ii) express principles and (iii) implied principles. Among the core principles to such an approach is the requirement to integrate rights into the issue subject to analysis.<sup>164</sup> As with general human rights, the express principles include accountability, non-discrimination and participation; which apply in a modified form to children's rights.<sup>165</sup> As specific express principles to children's rights Tobin mentions 'due deference' – i.e. respect for parents and guardians in the exercise of their responsibilities – and evolving capacities of the child. Last, there are three implied principles: (i) dignity, (ii) interdependence and indivisibility and (iii) cultural sensitivity.

These principles in essence attempt to reconcile the debates mentioned above by laying down criteria for a rights-based approach to children that takes into account their special position of dependency without at the same time discarding the concept of rights altogether. These principles could be said to represent the backbone of a rights-based approach to children's rights. The section below shall delve deeper into the same question from the perspective of the judiciary.

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156 Minow/Shanley 1996, p. 5, with further references.

157 Arneil 2002, p. 90.

158 Among others Minow 1986, Woodhouse 2009; Rosenbury 2015.

159 Woodhouse 2001, p. 1 referring to Freeman 1992, Federle 1995.

160 Bennet Woodhouse 2001, p. 1.

161 Bennet Woodhouse 2001, p. 3, Minow/Shanley 1996, p. 12.

162 Minow 1996, p. 20.

163 Tobin 2016.

164 Tobin 2016, p. 66.

165 Tobin 2016, p. 66.

### 2.4.3 A rights-based approach to judicial decision-making

At the heart of this dissertation lies judicial decision-making. One of the questions posed is ‘How can a child rights-based approach inform primary carer abductions with immigration components?’ As a precondition to answering this question it is considered necessary to set out the theoretical parameters of a rights-based approach in family matters.

As shown above, in general terms such an approach implies that the decision-making process shall be guided by the rights set out in the CRC. However, despite the wide ratification of the CRC, commentators have noted that it is rare for courts to refer to the rights of children even in judgments that concern them.<sup>166</sup> Commentators considered that one of the reasons for such few references was the lack of separate representation for children; indeed it was found that when children acted independently in litigation, judges did include children’s rights in their reasoning.<sup>167</sup> Other reasons could be that the legal provisions are phrased in adult terms and the concerns of adults tend to overshadow those of children.<sup>168</sup> Further, an over-focus on the child’s welfare could be seen as an impairment for a discussion on rights<sup>169</sup>.

The paragraphs above have argued that the main features of a rights-based approach are the focus on the human rights of children as enshrined in the CRC, with an adequate balance between protection rights and participation rights for children. It is not proposed to assimilate children to adults, but rather to ensure that rights are modified in such a way that they could be exercised effectively by children. Further, the implementation of such an approach may be different in practice depending on the implementation actor. Rights-based approaches may have different meanings if the question is how to apply such an approach to research, legislation or budgeting, to name but a few. When it comes to the judiciary, any process seeking to mainstream children’s rights should consider that the function of the judiciary is remedial and not anticipatory (such as the case may be with legislation, or other programmes).<sup>170</sup>

In his assessment on whether judges conduct a rights-based analysis, Tobin has identified six types of approaches: (i) the invisible rights approach, (ii) the incidental rights approach; (iii) the selective rights approach; (iv) the rhetorical rights approach; (v) the superficial rights approach and the (vi) substantive rights approach.<sup>171</sup> Tobin has argued in favour of the substantive rights approach as the manner of properly taking into account children’s rights in the decision-making process. His general claim is that “from a practical perspective, the recognition of children as rights-bearers requires that judges actively identify children’s claims to

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166 Fortin 2006, p. 300.

167 Fortin 2006, p. 301.

168 Fortin 2006.

169 Choudhry/Fenwick 2005, pp.491-492.

170 Tobin 2016, p. 66.

171 Tobin 2009.

independent rights and not simply overlook, subsume, marginalise them within the rights or interests of their parents".<sup>172</sup> A similar view is held by other scholars, who found that in balancing various rights, judges rarely expressly articulate the rights of children.<sup>173</sup>

This dissertation shall also use Tobin's substantive rights approach as a frame of reference for cross border family disputes over children. Tobin's view of a rights-based model implies a process where judges consider (i) the wishes of the child; (ii) the relevance of other rights under the CRC; (iii) the particular circumstances of the child; and (d) any available empirical evidence which may be of relevance.<sup>174</sup> Brief references to the rights of children are not sufficient to meet such an approach.<sup>175</sup> Nor are truncated references to some rights of children, or rhetorical affirmations pertaining to – for example- society's interest in protecting minors.<sup>176</sup> Last but not least, judges should undertake the actual scope and nature of the rights in question and balance them against any competing considerations.<sup>177</sup>

For Tobin, a rights-based approach to judicial decision-making includes four aspects: (i) the conceptualization stage; (ii) the procedures used; (iii) the meaning given to the rights in question and (iv) the reasoning, i.e. how the rights at stake were balanced in the context of the specific case. Under the conceptualization stage it is important to identify the children's rights at stake.<sup>178</sup> The procedures used refers to all the means taken in the process of litigation to ensure children's effective participation and appropriate protection: such as appointing a guardian *ad litem* or administration of evidence in a child friendly way, etc. The meaning given to the rights in question requires adaptation of the litigation process in a way that is particularly fit for children taking into account their specific position: thus the right to be free from inhuman and degrading treatment may have a different meaning for children than it has for adults. Last but not least, the substantive reasoning of courts relates to how they balance competing rights.<sup>179</sup> Importantly, balancing does not entail that the rights of children trump all other rights in question, but rather that all of the competing rights should be identified and given appropriate consideration.<sup>180</sup> Tobin accepts that there may be circumstances where other rights or interests will have priority over those of children, and such an outcome could very well fulfil the conditions of a rights-based approach provided that the aforementioned five conditions are met. Such a balancing, with identifying the rights of children along with the other rights or interests in a particular case, performs the important

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172 Tobin 2009, p. 586.

173 Fortin 2006, p. 302; in this sense see also, Liefwaard/Doek 2016. With specific reference to child abduction see Mol/Kruger 2018.

174 Tobin 2009, p. 592.

175 Fortin 2006, p. 301.

176 Tobin 2006, pp 598-600.

177 Tobin 2006, p 601.

178 Tobin 2006, pp 604-605.

179 Tobin 2009, p. 612.

180 Tobin 2009, p. 615.

function of ensuring that the rights of children are not overlooked in the decision-making process.<sup>181</sup>

In a similar vein, more recently, Krutzinna has proposed a framework for assessing the child's best interests in judicial decision-making, taking into account that judges have a considerable amount of discretion in assessing the best interests of the child.<sup>182</sup> Her proposal focuses on three steps: categorization -where the needs of the 'categorical child' are identified-, followed by individualization -meaning the hearing the views and preferences of the specific child- and ending with balancing which represents the determination of the appropriate course of action and decision-making which is in the best interests of the specific child.<sup>183</sup> Similarly to the rights-based approach proposed by Tobin, Krutzinna stresses the importance of transparent decision-making which explains and justifies a decision, and avoids misrepresentation of children's rights.<sup>184</sup>

## 2.5 CONCLUSIONS

The aim of this chapter was to place children's rights in the context of history and law and to lay the foundation of a rights-based approach to children's rights. The purpose was to show that the image of childhood has influenced both social perceptions and legal regulations concerning children. At international level, the CRC was predated and influenced by societal views of what childhood means and how children were seen within their families. The CRC's paradigm shift from children as objects of protection to children as rights holders can be better understood as an attempt to reconcile traditional views over children with new discourses on human rights. Such reconciliation has some paradoxical elements in that the child now has both protection rights and agency-based rights, and the family is the primary setting where 'the paradox' manifests itself. That leaves decision-makers with the delicate task of balancing rights so as to ensure that children can exercise their rights in a way that does not diminish their autonomy while ensuring they receive appropriate protection. This chapter has argued that a rights-based approach can duly reconcile these factors and it has laid out the parameters of such an approach.

A rights-based approach to children's rights considers the interdependency of individuals, with dedicated attention to relationships and their preconditions. It requires judges to follow certain steps when deciding cases concerning children and to explain at each step how they have considered and balanced the rights at hand. Such an approach has several advantages, including that it offers transparency and avoids the misrepresentation of children's rights.

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181 Tobin 2009, p. 617.

182 Krutzinna 2022.

183 Krutzinna 2022, pp. 133-134.

184 Krutzinna 2022, p. 140.