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The Convention on the Rights of the Child
Reflections from a historical, social policy and educational perspective

Eugeen Verhellen¹

1. Introduction

Even though scholarship about the human rights of children is scattered in a variety of paradigms, research tracks, disciplines and schools of thought (Hanson, 2012; Op de Beeck et al., 2013, p. 8), the framework used most frequently to structure children’s rights discussions and debates remains that of the Convention on the Rights of the Child (1989, hereafter the CRC or the Convention). By now, more than 25 years after its adoption, the Convention is regarded as a historical milestone. On the one hand, it is the culmination of a difficult power struggle over decades, aiming at improving children’s position in society by introducing a set of minimum performance standards against which States can be held accountable. On the other hand, it is the beginning of a new pedagogical practice of how to deal with children, not only for States, but for every member of society.

The CRC was adopted without a vote by the United Nations General Assembly on 20 November 1989 (A/RES/44/25). It entered into force less than one year later, on 2 September 1990. The Convention complemented and anchored the moral obligations with regard to children, already enshrined in the 1924 Geneva Declaration and the 1959 Declaration on the Rights of the Child, in a legally binding international human rights document. Meanwhile, the CRC has been complemented by three optional protocols. Two of these, one relating to the involvement of children in armed conflict and another to the sale of children, child prostitution and child pornography, were adopted on 25 May 2000 (A/RES/54/263) and entered into force in 2002. The third optional protocol providing a communications procedure was adopted on 19 December 2011 (A/RES/66/138) and entered into force on April 14th, 2014. Today, the CRC has been ratified or acceded to by 195 States parties, which makes it the most widely
ratified international human rights treaty in the world. With only South Sudan and the USA lacking in the list, the CRC asserts a quasi-universal definition of children’s rights.

The CRC did not appear out of the blue, however. In order to explain where the growing interest in children’s rights came from, this chapter starts by discussing two macro-social developments leading to the adoption of the CRC: (1) a changing child-image and (2) the development of a global human rights project since World War II (see also Verhellen, 2006). Second, the CRC framework of children’s rights is described, so as to provide a starting – rather than an ending – point of quality requirements about how to deal with children in law, social policy and education. The conclusion will bring the analysis to a close, focusing on the educational consequences of the CRC’s children’s rights framework.

2. A growing interest in children’s rights: Historical background

2.1. Changing childhood images up to 1989

Child-images capture the way in which children and childhood can be understood in a diversity of cultures, contexts, discourses and perspectives. As has been pointed out in the introduction to this Handbook, the way we look at and deal with children is determined not only by biological factors, but also by the social and cultural contexts and practices in which children grow up. As such, the child-image is subject to change over time and space. Indeed, historians, sociologists and anthropologists, while differing in their views, point to various significantly different approaches to the way in which adults and children interact (Verhellen, 1992; Montgomery, 2009; Liebel, 2012).

These changes are consequences not so much of individual, psychological changes in the child, but rather of changes on the macro-level of society (sociogenesis) (Elias, 2000). This macro-social evolution gradually causes individuals’ expectations of others to change. A gradual change in behaviour generated by the dominant expectations will also affect the individual personality (psychogenesis). In other words, changing expectations of certain groups of people, such as children, play a crucial role in the way we deal with them and thus also influence child-images. It is therefore important to understand that our image of children is a social construct, thus man-made, flowing from our expectations, and that children are not just children by nature (Ariès, 1979 [1962]).

In fact, regarding children as a separate social category is a rather recent phenomenon in the global North. In essence, one can roughly say that until about the end of the Middle Ages, there was little or no awareness of children as a “social group”. Given the very high mortality rate for children under six or seven, their main task was to try to survive. After this age, they disappeared into the world of adults. This was reflected in the law: children simply did not exist as a separate social category, and where they did, they were regarded as their father’s private property and treated like any other “goods” (Dasberg, 1986).

Insight into the social construction of child-images is profoundly influenced by historical research in the global North, notably by Philippe Ariès (1979[1962]). However, the disciplines of sociology and anthropology of childhood have highlighted different ways of behaving towards children in a variety of (native) cultures of the global South. As Montgomery (2009, p. 55) illustrates, “[t]he idea that childhood is a specific stage of life, separated from adulthood, does not hold true in many places”, for example where stages of social immaturity “last well beyond puberty and even marriage” (Montgomery, 2009, p. 55) or, to the contrary, where children of five or six years old carry out “jobs that a child in the West would not be considered capable of doing for many years” (Montgomery, 2009, p. 56).
It was not until the Enlightenment (eighteenth century), with its belief in the supremacy of Reason, that children were discovered as a social group. Gradually, children became to be considered as “future citizens”, as the “future performers” of the Enlightened Society. They became “tomorrow’s prosperity”. This enduring stress on “the future” and “progress” turned children slowly into “not-yet” human beings. This status of not-yet knowing, not-yet capable, not-yet adults created a separate social category of social immaturity in comparison to the ideal of the fully-knowing, capable adult.

Gradually, “specific” laws and “specific” institutions were invented to force the new enlightened moral tasks on children and those responsible for them (parents, teachers …). Indeed, around the turn of the nineteenth century, practically simultaneously in almost all Western countries, so-called “child protection laws” and “compulsory education” were introduced, systematically separating adults/parents and children into different regimes of social control and socialisation.

The far-reaching macro-social definition of children as not-yets was long taken for granted. This had numerous consequences. For example, these specific laws and institutions simultaneously excluded children from the adult world and included them in a world of their own. Children ended up in a kind of limbo, where they had to wait, learn and prepare themselves for “real” life. This macro-social process turned children into objects designed to achieve the ideal society of the future. It is with this child-image that the Global North enters the twentieth century. In fact, this limbo has not disappeared until today. To the contrary, in many aspects of children’s lives, their not-yet status has been reinforced (see also Reynaert and Roose, Chapter 6) or prolonged, even beyond the legal age of majority. National legislation reflects this status of the child as an object, also found in international rules.3

However, from then on (and still today), the image of childhood as an exclusively future-oriented view on children has been increasingly criticised. At the beginning of the twentieth century, for example, the Polish-Jewish paediatrician Janusz Korczak ([1919] in Berding, 2008) has highlighted that because of this dictate of the “future”, children gradually lose their “right to the present”. Subsequently, in 1962, when H. Kempe launched the notion of the battered child syndrome (Kempe et al., 1962; Camper Soman, 1974), the status of not-yet-being was challenged for a variety of reasons by different people from various sectors and levels of society. This became clear during the first international congress on children’s ombudwork (Verhellen and Spiesschaert, 1989). The main aim of this school of thought, which became known as the “Children’s Rights Movement”, was to have children considered as fully-fledged citizens. They argued for children to be regarded as individuals with their own human rights, and as competent to exercise these rights independently. As will be elaborated in part two of this chapter, this new image of childhood became one of the foundations of the CRC.

2.2. The human rights project

As the introduction to this Handbook points out, children’s rights are understood as the human rights of children, i.e. fundamental claims for the realisation of social justice and human dignity for children. The right to participate in democratic decision-making, to autonomy and to exercise rights independently are important aspects of how to realise these claims. The ontological view behind the children’s rights movement and the changing child image that accompanies

3 The 1924 Geneva Declaration particularly, and, to a lesser extent, also the 1959 Declaration on the Rights of the Child, see the child not as subject but as object. This is clearly demonstrated by the terminology used: “The child must be given…”.
it, is that children are human beings. Therefore, children are entitled to all human rights. Children do not need to be given rights, they have them. We, adults, only have to recognise that they are bearers of rights and ensure that the necessary tools to enforce them are available to all children. Human rights have therefore become a point of reference in the debate on children’s situation in society. From this point of view, recognising that children are bearers of rights forms part of much wider changes that began to take effect internationally especially after World War II. Some characteristics of this human rights project are discussed below.

3. Generations of human rights

Modern ideas on human rights gradually evolved as of the end of the eighteenth century. The first generation of civil and political human rights came about mainly through the American (1776) and French (1789) revolutions – most notably in the French Declaration of the Rights of Man and of the Citizen (1789), which contained traditional rights such as the right to freedom of opinion, freedom of the press, the right of assembly, the right to life, etc. They could be described as the first defensive weapons against sovereign rulers. The State has to abstain from interference in the (private) life of its citizens.

The second generation of human rights displays a far more offensive attitude to the State. Abstention from exaggerated interference (first generation) is now complemented by an urgent appeal to a sense of social responsibility on the part of the State. Recognising economic, social and cultural human rights, such as the right to a minimum income, to work, to health care, to education, to leisure, etc. means the State has to act. This second generation, dealing in essence with social justice, was enshrined in legally binding texts for the first time in the Russian Constitution (1918) right after the Russian revolution (1917).

In the last few decades, there has been more and more talk of peoples’ rights, a third generation of human rights. These are the so-called solidarity rights, such as the right to peace, a healthy environment, cultural integrity, self-government, sustainable development etc. The official international starting point was the 1992 Rio UN World Conference on the Environment and Development (UNCED), resulting, inter alia, in international texts containing rules on the third generation of human rights: the Declaration of Rio and the action programme Agenda 21. Debate about the actual shape and content of these new rights is still going on. Taking the example of the right to a healthy environment, an increasing global recognition is to be noted with ever more new constitutions incorporating this right, ranging from Kenya, the Dominican Republic (2010), Jamaica, Morocco and South Sudan (2011), to Iceland and Zambia (pending). In addition, in 2012, the UN Human Rights Council appointed an independent expert to report on the universal right to a healthy environment (Boyd, 2012).

4. Internationalisation and regionalisation: From declarations to legally binding instruments

At first, human rights were found in the legislation and constitutions of most (Western) countries. Although the ideas had gained international acceptance, human rights remained a matter
for national concern. The League of Nations (1920) was the first real attempt at internationalisation. Its major concern, avoiding the recurrence of war, is characteristic of a mainly re-active (defensive) approach: avoiding human rights abuses (for children this is exemplified by the Geneva Declaration adopted by the League of Nations in 1924). It would take until after the Second World War for the internationalisation of the human rights project really to take off, with the setting up of the United Nations (1945). This also involved a change of course, since as of now a pro-active (offensive) approach predominated.

In fact, the UN Charter (the international community’s constitution) not only mentions human rights explicitly, but also emphasises that respect for human rights is the best guarantee for peace and democracy. This means not only fighting human rights abuses, but also making efforts to improve people’s living conditions, to promote human dignity. In this way, for the first time human rights were tackled pro-actively and received an international legal basis in the Universal Declaration of Human Rights (UDHR), approved on 10 December 1948 (A/RES/217A (III)). In 1966, in the context of the Cold War, the Universal Declaration was further elaborated in two separate, legally binding treaties: the International Covenant on Economic, Social and Cultural Rights (hereafter ICESCR) and the International Covenant on Civil and Political Rights (hereafter ICCPR) (A/RES/ 2200 A (XXI)). Together, these three instruments (the Universal Declaration and the two Covenants) are called The International Bill of Rights. Subsequently, more and more declarations and treaties have been adopted which refer on the one hand to specific groups (children, women, refugees, the stateless, workers, persons with disabilities …) and on the other to specific problems of international concern (genocide, war crimes, torture, racial discrimination…).

Besides instruments with a global scope, one can also identify regional human rights instruments. They are adopted by and on behalf of regional structures (Europe, Africa, Americas and increasingly in Asia as well) where there is, theoretically at least, a greater degree of shared cultural identity. In fact, the ambition of achieving universal human rights, assuming this to be possible, often leads to vague and imprecise wording (in order to achieve consensus), making it difficult to turn these rules into precisely defined positive rules for the purposes of legislation.

The best-known and most influential regional human rights instrument is the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).7 The ECHR is the first international treaty with a binding enforcement mechanism. It was adopted on 4 November 1950 in Rome and entered into force in 1953. All 47 member States of the Council of Europe have ratified or acceded to it. In case of an alleged violation of any of the rights contained in the European Convention, proceedings can be instituted before the ECHR’s monitoring body, the European Court of Human Rights in Strasbourg, provided that all national legal avenues have been exhausted. The judgements or rulings of the Court are binding on the Member States. The ECHR deals mainly with first generation civil and political rights, as contained in the 1948 UDHR. Its second generation counterpart at the European level, the European Social Charter (ESC, adopted in 1961 and revised in 1996), contains economic and social rights.8

Although in principle the civil, cultural, economic, political and social rights specified in the ECHR, the ESC and the UN Covenants also apply to children, in 1989 the international community decided to adopt a separate Convention on the Rights of the Child alongside the existing Treaties and Conventions, treating children explicitly as a category of rights holders.

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7 CETS, N°: 005 (1950–1953)
There was, and still is, discussion whether or not a separate convention is cutting off children from the general human rights treaties. The idea behind the adoption of a separate Convention stems from the fact that explicit measures were deemed necessary to ensure that children could enjoy their human rights on an equal basis with other human beings (De Graaf, 1989). Wording like human dignity to be respected appears several times directly and indirectly in the substantive articles of the CRC and in the concluding observations of the Committee. However, the debate on children’s (legal) competence to exercise these rights independently is not yet over and questions often rose as to the usefulness and/or the necessity of a separate convention on children’s rights (De Graaf, 1989, pp. 14–24). At the time, in 1989, the practical application of the existing treaties to children had only just begun and was not yet, as it is increasingly today, part of a general human rights-based approach within the work of the various Committees and Courts, both at UN and regional level (see, among others, Kilkelly, 2004).

5. The UN Convention on the Rights of the Child: Implications for social policy

As mentioned, the CRC evolved from a Declaration (1924) made up of a small preamble and five points, to a Declaration (1959) with a preamble and 10 principles, to a Convention (1989) with an extensive preamble (13 paragraphs) and no less than 54 articles. The articles can be subdivided into three main parts: Art. 1–41: the substantive articles, defining the rights of the child and the obligations on states parties; Art. 42–45: procedures for monitoring the implementation of the Convention; and Art. 46–54: formal provisions governing the entry into force of the Convention.

5.1. Preamble

A preamble explains the background to, and the reasons for, the Convention. Hence the preamble does not contain binding principles, but gives a frame of reference, in the light of which the articles are to be interpreted. Among other provisions, the preamble refers to the notion that children should grow up in an atmosphere of happiness, love and understanding (§6), and that the child should be brought up in the spirit of the ideals proclaimed in the UN Charter, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity (§ 7).

5.2. Characteristics of the Convention

Articles 1 to 41 cover the rights guaranteed by the CRC. Here we find all those articles dealing with the rights of children or others’ obligations to them. Considering each article separately in this contribution would be too much and has been done elsewhere. Therefore, hereafter some general characteristics of the CRC are discussed, notably its comprehensiveness, including the holistic image of childhood it represents, and its legally binding nature.

9 For a quick overview of this discussion see Hanson (2014).
11 For an article by article commentary on the CRC, see Alen et al. (2005–2012).
5.2.1. Comprehensiveness

5.2.1.1. First and second generation of human rights together in one single document

The CRC is the first human rights treaty that combines the two generations of human rights in one single text, by which it explicitly emphasises the indivisibility of human rights.\(^\text{12}\) By bringing civil, political, economic, social and cultural rights together, the CRC broke through the traditional subdivision of human rights as represented in the Bill of Rights. This subdivision is harmful, as it hampers a fully fledged respect for human dignity, for example when these two categories are really separated and/or seen in a hierarchical structure. It can even lead to paradoxical situations. South Africa, for example, has signed but not ratified the ICESCR, which means that legally speaking, children have been attributed more rights than adults in this State. Similarly, children in South Africa, which signed but did not yet ratify the ICESCR, will lose rights upon reaching majority age.

The spirit of the CRC implies that there should be neither distinction, nor priority between different groups of rights. On the contrary, by bringing them together in one single instrument, it is the aim to indicate that they are of equal importance and – what is more – they are interdependent and inextricably related. This has consequences for social policy and practice in the implementation phase of the Convention. Connecting both generations of rights forces States parties to conduct an integrated policy that intentionally moves beyond the borders of different ministries. This new kind of policy causes a lot of difficulties for the States parties and their (legal) experts, since it is rather habitual to read a treaty “article-by-article”. Moreover, the very different nature of these generations causes “technical” problems, for instance the problem of the self-executing force of treaty-provisions (infra).

5.2.1.2. Three Ps and four basic principles

The Committee on the Rights of the Child (2003, §12; hereafter referred to as the Committee), the treaty-based monitoring body of the CRC (see below at 5.2.2), identified four basic principles which are to be read by States parties as horizontal implementation and interpretation principles throughout all the provisions of the CRC (CRC/C/5, §§13–14; CRC/C/58, §§25–47). Guided by these principles, i.e. of non-discrimination (Art. 2) (Besson, 2005; Abramson, 2008), the best interests of the child (Art. 3) (Freeman, 2007; Op de Beeck et al., 2014), survival and development (Art. 6) (Nowak, 2005) and respect for the views of the child (Art. 12) (Ang et al., 2006), the CRC grants children with “rightful entitlements” (Lundy and McEvoy, 2012, p. 77) relating to protection (e.g. against violence), provision (e.g. of an adequate standard of living) and participation (e.g. to express one’s opinion freely); or, in short, the “three Ps” – another commonly used typology to group the different articles together (Heiliö et al., 1993).

Rather than separating rights into different categories, which would be in breach of the comprehensive and holistic spirit of the CRC,\(^\text{13}\) this scheme is deemed useful to gain a better

\(^{12}\) In 2006, the Convention on the Rights of Persons with Disabilities (CRPD) followed a similar holistic framework incorporating both first and second generations of human rights.

\(^{13}\) This holistic approach is also mentioned in the reporting guidelines of the Committee on the Rights of the Child. CRC/C/58, 1996, Para. 9. General Comment no 5 (2003), General measures of implementation of the Convention on the Rights of the Child. CRC/GC/2003/5. This opinion was already mentioned during the World Conference on Human Rights. A/CONF.157/23, 12 July 1993, Para. 5.
insight into the scope of children’s rights as stipulated in the Convention. Hence, the three *Ps* have to be interpreted as *interdependent and indivisible* in the same way as the Convention itself: no protection without provisions and participation, no provisions without protection and participation, no participation without provisions and protection.

**Protection:** Careful reading of the CRC reveals that the former principles of the 1959 Declaration on the Rights of the Child are repeated and extended and now made legally binding. These principles are better defined in order to monitor them more stringently. These rights are specific for children, addressing their special needs and especially their vulnerability in comparison to adults. Protection rights aim to shield children from the consequences of harmful decisions of others. Besides the right to life, survival and development (Art. 6), we find specific rights to be protected from certain activities: maltreatment and neglect (Art. 19 and Art. 39, see also Lenzer, Chapter 16 in this Handbook), child labour (Art. 32, see also Hanson, Volonakis and Al-Rozzi, Chapter 18 in this Handbook), other forms of exploitation (Art. 36), torture and deprivation of liberty (Art. 37), sexual exploitation (Art. 34), sale, trafficking and abduction (Art. 35).

** Provision:** Provision rights are about creating and guaranteeing access to certain goods and services in order to ensure children’s healthy development, not only physically, but also emotionally and spiritually. These include the right to education (Arts. 28 and 29, see also Quennerstedt, Chapter 12 in this Handbook), the right to health care (Art. 24, see also Kilkelly, Chapter 13 in this Handbook), the right to social security (Art. 26), the right to an adequate standard of living (Art. 27) and the right to rest, leisure, recreation and cultural activities (Art. 31). As they appear also in other instruments, these rights are not new (with the exception of the aims of education in Art. 29). However, the CRC reinforces the recognition of these rights as specific *children’s rights* (Verhellen, 2008).

**Participation:** Participation rights are about rights to act and to participate in society. Within this cluster, one can identify the right to express an opinion, either personally or through a representative, and have due weight attributed to that opinion (Art. 12, see also Tisdall, Chapter 11 in this Handbook), freedom of expression (Art. 13), freedom of thought, conscience and religion (Art. 14), freedom of association (Art. 15), protection of privacy (Art. 16), access to information (Art. 17). In Art. 9§2, stipulating the right of the child not to be separated from his/her parents, the right to speak and be heard is even taken further, recognising the child as a “*party*” to the proceedings, having the opportunity to fully participate and make his/her views known.

### 5.2.1.3. The holistic childhood image in the CRC

As we have seen, prior to the drafting of the Convention, the image of childhood was mainly based on paternalistic perceptions. There was little or no attention for children’s individual personality, let alone for any specific human rights related to that (Price Cohen, 1991, p. 60). Instead, children were merely viewed as incomplete human beings, whose only remedy was “to grow up” ([O’Neill, 1988], quoted in Freeman, 2007, p. 10). As has been described above, the CRC countered this view, but did not make it disappear entirely. At its adoption in 1989, the Convention included the dominant currents of what had by then grown out to become the international children’s rights movement, proclaiming the *simultaneous importance of both dependency and autonomy* for children (Verhellen, 2006; Reynaert et al., 2011, p. 2).

Hence, holistically addressing children as persons in their entirety, the CRC demonstrates that there has been a growing consensus about the fact that children should not only be considered as passive objects of protection, but should also be regarded as active bearers of rights.
Replacing the old “the child must be given…” by “the child has the right to…” is a new phrasing, referring directly to the child as subject. Especially Art. 12 is key in this changing image. Via paragraph 1 of this article, the CRC is recognising the fact that the child already has an opinion and no longer a “not-yet”-opinion. Fundamentally, this (legal) standard is reflecting the recognition of every child as a meaning-maker and as such he/she has the right to speak, irrespective of their age (provided that the child has a certain level of maturity) or the topic at hand (provided that it concerns a matter affecting the child). Also notice that via the wording “… being given due weight …”, this right to speak is referring to at least the duty to listen to this opinion and to take it into account. This implies that children are seen as competent, unless it is proven that they are not, in which case adults and the State have the obligation to guide them towards this competence.

There is, however, still a lot of controversy about the (legal) capacity of children to exercise these rights independently. The most fundamental, recurring argument against autonomous rights for children is their supposed incompetence to take well-founded decisions. According to this view, children are physically, intellectually and emotionally not sufficiently mature and lack the necessary experience to make a rational judgement on what is and is not in their best interests. In the debate on children’s rights, a central role is played by this – often emotionally loaded – (in)competence argument. The validity, soundness and relevance of the incompetence argument are, however, disputed, for example in the view of children as “resilient” in situations of extreme hardship (Boyden and Mann, 2005).

However, even among advocates of increased competence for children, different schools of thought can be distinguished. First of all, there is a reformist trend that regards the arguments in favour of incompetence as valid (presumption of incompetence), but is of the opinion that our society seriously underestimates children’s capacity to take well-founded, rational decisions. The supporters of this view feel that children acquire this capacity much younger than is generally assumed, and that this capacity is gradually acquired. Hence, they argue in favour of lowering the age of majority and of the gradual acquisition of rights by children.

Second, the so-called children’s liberationists, a radical trend in the discussion on children’s competence, dispute the validity of the incompetence arguments on moral grounds; their basic principle (the highest moral standard) is equality of all people. Any form of discrimination, including therefore discrimination on the basis of age, is considered morally wrong. To them, granting children all human rights – and the capacity to exercise these – is the only solution.

A third trend, the pragmatic or emancipatory trend, is of increasing importance. Supporters add a pragmatic or emancipatory view to the liberalisationists’ perspective by wondering why it would not be possible, in practice, to grant children all rights. This would include the right to exercise these rights autonomously (presumption of competence), unless it can be proven that children are incompetent (juris tantum principle) to exercise certain rights, and there is general

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14 Article 12: (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

15 See e.g. Resolution 72 (29) on the lowering of the age of full legal capacity, adopted by the Committee of Ministers of the Council of Europe (1972) on 19 September 1972.

16 This approach is found mainly in the Anglo-Saxon countries and within a few decades a remarkable amount of publications appeared (see, among others, Adams et al., 1971; Cohen, 1980; Farson, 1974; Goodman, 1960; Gottheb, 1973; Gross and Gross, 1977; Holt, 1975).
agreement on this (“children have all rights unless…”) (De Wilde, 2007; Hanson, 2012, p. 77). Experience with adults shows this is perfectly possible. The main advantage compared to the present situation would be that the onus of proof is reversed. Indeed, at the moment children are in a much weaker position because the burden of proof lies with them. They have to demonstrate they are competent (“children have no rights unless…”).

The outcome of this competence debate ought to be that it is essential that the child’s competence be recognised in order to make her/him more competent and not the other way around: that her/his competence be (gradually) recognised because (step by step) she/he gained more competence. Therefore, the present situation has become somewhat confused and, at times, even paradoxical. Indeed, our relationship with children is still based on the established dominant child-image of children as objects, while, simultaneously, a new one, of children as subject, is gaining ground.

This discussion highlights that reading the CRC as a combination of protection, provision and participation rights will confront States parties with serious problems. Because of the historically developed and still-dominant child image emphasising the need to protect children, the recognition and the realisation of participation rights is obviously not yet acquired. Repeatedly, the cause is not about the “attitude towards participation”, but rather the way we (still) look at children as not-yet-capable “human becomings”.

5.2.1.4. “Existing” standards

Additionally, article 41 CRC has to be mentioned here as an important qualification for the rights in the Convention. It states that if any standards set in national law or other applicable international instruments are higher than those of the CRC, it is the higher standard that applies. This article demonstrates that the CRC contains only minimum standards that can always be improved. In fact, the Convention is calling on States parties to do better than the obligations imposed by the CRC. By “other applicable instruments”, one could think about instruments from international organisations like The Hague Conference for Private International Law, ILO, the Council of Europe, the EU…

5.2.2. Monitoring and enforcement obligations of a legally binding Convention

All too often, both in spirit and in practice, the CRC is still considered as a kind of (soft) “declaration of love”. Therefore, it should be repeated that the CRC is a Convention. Conventions are so-called “hard law”, in other words legally binding. Indeed when a State joins a Convention (i.e. ratifies it or accedes to it), it enters into an international agreement with the other States parties. Along with the others, it has to become and stay politically conscious that it has accepted the obligation to put into practice the provisions of that Convention and translate these principles systematically into its national legal system. The legal principle pacta sunt servanda therefore also applies to international treaties between States. A problem arising here, as in other areas of international law, is monitoring and enforcement. Each Convention is only as effective as its monitoring system, in combination with the enforcement mechanisms provided in the national legal systems.

5.2.2.1. At the international level

The CRC provides its own system to monitor the implementation by States parties (Verhellen, 1996; Verhellen and Spiesschaert, 1994). This task is taken up by the treaty body, the Committee
on the Rights of the Child. The Committee is composed of 18 independent experts\(^\text{17}\) and was established in Articles 43–45 of the CRC. Among other tasks, the Committee is to monitor progress made by States parties in accomplishing their children’s rights obligations under the Convention (Verheyde and Goedertier, 2006). For this purpose, within two years after ratification (and thereafter every five years), States parties have to report their achievements and remaining challenges to the Committee (Art. 44§1). Next to the official State reports, the Committee also receives shadow reports by agencies, NGOs or other experts who are familiar with the children’s rights situation in the country under scrutiny (Art. 45, a). Even children have in the past addressed the Committee directly, for example in UNICEF Belgium’s What do you think project (2013). Based on all these different sources of information, the Committee enters into a public “constructive dialogue” with the State. It formulates concluding observations – to be seen as sui generis jurisprudence (Price Cohen, 2005), which constitute, in their turn, the starting point for the next State report and discussion.

As such, ratifying the CRC implies the obligation for States parties to engage in a sustainable process of public scrutiny. This reporting process is in itself non-judicial. Indeed, the drafters of the CRC opted for advice and assistance in the format of non-binding recommendations to support implementation, in order to achieve one of their main objectives: bringing about a “positive” monitoring climate. The involvement of non-State actors turns reporting into an active means, also via mutual assistance and cooperation (Art. 4), of improving children’s situation rather than just a passive means of monitoring implementation. Also other activities of the Committee point in the same direction, e.g. to undertake urgent actions in serious situations,\(^\text{18}\) to initiate research studies (Art. 45,c), to hold regular days of general discussion\(^\text{19}\) and to formulate general comments (Art. 45,d).\(^\text{20}\)

In addition to the States parties’ duty to report (Art. 44§1) the sustainable process of public scrutiny also implies the important duty to inform (Art. 44§6). This means that States must widely disseminate the reports, summary records and concluding observations adopted by the Committee.\(^\text{21}\) In fact, this obligation is a direct result of Art. 42, a unique provision that emphasises States parties’ duty to “make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.” As such, the CRC not only seeks to clarify whether children’s rights are infringed, it also indicates that widespread knowledge of the rights of the child in public opinion is the best protection against such infringements. The absence of such systematic campaigns remains a weakness in most, if not all, States parties to the Convention.

In addition to the reporting process described above, since April 14th, 2014, the CRC also has an optional protocol providing a communications procedure (Lembrechts, 2012; Verhellen, 2013). Following the Protocol, children and their representatives may submit complaints of violations

\(^\text{17}\) Art. 43§2 CRC speaks about 10 members. In 1995, Costa Rica proposed an amendment to article 43§2 in order to extend the number of members from 10 to 18 (A/RES/50/155). After reaching the two-thirds majority States parties at their meeting of 23 February 2003 indeed elected the members of the extended Committee. At their 33rd session (19 May–6 June 2003) the Committee first met with 18 members. The Committee, by ( provisionally) meeting in parallel chambers, can handle now 48 reports instead of 27. The proposal to meet in parallel chambers was adopted on 23 December 2004 (A/RES/59/261).

\(^\text{18}\) CRC/C/10, 1992, para. 54–58.

\(^\text{19}\) CRC/C/4, 1991, rule. 75.

\(^\text{20}\) CRC/C/4, 1991, rules. 71–73. At the time of writing, the CRC Committee has interpreted the content of the Convention in 17 thematic general comments.

\(^\text{21}\) CRC/C/58, 1996, para. 23.
of rights recognised by the Convention and the first two Optional Protocols to the Committee, if they cannot find solutions in their country and if their State has ratified this Protocol. The Protocol not only provides children with a mechanism to address violations of their rights, it also strengthens their status as rights holders. As such, it ensures compliance by duty bearers to the CRC standards.

Finally, since the creation in 2006 of the Universal Periodic Review (UPR), children’s rights got an additional important monitoring mechanism. The UPR is an inter-governmental review mechanism under which the Human Rights Council examines the overall human rights situation, including child rights issues, in every member State of the UN. Each State is examined every four and a half years. Since the process is State-driven, and thus not initiated by a group of independent experts like the Committee, it is highly political, resulting in often vague and general recommendations that make follow-up extremely difficult (Abebe, 2009, p. 34). However, the results of the UPR-process are integrated in the constructive dialogue before the Committee where relevant, as the latter takes the child-rights-related recommendations from the UPR-report into consideration during its own review process.

5.2.2.2. At the national level

The mutual duties between States parties also have consequences on the domestic legal order. On the one hand, indirectly, States parties have the obligation to implement the CRC within their own jurisdiction. Therefore, they “shall undertake all appropriate legislative, administrative, and other measures” (Art. 4) (Rishmawi, 2006). In fact, this is the duty to bring national legislation and practice into full conformity with the principles and provisions of the CRC. To this end, the Committee has given detailed information on how States should act (CRC/GC/2003/5). It must be clear that, by doing this, special attention should be given to the comprehensiveness of the CRC. Last but not least, new proposed laws or amended existing laws affecting children should follow a child rights approach and not lower the (minimum) standards of the CRC.

On the other hand, there are direct consequences as well. The Committee stressed that new or amended domestic law(s) should mean that the provisions of the CRC could be directly invoked before the courts (CRC/GC/2003/5). Here we touch on the self-executing force of international treaties. After ratification of a Convention, (some of) its provisions are directly included in the national legal order, others need to be (indirectly) transposed into national legislation. This is only the case if the State party has recognised the principle of direct applicability of international treaties in its domestic legislation. In addition, if a Convention such as the CRC is to be directly applicable, its content must meet a number of conditions (Alen and Pas, 1996): The individual wishing to claim or enforce the right must fall within the jurisdiction of the State; the Article he or she wishes to rely on must be recognised as a right by the State party (i.e. the State cannot have submitted a reservation to qualify the content of a certain right); and the content of the provision must be precise and specific enough to be applied by a national authority without any further act of the State (Cremer, 2011). Finally, it is up to the national courts to decide which provisions have or do not have direct effect. The self-executing force of some CRC-rights is recognised by domestic courts in several States parties (Vandaele

22 A/RES/60/251, 5(e)
24 Available at www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx.
and Pas, 2004). It must be clear that much depends on the willingness and creativity of lawyers and magistrates in making the CRC directly capable of being invoked by individuals.

6. Conclusion: Educational consequences of the CRC framework

This chapter described how the CRC is unique in being the most widely ratified international human rights treaty. No less than 195 States have committed themselves to respect, promote and protect the rights of children through the implementation of the standards and principles enshrined in it. With its universal appeal, the indivisibility of its provisions, the repeatedly (e.g. Art. 4, Art. 23(4), Art. 24(4), Art. 28(3), art. 45 (d)) strong plea for international cooperation, its comprehensiveness and its legally binding character, the CRC is challenging us with a never-before-seen geo-political social contract. Since its entry into force in 1990, legal, legislative and policy reforms have produced positive results both at a national, regional and international level (UNICEF, 2007).

However, over the same period of time, it has become all too clear that this promising development does not mean that children’s rights enjoy universal respect in practice. Despite the continuous effort to monitor and enforce the Convention, violations of children’s rights continue to persist in all layers of society in all corners of the world. This means that our task as academics, policy makers or practitioners aiming to realise a balanced society in which social justice and human dignity for children are fully realised, remains an open-ended challenge.

In providing a new framework on how to relate to children as moral and legal rights holders, the legal content of the CRC provides guidance on how this challenge can be taken up in law and social policy. At the same time, however, the CRC reflects a significant educational agenda. Educational science, teaching us how to deal with children, and children’s rights as stipulated in the Convention, are inextricably linked.

Whereas earlier instruments had focused on protection claims for children, the CRC codified a new discourse of children as “rights holders”. Inspired by the CRC – and the social movements that preceded its adoption – a new child image gains in strength: children are no longer regarded as beings who are “not-yet” (adults), but as fully-fledged individuals with their own meaning-making capacity, competent to exercise their human rights, if necessary with some support, independently (Verhellen, 2006). Enshrining these rights in positive law (standard setting) is, however, not the end of the matter. Implementation, monitoring, enforcement and translation of these legal principles to the pedagogical practice, i.e. the way we deal with children, are continuing challenges.

The notion bearers or subjects of human rights includes that children are seen as meaning-makers and competent to exercise their rights. This competence approach is reflected in the CRC and is indeed quite new. It is of importance, then, to experience that the more their competencies are recognised and realised, the more children will gain a prominent space and place in society, and the more they will ultimately be able to challenge the dominant child image that still does not see them as capable human beings on their own. This so-called pragmatic trend is growing: presupposing (juris tantum) that the child is competent unless it can be proven that she/he is not. In the end, children will not only become more visible, but above all they will become visible in a different way (as meaning-makers). The emerging child image will not only influence this relationship on the micro level, but also, the macro structural level will undergo substantial changes. The legally binding characteristics of the CRC will lead to new laws and new structures. The processes of sociogenesis and psychogenesis (discussed above) are working here too. The new way of dealing with children will become more and more horizontal: mutual respect will enter everyday reality.
However, the CRC is still rather young, and therefore it is not the end but rather a new starting point. In other words, standard setting is still going on today. Even more so, the existing standards continue to be challenged, e.g. by bottom-up approaches that may lead to other or reverse forms of standard setting (Liebel, 2012; Hanson and Nieuwenhuys, 2013). In light of these parallel developments, also implementation and monitoring need urgent and serious attention. For instance, most countries still suffer while trying to implement genuine participation rights. Mostly there is not a difficulty with a view to participation, but rather with a view to perceiving children still as not-yet competent. This may explain why so many participation projects are seen as preparing children to be able to participate later on, which is an “instrumental” conceptualisation of children’s participation. Again, children are meaning makers and as such they already participate. Recognising this capacity seems to be a difficult learning process. It is thus not so surprising that a lot of youth and/or educational policy documents reflect that this learning process is going at snail’s pace.25

Finally, it is of the utmost importance to keep alive the consciousness, and to strengthen the professionalisation, among other things, through an intentional and systematic human/children’s rights education policy and keep the courage and (political) will to continue the complex implementation process. Therefore, the powerful continuation of the already existing critical discussion to which this Handbook aims to contribute, is a sine qua non. For, human/children’s rights are not gifts, but are more like verbs to conjugate in the present and the future – and this by means of all personal pronouns.

Questions for debate and discussion

• What are the challenges for research, policy and practice in the way in which the CRC – and children’s rights more broadly – unite law, social policy and education?
• What are the implications of the dual childhood image the CRC contains, i.e. an image that attributes simultaneous importance to both dependency and autonomy?
• How can contextualised, bottom-up approaches complement the CRC framework in our way of dealing with children?
• What are arguments in favour or against a separate Convention for children alongside the other UN human rights conventions, and how does this relate to the stance that children should be seen as human beings on equal footing with adults?

References


25 This is illustrated, for example, by the slow pace at which the legal status and participation of children at school (in Flemish Leerlingenstatuut) got translated into a binding decree in Flanders. Recommendations from the Children’s Rights Commissioner have focused on the necessity of strengthening the position of pupils since 1999 already (Kinderrechtencommissariaat, 2014, p. 2).
Reflections on the CRC


