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Does exactly what it says on the tin?

A critical analysis and alternative conceptualization of the so-called 'general principles' of the Convention on the Rights of the Child

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Abstract

The four general principles of the Convention on the Rights of the Child are one of its most cited features. This article tracks the evolution of the "general principles" in the drafting process of the Convention and the Committee's determination of the content of its 1991 reporting guidelines. This is followed by an analysis of the approach to the general principles" that the Committee has adopted in its monitoring and reporting processes and General Comments. It concludes that these four articles are not necessarily "general" nor "principles" and suggests how the concept of a set of cross-cutting standards might evolve and perhaps be reformulated in ways that are faithful to both the text of the Convention and subsequent understanding and practice.

Introduction

The International Journal of Children's Rights was founded in 1991, the same year that the United Nations Committee on the Rights of the Child ('the Committee') commenced its work. One of the Committee's first tasks was to provide guidance to States Parties on the implementation of the Convention on the Rights of the Child (CRC). Emerging from its earliest discussions was a concept that, a quarter of a century

on, has become one of the most widely known and commonly referenced aspects of the Convention, that is the notion that Articles 2, 3, 6 and 12 collectively provide a set of 'general principles' that guide the interpretation and implementation of the rest of the Convention. The concept of 'general principles' is questioned rarely, a position that is surprising given the fact that they were not envisaged at any stage by the drafters when they concluded their work just a few years prior. In this article for the 25th anniversary of the journal, we harness the opportunity to probe what for each of the authors has been a long-standing source of unease. Our shared discomfort lies in a series of interconnected concerns: that these four articles are not necessarily 'general' or even 'principles'; that the rationale for choosing them and assigning them their purported role is unclear; and that their interpretation and application by the Committee may produce unintended effects.

Academic research on children's rights is extensive, varied and growing (Quennerstedt, 2013). The diversity of scholarly work on the Convention on the Rights of the Child can be situated on a continuum ranging from a relative proximity with the major actors' internal viewpoints on the need to promote the CRC to more critical, external observations on development and trends in children's rights research. Authors writing from the former perspective generally adopt a positive attitude towards the CRC and tend to endorse the interpretations and choices made by the Committee on the Rights of the Child of which several authors have been a member (see for instance, Vuckovic Sahovic et al. (2012)). From the latter perspective, it has been claimed that much of what has been produced from a legal positivist perspective is part of a global human rights industry that has become bogged down in consensus thinking, insufficiently critical of the Convention and the Committee and distanced from the reality of children's lives (Reynaert et al, 2009). However, most academic work lies somewhere

in between both positions and presents the Convention and its monitoring and implementation by the Committee, without radically departing from it, as incomplete (Freeman, 2000; Kilkelly and Lundy, 2006) and/or at times ill-considered (Harris-Short, 2003; Nolan, 2013). Yet within overall academic research on children's rights, the four 'general principles' seem to have largely evaded a critical gaze, with scholarship tending to endorse and/ or elevate them, or, less frequently, failing to acknowledge them at all. In order to address this void and in line with this special issue's overarching theme of 'looking back and into the future', we track the evolution of the 'general principles' in the drafting process of the Convention and the Committee's determination of the content of its 1991 reporting guidelines. This is followed by an analysis of the approach to the 'general principles' that the Committee has adopted in its monitoring and reporting processes and General Comments. We conclude with some reflections as to how the 'general principles' might evolve and perhaps be reformulated in ways that are faithful to the text of the Convention yet align with common understanding and usage.

1. Origins of the General Principles

The 'General Principles' of the CRC were introduced by the Committee on the Rights of the Child in the guidelines for initial reports (Committee on the Rights of the Child, 1991). In this section, we will have a closer look at the discussions amongst Committee members to better understand how and why the 'general principles' have been instituted. Before that, we will first briefly examine the text of the CRC and its drafting history to see if there are provisions that can be qualified as 'general'.

1.1. The text and drafting history of the Convention

The preamble to the Convention on the Rights of the Child makes a general reference to non-discrimination, but does not mention any of the other 'general principles' nor the idea that there would be a set of 'general principles' that guide its interpretation and implementation. The text of the Convention itself is divided in three parts: 'Part 1' covers the articles 1 to 41 that contain the Convention's 'substantive provisions'; 'Part 2', which includes the articles 42 to 45, deals with the reporting procedure and the establishment and working methods of the Committee on the Rights of the Child; 'Part 3' contains the articles 46 to 54 and lists the final provisions that deal with technical matters such as the signature, ratification, reservations and denunciation of the Convention. The three 'Parts', which do not have a title, were introduced following the suggestion made by the Legal Counsel to divide the Convention into parts or sections that would give it greater clarity and make reference to the text easier (Commission on Human Rights, 1989, p. 134-135). Unlike the 2006 UN Convention on the Rights of Persons with Disabilities (CRDP) which was adopted after the CRC and lists the 'general principles' in article 3 and 'general obligations' in article 4, the title 'general principles' does not appear in the text of the Convention (Lundy and Byrne, 2017).

The published records of the legislative history of the CRC contain only a few traces that ascribe general features to particular provisions (Office of the United Nations High Commissioner for Human Rights, 2007). At the end of the drafting process, during a technical review of the text on the ordering of the articles, a proposal submitted by UNICEF suggested making a distinction between the first few articles and the subsequent substantive rights provisions, in order to conform to 'the general practice with respect to international human rights treaties' (Commission on Human Rights, 1988a, p. 6). Before starting the enumeration of the substantive rights provisions,

UNICEF proposed to first mention the following four provisions (between brackets is the article number which was finally adopted):

> Definition of the child (Art. 1 CRC)
> Obligations clause dealing with non-discrimination (Art. 2 CRC)
> General obligations clause (Art. 4 CRC)
> General qualification clause (Art. 5 CRC)

Subsequently, in a document with additional comments and clarifications submitted by the Secretariat, this suggested sequence became the ordering of the first articles in the final text of the Convention. The only change that was made to the UNICEF proposal was the insertion of the provision related to the best interests of the child as the third article between the 'general obligations clause' of article 4 and the 'general qualification clause' of article 5 (Commission on Human Rights, 1988b, p. 11):

> Article 1 – Child – age
> Article 2 – Non-discrimination
> Article 3 – Best interest of child; primary consideration
> Article 4 – implementation by States of rights recognized
> Article 5 – Parental direction and guidance
> Article 6 – Right to life, child's survival and development

From the textual analysis of the wording and drafting history of the Convention, we can see that they offer little guidance on how to understand the 'general principles'. The only time when the idea was discussed that some provisions might be of a 'general' nature was during a technical examination of the ordering of the provisions at the end of the drafting process. Also, the written records do not provide any further explanation on what is meant by the notions 'obligations clause', 'general obligations clause' and 'general qualification clause', a distinction suggested by UNICEF. With hindsight, knowing that the general principles have had such a large impact on the way the CRC is approached, it is remarkable that the only reference to the idea of conferring to some provisions a 'general' character happened during a technical discussion, when the

drafters expressly wanted to avoid entering in a substantive discussion (Commission on Human Rights, 1988a, p. 3).

1.2. Institution of the 'general principles' by the Committee on the Rights of the Child

The first ten Committee members, who had been elected by the States Parties in February 1991 after the entry into force of the CRC on 2 September 1990, held their first session from 30 September to 18 October 1991 at the Palais des Nations in Geneva. The activities during this first session mainly dealt with the organization of the Committee's work, which included the election of a chairman, the adoption of internal rules of procedure and the elaboration of working methods related to the consideration of reports to be submitted by States parties (Committee on the Rights of the Child, 1991c).

As a basis for the discussion of the reporting guidelines for initial reports to be submitted by States Parties, which started on Monday 7 October 1991, the Committee agreed to work further on a document that had been prepared by the secretariat and which contained draft general guidelines regarding the form and content of the initial State Party reports (Committee on the Rights of the Child, 1991b). For the purpose of the preparation of the States Parties' initial reports, the document proposed to cluster the provisions of the Convention in groups of rights. The proposed clustering by the secretariat has only marginally been amended by the Committee and provides until today the main skeleton for the States Party reports. The document's second sub-heading, called 'the child and the law', asked States to provide information on the definition of the child as well as on four particular provisions; these deal with non-discrimination, best interest of the child, the right of a child to express his or her views and the administration of juvenile justice (Committee on the Rights of the Child, 1991b, para 6 and 7). The draft guidelines proposed by the secretariat found support amongst

the Committee members who were in favour of the suggested cluster approach and embarked upon a detailed discussion of these draft guidelines (Committee on the Rights of the Child, 1991c). In view of the importance of the paragraph that groups four fundamental provisions together (non-discrimination, best interest of the child, the right of a child to express his or her views and the administration of juvenile justice), during the meeting the suggestion was made to give this paragraph a separate title – 'the best interests of the child' and 'basic principles' were suggestions made. Members also suggested to place 'the administration of juvenile justice' elsewhere, as it was seen as not as fundamental as the three other provisions. The document, which had been elaborated by the secretariat, for the first time grouped together several provisions that would become, after further discussion and amendment by the Committee, the 'general principles' of the CRC.

The Committee decided to establish a drafting group composed of four of its members with the task to reformulate the draft general guidelines for initial reports, including to propose a title and a list of the provisions to be included in the paragraph that groups together these fundamental provisions.[1] This reformulated draft, which formed the basis for the Committee's subsequent discussion on the reporting guidelines a week later on 15 October 1991, proposed to give these provisions the title 'general principles'. It also barred the 'administration of juvenile justice' from the list and retained three provisions, that is non-discrimination (article 2), best interests of the child (article 3) and the right of a child to express his or her views (article 12). During the discussion, Hammarberg, who was a member of the drafting group, underlined that the Committee did not want to give priority to one right or another or to establish

[1] This drafting group consisted of the following Committee members: Mrs. Santos Pais, Mrs. Belembaogo, Mr. Hammarberg and Mr. Kolosov (Committee on the Rights of the Child, 1991c).

'fundamental principles'. He explained that the three rights included in the list of 'general principles' are "those rights which (…) applied in all areas; non-discrimination, for example, applied in education, health and other fields". (Committee on the Rights of the Child, 1991c, SR.21, p. 7). Another member of the drafting group, Kolosov, at one point suggested amending the title to read 'general approaches', a suggestion which was not followed by the Committee, and explained that the Committee should not interpret the articles in the Convention "by structuring rights according to those it considered most important" (Ibid., SR.21, p. 7).

Two other members, Mason and Eufemio, insisted on including in the list the right to life (article 6), as this right 'pervaded' the entire Convention and is 'inextricably linked' with all other Convention provisions (Ibid., SR.21, p. 7). Both Committee members, who did not participate in the working group, objected to including article 12 and even said that if no reference to the right to life was made, the right of the child to express his or her views should be removed from the 'general principles' as this right only begins at a certain age. After further discussion, in particular Hammarberg's plea to maintain article 12 which he considered an essential feature of the Convention, a compromise solution was accepted that included both the articles 6 and 12 in the list of 'general principles', a title over which general agreement was found.

The two paragraphs in the guidelines for initial reports that contain the final list of 'general principles' read as follows (Committee on the Rights of the Child, 1991a, p. 4):

> General principles
> Relevant information, including the principal legislative, judicial, administrative or other measures in force or foreseen, factors and difficulties encountered and progress achieved in implementing the provisions of the Convention, and implementation priorities and specific goals for the future should be provided in respect of:
> (a) Non-discrimination (art. 2);

(b) Best interests of the child (art. 3);
(c) The right to life, survival and development (art. 6);
(d) Respect for the views of the child (art. 12).

In addition, States parties are encouraged to provide relevant information on the application of these principles in the implementation of articles listed elsewhere in these guidelines.

The final list differs only on one point compared to the suggestion initially made by the secretariat, namely reference to article 40 on the administration of juvenile justice is replaced by article 6 on the right to life, survival and development. There was no discussion amongst the Committee members about the inclusion of non-discrimination and best interests of the child over which they tacitly agreed. Conversely, mention of the 'views of the child' was overtly contested by a minority of Committee members who suggested to bring in the right to life instead; the inclusion of both 'the right to life' and 'respect for the views of the child' as general principles in the adopted document is the outcome of a compromise between both standpoints. It was the Committee members who decided to give the paragraph the title 'general principles' that are considered rights which apply in all areas and/or that pervade the Convention. For the Committee, at that time, the coining of these rights as 'general principles' was not intended to imply that they have priority over other rights.

1.3. A 'thin' conceptualisation

Our review of the discussion amongst the Committee members shows that there was only a very limited understanding of the concept of 'general principles'. These findings stand in sharp contrast with the often very elevated functions that have been ascribed to the 'general principles' in later comments and writings. In a 1999 UNICEF publication, Marta Santos Pais, who was a member of the Committee between 1991 and 1997 and who had participated in the discussions leading to the adoption of the 'general principles', for instance wrote that the four general principles of the

Convention aim to ensure "a common philosophical approach to the spectrum of areas addressed by the Convention"; according to her, the general principles have been identified by the Committee as "underlying and fundamental values that are relevant to the realization of all children's rights" (1999, p. 9). What has happened between their initial thin conceptualisation and the presentation of the 'general principles' as representing the Convention's 'core values' is the subject of the next section, where we will examine how the Committee has developed the 'general principles' further.

2. The general principles in the work of the Committee

During its 25 years of existence, the Committee on the Rights of the Child has relied on the 'general principles' in the guidelines for country reports, in the concluding observations for each country's individual states party report as well in its General Comments. Although the general principles are listed as Articles 2, 3, 6 and 12, it should be noted that it is not always the whole of the Article that is engaged. In case of Article 3, as was pointed out to us by Nigel Cantwell, it is only the first paragraph of the Article, 3(1), that has been ascribed the status of a 'general principle' and not Article 3 as a whole. Consequently, the provisions contained in Article 3(2) and Article 3(3) have been almost completely marginalised in the reporting guidelines. A similar observation can be made concerning the Articles 2 and 12, where the status of 'general principle' is generally ascribed only to the first paragraph rather than to the Articles 2 and 12 as a whole. However, for ease of referencing and understanding, in the discussion that follows we will largely be referring to the full article numbers of the four extant 'general principles'. With this clarified, the section that follows looks to what extent the general principles have been applied and/or developed further in each of these three spheres of application.

2.1. Reporting guidelines

The Committee's main role as a Treaty body lies in monitoring the implementation of the CRC through the periodic review process. Reporting guidelines are key to the monitoring process; they have an instrumental and communicative function in establishing what is important enough to warrant both review by governments and oversight and monitoring from the Committee. The 1991 initial state party reporting guidelines, in which the 'general principles' debuted, have been revised four times (1996, 2005, 2010 and 2015) drawing on the Committee's growing experience of monitoring and reporting. In each of the successors, the 'general principles' feature in the same spot – straight after the general measures of implementation and definition of the child. However, what States Parties are asked to provide and where varies across time. As set out above, in 1991, states were simply asked to provide information on both 'the principal legislative, judicial, administrative or other measures in force or foreseen, factors and difficulties encountered and progress achieved in implementing the provisions of the Convention' and on the 'application of these principles in the implementation of articles listed elsewhere in these guidelines.'

The 1996 guidelines expand significantly on what was to be required in reporting (Committee on the Rights of the Child, 1996). Four of the forty-nine pages address what is required in relation to the 'general principles' but in this first revision what was expected was listed separately under each of the four Articles. This includes some visible connections out to the other articles of the Convention or recognised domains of children's lives. For example, Article 2 includes reference to 'indicate the measures adopted to ensure the rights set forth in the Convention'. Articles 3 and 12 ask for information on family life and school life and then mention specific areas such as planning and development policies, adoption, juvenile justice, asylum, institutional care

and social security. There are also regular references back to the general principles in the detail of what is required in relation to other Articles, including for example family reunification, recovery of maintenance, children in alternative care, health service, education, school discipline, refugees, children in armed conflict, juvenile justice, and sexual abuse.

The guidelines were revised again in 2005, 2010 and 2015. From 2005 on there is a notable retreat in references to the 'general principles' in areas other than the dedicated section on the general principles themselves. The 2005 guidelines begin with a call for information on monitoring, budgetary and other resources, statistics and factors and challenges across the other clusters including the 'general principles' (Committee on the Rights of the Child, 2005). The specific guidance on these is then remarkably brief but there is a new request to provide information on 'the implementation of these rights in relation to the most disadvantaged groups' (at para. 22). The biggest departure in these guidelines is the introduction of an appendix of statistical data which only deals with Articles 6 and 12 and in the latter case in a very limited way. The only other reference to the 'general principles' in the information requested in other clusters is to Articles 3 and 12 under family life and alternative care (paragraph 26). This was subsequently dropped in the 2010 guidelines which, in other material respects, replicate their immediate predecessor's treatment of the general principles.

The current guidelines (Committee on the Rights of the Child, 2015) are very similar to those issued in 2005 and 2010, once again highlighting the same four articles under the heading of 'general principles' and including a request for specific information on Articles 6 and 12 in an appendix (Committee on the Rights of the Child, 2015). Article 2 is discussed individually and further detail is given about the need for information for certain categories of discrimination (gender, disability, children belonging to minorities

and indigenous children). Articles 3 and 12 are grouped together, with the guidelines saying that 'states parties should provide updated information on legislative, judicial, administrative or other measures in force, particularly on how the principles of the best interests of the child (art. 3) and respect for the views of the child (art. 12) are addressed and implemented in legislative, administrative and judicial decisions' (at paragraph 25). Article 6 is also discussed in a dedicated section, with the Committee requesting specific information on capital punishment for offences committed under 18, deaths and extrajudicial killings of children and measures to prevent suicide and eradicate infanticide (paragraph 26). There are limited references to the four individual Articles under the other clusters.

2.2. Concluding observations

A review of recent concluding observations provides some insight as to how the general principles are handled by the Committee in practice in the monitoring process. In the October 2016 session, six countries were reviewed: South Africa, Nauru, Saudi Arabia, Sierra Leone, New Zealand, and Suriname. Although a review of these six provides but a snapshot of the Committee's activity, it is apparent from more extensive analysis that the Committee's concluding observations generally follow a tried and tested formula that mirrors the state party reporting guidelines discussed above (see Lundy, 2012). Under the heading 'general principles', each of the four articles is listed separately, with similar issues and phrases reoccurring throughout. The material covered for Articles 3 and 12 in particular often repeats the same stock phrases. For example, the commentary for New Zealand is typical in relation to Article 3(1):

The State party is encouraged to develop procedures and criteria to provide guidance to all relevant professionals for determining the best interests of the child in every area and for giving it due weight as a primary consideration (2016b, para. 16).

Likewise there is a formula for discussion of Article 12, exemplified here in its remarks on South Africa and Sierra Leone respectively:

"*The Committee recommends that the state party (a) ensure meaningful participation in public decision-making at all levels by allocating adequate technical, human, financial resources for that purpose*;" (2016c, para 30).

"the Committee encourages the State party to ensure that children's views are given due consideration, in accordance with Article 12 of the Convention, particularly at the community level, through established networks such as village development committees and other community based structures, as well as in the family, at schools and in relevant judicial and administrative procedures concerning children."(2016d, para. 15).

References to children's participation often appear again in the discussion of individual articles that follow but only sporadically. In Suriname, the commentary under the heading of Article 12 is by far the most extensive, calling for research on children's views, toolkits for consultation, awareness raising activities and for the Youth Parliament to be more inclusive (2016e, para.16) However, here and in the report in Sierra Leone, it is never mentioned again. In other instances, there are occasional, rather random mentions of the need to consult children usually in areas of public policy such as education or health.

When it addresses Article 6, the Committee often directs its remarks to the issues listed in the 2015 guidelines, mainly around infant and child mortality. However, in this section the opportunity is seized to highlight country specific threats to children's life and survival. For example, issues raised in the October 2016 session included: prevention and treatment of HIV/AIDs and firearm control in South Africa; the execution of four named individuals who were sentenced to death when they were under 18 in Saudi Arabia; and indigenous Nauruan children and refugees and asylum seekers. Inexplicably Article 6 was skipped in the discussion on Sierra Leone, although the challenges of Ebola are highlighted elsewhere. Regarding the commentary on

Article 2, there is an obvious set-piece where the Committee lists most of the same groups of children highlighted in the reporting guidelines (e.g. children with disabilities). However, the Committee also uses the opportunity to flag up at the very outset the groups of children and young people who are most marginalised in specific national contexts. For example, issues raised in the October 2016 session included: prevention and treatment of HIV/AIDs and firearm control in South Africa; the execution of four named individuals who were sentenced to death when they were under 18 in Saudi Arabia; and indigenous Nauruan children and refugees and asylum seekers.

There is no denying that there are some advantages in discussing these four provisions early and separately. The focus on Articles 2 and 6 in particular can provide an immediate and powerful lens into some of the most pressing issues for children and egregious breaches of their rights in a particular State Party. The problem is that, for these provisions to fulfil the task assigned to them as 'general principles', consideration needs to be continued throughout the discussion of each of the substantive rights and this is simply not happening to any significant extent for most of the provisions. Article 6 is not mentioned again. The best interests principle in Article 3 is mentioned hardly at all. Children's participation is mentioned very occasionally in relation to policy development. Only issues of discrimination appear regularly, albeit not routinely, in discussion of other substantive rights. Moreover, by the time the Committee reaches its commentary on juvenile justice (one of the last Articles of the CRC which appears at the end of the reporting guidelines), attention to the four general principles has all but fizzled out. They are not mentioned at all in South Africa, Suriname, Sierra Leone, and Nauru. In Saudi Arabia and New Zealand, the only references to any of the four are to

issues of discrimination (gender, Maori and Pasifika, respectively). This supports Abramson's assertion that there is a 'front-loading' of the 'general principles' in the reporting processes, one that sacrifices an integrated discussion in relation to the subsequent substantive rights of the Convention (Abramson, 2003. p. 16)

2.3. General Comments

The Committee's other major function is to advise on the meaning and ways of implementing the Convention, a task that is most often carried out through the development and publication of general comments. References to the 'general principles' in the general comments are regular but remarkably inconsistent. Every general comment mentions one or more of the four Articles and the majority refer to them as a set. A review of 18 general comments (leaving aside General Comments No. 12 and 14 as they are on Articles 12 and 3 respectively) paints a mixed picture; in four they are not mentioned at all as a set; in four they are mentioned briefly in passing; in six they are listed and discussed as a set; in six they are included in a list with other significant Articles – most notably 4 and 5. For example, in the most recent General Comment (GC 20 on the implementation of the rights of the child during adolescence, 2016a), reference to Article 6 on the right to life, survival and development is not included *in toto*; this principle is replaced by the 'Right to development' with reference to the principle of the child's 'evolving capacities' in Article 5 – a remarkable shift for which no further comment is provided.

Moreover, the review indicates that the Committee's approach is not coherent over time. The first general comment (on the aims of education, Committee on the Rights of the Child, 2001) does not refer to them at all even through it was published 10 years after the 1991 guidelines. But nor does the eighth in 2006 (Committee on the Rights of

the Child, 2006). The third general comment refers to them as part of a 'child rights approach' as does number 13 which includes discussion of Articles 4 and 5. The general comments that include and discuss them as part of the original four-part set are peppered across the last 15 years as are those that augment the list of Articles with general application beyond the original quadruplet.

The Committee's guidance on the meaning of the 'general principles' in the general comments is sparse and, where provided, also lacks consistency and for the most part clarity. Most often the 'general principles' are mentioned without any specific guidance as to their meaning and application as a set. The first reference to them is in General Comment No 3 on HIV/AIDS where it says:

The Convention, and in particular the four general principles with their comprehensive approach, provide a powerful framework for efforts to reduce the negative impact of the pandemic on the lives of children (Committee on the Rights of the Child, 2003a, para 6).

General Comment No. 5 (Committee on the Rights of the Child, 2003b, paragraphs 2 and 4)) on general measures of implementation does not refer to them as general principles but describes Articles 2 and 3 as '***general implementation obligations'***. General Comments no 16 and No 19 on business principles and public budgets refer to them '***as the basis for all state decisions and actions.'***

The general comments that are dedicated to two of the four 'general principles, Articles 12 and 3, provide the most detail on their meaning, although there is an added challenge in extracting the import attributed to them individually from that attached to them as so-called 'general principles'. General Comment 12 (2009) on the right to be heard describes this provision as one of the 'fundamental values of the Convention' and describes its function and purpose as a general principle as follows:

The Committee on the Rights of the Child (the Committee) has identified article 12 as one of the four general principles of the Convention … which highlights the fact that

this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights. (2009, para. 2)

Article 12 as a general principle provides that ***States parties should strive to ensure that the interpretation and implementation of all other rights incorporated in the Convention are guided by it.*** (2009, para. 12)

The approach in the General Comment on Article 3 is somewhat different, in fact notably expansive. There it is stated that Article 3 fulfils three roles: an intrinsic obligation for States; a fundamental, interpretative legal principle; and a rule of procedure (at para. 6). Leaving aside Article 3's 'intrinsic' obligation as standalone right, the roles assigned to the best interests principle are (a) interpretative and (b) procedural. It is hard to see how this process function differs from the prior discussion of the 'general principles' being used to guide implementation of rights.

2.4. Lack of clarity and consistency

In summary, a review of the Committee's use of the four general principles in its two main functions – monitoring states parties' progress through periodic review and advising on the meaning of the Convention through the publication of General Comments – indicates a lack of clarity and consistency in the formulation and application of the 'general principles'. In this the Committee on the Rights of the Child is not alone. Treaty bodies have a reputation for interpreting and applying Conventions in ways that do not always lend themselves to standards of rationality and predictability (Mechlem, 2009). In the section that follows, we reflect on the criteria that could determine which provisions of the CRC merit the status of having cross-Convention import and how they might be better described and operationalized.

3. An alternative conceptualization

The fact that the established ‘general principles’ have not benefitted from clear and consistent conceptual underpinnings does not appear to have restricted their recognition and impact. On the contrary they have been used widely, even embraced by NGOs and child rights scholars (Lundy and Byrne, 2017). Governments have been content to report on them, gravitating towards Articles 3 and 12 in particular when they are incorporating the CRC in law (Lundy et al, 2013). It seems that these four Articles, packaged as a set, constitute an accessible shorthand for the child rights project as a whole. The sum is, to some extent, greater than the parts. But that is both good and bad since the ’recognisability’ and significance attached to these four Articles is not only legally and logically unsustainable but, as we have seen, can distort and detract from the implementation and monitoring of the CRC as a whole. We do not wish to deny the pedagogical value of a set of accessible ‘principles’ and acknowledge the practical and symbolic value in identifying provisions that collectively capture the fundamental elements of a so-called child rights ‘approach’. We do, however, think that the provisions that form part of that set should be not only justified but justifiable. Having acknowledged a role for some cross-cutting provisions, the question arises as to how these might be identified and determined. In his discussion of the ‘general principles’, former Committee chairman Jaap Doek called for a critical and analytical discussion of the role and substance of the general principles (Doek, 2007), an endeavour the present article has embarked on. After our analysis of the origins and further development of the CRC’s ‘general principles’, which we found weakly conceptualised and lacking clarity and consistency, this last section proposes an alternative conceptualization of cross-cutting provisions in the CRC in which we will provide criteria for the selection and propose some provisions, highlight their possible functions and discuss how to label them.

We first turn our attention to identifying some key criteria that we consider justify a determination that specific articles of the CRC have a cross-cutting role in relation to the interpretation or implementation of other Articles of the CRC. First and foremost here is that there should be some degree of *fidelity to the text* of the CRC. We acknowledge that the interpretation of the Convention, like all human rights instruments, is challenging and that it is and should be interpreted dynamically over time, with its meaning evolving as it is discussed and applied by a community of different interpreters (Tobin, 2010). However, while the Committee is one of the bodies that has an authoritative role to play in interpreting the Convention, it should attempt to honour the intentions of the drafters and those who ratified the CRC by adhering to an interpretation that the actual wording chosen is capable of bearing. That fastened down, our second criterion acknowledges that the understanding of the CRC has evolved over time and that alignment with *de facto understanding and practice* should, 25 years on, be factored in to any decisions around the Articles that might play a role across the CRC as a whole.

A first set of provisions that have, corresponding to their language and the role they have played in practice, a pan-Convention function deal with general measures of implementation. At the centre of these obligations stands Article 4 CRC that requires States Parties to undertake 'all appropriate legislative, administrative, and other measures for the implementation of *the rights recognized in the present Convention*.' Closely related provisions are contained in the Articles 42 and 44, paragraph 6 that oblige States Parties to make the principles and provisions of the Convention and their country reports widely known. And there is also Article 41 that prescribes that in the case of a conflict between the Convention and provisions contained in national or international law that are more conducive to the realization of the rights of the child,

the latter provision should prevail. These implementation obligations are intended, in the words of the Committee, 'to promote the full enjoyment of all rights in the Convention by all children, through legislation, the establishment of coordinating and monitoring bodies – governmental and independent – comprehensive data collection, awareness-raising and training and the development and implementation of appropriate policies, services and programmes' (2005, para. 9). In order to differentiate these obligations from other 'general' cross-cutting Convention provisions, we suggest to name the set of these provisions **'overall implementation obligations'**, a label that expresses very well their pan-Convention function, in particular in relation to the implementation of the CRC.

To be distinguished from these overall implementation obligations are provisions that, according to their wording and effective understanding, play an intersecting role in the context of all Convention articles. They are the provisions concerning non-discrimination (article 2), the best interests of the child (article 3), evolving capacities (article 5) and the right to be heard (article 12). The first paragraph of Article 2 obliges States to respect and ensure, without discrimination, *the rights set forth in the present Convention* and can be designated, according to these wordings, as a non-autonomous or auxiliary clause that intersects with all other Convention provisions.[2] Article 3, paragraph 1 CRC stipulates that the best interests of the child shall be a primary consideration *in all actions concerning children*, thereby expressing its broad and almost unlimited scope. The notion of 'the best interests of the child' is also firmly rooted in the children's rights field as one of the oldest and most commentated provisions (see Freeman, 2007). Article 5 CRC requires States Parties to respect the

[2] However, note that Article 2's second paragraph protects children against *any kind of discrimination* and conveys a non-subordinate, autonomous meaning to the non-discrimination provision (Besson, 2005, p. 446).

responsibilities, rights and duties of parents to provide appropriate direction and guidance – in a manner consistent with the evolving capacities of the child – in the exercise by the child *of the rights recognized in the present Convention*. Not only do the terms used in Article 5 provide the child's evolving capacities a supportive role regarding the other rights recognized in the CRC, but the concept has also been widely recognized for providing a balancing role between children's autonomy and protection rights (Lansdown, 2005). Article 12 assures the child the right to express his or her views freely *in all matters affecting the child* and imposes States Parties to give the views of the child due weight. This provision has hence an extensive scope and can rely on a still developing but already robust collection of theory and practice about children's participation rights (see Lundy, 2007). In addition to the overall implementation obligations that are contained in Articles 4, 41, 42 and 44, paragraph 6, we think in conclusion that Articles 2, 3, 5 and 12 CRC, taken as a set, meet the requirements to be ascribed a cross-cutting role for the implementation of the whole of the Convention on the Rights of the Child.

Compared to the list of four 'general principles' that was instituted by the Committee on the Rights of the Child, we propose to replace Article 6 by Article 5. We consider that Article 6 on the right to life, survival and development, which as we have seen was added to the set of general principles by Committee members in an ad hoc manner at the very end of the discussion, and was retained in exchange of keeping the respect for the views of the child on the list, sits uncomfortably as a provision with a cross-cutting role. Of course, without the right to life, all other human rights risk becoming devoid of meaning (Nowak, 2005). But it is difficult to understand the added value of attributing to this provision a cross-cutting role: it is a provision that is fundamentally important but is fortunately not always relevant to the implementation of other CRC

provisions. In contrast, Article 5 on the child's evolving capacities has been formulated in direct relation to the other rights recognized in the CRC and has also been widely used by many child rights actors in a cross-cutting role. In its most recent General Comment No. 20 (2016a) on the implementation of the rights of the child during adolescence, the Committee itself seems to be moving in the same direction, as it does not explicitly mention Article 6 CRC amongst the list of 'general principles' (referring only to one aspect of it– the right to development), but instead refers to Article 5 and 'respect for evolving capacities' (2016a, paras. 18-20).

We also think that the label 'general principles' proposed by the drafting group has not served its purpose. Our conclusion, having followed this particular path into an interesting but ultimately dead end (a veritable legal *cul de sac),* is that an attempt to define the term 'principles' sheds little in the way of light in this context. The term was used so loosely in the first instance that it does not fare well when lined up in a discussion of the meaning generally attributed to legal or human rights principles. We feel it is time to park the notion of 'principles' in the annals of the Committee on the Rights of the Child, and to come up with an alternative label that is non-confusing, legally sound and user friendly. To paraphrase a popular advertisement slogan for varnishes and wood preservatives in the UK and Ireland, the label for these 'horizontal' or 'umbrella' provisions as they have also been called (Abramson, 2008), should 'do exactly what it says on the tin'. We think that the set of provisions contained in Articles 2, 3, 5 and 12 can best be called '**cross-cutting standards**' of the CRC. Contrary to the more elevated functions that have been ascribed to the 'general principles' of the CRC, such as expressing the Convention's 'fundamental values' or pursuing other grand objectives, the 'cross-cutting standards' are more down to earth but might prove more useful as overarching themes that aptly summarise the Convention's core meaning.

We choose the word ‘cross-cutting’ rather than ‘general’, or ‘overall’ because it directly expresses what these provisions do: they cross-cut or intersect with and apply to all other articles. We propose the word ‘standard’ since the common usage of this term expresses, in a general descriptive manner, a substantial norm and also refers to a required level of quality that can be measured. The term ‘standard’ hence expresses the two main functions of the four provisions (non-discrimination, best interests of the child, respect for the evolving capacities and respect for the views of the child) which are to provide a framework to interpret the CRC as well as to assess progress made with the implementation of the Convention as a whole. This latter function can be particularly well fulfilled by using the cross-cutting standards as analytical devices to evaluate progress made under each cluster of rights in the country reports as well as to organise the Committee’s concluding observations. So instead of addressing them at the beginning of the reports in order to avoid the decried ‘front-loading’, one suggestion is that the cross-cutting standards should be addressed by way of a conclusion, at the end of the report and concluding observations.

Conclusion

We have seen that the four general principles of the CRC emerged in a somewhat ad hoc manner and that, while they have captured the imagination of child rights scholars and practitioners alike, there is a lack of consistency and clarity both in their initial conceptualisation and subsequent interpretation and application. Our alternative, an attempt to retain the manifest advantages of a set of general provisions in practice while retaining fidelity to the text of the CRC, contains two suggestions: overall implementation obligations and cross-cutting standards. For us, the latter presents as

the most attractive option to replace the 'general principles' since the term 'does what it says on the tin', that is it identifies a number of provisions of the CRC (Articles 2, 3, 5 and 12) that have been attributed (in both the text of the Convention and its praxis) a role to play in the interpretation and implementation of all other CRC provisions.

Other conceptualizations are possible: we do not think that our reflections on a new set of cross-cutting provisions point to the only possible substitute. But we do hope that by providing an alternative vision, we can trigger further discussion about their role and the label which would best suit these functions. Further work is also needed in relation to the guidelines for reporting, in particular on the clustering of the articles for the country reports, which do not always work out well and seem to have been the product of a process which was also initiated by the ten initial Committee members but has been around for 25 years without much critical scrutiny. The treatment of the general principles is just one case in point here, albeit a strong one: it is patently wrong that the general principles are addressed independently and incompletely and rarely considered in relation to the other CRC provisions, in spite of the rhetoric about their application across the whole of the Convention.

The exercise to critically assess the general principles and propose an alternative conceptualization forms part of a wider challenge for children's rights studies (see further Hanson, 2014), that is to keep open for discussion, critique and disagreement the choices made to move children's rights forward. In this respect, we, like many other children's rights scholars, identify ourselves as 'critical proponents' of the CRC (Reynaert et al, 2012). We recognise the significant tensions in this activity: those who seek to critique the endeavour run the risk of undermining its inherent credibility. Some might see that as a potentially dangerous approach, especially at times when the human rights project, and children's rights in particular, are fragile. Yet, in line with the theme

of this anniversary issue, we consider that one of our roles, as scholars of children's rights, is to *look back* with a critical gaze on what has emerged in the practice of the Convention on the Rights of the Child in order to inform and secure the credibility of the children's rights project *into the future*.

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