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Chapter 41

Article 4: States Parties' Obligations



Roberta Ruggiero

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.

Overview

Article 4 deals with the nature of the States Parties' obligations and it therefore relates 'to all the substantive articles of the Convention' (Rishmawi, 2006, pp. 22, 57). Together with Articles 42 and 44(6), it comprises the heading 'General Measures of Implementation' in the States Parties' periodic reports (Hodgkin et al., 2007, p. 47; Rishmawi, 2006, p. 22; UN Committee on the Rights of the Child, 1991, paras. 9–11, 1996, paras. 11–24, 2002a, p. 58, 2015, paras. 18–21).

It imposes on States Parties the obligation to 'undertake all appropriate legislative, administrative, and other measures' necessary for the implementation of the rights enshrined in the Convention and in its Optional Protocols. It qualifies the nature of States Parties' obligations related to the economic, social, and cultural

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rights internally to the limit of ‘the maximum extent of their available resources’ and if needed through international cooperation.

The initial wording of Article 4 did not contain any reference to the two categories of rights (civil and political rights, and economic, social, and cultural rights), but observations were raised by States Parties about the necessity of adjusting the wording in accordance with Article 2 (1) of the ICESCR (Office of the United Nations High Commissioner for Human Rights and Rättsbarnen (Society: Sweden), 2007, p. 349). After several amendments and proposals, a new version of the provision was made. It introduced the phrase ‘in accordance with their available resources’, but without specifying that this applied only to economic, social, and cultural rights.¹

Thus, after several proposals, it was decided that only economic, social, and cultural rights should be connected to the availability of resources. This compromise brought about the current text of Article 4, which was adopted unanimously, and its interpretation can be elucidated by the interpretation provided respectively by the ICCPR Committee and the Committee on Economic, Social and Cultural Rights.

However, the distinction of the nature of the States Parties’ obligations in relation to the implementation of the two categories of rights have several practical

¹Text of Article 4 adopted at first reading: ‘The States Parties to the present Convention shall undertake all appropriate administrative and legislative measures, in accordance with their available resources and, where needed, within the framework of international cooperation, for the implementation of the rights recognized in this Convention’ (Rishmawi, 2006, p. 19; UN Commission on Human Rights and Working Group on a Draft Convention on the Rights of the Child, 1988; Office of the United Nations High Commissioner for Human Rights and Rättsbarnen (Society: Sweden), 2007, p. 352).

The UN Secretary-General asked for a technical review of this ‘first reading’ and requested comments from a number of UN bodies and agencies, UNICEF included. UNICEF introduced a major shift in the discussion. It underlined that Article 4 of the Convention was essentially based on three aspects:

The obligation to implement

In ‘accordance with their available resources’

‘where needed within the framework of international cooperation.’

With reference to the second point, UNICEF underlined that none of the States Parties’ obligations related to the implementation of the ICCPR and CEDAW are limited in accordance with the ‘available resources.’ UNICEF requested the deletion of the reference to available resources, on the grounds that the draft of Article 4 ‘would achieve a radical diminution of the standards contained in existing instruments and would run counter to all of the assumptions that have hitherto governed the recognition of civil and political rights in international law.’

After the UNICEF observation, several delegations expressed their concerns. Some underlined that the Convention should not weaken civil and political rights, which in the ICCPR are not subject to the availability of resources. Others were against the deletion, on the grounds that economic difficulties indeed justify the constraints faced by developing countries. This was the first time during the drafting of the Convention that the nature of the States parties’ obligations in relation to the availability of resources was addressed, along with its implication in relation to the two categories of human rights (Rishmawi, 2006, p. 20; Office of the United Nations High Commissioner for Human Rights and Rättsbarnen (Society: Sweden), 2007, pp. 352–354).

implications. In fact, during the drafting, it was decided that the Convention should consist of concrete provisions, supplementary to those already existing in the other international treaties, in particular the ICCPR and the ICESCR (de Detrick, 1999, p. 6). Therefore, the Convention not only combines both categories of rights, but it also adds new rights, many of which encapsulate different aspects of both categories. This implies that many rights of the Convention cannot be classified in a straightforward manner as civil, political, or economic, social, or cultural rights (Rishmawi, 2006, pp. 13–18). Examples include the States Parties obligation to respect the rights and duties of parents to provide direction to the child in the exercise of their rights (Article 14(2) and Article 5) and the right of the child to express their views freely in all matters affecting them (Article 12(1)).

In the Convention, there are rights which are not included in the ICCPR and the ICESCR. These include those enshrined in Articles 31 (right to rest and leisure), 35 (right to be protected against abduction and sale), 36 (right to be protected from all forms of exploitation) and 39 (right to integration and social recovery for victims). Based on General Comment no. 5, 'there is no simple or authoritative division of human rights in general or of Convention rights into the two categories' and this reflects the indivisibility of all human rights and the 'enjoyment of economic, social and cultural rights is inextricably intertwined with enjoyment of civil and political rights' (Rishmawi, 2006, pp. 14–15; UN Committee on the Rights of the Child, 2003a, para. 6).

General Principles

The link between Article 4 and the General Principles is well documented in the reporting guidelines and General Comment no. 5, in which the Committee clarifies that the 'development of a children's rights perspective throughout government, parliament and the judiciary' is a precondition for the effective implementation of the whole Convention, in particular, in the light of its General Principles.

Article 2 The non-discrimination principle requires States Parties to implement the rights in the Convention to each child without discrimination. This also requires States Parties to undertake all the 'special measures' necessary for the implementation of the right of an individual child and/or groups of children in accordance with their specific condition. In those cases, the special measures are justified by the necessity to diminish or eliminate conditions that cause discrimination, with the intention of facilitating equal access to rights (the latter does not always imply identical treatment) (UN Human Rights Committee, 1989). For this reason, the Committee highlights 'the need for data collection to be disaggregated to enable discrimination or potential discrimination to be identified'. Furthermore, to overcome discrimination, changes in legislation, administration and resource allocation, as well as attitudes and practices, may be required (2003a, para. 12).

Article 3(1) Every ‘legislative, administrative and judicial body or institution is required to apply the best interests principle, by systematically considering how children’s rights and interests are or will be affected by their decisions and actions’. This principle also applies in those cases in which children would only indirectly be affected, by a proposed or existing law or policy or administrative action or court decision (UN Committee on the Rights of the Child, 2003a, para. 12).

Article 6 Based on the Committee’s interpretation, the concept of ‘development’ is a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological, and social development. Under Article 4, States Parties are requested to undertake all adequate implementation measures with the aim of achieving ‘the optimal development for all children’ (2003a, para. 12).

Article 12 With reference to the role of the child as an active participant in the implementation and monitoring of their rights, States Parties are requested to apply this principle equally to all measures adopted to implement the Convention. This can include, for example, involving children in the government decision-making processes, parliamentary procedures, providing them access to documents, adequate information, and giving due weight to their views. The Committee underlines that ‘Article 12 requires consistent and ongoing arrangements’ (2003a, para. 12). The consultation of children should be a constant part of the decision and discussion processes, and the emphasis on ‘matters that affect them’ entails the assessment of the opinions of particular groups confronted with the issue under discussion. Therefore, both Governments and children should have their direct appropriate channel of contact.

Articles Related or Linked to Article 4

Based on the interpretation of Article 4 provided by the Committee, this Article is instrumental to the implementation of all the other substantive rights listed in the Convention. Therefore, it is worth underlining that the wording of Article 4 is similar to that used in other provisions of the Convention, in particular with reference to the two notions of ‘maximum available resources’ and of ‘progressive realization.’ These two notions compose the essence of the progressive nature of implementation of some Convention rights. For example:

Article 23 identifies the States Parties’ obligation to encourage and ensure assistance to children with disabilities in the limit of ‘the available resources.’

Article 24(4), with reference to the progressive full realisation of the right to ‘the highest attainable standard of health.’

Article 27, in relation to the right to an adequate standard of living and the obligation of the States Parties to assist parents and other caregivers in the fulfilment of this right ‘in accordance with national conditions and within their means.’

Article 28 (1), in which the implementation of the right to education implies ‘achieving this right progressively’ (Rishmawi, 2006, pp. 22, 23).

Relevant Instruments

The following are the main international human rights treaties with particular relevance to children's rights, that, like Article 4 of the Convention on the Rights of the Child, contain provisions defining the nature of States Parties' obligations.

International Covenant on Civil and Political Rights (1966), Article 2(2).

International Covenant on Economic, Social and Cultural Rights (1966), Article 2 (1).

International Convention on the Elimination of All Forms of Racial Discrimination (1966), Article 2(1)(c).

UN Convention on the Elimination of All Forms of Discrimination against Women (1979), Article 2 (2) and Article 3.

UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Article 2(1).

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Article 73(1).

UN Convention on the Rights of Persons with Disabilities (2006), Article 4(2).

European Convention on Human Rights (1950), does not deal with nature of the States Parties' obligations. These latter have been clarified by judgements of the European Court of Human Rights.

American Convention on Human Rights 'Pact of San Jose, Costa Rica' (B-32) (1978), Article 2 and Article 26.

African Charter on the Rights and Welfare of the Child (1990), defines the nature of States Parties obligation in Article 1(1), however it does not qualify the nature of the States Parties obligations in relation to economic, social and cultural rights (Rishmawi, 2006, pp. 3, 14).

Attributes

Attribute One: States Parties' Obligations to 'Undertake All Appropriate, Legislative, Administrative and Other Measures'

Both the ICECR and the ICCPR have articles similar to Article 4 of the Convention on the Rights of the Child, but they provide different levels of detail in the identification of the 'appropriate measures of implementation'. For example, while Article 2(2) of the ICCPR refers to legislative and others measures 'necessary to give effect to the rights,' Article 4 of the Convention on the Rights of the Child states that those measures should be taken in accordance with the national constitutional processes and does not refer to administrative measures. On the other hand, Article 2(1) of the ICESCR also states the use of all 'appropriate means,' but it particularly emphasises the adoption of legislative measures for the fulfilment of the rights recognised in the ICESCR.

Article 4 presents the most comprehensive list of possible measures of implementation and the Committee, in its General Comment no. 5, provides a more detailed description of these measures, building on the General Comments issued by treaty bodies responsible for the ICCPR and the ICESCR (Rishmawi, 2006, pp. 26–27).

Considering the wide range of systems of government among states in the General Comment no. 5, the Committee groups those measures into four categories:

1. **Review of reservations:** Based on Article 2 of the Vienna Convention on the Law of Treaties, a ‘reservation’ is a unilateral statement ‘made by a State, when signing, ratifying, accepting, approving or acceding to a Treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the Treaty in their application to that State.’ States Parties are entitled at the time of ratification to make a reservation unless it is ‘incompatible with the object and purpose of the treaty’ (Article 19). Similarly, Article 51(2) of the Convention states that ‘A reservation incompatible with the object and purpose of the present Convention shall not be permitted.’ Therefore, States Parties that have made reservations which plainly breach Article 51 (2), for example, by suggesting that ‘respect for the Convention is limited by the state’s existing Constitution or legislation, including in some cases religious law,’ are requested to withdraw their reservation. In any case, Article 27 of the Vienna Convention on the Law of Treaties provides: ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’ (Rishmawi, 2006, pp. 44–48; UN Committee on the Rights of the Child, 2003a, paras. 13–16).
2. **Ratification of other international human rights instruments:** The Committee consistently encourages States Parties to consider signing and ratifying all the Optional Protocols to the Convention, and other international human rights instruments, ‘in the light of the principles of indivisibility and interdependence of human rights.’ In General Comment no. 5 it provides a non-exhaustive list of them (2003a, para. 17, Annex).
3. **Legislative measures.** This includes the following:
 - Harmonisation of the national legislation, to ensure the full compatibility of national legislation with the Convention provisions. This should be addressed through a comprehensive and constant ongoing review of all national legislation (UN Committee on the Rights of the Child, 1994, para. 15, 1997, paras. 12, 29, 2002b, para. 9), to ensure compatibility of implementation with no discrimination, in particular within federal states.

This process also applies to customary and religious laws. In this case, States Parties are requested to ensure the harmonisation of customary law, and the interpretation of religious laws should be reconciled with fundamental human rights (UN Committee on the Rights of the Child, 2003b, para. 8) and should not be used as an excuse for failure in implementation of the Convention (Rishmawi, 2006, pp. 25–26). The harmonisation process equally applies to civil and political rights, and to economic, social, and cultural rights regarding ‘immediate obligations.’ In particular, the ICESCR Committee has

clarified that even though the obligation related to the ICESCR implies a progressive implementation, there are always 'obligations of immediate effect.'²

- Giving legal effect to all rights, by considering the Convention status in domestic legislation. The harmonisation of national legislation in compliance with the Convention does not ensure the 'direct applicability' of its provisions, which is related to the status of the Convention within national legal systems. Therefore, in order to ensure the legal effect of all Convention rights, States Parties are requested to clarify the 'extent of applicability of the Convention in States where the principle of self-execution' applies and others where it is claimed that the Convention 'has constitutional status or has been incorporated into domestic law' (UN Committee on the Rights of the Child, 2003a, para. 19). In particular, with reference to Convention incorporation into domestic legislation, this should imply that the Convention can be 'directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice' (Hodgkin et al., 2007, p. 54; UN Committee on the Rights of the Child, 2003a, paras. 20, 21).³
- Ensuring justiciability of rights. In cases of violations, effective legal remedies must be available to redress violations. 'Children's special and dependent status' poses additional challenges 'in pursuing remedies for breaches of their rights.' Therefore, States Parties are requested to set up effective, child-sensitive procedures available to children and their representatives. Furthermore, in cases of confirmed breach of rights, 'appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration' should be provided (Article 39) (UN Committee on the Rights of the Child, 2003a, para. 24). This applies to all Convention rights on an equal basis. Domestic law needs to set out detailed entitlements able to allow effective remedies for non-compliance and violation (Committee on Economic, Social and Cultural Rights (CESCR), 1998). These measures are a combination of legislative and administrative actions that provide a comprehensive system of remedies (UN Committee on the Rights of the Child, 2003a, paras. 24–25).

4. **Administrative and other measures.** In recognition of the significant differences between national systems, the Committee in the General Comment no. 5 provides some key advice:

²For example, the inclusion within the national legislation of provisions related to economic, social, and cultural rights, such as the right to education, or the right to non-discrimination (immediate obligations) (Rishmawi, 2006, p. 27; UN Committee on Economic, Social and Cultural Rights, 1991, pp. 83–87).

³See also 'A Commentary on the United Nations Convention on the Rights of the Child, Article 4: The Nature of States Parties' Obligations' (Rishmawi, 2006, pp. 23–24).

- National comprehensive strategy or national plan of action: This should cover all the provisions of the Convention and be related to the situation of all children, while giving specific attention to identifying and giving priority to marginalised and disadvantaged groups.

It could be elaborated in sectoral national plans of action, for example, for education, health, trafficking and so on, but coherence and coordination should be ensured. The development of a national strategy is not a one-off task, and thus it should include arrangements for monitoring and continuous review of its outcomes (UN Committee on the Rights of the Child, 2003a, para. 26).

- Coordination: The Committee has underlined that the effective implementation of the Convention requires visible cross-sectoral coordination, in order to recognise and realise children's rights at the government and society level (2003a, para. 27). Many, if not all, government departments and other governmental or quasi-governmental bodies have a regular direct or indirect effect on children's lives' (2003a, para. 27). Thus, the Committee asks for a permanent governmental coordination mechanism to further the coordination between central government and local departments, and between government and civil society, children included. The concept of coordination has a horizontal and vertical connotation. The latter refers to coordination among different governmental levels (central and local entities). It is particularly relevant to delegation and decentralisation of competencies from the central government to local entities. This evidently characterises federalised states, but centralised states are also confronted with high devolution or delegation of power to the local authority. The Committee reiterates that this administrative organisation does not reduce the direct responsibility of the State Party, but on the contrary imposes more responsibility in terms of vertical coordination and budgetary allocation (2003a, paras. 40–41).
- Privatisation: Many States Parties hand over public services to private entities, which includes businesses, NGOs, and other private associations, both for-profit and not-for-profit (UN Committee on the Rights of the Child, 2002c). Enabling the private sector to provide services does not reduce 'the State's obligation to ensure for all children within its jurisdiction the full recognition and realization' of all Convention rights. Thus, privatisation includes the responsibility 'to ensure that non-state service providers operate in accordance with the CRC provision' and it creates an indirect obligation on private entities, on which a permanent monitoring mechanism could be imposed to ensure that non-state service providers respect the Convention (UN Committee on the Rights of the Child, 2003a, paras. 42–44).
- Monitoring implementation: Effective respect for and implementation of the Convention and the respect of the best interests of the child in legislation and policy development, and delivery at all levels of government, demands a

continuous process of child impact assessment⁴ and child impact evaluation.⁵ In terms of self-monitoring and evaluation, this constant ongoing process needs to be built into government at all levels and for all policy. However, the Committee also emphasises the necessity of an external and independent monitoring of the implementation process, 'by, for example, parliamentary committees, NGOs, academic institutions, professional associations, youth groups and independent human rights institutions' (Rishmawi, 2006, pp. 48–49; UN Committee on the Rights of the Child, 2003a, paras. 47–48).

- Data collection and development of indicators: The Committee always requires detailed statistical data, which is disaggregated in terms of not just gender and age, but also in terms of geography, ethnicity, and religion, with the aim of building up a longitudinal understanding of children's condition over time. This allows understanding of whether there is any kind of discrimination in relation to one of these sectors in policies or practices. Furthermore, the data collection needs to extend over the whole period of childhood, up to the age of 18 years, and it needs to be coordinated through the jurisdiction, ensuring nationally applicable indicators (Rishmawi, 2006, pp. 51–55; UN Committee on the Rights of the Child, 2003a, paras. 47–48).
- Budget allocation: Lack of resources cannot be used as a reason not to establish social security programmes and a social safety net.⁶ The Committee dedicates increasing attention to the identification and analysis of resources for children in national and other budgets. It argues that 'no State can tell whether it is fulfilling children's economic, social and cultural rights 'to the maximum extent of... available resources', as it is required to do under Article 4, unless it can identify the proportion of national and other budgets allocated to the social sector and, within that, to children, both directly and indirectly.' In its General Comment no. 19, the Committee provides guidelines and recommendations on how to realise children's rights in relation to each of the four stages of the public budget process: planning, enacting, executing, and follow up (2016, paras. 61–111, 57–63).
- Training and capacity building: Like all the other general measures of implementation, this is a transversal one that requires States Parties to 'develop training and capacity building for all those involved in the implementation process' including all those working with and for children.⁷ This training must

⁴Predicting the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights.

⁵Evaluating the actual impact of implementation.

⁶For children belonging to vulnerable or financially disadvantage groups including children with disabilities, children affected or/and infected by HIV/AIDS, street children and children living in poverty (UN Committee on the Rights of the Child, 2002d, paras. 14, 15, 2006a, paras. 17, 18, 2006b, paras. 20, 2, 2016, para. 21).

⁷These include, for example, government officials at all level, parliamentarians, members of the judiciary, community and religious leaders, teachers, social workers and other professionals, including those working with children in institutions and places of detention, the police and

be included in professional training curricula, codes of conduct, and educational curricula at all levels, included among children themselves (Article 42) (Rishmawi, 2006, pp. 50–51; UN Committee on the Rights of the Child, 2001, 2003a, paras. 66–70). Within this measure is included the obligation of States Parties to make their reports widely available to the public (adults and children) (Article 44(6)) (UN Committee on the Rights of the Child, 2003a, paras. 71–73).

- Cooperation with civil society: Even though States Parties hold the main responsibility for the implementation of the Convention, this extends ‘in practice beyond the State and State-controlled services and institutions to include children, parents and wider families, other adults, and non-State services and organizations’ (UN Committee on the Rights of the Child, 2003a, paras. 56–69), as stated in the General Comment no. 14 of the Committee on Economic, Social and Cultural Rights on the right to the highest attainable standard of health (2000). In addition, the Committee on the Rights of the Child has emphasised that ‘It is important that governments develop a direct relationship with children, not simply one mediated through non-governmental organizations (NGOs) or human rights institutions’ (2003a, para. 12).
- International cooperation: Articles 55 and 56 of the Charter of the United Nations identify the overall purposes of international economic and social cooperation. Drawing on these provisions, the Committee advises States Parties to establish a rights-based framework for international development assistance and to increase the percentage of gross domestic product invested in this sector, in compliance with the international standards. It also encourages States Parties that receive international financial and technical aid and assistance to allocate a substantive part of that aid specifically to children (Rishmawi, 2006, pp. 35–54; UN Committee on the Rights of the Child, 2003a, paras. 60–64).
- Independent human rights institutions: The setting up of these entities falls within the ratification commitment of States Parties (UN Committee on the Rights of the Child, 2002e, para. 1). These independent institutions are complementary to governmental structures and their role is to ‘monitor independently the State’s compliance and progress towards implementation’ of the Convention. Their main characteristic is independence and thus government cannot delegate to them its monitoring obligations on child impact assessment of their strategies and policy-outcomes evaluation. Furthermore, they need to remain ‘entirely free to set their own agenda and determine their own activities’ (UN Committee on the Rights of the Child, 2002e, para. 25, 2003b, para. 65).

armed forces, including peacekeeping forces, those working in the media, parents/caregivers and many others.

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