



2

Children's Right to Protection Under the CRC

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1 Introduction

The UN Convention on the Rights of the Child (CRC) recognizes children as rights holders and provides them with individual rights. The aim of this chapter is to provide the reader with a legal understanding of children's right to protection against maltreatment in their homes and the obligations of states parties in implementing this right in practice. The rights and obligations form the framework within which to exercise professional judgment in this area, and specifying their content is a prerequisite for rights to be realized.

Children's rights under the CRC are commonly divided into three categories, and protection rights are one of those, beside provision rights and participation rights (Hammarberg 1990, p. 100). However, children's rights are indivisible and holistic and should not be seen separately or in isolation from each other. This book is about child protection, but

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children cannot be properly protected without being provided with food, housing, care, health services and education or the opportunity to participate in decision-making regarding their own lives and in society. In protecting children, the interplay between the different types of rights is important.

Two of the articles in the Convention are central in obliging states parties to establish some form of child protection system. Under Article 19 children have the right to be protected from physical and mental violence, neglect, sexual abuse and exploitation, while they are in the care of parents or any other person. Article 3 para. 2 gives the child the right to such protection and care as is necessary for his or her well-being. The latter is formulated in a positive way, and especially the right to good care goes further than the right to be protected against various forms of maltreatment, which illustrates the blurred boundary between protection and provision.

In addition, Article 37 (a) contains a prohibition against torture and other cruel, inhuman or degrading treatment or punishment, similar to what applies to everybody under Article 7 of the International Covenant on Civil and Political Rights and Article 3 of the European Convention on Human Rights. However, CRC Article 19 is considered to be the core provision for addressing and eliminating all forms of violence against or maltreatment of children (GC No. 13, para. 7 a).

The primary position of the family in the upbringing of children is recognized by the Convention in its preamble:

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community, ...

The child should primarily have the opportunity to grow up in its own family, and for that purpose assistance to the family may be necessary. However, the Convention also recognizes that children must be protected from violence, abuse and neglect and that separation from its parents may sometimes be necessary for the child's best interests (Art. 9, para. 1, GC No. 13, para. 7 a).

The Convention requires a child rights approach to child care and protection, meaning that the child should be viewed as a rights holder, not a beneficiary of adults' benevolence (GC No. 13, para 72 a). As explained by the UN Committee on the Rights of the Child (henceforth: the Committee):

In a child rights approach, the process of realizing children's rights is as important as the end result. A child rights approach ensures respect for the dignity, life, survival, well-being, health, development, participation and non-discrimination of the child as a rights holder. (GC No. 21, para. 10)

In relation to child protection, the Committee underlines the connection between the child rights approach and the resources of the child itself and its surrounding social systems:

This child rights approach ... places emphasis on supporting the strengths and resources of the child him/herself and all social systems of which the child is a part: family, school, community, institutions, religious and cultural systems. (GC No. 13, para. 59)

The Committee on the Rights of the Child is responsible for monitoring states parties' compliance with the CRC. It consists of 18 independent experts from various countries around the world, elected by the 196 states which have ratified the Convention (states parties)¹; see Article 43. The states parties are under the obligation to report to the Committee every five years (Article 44). The Committee receives additional information from a variety of sources. Based on all of this the Committee holds a dialogue with a delegation from the country and subsequently produces its concluding observations with recommendations.

In addition to reviewing country reports, the Committee has developed 23 general comments (GCs). Since 2014 it also deals with individual complaints under the 3rd Optional protocol to the Convention on a communications procedure.²

This chapter will present children's rights in the context of child protection. The general principles of the Convention are introduced in Sect. 2. Section 3 presents Article 19, its interpretation and scope. In the

following sections, the obligations of each state party are outlined. A major obligation is to do everything possible to prevent violence, abuse and neglect from occurring (Sect. 4). Once maltreatment of children has taken place, the states parties have the obligation to respond to it in various ways, with particular regard to protecting the child and fulfilling the child's right to rehabilitation under Art. 39 (Sect. 5). Considering the best interests of the child is crucial in all professional work in this area (Sect. 6). In the concluding Sect. 7 the threads are gathered.

2 General Principles

The Convention contains four general principles which are cross-cutting and thus relevant to child protection. One of them, the right to life, survival and development under Article 6, forms the very basis for the child's right to protection from all forms of maltreatment. The term 'development' should be interpreted in its broadest sense, to encompass the child's physical, mental, spiritual, moral and social development (CRC Article 27 para. 1, GC No. 13, para. 61).

The right to non-discrimination under Article 2 is an important safeguard against arbitrary treatment. While requiring that equal cases be treated equally, it also implies that differences and nuances between cases should lead to differential treatment. Thus, in child protection, where no case is equal, the idea of formal equality is not easily applicable to professional judgment. However, differences in treatment need valid reasons. If decisions are studied systematically certain patterns may appear which may give rise to the question of bias in the execution of professional discretion; for example with regard to ethnicity or social background.

The right of children under Article 3 para. 1 to have their best interests taken into account as a primary consideration in all actions concerning them is crucial for all decision-making. It requires precisely that each child is treated individually and is highly relevant for the child protection system (more in Sect. 6 below).

Children's rights under Article 12 to express their views in decision-making and have them given due weight is vital, both for their feeling of being involved in their own case and for the aim of reaching a good

decision (GC No. 12). The child's view is also an important element in determining what is in his or her best interests.³ Children's participation as well as their best interests are not only relevant for individual decisions affecting the child, but also in designing the system of decision-making.

3 Article 19: Interpretation and Scope

Article 19 contains the right to protection and reads as follows:

1. *States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*
2. *Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.*

The Committee has published a general comment on Article 19 (GC No. 13) on the right of the child to protection from all forms of violence, which is informative in explaining the content of this right and the obligations of states parties in this regard. Further guidelines for practice are found in the United Nations Alternative Care Guidelines and the handbook to these guidelines (Cantwell et al. 2012).

In its first paragraph, Article 19 lists all the various forms of maltreatment that the child shall be protected from. The Committee in GC No. 13 uses the term 'violence' to cover everything listed in Article 19 para. 1: all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.⁴ The term 'all forms' indicates that there are no exceptions, which is deemed necessary as the slightest possibility of any form of acceptable maltreatment easily will be misused. Whether all instances of maltreatment should be prosecuted is another matter.

It is debatable whether using the term violence to cover all forms of maltreatment is useful in a child protection context. Even if it emphasizes that all the acts listed in Article 19 are harmful to children, the nuances disappear and thus the need to adapt the measures to the type of maltreatment in question. Instead, I will use the term ‘maltreatment’ below to make it clear that I do not only speak about physical or mental violence, but also neglect and sexual abuse.

Corporal punishment is unacceptable, however light (GC No. 13, para. 17, 22 (a) and 24, GC No. 8, paras. 2, 5, 8 and 11). Any excuse in law for parents, legal guardians or any other person to use physical punishment in the upbringing, such as ‘reasonable chastisement’, ‘justifiable assault’ or ‘right to correct’, must be abolished.⁵ States parties are required by Article 19 para. 1 to take ‘all appropriate legislative, administrative, social and educational measures’ to protect the child from the above-mentioned acts. The measures are elaborated in para. 2 and further specified by the Committee in GC No. 13 (para. 11 b), including the need for judicial measures.

The objectives of GC No. 13 are to guide states parties in their efforts to understand their obligations under Article 19 and to outline necessary measures. Furthermore, the aim is to overcome isolated, fragmented and reactive initiatives to address child caregiving and protection, ‘to promote a holistic approach to implementing Article 19 based on the Convention’s overall perspective on securing children’s rights’ (para. 11 d), and to provide states parties and other stakeholders with a basis from which to develop a coordinating framework for eliminating maltreatment. In stressing these objectives, the Committee shows the necessity for states parties to develop an ‘integrated, cohesive, interdisciplinary and coordinated’ child protection system (para. 39). The system should consist of legislative, administrative, social and educational measures as mentioned in Article 19 para. 1 and cover all types of interventions mentioned in para. 2, that is various forms of prevention as well as identification, reporting, referral, investigation, treatment and follow-up of individual instances.

In short, the obligations of states parties are to prohibit, prevent and respond to all forms of violence as presented above. Prevention is at the very core of protecting children from violence. It has several aspects, and

prohibition is a crucial part of it. I will come back to prevention in Sect. 4 below, after a few words about the system that needs to be in place.

Individual rights are of little value if the states parties do not have the structures in place to implement them, and children's right to protection cannot be upheld without a proper child protection system. That is why the Committee in its exchange with states parties pays a lot of attention to general measures of implementation (GC No. 5 2003). There must be legislation in place, a comprehensive policy and strategy, a coordinating body at the national level, and allocation of the resources necessary for the activities (GC No. 13 para. 72 and GC No. 19).⁶ As a factual basis for formulating the law and policies, and for evaluating them, the states parties should have a comprehensive data collection system.⁷ Knowledge of the Convention should be disseminated to the public and to children, and all professionals working with or for children need training on how to implement the Convention, including on best interests and how to have conversations with children.⁸ To hold the government accountable, all states parties should have a fully independent national human rights institution (Paris Principles 1993; GC No. 2 2002), and the involvement of civil society should be supported.

4 Prevention of Maltreatment

4.1 Overview

The main way to protect children from all forms of violence as understood by Article 19 is to prevent it from occurring. In addition to social policy and educational measures being mentioned in Article 19 para. 1, prevention is specifically required by para. 2. The need for prevention is strongly emphasized by the Committee in GC No. 13 (para. 46). Prevention can take place at various levels. General prevention is aimed at combating the root causes of maltreatment of children, such as poverty as a stress factor in the daily lives of families or the status of persons with disabilities in a society. More specific preventive measures, but still at the general level, may be directed at supporting children and their families or

at changing attitudes to children and the way they are treated. Individual prevention is necessary where a child is at risk.

Prohibition is an important part of prevention. It sends a clear message that violence against children is unacceptable, as well as, hopefully, deterring people from committing violence for fear of sanctions. Whether a prohibition should lead to reporting to the police in all instances will be discussed in Sect. 5.2 below.

Without coordination of the efforts of various sectors children may fall between the cracks and successful prevention may not be possible. Thus, GC No. 13 underlines that

[m]echanisms must be explicitly outlined to ensure effective coordination at central, regional and local levels, between different sectors and with civil society, including the empirical research community. (Para. 72 (i))

More specifically, the Committee recommends that the links between mental health services, substance abuse treatment and child protection services be strengthened (GC No. 13, para. 47 [c] iii).

4.2 Social Policy Measures

Poverty makes it difficult for parents to take proper care of their children. Not only does it entail challenges in providing children with basic necessities such as food, clothing and shelter, it may also lead to various forms of parental behaviour that are detrimental to children. Parents may have to go away to find work in another part of the country or abroad, leaving their children behind without proper care ('I am Kuba' 2015; Sandberg 2018).⁹ Where instead they stay at home, the stressful situation may lead to emotional neglect of the children and even physical violence or other forms of abusive behaviour. That is why poverty reduction strategies, including financial and social support to families at risk, as well as housing and employment policies, are important social policy measures to prevent violence against children from occurring (CRC, Art. 27, para. 3, GC No. 13, para. 43 [a], Alternative Care Guidelines 2010, para. 15).¹⁰

4.3 Social Programmes for Caregivers and Children

In general, the significance of the family as a favourable environment for children to grow up in is emphasized by the CRC, particularly in the preamble but also in provisions such as Article 18. Article 19 para. 2 requests that states parties establish social programmes to provide necessary support for the child and for those who have the care of the child. Support to the family in order to enable parents and other caregivers to take care of their children in an adequate way is high on the Committee's agenda.¹¹ Examples of social programmes to be established to provide optimal positive child-rearing are community-based mutual-help groups, welfare programmes, counselling support and therapeutic programmes for caregivers related to domestic violence, alcohol, drugs or mental health needs. Other measures are pre- and post-natal services and home visitation programmes. There should also be programmes directed at children themselves, such as childcare, early childhood development and after-school care programmes, child and youth groups and clubs, counselling support to children and 24-hour free helplines GC No. 13, paras 43 b and 47 c).

4.4 Educational Measures

Another type of prevention is educational measures to change attitudes in society to children and their upbringing, to violence in general and more specifically to violence and other harmful behaviour towards children. Educational measures are required by Article 19 para. 1 and further elaborated in GC No. 13. They should 'address attitudes, traditions, customs and behavioural practices which condone and promote violence against children' (para. 44). In particular, awareness campaigns should be conducted to promote positive child-rearing and combat negative societal attitudes, a recommendation which is repeatedly made to states parties in the Committee's concluding observations. More specifically parents and other caregivers should be educated in this regard.

Children's empowerment and participation under Article 12 are crucial aspects of the prevention of violence. Information should be provided

which is accurate, accessible and age-appropriate. Training on life skills, self-protection and participation should be conducted. The Committee also underlines the need for all children to be registered in order to facilitate their access to services and redress procedures (GC No. 13, paras 44 and 47). Last but not least, training of professionals and others working with or for children is necessary for children's rights to be upheld. It should be carried out on a regular basis, as an ongoing process and not as a one-off event. The training must cover a child rights approach to Article 19 and its application in practice. Professionals and others should be able to guide parents and other caregivers on positive parenting and the importance of avoiding any kind of maltreatment in the upbringing. Groups mentioned in GC No. 13 are teachers at all levels of the educational system, social workers, medical doctors, nurses and other health professionals, psychologists, lawyers, judges, police, probation and prison officers, journalists, community workers, residential caregivers, civil servants and public officials, asylum officers and traditional and religious leaders (para. 44).

4.5 Individual Prevention: Identification and Intervention

Targeted prevention requires that children at risk are identified (see Article 19 para. 2). To prevent maltreatment from occurring, children must, according to GC No. 13, be given 'as many opportunities as possible to signal emerging problems before they reach a state of crisis' (para. 48). Adults that are in contact with a child should be able to recognize possible issues from the child's behaviour or what the child says, without the child explicitly asking for help. This is highly relevant for school and pre-school teachers who meet the child every day, as well as health professionals, social workers and police, but also for adults in the family or neighbourhood who meet the child in an informal setting. Identification requires that 'all who come in contact with children are aware of risk factors and indicators of all forms of violence, have received guidance on how to interpret such indicators, and have the necessary knowledge, willingness and ability to take appropriate action' (ibid.).

For those who see that a child may be at risk, there must be clear guidance as to how this can and should be reported to the child protection authorities. Such authorities should be present at community level and stand ready to deal with the issue swiftly, in order to prevent problems from escalating. Since the cases and situations may vary enormously, a number of measures should be available. Any intervention should be targeted at the situation of this individual child and selected according to his or her best interests (see Sect. 6 below). The government, civil society and professionals are encouraged to develop and implement community-based services. Assistance to the family should be provided

by adopting measures that promote family unity and ensure for children the full exercise and enjoyment of their rights in private settings, abstaining from unduly interfering in children's private and family relations, depending on circumstances. (GC No. 13, para. 47)

The emphasis on family unity and the importance for the child of family relations is fully in line with the Convention, as mentioned above. A footnote to this quote in the GC refers to, among other items, a decision from the European Court of Human Rights from 1988 (Olsson) regarding the right to family life. Although that decision is still relevant, the European Court of Human Rights in recent years increasingly has made reference to the best interests of the child in determining the limits of parents' right to family life (see, among others, *Jovanovic v. Sweden* [2015], para. 77, and Chap. 4 in this book). There will always be the question of how far one should go in protecting family unity if a child is at risk. At the preventive stage, before the maltreatment has escalated, retaining family unity is the clear starting point and main rule. However, at a certain point it may not be possible to protect the child from maltreatment and uphold his or her best interests by preventive measures in the home only. It may be necessary to break family unity by removing the child or, as it may be, the perpetrator from the home.¹² A main purpose of separation is to prevent further maltreatment of the child. However, it is also necessary to respond in an adequate way to the maltreatment that has already happened (see the next section).

5 Responding to Violence, Abuse and Neglect

5.1 Reporting and Referral

The response to violence is outlined in Article 19 para. 2 as reporting, referral, investigation, treatment and follow-up. Before being reported or otherwise acted upon, maltreatment of children must be identified, which is further elaborated above. As an aspect of prevention, reporting of children at risk is important, but when maltreatment actually occurs there need to be stronger reporting mechanisms. The Committee strongly recommends that all states parties develop

safe, well-publicized, confidential and accessible support mechanisms for children, their representatives and others to report violence against children, including through the use of 24-hour toll-free hotlines and other ICTs. (GC No. 13, para. 49)

The GC further states that reporting should at least be required of professionals working directly with children. The obligation to report should cover not only instances of violence, but also suspicion or risk (ibid.). To whom one should report is not elaborated in GC No. 13. It could be to a public agency with responsibility for child protection, but as apparent from the quote above it could also be for example to a helpline. The point is that whoever receives the report must have an obligation to act upon it and where necessary refer it to the relevant agency (see below).

The establishment of reporting mechanisms entails the need for providing training and support for personnel who receive the information on how to act upon it in a meaningful way. Related support services for children and families should be established, and they should be help-oriented, offering public health and social support, rather than triggering responses which are primarily punitive (GC No. 13, para. 49).

Closely related to reporting, which is expected of professionals dealing with a child, referral of the case to the appropriate agency is crucial for giving the child assistance according to his or her needs. The receiving agency should be the one in charge of coordinating the response, such as

a child protection or child welfare agency. The child may be in need of services from various sectors, such as health care or specialized services for children with disabilities. Consequently, the Committee stresses the need for professionals in the child protection system to be trained in inter-agency cooperation and protocols for collaboration. According to GC No. 13, the process will involve:

- (a) *a participatory, multi-disciplinary assessment of the short- and long-term needs of the child, caregivers and family, which invites and gives due weight to the child's views as well as those of the caregivers and family;*
 - (b) *sharing of the assessment results with the child, caregivers and family;*
 - (c) *referral of the child and family to a range of services to meet those needs; and*
 - (d) *follow-up and evaluation of the adequateness of the intervention.*
- (Para. 50)

5.2 Investigation and Prosecution

Investigation of a case of violence against children may take place within the child protection system, with the aim of providing assistance to the child and the family. It may also be conducted by the police with the aim of deciding whether to bring charges against the perpetrator. The two forms of investigation are not contradictory, and the one does not exclude the other. However, there are several challenges in the intersection between the child protection system in its narrow sense (as the system providing assistance to the child and family or making other interventions in the family) and the criminal justice system. Where prosecution may lead to a parent being sentenced to prison, this may not be in the best interests of the child. Additionally, if parents know that by admitting violence against their child they will be reported to the police, they may not be willing to admit such acts. Without the parents acknowledging what they are doing and the consequences for the child of being maltreated, it may on the other hand not be possible to provide them with the appropriate training, treatment or other measures to overcome the problems and so to maintain the unity of the family.

According to GC No. 13, ‘extreme care must be taken to avoid subjecting the child to further harm through the process of the investigation’ (para. 51), but it does not elaborate on how the various dilemmas may be dealt with. In GC No. 8 on corporal punishment, however, the Committee states,

While all reports of violence against children should be appropriately investigated and their protection from significant harm assured, the aim should be to stop parents from using violent or other cruel or degrading punishments through supportive and educational, not punitive, interventions. (Para. 40)

The statement is directly related to violence used as a punishment in the upbringing, but it is just as relevant for other forms of parental behaviour which is detrimental to children. The main point of investigation should be to stop the violence, not to sanction the parents. Indeed, a prohibition and criminalization of violence against children may not be fully effective unless sometimes followed up by prosecution and sentencing to set an example. The Committee yet explicitly states that prosecuting parents is in most cases unlikely to be in their children’s best interests. According to the Committee, a case should only be prosecuted where it is regarded as necessary to protect the child from significant harm and is in the best interests of the child, with due weight to the child’s views (GC No. 8, para. 41). The prosecution authorities need training to carry out assessments of a child’s best interests in such situations. However, it is not necessarily a good idea to leave this assessment to the prosecutor. In light of what is said above on the challenge of making parents cooperate with the child protection authorities if the case is reported to the police, it may not be in the child’s best interest to do so. This should be assessed on a case-by-case basis by the child protection authorities.

5.3 Treatment and Follow-Up

In Article 19 the only reference to what kind of assistance should be provided to the child and/or the family is the term ‘treatment’. A relevant provision in this respect is Article 39 on the child’s right to rehabilitation, which requires the states parties to

take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; ... Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Effective access to redress, remedies and reparation to children when their rights are violated should be ensured by legislative provisions (Comment No. 13, para. 41 f and i). In individual cases of considering rehabilitation and reparation, attention must be given to hearing the child's views and giving them due weight under Article 12. The child's safety and the possible need for immediate safe placement are important considerations. Furthermore, as with all interventions in the child protection system, the 'predictable influences' of potential interventions on the child's long-term well-being, health and development must be taken into account (GC No. 13, para. 52). There is an unavoidable need in such cases to make predictions, and purely theoretical effects are not sufficient. Predictions should be based on empirical facts of the past and present, concerning the child and his or her situation and relationships. According to Art. 3 para. 1 the decision shall be made according to the child's best interests (see GC No. 14 and below).

As possible types of intervention GC No. 13 mentions medical, mental health, social and legal services and support, as well as longer-term follow-up services. A full range of services should be made available, including services and treatment for perpetrators of violence, especially child perpetrators. Family group conferencing and other similar decision-making practices are also mentioned (para. 52).

Separation of the child from its parents is not generally desirable and as a main rule shall not happen against their will (see Art. 9 para. 1 of the CRC). The same provision provides for an exception, but only in cases where it is necessary in the best interests of the child. Abuse and neglect are specifically mentioned as circumstances that may make separation necessary. If the child is placed outside the parental home, the child should be ensured contact with both parents under Article 9, para. 3, unless it is contrary to the best interests of the child (see GC No. 13, para. 53). Under Article 16 children also have a right to respect for their family life with the wider family, which should be understood to include their

siblings (see ECtHR, *Moustaquim v. Belgium* 1991, para. 36). Thus, the relationship of the child and his or her siblings should be taken into account in the professional judgment of what interventions to make.

The term ‘follow-up’ requires that it is made clear who has the responsibility for the child and the family through all the stages of a case and clarification of the aims of whatever actions are taken. Furthermore, it requires that deadlines are set for the implementation and that the duration of any intervention is made clear. Interventions should be subject to review, monitoring and evaluation, for which mechanisms and dates must be clarified in advance. There should be a case management process in order to secure continuity between stages of intervention (GC No. 13, para. 53). The child’s right to development under Article 6, including its physical, mental, spiritual, moral and social development, is crucial and should be taken into account in all decisions (*ibid.*, Art. 27, para. 1, GC No. 5, para. 12). Article 29 on the aims of education in its letter (a) presents the aspiration of the development of the child’s personality, talents and mental and physical abilities to their fullest potential. The child also has the right under Article 25 to periodic review of treatment and placements.

5.4 Judicial Involvement

Article 19 does not require judicial involvement in all cases, only ‘as appropriate’. With reference to the best interests of the child as the primary purpose of decision-making, the Committee stresses that regard should be given ‘to the least intrusive intervention as warranted by the circumstances’ (GC No. 13, para. 54). However, according to Article 9, para. 1 a decision to separate a child from its family should always be subject to judicial review. Administrative courts or court-resembling bodies¹³ are included in this concept, provided they fulfil the requirements of independence and legal expertise.

In addition to juvenile or family court intervention, judicial intervention may consist of family group conferencing, alternative dispute-resolution mechanisms and restorative justice and kin agreements, provided that processes respect human rights and are accountable and managed by trained facilitators (para. 55).

Requirements for the judicial process include prompt and adequate information for the child and its parents. Wherever possible, the process should be of a preventive nature. The procedures have to be child-friendly throughout the process, taking into account the child's personal situation, needs, age, gender, disability and level of maturity, and fully respecting their physical, mental and moral integrity. Child-friendliness also implies that the process should be swift (para. 54 a–d, Alternative Care Guidelines, para. 57).

Where appropriate, juvenile or family specialized courts and criminal procedures should be established for child victims of violence, which could include specialized units within the police, the court and the prosecutor's office. Specific interdisciplinary training on the rights and needs of children should be provided to all professionals involved in such cases (para. 56).

6 Best Interests of the Child

In the implementation of the system, decisions and other actions have to be taken every day in relation to every child that needs protection. The best interests of the child are mentioned several times above in relation to various individual decisions that need to be made; they are relevant for any intervention made by the child protection authorities as well as the more specific decisions of separating the child from its parents, whether or not to prosecute parents, and so forth. Those who prepare and make decisions must use their professional judgment in looking for possible solutions and in choosing among the alternatives, and the best interests of the child should guide that judgment.

A main point of Article 3 para. 1 on the best interests of the child is that decisions have to be made according to the individual child and his or her situation. As emphasized by the Committee,

Assessing the child's best interests is a unique activity that should be undertaken in each individual case, in the light of the specific circumstances of each child or group of children or children in general. (GC No. 14, para. 48)

To guide the best interests assessment, the Committee in its GC No. 14 made a non-exhaustive list of elements to consider (para. 50).

The child's views are central in this respect, and the fact that the child is very young, has a disability, belongs to a minority group or is in any other vulnerable situation does not deprive him or her of the right to be heard nor reduce the weight to be given to the child's views. Another important element is the child's identity, including his or her personality and characteristics such as sex, sexual orientation, gender identity, religion and beliefs, and cultural identity. This demonstrates the need for diversity in assessing children's best interests. If the child is in a situation of vulnerability of some kind, such as having a disability, belonging to a minority group, being an asylum seeker, victim of abuse or living in a street situation, this situation should be taken into account. However, even children in such situations should be judged individually. Other elements in the best interests assessment are the possibility of providing care, protection and safety to the child, and preservation of the family environment and maintaining relations. These correspond with the rights emphasized above. The reason why they are also included as part of the best interests assessment is that this assessment has to be undertaken once the various rights do not point in a clear direction. The child's right to health and to education are also elements to be taken into account (GC No. 14, paras 53–79).

In deciding what measure to take in a child protection context, resilience and protective factors, as well as risk factors, should be taken into account. Protective factors include:

stable families; nurturing child-rearing by adults who meet the child's physical and psychosocial needs; positive non-violent discipline; secure attachment of the child to at least one adult; supportive relationships with peers and others (including teachers); a social environment that fosters pro-social, non-violent and non-discriminatory attitudes and behaviours; high levels of community social cohesion; and thriving social networks and neighbourhood connections.
(GC No. 13, para. 72e)

Once all the elements that are relevant for an individual child in his or her specific situation have been identified, examined and assessed, they

have to be considered altogether for a best interests determination. If they all point in the same direction, it is clear what solution is in the child's best interests. Where, on the other hand, different elements point in different directions, they need to be balanced. This balancing exercise has to be performed with regard to the individual situation and needs of that child. For instance, where protection factors stand up against factors related to the autonomy of the child, the age and maturity of the child should guide the balancing. In assessing the maturity, the physical, emotional, cognitive and social development of the child should be taken into account (GC No. 14, paras 80–83). Interestingly, the GC adds that in the light of children's evolving capacities, decision-makers should consider measures that can be adjusted or revised accordingly, rather than irreversible solutions.

Where there are competing interests or rights of other people, Article 3 says that the best interests of the child should be 'a primary consideration'. They should have great weight, but Article 3 does not exclude the possibility of other rights or interests prevailing. In child protection cases, however, where the opposing interests are those of the parents that are responsible for the child, the best interests of the child should carry particularly great weight. The parents do not have the right to any action that may harm the child. This is the approach taken by the European Court of Human Rights, stating that 'in cases of this type (public care of children and contact restrictions) the child's interest must come before all other considerations' (*Jovanovic v. Sweden* 2015, para. 77).

7 Conclusion

In order to realize children's right to protection under Article 19 of the CRC, the state party has the obligation to make available all the preventive measures presented in Sect. 4 and have measures in place to respond to maltreatment of children as outlined in Sect. 5. At the individual level, child protection involves a choice of measures and other decisions for which Article 3 para. 1 requires that the best interests of the child 'shall be a primary consideration' (see Sect. 6). The best interests of the child

give direction to the professional judgment to be exercised at all levels of these cases.

As Cantwell points out, it is essential that the reference to best interests does not divert attention away from the vital message of the Convention, that children have human rights.¹⁴ At the outset, the best interests of the child is a paternalistic concept that should not override the idea of the child as a rights holder. However, the two are not necessarily contradictory. The child rights approach mentioned in the introduction to this chapter emphasizes the child as a rights holder, and the whole child protection system is to be based on the rights of the child. In exercising their professional judgment in individual cases, it is important that the professionals bear in mind their obligation to safeguard the child's right to protection, as well as the inter-connected rights such as the rights to health, rehabilitation and development. At the same time, they should seek to uphold, as far as possible, the right of the child to respect for its family life. In situations where the rights of the child point in different directions, or where there is a choice between measures to uphold the rights, the best interests of the individual child are a useful tool to guide the solution.

Last, but not least, the child's right to express its views and have them taken into account is vital in any decision-making. As demonstrated above, the child's views should be an essential element in the best interests assessment, making it less paternalistic. This right, however, does not imply that the adults can leave the decision to the child in the name of autonomy or for the sake of convenience. The responsibility for making decisions lies with the adults.

Notes

1. All nation-states in the world except the USA.
2. An optional protocol is an addition to the Convention, and states choose whether they want to ratify it. The two first optional protocols are on children in armed conflict and on the sale of children, child prostitution and child pornography.
3. See Peters (2018) for reflections on the voice, story and dignity of the child in relation to hearing children in child protection, Leviner (2018) on the need to rethink children's participation in the Swedish child

protection system, and Pösö and Enroos (2017) on the narrow representation and use of children's views in Finnish care orders.

4. In line with the Global Study on violence against children (2006), para. 8.
5. The first two terms are from common-law systems, the latter from countries influenced by French law.
6. The lack of a coordinating body in many South American countries is emphasized by Kamimura et al. (2017).
7. On the situation of data collection in some Latin American countries, see Kamimura et al. (2017), at pp. 848–853.
8. On the important role of professionals, see Cardol (2017), p. 891.
9. 'I am Kuba' (2015), Sandberg (2018).
10. The example of Mozambique is presented in Huijbregts and Chowdhury (2017).
11. Van den Boom (2017, pp. 810–811) calls for the Committee to become more explicit in its concluding observations to states parties about their duty to provide parent support services.
12. See Sandberg (2018) on the requirements for placing the child in alternative care.
13. Such as the Norwegian County Board.
14. Cantwell (2017), p. 62.

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