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**SILENT MINORITIES**  
Children's Right to be Heard

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## **I. ABSTRACT**

The new conception of children's rights brought empowerment and protection but, at the same time, uncertainties and inconsistencies. International law, in an attempt to assess the real needs of the child, treated children for the first time as subjects of law.

The Right of the Child to be Heard, is a unique provision enshrined in Article 12 of the Convention, which not only protect children as vulnerable individual, but also empower them as an active member of the society.

However, the recognition that every child has an inherent right to say, is widely disrespected by the States parties. Indeed, the lack of listening by the decision makers is greatly represented when States parties implement the Convention in the field of legal proceedings. In these cases, the law has serious problems to balance the right of the child to be heard and, at the same time, decide for their best interest.

The worldwide situation leaves certain doubts of the success of the Convention. Despite the fact that many efforts have been done, and many legal literature has been drafted regarding the improvement of children justice, the rhetoric's usually differ from the reality.

Quim Genís

Per l'Arnau,  
a qui no trauré mai més el pipo  
sense abans explicar-li

*To Arnau,  
to whom I will never pull the dummy  
again, without first telling him*

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### **III. ACRONYMS**

API	Additional Protocol I (Geneva Conventions)
APII	Additional Protocol II (Geneva Conventions)
CoE	Council of Europe
CRC	Convention on the Rights of the Child
DRC	Declaration on the Rights of the Child
ECA	European Convention on Adoptions of Children
ECECR	European Convention on the Exercise of Children's Rights
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	Europe Union
GC	General Comment
ICCPR	Int. Covenant on Civil and Political Rights
ICESCR	Int. Covenant on Economic Social and Cultural Rights
IHL	Int. Humanitarian Law
OHCHR	Office of the High Commissioner of Human Rights
TEU	Treaty of the European Union
UN	United Nations
UNCRC	United Nations Committee on the Rights of the Child
UNGA	United Nations General Assembly

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## Introduction

The conception of the child as a subject of law dates from the ratification of the United Nations Convention on the Rights of the Child in 1989. Nevertheless, the new paradigm of children's rights is still under discussion. Despite the efforts made by the UN Committee on the Rights of the Child ("The Committee" herein after) to guide for a successful implementation of the Convention, States parties still today contradict each other when understanding the mandates of the text.

The fact that the international legal framework protecting children's rights is based in four major principles (which appear in the Convention as a legal provision as well) rise more uncertainties rather than establishing a common approach. Indeed, according to the Committee, the principle of non-discrimination (Article 2), the principle of the best interest of the Child (Article 3), the principle of the inherent right to life and development (Article 6) and the principle of children participation (Article 12), should be understood holistically when States parties implement the Convention. That means that these principles complement each other in order to interpret the Convention as extensive as possible.

Furthermore, between the principle of the best interest of the child and the right to be heard exist an intrinsic link which *a priori* should have a complementary role when implementing the Convention. The first is willing to achieve child's best interest, whereas the second provides a mandate to secure that the views of the child are heard and children views are given due weight, including the decisions affecting his or her best interest<sup>1</sup>. Moreover, the best interest of the child, as the Committee points out, it must be understood as a right, as a principle and as a rule of procedure and, thus, acquires paramount consideration in all legal proceedings affecting the child. On the other hand, the right to be heard, must ensure children participation over all matters affecting them, which also means, to give them voice in any administrative or judicial proceeding affecting them. Bearing this in mind, the uniqueness of the principle of children's participation, sets an unprecedented mechanism to bring children as an active part during the legal proceedings as well as an active part of the society.

Indeed, Article 12 not only empowers the child to speak up, but also bind States parties to take children voices into account. However, the law does not know how to undertake children's participation into the legal proceedings. While some courts take in consideration the views of the

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<sup>1</sup> Committee on the Rights of the Child. General Comment n°12. Para. 43.

child as primary source to decide on his or her best interest, others, in the name of children's protection, keep them away from the courts and, as a consequence, children might become voiceless.

Furthermore, another contentious issue arises within the international community when States parties implement the rights of the child enshrined in the CRC. The Convention is not clear setting a common criterion on how to assess children maturity in order to let them decide. Although the CRC and the guidelines drafted by the Committee<sup>2</sup> encourages States parties not to set age barriers, and rather assessing the maturity and capacity of the child, the criteria of establishing age threshold, differ from one State to another. These questions set inconsistencies on how the international law understands children's rights, and leave uncertainties for the successful implementation of the Convention.

Hence, this thesis will analyse from a legal point of view, the implementation of the right to be heard in different legal proceedings and, finally, discuss the issues that arise during the theoretical approach of this work.

First, we will assess the legal nature of Article 12 of the CRC (the right to be heard), coming from the short history of the concept of children's rights until today, both within the United Nations level and the European regional level. The understanding of Article 12 is of importance considering its uniqueness, because is the key clause of the Convention protecting and empowering the child as an active part of the society. Also, assessing Article 12, will give us the necessary insights for, then, determine other issues at stake such as the broad concept of the best interest of the child when implementing the Convention.

The second section, focusses on the implementation of the right to be heard in different legal proceedings: Family law, Medical law, Refugee law, and special attention will be paid when children are in conflict with the law.

Last but not least, the last section becomes a discussion bringing all the issues that appeared in the section right before. We considered to focus on the role took by the right to be heard but, at the same time, the discussion brings other concepts and shortcomings which directly affect the implementation of the rights contained in the CRC in the legal proceedings.

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<sup>2</sup> General Comments, Concluding Observations, reports.

## CHAPTER I LEGAL NATURE OF THE RIGHT TO BE HEARD

### 1. The Right to be Heard at international level

Within the framework of the United Nations, the rights of the child have not received the attention they deserve, due to the fact that children are vulnerable and thus subject to legal protections. Nowadays, human rights protection mechanisms not only protect children as objects of law, just like any other person, but also provide rights specific to children as “developing” human beings and as a vulnerable group. Nevertheless, we will see how, the specific protection of children was foreseen as early as the 1920s. Thus, we will put the regulation of children's rights into context by analysing their evolution within the framework of the United Nations, paying special attention to its main texts and the gradual implementation of the concept of children's participation within the international legal texts.

Thus, by their nature, children have not enjoyed enough freedom to raise their voice, and to actively participate in all matters that concern them. It was not until the late eighties that the views of the child, as an active part of society, began to be taken seriously. Moreover, the rights of children were only implemented at European level after the United Nations Convention on the Rights of the Child (CRC either the Convention hereinafter) was drafted. In this respect, supranational organizations with legislative capacity in this field, such as the European Union or the Council of Europe, regulate children rights in parallel with the existing international documents. However, there exists some variations in such regulation regarding the right of the child to be heard, as will be discussed in greater detail below.

At a present, the right of the child to be heard can be found in most of the regulations regarding children's rights. However, although most of these provisions take Article 12 as an example to develop the right of the child to be heard, their wording varies substantially.

## 1.1 The Development of the Rights of the Child by the United Nations

The evolution of the rights of the child has a high point in the internationalization of its protection through the mechanisms established by the international community, starting from the League of Nations to date.

In the early 1920s, in the inter-war period, the League of Nations saw the need to place greater priority on the vulnerability of children<sup>3</sup>. After the IWW, a big part of the international community agreed to draft a text to protect children. For the first time, the international community treated children themselves as independent objects of rights. The Declaration of Children's Rights of 1924, known as the Geneva Declaration, focused on the rights of children from a perspective of protection in armed conflict and the impact of such conflict their social life. Thus, the Declaration of Children's Rights of 1924 did not contain any provision relating to the right to be heard or children's participation in society<sup>4</sup>. Later, the 1948 Universal Declaration of Human Rights (Article 25) only mentioned children as a subject of special protection and as an object of law: *Motherhood and Childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection*. However, the UN felt there was a lack of protection for children in its international treaties. Hence, following the Universal Declaration of Human Rights, the General Assembly saw the need to draft a text in the form of a declaration that provided a specific protection framework for children. Consequently, the Declaration of the Rights of the Child (DRC) was adopted by the General Assembly of the United Nations in 1959 in an attempt to improve upon and build upon the principles established by the 1924 Declaration of the League of Nations, a system of protection for children. The DRC was perceived as being the main milestone for special protection of children in terms of economic, social and cultural rights and in the consolidation of the concept of "best interests of the child"<sup>5</sup>. However, the DRC still did not contain any reference to the right of the child to be heard, any provision for their active participation in society, or even to their right to freedom of expression<sup>6</sup>.

Furthermore, other relevant instruments regarding children's rights were ICCPR<sup>7</sup> and ICESCR<sup>8</sup>, which included special provisions for the protection of children, emphasised the protection of children from exploitation and implementing the right to education. As we have already mentioned, the

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<sup>3</sup> (Marshall, 1999) P. 106.

<sup>4</sup> (Krappmann, 2010) P. 503.

<sup>5</sup> (Zeldin, 2007) P. 3,4.

<sup>6</sup> (Krappmann, 2010) P. 504

<sup>7</sup> International Covenant on Civil and Political Rights approved in 1966 and entered into force in 1976.

<sup>8</sup> International Covenant on Economic Social and Cultural Rights approved in 1966 and entered into force in 1976.

international framework for the protection of human rights protect children as human beings. However, children are also considered to be particularly vulnerable and there was a need to consider developing countries, due to the fact that they had specific characteristics that deserved special attention. Hence, the International Conventions which make up the Bill of Rights took into consideration specific provisions regarding the rights of the child. The ICCPR, for example, recognizes children's right to special protection in accordance with their status as minors, as well as the right of the child to have a name and nationality (Article 24). For its part, ICESCR provides special protection against victimization and obliges states parties to establish a minimum working age (Article 10). Moreover, article 13 ICESCR establishes the right of everyone to education, and universal free education for all children. However, article 13.3 does not take into account the views of children, even if the matter is directly involved.

Other instruments were drafted that took the protection of children into account. In 1973, ILO approved the Minimum Working Age Agreement; in 1979, the UNGA approved the Convention on Discrimination against Women and Girls (CEDAW); in 1989 the CRC was approved, and entered into force the following year; in 1999 the ILO drafted the Convention 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; in 2000 the UNGA approved the 2 optional protocols of the CRC, with the first addressing the sale of children, child prostitution and child pornography and the second covering the involvement of children in armed conflicts.

Nevertheless, there were specific international instruments protecting children, whose contents gave children's views more weight. Examples include the UNCRC, the International Covenant on the Civil aspects of Child Abduction or The Hague Convention related to adoption. According to Aisling Parkes, most of the international instruments implementing and protecting children rights, and those which reinforce the right to be heard to some extent implement and recognize the right to be heard procedurally rather than substantially. This was the case, for example, in relation to Article 13 of the 1980 Hague Convention on the Civil aspects of International Child Abduction and article 4(d) of The Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993, giving special consideration to child views, having regard to the age and degree of maturity of the child when dealing with the adoption procedures<sup>9</sup>. However, the CRC was the first international document recognizing *strictu sensu* the legal term Right to be heard.

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<sup>9</sup> (Parkes, 2013) P. 7.

## 1.2 The United Nations Convention on the Rights of the Child

The UN Convention on the Rights of the Child was adopted by the General Assembly of the UN in 1989, and entered into force in September 1990. Unlike earlier texts, the CRC is an international treaty that deals primarily with children's rights, and which not only provided new forms of protection of children's rights, but did so, as we shall see, working from another perspective. However, like the vast majority of international texts, the drafting process of the convention was neither easy nor quick. There was much discussion regarding the wording of the convention and there was a period of more than ten years between the drafting of the initial outlines and the publication of the final version of the text.

The process of drafting an international convention on children rights begun in 1976 with a proposal by Poland, which aimed to draft the first internationally binding tool in relation to children's rights in particular. The first stage was to transcribe and reformulate what was already set out in the Declaration of Children Rights and to enshrine this in the form of a binding convention. None of the comments submitted by the states in relation to the Polish proposal concerned children's participation. Later on, in 1979, the right to be heard was included (OHCHR, Vol I, 56) in Article 7 of the Polish proposal, which established that "*child should be considered as an active member of the society*". Subsequently, the revised version of Article 7 (now Article 12) became the right of the child to express himself "*in matters concerning his own opinion*" (UN document E/CN.4/1349 see OHCHR, Vol I, 74). After the first discussions and the recommendations made by the member states, a working group was established in order to draft the Convention on the Rights of the Child (CRC), which was intended to be published in 1979. During its drafting process, one of the points under discussion was the inclusion of the provision of the right to be heard as an autonomous clause, rather than being part of the child's "best interest". Nevertheless, in the final version of the text, the inclusion of the right to be heard was not only drafted as an autonomous provision, but also became one of the pillars of the CRC. According to Krappmann, the conventions have been written with the preconceived notion that human beings inherently have the freedom to decide freely on the subjects that concern them. Thus, the Convention's way of ensuring this, while at the same time complying with the principle of children's dignity, was to give the child the space to freely express his or her views, and have a say in the decisions affecting him or her. As a result, the juridical term "*right to be heard*" was born<sup>10</sup>.

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<sup>10</sup> (Krappmann, 2010) P. 505.

Finally, 10 years of negotiations on the drafting of the convention resulted in the most ratified international treaty ever, with 193 signatures. The CRC entered into force in 1990<sup>11</sup>.

### 1.1.1 The systematics of the CRC

The Convention is composed of 54 articles, 41 of which relate to civil and political rights, as well as economic, social and cultural rights. These reinforce the indivisibility of human rights, bringing them together in a single instrument. The two categories of rights are to be understood as justiciable and indivisible. The Committee on the Rights of the Child emphasizes the strengthening of the interrelation between both rights groups within the convention<sup>12</sup>.

The first two articles of the convention contain the first obligation as well as the definition of a child, probably the most important concept within the text. Article 1 defines the child as “*every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier*”, whereas Article 2 obliges the States parties to protect and promote the rights established by the CRC. Moreover, according to Parkes, and the traditional understanding of the convention, the other provisions of the CRC can be divided into three groups, in accordance with the three “p’s”, protection, provision and participation<sup>13</sup>. The participation of children in matters of concern to them is therefore a key element in the field of children's rights. However, though important, Article 12 (which will be analysed later) is not the sole provision dealing with participation. The CRC also contains provisions on the involvement of children in society and fostering their active participation in cultural life and the arts (Article 31), the rights of disabled children (Article 23). The issue of participation is addressed implicitly in Article 15 (on freedom of association), Article 30 (on minorities and indigenous) and Article 40.1 (administration of juvenile justice)<sup>14</sup>.

Moreover, the CRC may also be understood as consisting of several principles or “pillars”. The Committee on the Rights of the Child, identified four articles as the general principles of the Convention: Article 2, which sets out the non-discrimination clause, “the obligation of States to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind”<sup>15</sup>; Article 3.1, which states that “the best interests of the child as a primary

<sup>11</sup> Today the UNCRC is ratified by 196 states parties and one signatory part: United States of America (in this case, they argue that they have a wide regulation in children protection. <http://indicators.ohchr.org/>)

<sup>12</sup> Committee on the Rights of the Child. General Comment n°5

<sup>13</sup> (Parkes, 2013) Pp 6 para 2.

<sup>14</sup> (Lücker-Babel, 1995) P. 392.

<sup>15</sup> Committee on the Rights of the Child. General Comment n°5. P-4 para 1.

consideration in all actions concerning children”<sup>16</sup>; Article 6 “the child’s inherent right to life and States parties’ obligation to ensure to the maximum extent possible the survival and development of the child”<sup>17</sup>; and Article 12 “the child’s right to express his or her views freely in “all matters affecting the child”, and those views being given due weight”<sup>18</sup>. Thus, each of these provisions must be considered not only as a right in and of itself, but also as playing a role in the implementation and interpretation of the entire convention<sup>19</sup>.

Indeed, the convention contains a block of articles dealing with the idea of children's participation, Article 12 being the core element. This identifies the child as a person with his or her own opinions and feelings, recognizing his or her right to participate in society. This right is closely connected with the following articles in the Convention, Article 13, which relates to freedom of expression; Article 14, freedom of thought, conscience and religion; Article 15, freedom of association; Article 16, right to privacy and Article 17, rights relating to access to information<sup>20</sup>. Hence, the great innovation of the Convention is that it establishes a commitment to understanding the child as a subject of rights, giving them autonomous status. Gradually, the child acquires the capacity to decide for itself, and, in turn, to participate in society.

As we have already pointed out, the implementation of the provisions that take the views of the child into consideration has traditionally been more procedural than substantial. However, while some earlier documents had contained provisions relating to children's participation, it was not until the drafting of the CRC that children's right to be heard acquired a cross-cutting status in all matters affecting them.

### **1.1.2 Literal Analysis of Article 12**

Article 12 of the CRC is a unique provision in international instruments for the protection of human rights, since it deals with the legal and social aspects of the status of children<sup>21</sup>. For the first time, there was a legally binding text that included a specific provision taking into account the children's views in relation to matters concerning them and giving them due consideration according to their age and maturity. The right to be heard is an innovative provision, but is also a very intricate one. For this reason, it is necessary to analyse its legal nature, its relationship with the other principles of the

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<sup>16</sup> Committee on the Rights of the Child. General Comment n°5. P-4 para 2.

<sup>17</sup> Committee on the Rights of the Child. General Comment n°5. P-4 para 3.

<sup>18</sup> Committee on the Rights of the Child. General Comment n°5. P-4 para 4.

<sup>19</sup> Committee on the Rights of the Child. General Comment n°12.

<sup>20</sup> (Creus, 2010) Pp. 3,4.

<sup>21</sup> Committee on the Rights of the Child. General Comment n°. 12. P.5.

CRC, and to identify the difficulties regarding its implementation. The Committee on the Rights of the Child issued a General Comment on the right to be heard (General Comment n°12), given that guidelines were required in order to ensure that domestic legislative instruments implemented this right correctly and effectively.

Article 12 provides:

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

As can be seen, Article 12 imposes on States parties the obligation to listen to children in all decisions affecting them. Sahovi states that this provision is not simply a wish, a recommendation or a suggestion for states, but constitutes an obligation that is directly applicable to domestic law<sup>22</sup>. Following Sahovi's argument, it is clear that the states, when applying children rights, tend to think from an adult point of view. This provision (indeed the entire Convention) must be understood from a child's point of view. Furthermore, Article 12 is clear and unambiguous, leaving little room for differing interpretations. In fact, the provision is sufficiently specific and descriptive to be implemented directly by the domestic legislation of member states. Indeed, Article 12 may be described, as what Lücker-Babel defines, as a *self-executing provision*<sup>23</sup>. In this way, society and public authorities cannot act in relation to the issues affecting children as if they were passive elements of society. The margin of appreciation granted by Article 12, thus, is very small.

#### **1.1.2.1 Analysis of Paragraph 1**

To dissect Article 12, we will follow the analytical approach developed by the Committee in GC n° 12, which is based on the literal legal meaning of the article. The committee is responsible for interpreting the key elements of this provision and explains its content as follows:

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<sup>22</sup> (Vukovi *et al.*, 2012) P. 106.

<sup>23</sup> (Lücker-Babel, 1995) P. 395.

“*Shall assure*”: With this expression, the Committee wants to ensure that member states fully comply with the provision. “States parties’ are under strict obligation to undertake appropriate measures to fully implement this right for all children”<sup>24</sup>.

“*Capable of forming his or her own views*”<sup>25</sup>: The States Parties have an obligation, according to the Committee, to determine the capacity of children to form their own judgment. Thus, the provision of Article 12 is not understood as a limitation of children but as an obligation of the state to determine the degree to which each individual can form their own judgments. The burden of demonstrating capacity does not fall upon the child. Another important clarification made by the Committee in the General Comment is that there is no age limit to enjoy the right to be heard. Therefore, it is discouraged from imposing age limits to enjoy the right to be heard. There has been a great debate regarding the role played by children's age and their ability to express their views has been subject to much debate. However, the Committee identified several ways of forming its views, including non-verbal ones. Lansdown<sup>26</sup>, found in his study that children are able to form their own views, even when expressed non-verbally, and this opinion is shared by the Committee<sup>27</sup>. According to Lücker-Babel, “*the capacity of discernment, in the sense of the Convention, would not be thus considered as an element occurring at a given age in a uniform manner, but as something that varies according to the development of children, to their capacity to comprehend the events affecting them and to the nature and gravity of the problem in question*”<sup>28</sup>. Finally, the Committee also notes that States should pay further attention towards those children in special vulnerable situations, such as minorities or children in conflict with the law.

“*The right to express those views freely*”: Using the words of the Committee, *freely means that the child can express her or his views without pressure and can choose whether or not she or he wants to exercise her or his right to be heard*<sup>29</sup>. Thus, this concept determines, firstly, that children must express themselves without any pressure and, secondly, that they have the right to refuse to express their views regarding the issues that concern them., such as teenagers who want to remain silent in front of authorities, or refuse to attend a hearing<sup>30</sup>.

“*In all matters affecting the child*”: With this provision, the CRC wants to assure that the child is heard in all matters affecting him or her. This general condition stemming from the word “affecting”

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<sup>24</sup> Committee on the Rights of the Child. General Comment n°.12. Para. 19.

<sup>25</sup> Committee on the Rights of the Child. General Comment n°.12. Para. 20.

<sup>26</sup>(Lansdown, 2005)

<sup>27</sup> Committee on the Rights of the Child. General Comment n°.12. Para 21.

<sup>28</sup> (Lücker-Babel, 1995) Pp. 397-398.

<sup>29</sup> Committee on the Rights of the Child. General Comment n°.12. Para. 22-25.

<sup>30</sup> (Vukovi *et al.*, 2012) P 107.

has to be understood either direct or indirectly<sup>31</sup>. This part of Article 12 refers to a wide range of situations affecting children<sup>32</sup>. However, the CRC avoids establishing a finite list of issues that concern children, instead choosing to implement a more comprehensive and open provision. Moreover, the right to be heard given protection within all spheres of society, both within the family and the public domain. Thus, according to Article 12, the states have the responsibility to ensure that both family and society take into account the opinion of the children, in accordance with the CRC standards<sup>33</sup>. The Committee, emphasizes that a broad and flexible interpretation of the provision "*in all that affects him or her*" helps the child feel part of the community and fosters greater inclusion<sup>34</sup>.

*"Being given due weight in accordance with the age and maturity of the child"*: The views of children have to be analysed so that appropriate weight can be given to the issues that concern them. However, this analysis must be in accordance with their age and take the child's maturity into account. According to the Committee's opinion, biological age is not sufficient as a criterion for assessing the weight that is to be given to the views of the child, as the maturity of the child must also be taken into account. The Committee defines maturity in the context of Article 12 as "*the capacity of a child to express his views on issues in a reasonable and independent matter*"<sup>35</sup>. Therefore, it determines the appropriate weight to be given to their opinion on a case by case basis. Parkes, recognizes a "dual criteria" in the provision of Article 12, since she understands that the factor of age and the maturity cannot be understood separately, but a judgment in relation to the matter concerning the child must take both concepts into account<sup>36</sup>. In addition, as Lückner-Babel argues, children's opinions will be given sufficient weight to be considered taking into account the nature of the issues being discussed and the interest of the other interested actors (i.e. family, institutions). Hence the importance of the child's decision may vary in each situation<sup>37</sup>.

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<sup>31</sup> Committee on the Rights of the Child. General Comment n°. 12. Para. 26-27.

<sup>32</sup> Committee on the Rights of the Child. General Comment n°. 7. Para-14.

<sup>33</sup> (Parkes, 2013) P 34.

<sup>34</sup> Committee on the Rights of the Child. General Comment n°. 12. Para 27.

<sup>35</sup> Committee on the Rights of the Child. General Comment n°. 12. Para. 30.

<sup>36</sup> (Parkes, 2013) P. 36.

<sup>37</sup> (Lückner-Babel, 1995) P. 399.

### 1.1.2.2 Analysis Paragraph 2

The second paragraph of Article 12 reinforces the idea that children have to be heard when they are involved in any judicial proceedings. In this way, the Convention notes that this issue deserves special attention when it comes to listening to children.

*“In any judicial and administrative proceedings affecting the child”*: This particular clause applies to all relevant judicial proceedings affecting the child. In addition, it covers "administrative proceedings", which, according to the Committee, are not only to be understood *strictu sensu*. On the contrary, these are to include decisions about children's education, health, environment, living conditions, or protection<sup>38</sup>. Although the Committee gives a list of recurrent situations, this should not be viewed as exhaustive. The way the CRC is drafted allows the concepts of administrative and judicial proceedings to be interpreted more freely. However, in light of the provision in Article 12 (2) concerning judicial and administrative proceedings, it is also necessary to consider Article 9 (2) and 21 of the Convention. Article 9 (2) ensures that all parties are able to participate in the process and have their voice heard and, whereas Article 21 specifies that all parties involved in adoption process are to be adequately informed and the final decision must be according to the children's consent<sup>39</sup> (when they have capacity for doing so).

*“Either directly, or through a representative or an appropriate body”*: Although Article 12 gives the child the possibility to participate directly or through a representative after he or she has decided to do so, the committee recommends that “wherever possible, the child must be given the opportunity to be directly heard in any proceedings”<sup>40</sup>. In the event that it is appropriate for the child to be represented, not only must it be considered to be in the best interest of the child, this factor must take precedence over all other considerations.

*“In a manner consistent with the procedural rules of national law”*: Finally, the Committee notes that this provision only requires States parties to comply with the basic procedural rules for a fair procedure<sup>41</sup>.

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<sup>38</sup> Committee on the Rights of the Child. General Comment n°. 12. Para. 32.

<sup>39</sup> (Parkes, 2013) P37.

<sup>40</sup> Committee on the Rights of the Child. General Comment n°. 12. Para. 35.

<sup>41</sup> Committee on the Rights of the Child. General Comment n°. 12. Para. 38-39.

## 2. Regional development of the Right to be Heard

Article 41 of the Convention encourages the development of national and regional legislation to develop beyond the provisions of the Convention itself.

*“Nothing in the present convention shall affect any provisions which are more conducive to the realisation of the rights of the child and which may be contained in the law of a State Party; or international law in force for that State”.*

According to this provision, we must take into account relevant legislation, both at the regional and national level. The following is an analysis of the regional regulation of the right to be heard in the aforementioned area. Although in other regional systems, such as the African regional system<sup>42</sup>, the right to be heard has been reinforced in the last decades, we will focus our analysis within Europe. In Europe, during the last decades, the development of the right to be heard has been taken into account in a variety of legal documents, for example the Council of Europe adoption of the European Convention on the Exercise of Children’s Rights 1996 (convention restricted to a family proceedings before a judicial authority), or the EU Agenda for the rights of the Child or the European Convention on the Adoption of Children.

### 2.1 European Union

Within the framework of the European Union, the development of the rights of the child have been delayed. According to different authors<sup>43</sup> this is because the Europe as a whole has understood that the protection of these rights should be supported by domestic law, without the need to harmonize legislation within the Union; in other words, the Member States wished to avoid discussions in the field of children’s rights<sup>44</sup>. However, since the Lisbon Treaty entered into force in 2009, the European Union's commitment towards Human Rights has been strengthened considerably. In particular, Article 6 of TEU brought about the accession of the EU to the ECHR, the legal value as a treaty of the European Social Charter and the recognition of fundamental rights as general principles of the Union’s law. With the entry into force of the Treaty of Lisbon, the Charter is directly binding and thus enforceable both against the member states and the EU. It is essential to consider this issue, due to the fact that the mechanisms for the protection and promotion of the rights of the child in the UN

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<sup>42</sup> See (Parkes, 2013) P.11.

<sup>43</sup> See Stalford H. and Drywood E.

<sup>44</sup> (Parkes, 2013) P. 11

level are not as coercive as the EU system is. Nonetheless, as we have already pointed out, the right of the child to be heard in the EU has not been developed to the same degree as it has been by the UN.

The Charter, as the main text regarding fundamental rights for the EU citizens, addresses the right of children to be heard in the following manner:

*“Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity”<sup>45</sup>.*

Thus, Article 24 of the Charter not only articulates the best interest of the child, but also establishes the obligation to take the views of the Child into consideration. Although this wording is clearly based on that of Article 12 UNCRC, the structure for ensuring the views of the child are heard is weaker. While Article 12 amends *“the right to express those views freely in all matters affecting the child”<sup>46</sup>*, the Charter says they, *“may express their views freely”*, and, therefore, Member States are not bound by the Charter to give children the right to express their views in all matters concerning them.

With the international implementation of children rights, the EU has made progress (although slowly), towards the promotion and implementation of children's rights. In addition, the EU has taken some steps towards the full realisation of the right of the child to be heard. In 2006 the Commission issued a communication entitled *“Towards an EU strategy on the rights of the child”<sup>47</sup>*, in an attempt to improve the situation regarding children's rights within the scope of the EU, both internally and externally, and to create awareness of the lack participation by children in matters affecting them. The Communication explicitly recognises, in line with the Committee's understanding of Article 12, that *“children need to express their views in dialogues and decisions affecting their lives. The Commission will promote and strengthen networking and children's representation in the EU and globally, and it will gradually and formally include them in all consultations and actions related to their rights and needs”<sup>48</sup>* (III.1-4). The Commission made an explicit commitment to improve direct participation of children in matters which affect them, specifically when drafting the EU legal and policy agenda for children rights<sup>49</sup>. In addition, the Commission also established a monitoring mechanism to control and implement children's rights in Europe<sup>50</sup>.

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<sup>45</sup> Article 24 (1) Charter of Fundamental Rights of the European Union. (2000/C 364/01).

<sup>46</sup> Article 12 (1) UNCRC.

<sup>47</sup> (Commission of the European Communities, 2006)

<sup>48</sup> (Commission of the European Communities, 2006) III.1.4. Para 3.

<sup>49</sup> (Commission of the European Communities, 2006)

<sup>50</sup> European Forum on the Rights of the Child.

For its part, the Parliament of the European Union has been supporting the implementation of children rights, and has been leading the EU children's rights agenda bringing initiatives and advocating for child-friendly participation in order to allow children to influence the EU decision-making process more directly<sup>51</sup>.

However, despite the intentions of the EU institutions when it comes to giving voice to children's rights, the relevant EU legal provisions are not applied in a consistent manner. A significant obstacle within the EU for children's participation is that the "Citizens Initiatives" (Article 11 (4) TEU) which are a mechanism by which children's rights can be promoted, are subject to an age threshold<sup>52</sup>. Indeed, to be part of the Citizens Initiatives, they must comply with the regulation<sup>53</sup> which sets the minimum age to participate at 18 years<sup>54</sup>, in accordance with the minimum voting age to be eligible to vote on the European Parliamentary Elections.

Notwithstanding the efforts made by the European Union to achieve the same level of protection and promotion as the UN have, little has been done in the area of children's participation. Although the EU Agenda for the rights of the child is strengthening the commitment of the EU to children's rights and although the Commission advocates in favour of making justice systems more child-friendly<sup>55</sup>, there are still some gaps to cover when we talk about children voices because they are not listened in the decision-making processes, and the age barrier still limit the weight given to the children views.

## 2.2 Council of Europe

The Council of Europe has often stood out as being at the forefront of the defence and promotion of human rights. However, as far as children's rights are concerned, it was not until 1996 when the European Convention on the Rights of the Child was drafted. The ECRC aims to ensure the best interests of children, and specifically aims to regulate procedural measures allowing children to exercise their rights.

Notwithstanding, the main instrument of the Council of Europe is the European Convention on Human Rights. In the European Convention, there is no specific provision which regulates the rights

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<sup>51</sup> (Stalford and Schuurman, 2011) Pp. 383-386.

<sup>52</sup> (Stalford and Schuurman, 2011) Pp. 389-391.

<sup>53</sup> Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative (Consolidated version 01/07/2014).

<sup>54</sup> Note that in Austria the minimum age of participation is 16 years old, thus, minors with 16 or above are allowed to participate in Citizens Initiatives.

<sup>55</sup> (European Union Agency for Fundamental Rights, 2015)

of the child. Consequently, the right of the child to be heard is not provided by the Convention. Moreover, the other documents drafted within the CoE framework, do not regulate as clear as the CRC does, the right of the child to be heard. However, as Aoife points out, even if the ECHR does not specifically contain the right of the child to be heard, nor the Court have specifically ruled on this right, the two instruments tend to protect this right in line with Article 12 of the CRC. This can be seen in different legal literature from both the Court and the reports made by the CoE. A clear example of such behaviour are the communications and reports drafted by the CoE, which indicate that the right to be heard will be applied as a Convention right when dealing with a case in this area<sup>56</sup>. Aoife gives consistency to his argument pointing out that *“there are features of the principle of evolutive interpretation, of the positive obligations inherent in the Convention and of the doctrine of the margin of appreciation that facilitate a reading into the Convention of a right of children to be heard”*<sup>57</sup>. Hence, bringing together the instruments of the Council of Europe, such as the ECECR or European Convention of Adoptions<sup>58</sup>, they provide a broad and open protection for children, but still insufficient regarding the right of the child to be heard in the terms established by the CRC. Although the Court acknowledges the right to be heard according to the CRC, Member States of the CoE enjoy certain margin of appreciation when dealing with children participation, as the next chapter will explain in more detail.

Taking in consideration the ECECR, its Article 3 is considered to be the homologous provision of Article 12 of the CRC. But Article 3 ECECR only refers to children participation in the case of legal proceedings, as it follows:

*A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights:*

- *to receive all relevant information;*
- *to be consulted and express his or her views;*
- *to be informed of the possible consequences of compliance with these views and the possible consequences of any decision;*

Basically, Article 3 paraphrases Article 12 (2) CRC by obviating the first paragraph where the nature of the right to be heard is valued and which constitutes the essential framework for interpreting the

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<sup>56</sup> (Daly, 2011) P442.

<sup>57</sup> (Daly, 2011) P. 442. Para.3.

<sup>58</sup> Note that the CoE also amended the Convention on Contact concerning Children (drafted in 2003, entered into force in 2005) and the Convention on the protection of children against sexual exploitation (drafted in 2007, entered into force in 2010).

rights of the child in terms of participation. Hence, the provision of the ECECR, does not mention that the views of the child shall be given due weight according to children's age and maturity.

The Court, however, has ruled on the "effective participation" of children in conflict with the law. In *T v United Kingdom*<sup>59</sup> and *V v United Kingdom*<sup>60</sup>, the Court ruled about the importance of bringing the views of the child before the court in criminal procedures<sup>61</sup>. The Court considered the international standards for ruling the case and determined that the conditions of the trial had to be such as would permit children participation, taking into account the age, level of maturity and intellectual capacity<sup>62</sup>. Moreover, it is clear that the Council of Europe is developing and improving the rights of the child, and encourages Member States to adapt their legislation to give voice to children in all matters affecting them. A clear example is the report drafted by the Council of Europe, the "Stockholm Strategy *Building a Europe for and with children: Towards a Strategy for 2009-2011*". Through the work done in this report, the CoE drew up a key text for the development of the rights of the child in Europe. Furthermore, the Council of Europe also drafted the Guidelines for Child-friendly Justice, which became a key document for the implementation of children's rights in civil, criminal and administrative proceedings, in Member States' legislations<sup>63</sup>. Later on, the CoE established a strategy for the rights of the child 2012-2015 which, with a focus on the situation of children with special vulnerability, seeks to effectively implement the rights recognised by the CRC.

It seems clear that, the European system that protects the rights of the child, is moving towards a full recognition of the right of the child to be heard and, furthermore, to support states implementation in accordance with the standards given by the CRC. The Committee of Ministers of the CoE, in its Recommendation on the Participation of Children, recommended that the governments of Member States must ensure that all minors can exercise their right to be heard. Further, the Recommendation specifies that children's views must be taken seriously, and the child shall participate in the decision-making processes at all levels that affects them in accordance with their age and maturity<sup>64</sup>.

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<sup>59</sup> *T v. United Kingdom* – Application No. 24724/94, ECtHR.

<sup>60</sup> *V v. United Kingdom* – Application No. 24888/94, ECtHR

<sup>61</sup> (Parkes, 2013) P.168-169.

<sup>62</sup> *T v United Kingdom*. Para 46 and 47.

<sup>63</sup> (Parkes, 2013) P. 12.

<sup>64</sup> Recommendation CM/REC (2012)2 of the Committee of Ministers to MS on the participation of children and Young people under the age of 18.

### **3. Conclusion**

Since 1989, when the UNCRC was ratified, the development of children rights has been grown progressively until achieving a good level of protection, prevention and implementation. Although the development at international and regional level has been sufficient to make children not only more visible, but also heard, there are some shortcomings that have to be addressed. Lack of specificity on the right to be heard, and lack of harmonization of the legal term “right to be heard”, set uncertainties within the international framework protecting children participation. Either the Council of Europe and the European Union, drafted a great amount of literature considering children’s participation and children right to be heard in a variety of circumstances. However, from the rhetoric towards the reality, there is a gap when considering the views of the child. If there is no real political will from the Member States to implement the provisions protecting and promoting children’s needs, the reality would differ from the legal literature. Although the wording of Article 12 CRC is clear and unambiguous, other provisions regarding children participation in the European system are limited in scope. Indeed, the European provisions are more enforceable rather than the CRC and thus, the implementation of the right to be heard differs on perspective.

## CHAPTER II THE VOICE OF THE CHILD IN FRONT OF THE LEGAL PROCEEDINGS

Children may be seen to form one societal group, but nevertheless, their background and the setting in which they live varies greatly. As a result, they may find themselves in a variety of situations that require them to participate in different types of legal proceedings. Although every branch of the law has its own procedural rules, the aim of this chapter is to focus on the implementation of the right to be heard in different legal proceedings. In this regard, the Committee, acknowledging the lack of consistency in the implementation of the right to be heard by the states parties, issued the basic guidelines on how to implement Article 12 in legal proceedings<sup>65</sup>.

As we have already pointed out in the first chapter, the general principles of the Convention must be viewed as being interrelated and interconnected in order to reach a clear and comprehensive interpretation of the text. This is particularly the case in judicial proceedings in which both the principle of participation and the principle of the best interest of the child play an essential role in guaranteeing children's rights. As stated by the Committee of the Rights of the Child in its GC 14, the best interest of the child must be understood as a right, as a principle and as a rule of procedure<sup>66</sup>. In light of this statement, and taking into account Article 12(2) CRC, best interest as a rule of procedure obliges any judicial or administrative proceedings to listen to children who are affected by them. Hence, in order to comply with the core element of the CRC, which is to pursue the best interests of the child, balancing both principles is a key consideration when children are involved in any judicial proceedings. Indeed, as discussed in the first chapter, the structure of the Convention makes it possible to implement the rights of the child in a holistic way, using a wide range of legal proceedings and instruments, which, *a priori*, leaves States Parties with little room for interpretation. Moreover, in relation to the regulation of certain legal proceedings which will be analysed in detail below, the CRC gives specific protection in certain areas such as family relations, covered in in Article 9, the refugee status in Article 22, and the situation of children in conflict with the law in both Article 37 and 40. Once again, it should be borne in mind that other provisions of the convention may also apply when implementing the CRC in judicial proceedings.

However, the principle of children's participation in all legal proceedings affecting them, together with the requirements of Article 12 CRC, may clash with the principle of the best interests of the

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<sup>65</sup> Committee on the Rights of the Child. General Comment n°.12. Para 89

<sup>66</sup> Committee on the Rights of the Child. General Comment n°.14. Para 1-7.

child. Archard and Skivenes, highlight the fine balance between the best interest of the child and the weight given to their opinions in the legal proceedings: “*promotion of a child’s welfare is essentially paternalist since it asks us to do what we, but not necessarily the child, think is best for the child; whereas, listening to the child’s own views asks us to consider doing what the child, but not necessarily we, thinks is best for the child*”<sup>67</sup>. These principles are given different weight and are treated differently depending on whether it is a family law proceeding, medical law proceeding, procedures in relation to refugees or when children find themselves in conflict with the law.

Furthermore, Article 12 CRC, read in conjunction with Article 13 CRC, requires a variety forms of listening children’s views and, as this chapter will assess, how and to what extent the provisions of the CRC concerning children’s participation, should be applied and implemented in a different legal proceedings.

Although we are going to address the main features of such legal procedures, there are certain common stages that, in accordance with international standards, act to fulfil the duties laid down by Article 12 CRC. Thus, all judicial proceedings involving children must<sup>68</sup>:

- Prepare the children by providing them with all the information about the process, their rights, how they can participate in it, and how their opinion is going to be considered in the process (and the potential consequences of the proceeding)
- They should also be given the essential information regarding the process. What it will involve, and how, when, and where the hearing is to be held.
- Ensure that the minor will be heard effectively, guaranteeing all rights and creating a space for children, in a child-friendly justice.
- In several general observations, the Committee has recommended analysing the capacity of the children, taking into account their age and maturity. In any case, there must be a presumption in favour of the child's capacity.
- Complaint and remedy mechanisms should also be guaranteed if the right of the child to be heard is violated.

This chapter will address the implementation of the right to be heard in different legal proceedings by virtue of Article 12(2) CRC. Family law, medical law, refugee law and criminal law are the main types of legal proceedings involving children. Particular attention will be paid to the significance and

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<sup>67</sup> (Archard and Skivenes, 2009) P.2.

<sup>68</sup> (Landsdown, 2011) Pp. 63-65.

implementation of Article 12 CRC when children are in a more vulnerable situation, such as when they are in conflict with the law. Finally, we will see to what extent minors are able to speak up when they are deprived of liberty.

## 1. Family law

As has already been stated in the preamble of the CRC, “*the child, for the full and harmonious development of her or his personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding*”<sup>69</sup>. Thus, family is understood to be the best institution where children can freely enjoy their rights. However, the family environment might be broken or become problematic for several reasons: divorce, separation or, in another set of circumstances, adoption proceedings. In such cases, family law needs to deal for the best interest of the child and must take children’s views into consideration due to those proceedings are being of major importance to the child’s own future.

Before the CRC entered into force, children were not supposed to go before the court, even if the judicial proceedings were on matters concerning him or her. It was acknowledged that keeping them away from the court was for his or her best interest. However, after the CRC was approved, another understanding of children’s participation in judicial proceedings arose. As the Committee points out, in many cases children are in an incredibly weak position due to the language used, their limited understanding of the system, and the threat of manipulation by adults<sup>70</sup>. Thus, although bringing children before the court is not recommended, it is in their best interest to listen them during the proceedings.

One of the most common conflict situations within the institution of the family is the that of divorce and separation. This falls within the area of Family law. As it is generally known, and as Freeman highlights “*in divorce cases, children are the most vulnerable and also who usually pay the worst consequences*”<sup>71</sup>. Hence, such cases directly affect the child, who, according to Article 12 CRC, has the right to express his or her views and be heard. On the contrary, if the child is not listened to, the judicial system not only might fail to apply Article 12 CRC, t but could also fall into so called “legal paternalism”, meaning that adults would have the sole say in determining the child’s<sup>72</sup>. This concept

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<sup>69</sup> UN CRC 1989.

<sup>70</sup> Committee on the Rights of the Child. General Comment n°.12.

<sup>71</sup> (Henaghan, 2015)

<sup>72</sup> (Parkes, 2013) P. 90.

of paternalism is discussed by Guggenheim<sup>73</sup> who argues that children's rights are wrong because they are manipulated by the adults and thus, in practice, the rights are not applied in a way that promotes the best interests of the child<sup>74</sup>.

When implementing Article 12(2) in family law proceedings, it must be read in conjunction with Article 3CRC, which gives priority to the child's best interests, and Article 4CRC, which requires States parties to take any legislative, administrative or other type of measure necessary for the implementation of the rights of the child. It is clear that family law proceedings directly affect the child. However, although the legal tradition has protected children, keeping them away from the procedure, legal developments after the Convention are giving children more space to participate. Nevertheless, meeting the mandate of the Convention not only requires giving the child a voice, but makes it necessary to change the judicial system itself, to facilitate communication, and ensure that the views of the child are taken into account<sup>75</sup>.

The two main contentious proceedings in family law, considering the impact that might have towards the child, are the processes of separation or divorce and the process of adoption. Due to their importance, we will analyse them using a children-rights based approach, taking into account the implications of the family law proceedings for children and their right to be heard in such situations.

### **1.1 Divorce and separation**

As it is stated by the Committee, to fulfil the principle of the best interests of the child, in any legal proceeding, the children should be given the right to express him or herself. Hence, considering that most of the jurisdictions have held that in divorce or separations the judge must give a decision in accordance with the best interest of the child, children must be listened or, at least, must decide if they want to participate in the proceeding. The decisions taken in cases of separation or divorce can heavily influence children in matters of custody, housing, education and maintenance. For these reasons, all legislation on divorce or separation, must incorporate the right to be heard and thus, implemented by the decision makers<sup>76</sup>. Daly, argues that the relationship between children, family and the state has evolved, and that there is a need to balance child protection and their participation<sup>77</sup>. However, although children are the most vulnerable party in these proceedings, they are usually

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<sup>73</sup> (Guggenheim, 2007)

<sup>74</sup> (Federle, 2009) P.321,322.

<sup>75</sup> (Guggenheim, 2007)

<sup>76</sup> Committee on the Rights of the Child. General Comment n°.12. Para 52-53.

<sup>77</sup> (Daly, 2011) pp. 441–61,.

silenced by their parents or not listened enough by the state. According to the Committee, the opinion of the child must be heard (but should not be decisive) in all administrative and judicial proceedings by the person making the decision, with due weight being given to the child's views, in accordance with his or her age and maturity<sup>78</sup>. However, as Daly points out, it is evident that the implementation of the right of the child to be heard at the domestic level, in accordance with the international standards, is poor<sup>79</sup>. In this regard, several reports of the Committee have pointed out the lack of measures implementing the mandate of Article 12 CRC in legal proceedings such as divorce or separation. In its considerations regarding the report on the implementation of children's rights in Spain, the Committee noted that: “(...) *in certain circumstances, recourse to higher courts is still necessary in order to obtain recognition for the right of a child to appear independently of his or her legal guardians in a court, in particular in judicial and administrative procedures affecting the child*”<sup>80</sup>. Furthermore, in a more recent report in the UK, the Committee voice concern about how the “*reforms concerning the reduction of legal aid in all four jurisdictions appear to have a negative impact on the right of children to be heard in judicial and administrative proceedings affecting them*”<sup>81</sup>. Indeed, most of the countries have been requested by the Committee to reinforce their judicial systems in order to ensure a wider application of Article 12 CRC in civil proceedings<sup>82</sup>. The Committee is aware of the vulnerability of children during legal proceedings, for that reason it often strongly recommends States parties to take the necessary steps to ensure that children views are taken into account. As we have seen in the case of the Spanish report on the implementation of the Convention, the Committee also emphasizes the need to provide children with the possibility to participate in the process independently, in order to avoid the possibility of their statements being interfered with by their parents, guardians or lawyers. Hence, the Committee, interpreting Article 12 when children are involved in family law proceedings, says that children have the right to be heard independently by the decision maker.

Divorce and separation represent a conflict of interest between different parties, mainly between parents. However, also the interests of children themselves (if applicable) are also at stake. Bearing this in mind, Article 9 CRC protects children's rights within the situation of separation and divorce. Moreover, Article 9(2) CRC is directly linked with the core content of Article 12 CRC regarding legal proceedings, stating that: “*In any proceedings pursuant to paragraph 1 of the present article, all*

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<sup>78</sup> Committee on the Rights of the Child. General Comment n° 12.

<sup>79</sup> (Daly, 2011) P. 441.

<sup>80</sup> CRC Concluding Observations: Spain, CRC/C/ESP/CO/3-4/2010

<sup>81</sup> CRC Concluding Observations: UK and Northern Ireland, CRC/C/GBR/CO/5/2016. Para 30.

<sup>82</sup> See also the Concluding Observations of Lebanon (CRC/LBN/CO/4-5/2017), Romania (CRC/C/ROU/CO/5/2017), Serbia (CRC/C/SRB/CO/2-3/2017).

*interested parties shall be given an opportunity to participate in the proceedings and make their views known*". Thus, the intention of the Convention here is to ensure the participation of all parties in the process, but also to include children's views as an effective part of the proceeding, in order to ensure the best interest of the child, the core element of the convention.

However, the reality when implementing Article 12 CRC in family law proceedings, casts serious doubt on the effectiveness of the Convention in seeking the best interest of the child. In fact, many questions may arise in family law proceedings when deciding which principle should prevail: the right to be heard or the principle of the best interest of the child. Is it possible, in divorce proceedings, to ensure the best interests of the child and, at the same time, take into account the views of the child? Who decides the best interest of the child and what do they base their decision on?

Archard and Skivenes, try to answer the questions about how to balance the best interest of the child and their right to participate in the legal proceedings. The main discussion they identify is as follows: *"The courts must thus determine what it is to give 'significant weight' to a child's opinions; or what it is for a child to be of 'sufficient' maturity; or what is 'best' for any child"*<sup>83</sup>. Accordingly, there is no problem when the child's opinion matches the decision taken for his or her best interest. The major problem arises when the court determines that the best interest for the child is indeed contrary to the opinion of the child. In this scenario, some other questions may arise: What are the possible implications of a child being dissatisfied with a decision purportedly taken in his or her best interest? Or, taking into account the evolving capacities of the child, how long will a decision be considered a decision in their best interests? Will the views of the child be taken into account in the long term? In the case of *Anayo v Germany* (2010)<sup>84</sup>, Mr. Anayo, who was the biological father of two twins, was denied the right to have contact with his biological daughters (they had another legal father). The Supreme Court of Germany considered that since there was no connection between Mr Anayo and his daughters, it was not in the best interest of the girls to maintain contact with their biological father. (Here, the opinion of minors could not be taken into account because they were too young, but the it was possible that the best interest for girls would change as soon as they were mature enough to make their own decisions). The Court decided that the domestic courts had fairly balanced the competing interests involved. However, they failed to give any consideration to the question whether, in the particular circumstances of the case, contact between the twins and Mr Anayo would be in the children's best interests. This therefore constituted a violation of the right to respect for family life (Article 8 ECHR). As this case reflects, what is considered best for the child in the short term may

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<sup>83</sup> (Archard and Skivenes, 2009) P. 4.

<sup>84</sup> Case *Anayo v Germany*, Application n° 20578/07.

not reflect the best interest for him over a longer period of time. In this sense, neither the national legislator nor the international legislator give enough guidance to determine best interest in the long term, when the child has sufficient maturity to decide or give an informed opinion according to his or her age and maturity.

In the jurisprudence of the ECtHR, the paramount importance of the best interest of the child is evidenced. In *Sommerfield v Germany* (2003)<sup>85</sup>, in a custody dispute, the child was heard up to three times during the regular and appeal proceedings. Her decision of not wanting to see her father was decisive in the ruling of the domestic courts. Indeed, the European Court of Human Rights, in his first decision, found that the assistance of a psychological expert was an essential and accessory mechanism to assess the daughter's opinion. However, in the decision of the Grand Chamber, the fact that the girl was mature enough to express her wishes, and to understand the consequences (she was at the age of 13), the analysis of an expert psychologist was not necessary. The Court accepted the value given to the girl's opinion, arguing that following the girl's opinion would be in her best interests and that obliging her to act against her will would in fact have worse consequences. Although the Grand Chamber held on appeal that there was a breach of both Article 8 ECHR (Right to respect for private and family life) and Article 14 ECHR (Prohibition of discrimination) for treating the father's right to access in and out of wedlock in a different manner. It specified that the breach of Article 8 was not substantial, and therefore held that denying access to his daughter would be, in accordance with the daughter's views, in her best interest.

*“Having had the benefit of direct contact with the girl, the District Court was well placed to evaluate her statements and to establish whether or not she was able to make up her own mind. On that basis the District Court could reasonably reach the conclusion that it was not justified to force the girl to see her father, the applicant, against her will”*<sup>86</sup>

In *Sahin v Germany* (2003), the Grand Chamber of the ECtHR, argued that, taking into account the views of the child in the custody procedure is, within the margin of appreciation, and therefore a decision that must be taken by the national courts (referring to Article 8 ECHR). However, the Court pointed out that it is necessary to measure the circumstances, the age and maturity of the child, and recommend taking the decision on a case-by-case basis. In *Sommerfeld*, the Court stated that it would be going too far to say that domestic courts are always required to involve a psychological expert on the issue of granting access to a parent not having custody. In the view of the Court, the German District Court, having had the opportunity to hear the child directly, was able to evaluate the girl's

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<sup>85</sup> *Sommerfield v Germany*. Application n°31871/96 (2003) ECtHR.

<sup>86</sup> *Sommerfield v Germany*. Application n°31871/96 (2003) Para 72.

statements and to establish whether or not she had been able to make up her own mind. In *Sahin* the Court stated that it would be going too far to say that domestic courts should always take the views of the child as decisive on the issue of access and custody<sup>87</sup>.

Hence, seems clear that the ECtHR rely at first in the best interest of the child, instead of the right of the child to be heard. However, despite the right to be heard is not enforced by the Court, it appears that it relies in the obligations of state parties to “*undertake all actions and policies in the light of the best interest of the child*” (art. 3 CRC), and ensure that “*a child is not separated from his or her parents against their will unless such separation is necessary for the best interest of the child*” (art. 9 CRC).

Another controversial aspect regarding the participation of children in family law proceedings is their representation. There exist different ways to participate in a family law proceeding as legal systems vary from one country to another. In some countries, children have a different legal representative, a separate representation. This system helps to keep the question of the interests of the child away from the other parties, who might interfere with the children’s interests. Indeed, this practice is growing in European countries, to ensure the best interests of the child are met. Countries such as Australia, Sweden or the United Kingdom have implemented their legislation in this regard to provide children with separate representation, or “special representatives”<sup>88</sup>. Although it has been proven that this practice improves the representation of the child, it also shows that there is a special need to train lawyers (as well as judges) to work with minors in the area of family law<sup>89</sup>.

## 1.2 Adoption

Another field in family law, in which there is contention regarding children’s participation, is adoption proceedings. There is no doubt that the process of adoption has to be centred on children’s best interest. However, as is also the case in other family law proceedings, the approaches taken differ between countries. In Europe, for example, there exist different criteria on how to give due weight to children’s opinion concerning adoption. The age limit for the child to consent ranges from 10 years in Estonia, 11 in Malta, 12 in Belgium or Spain, 13 in France, 14 in Germany and 15 in Luxembourg. In all these states, and the vast majority of other states, the only criterion for giving children consent to adoption, is to meet the age set by law. This criterion is contrary to the essence of Article 12 of the

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<sup>87</sup> *Sahin v Germany*. P. 73.

<sup>88</sup> (Parkes, 2013) P.105.

<sup>89</sup> (Parkes, 2013) P.107.

CRC. As argued in previously, Article 12 CRC requires States parties to determine the capacity of the child according to age and maturity.

Hence, as stated above, almost every country in Europe sets an age barrier in order to give legitimacy to children's voice. Only 6 countries (Cyprus, the Czech Republic, Slovakia, Switzerland, Turkey and Ukraine) have no fixed age for children's consent. In these countries, the children consent is required if they have sufficient capability and maturity to understand the importance of this particular decision<sup>90</sup>. This model is more in line with the provision laid down by the Convention. However, at regional level, the European Convention on Adoptions of Children (ECA) (2008) sets the age limit at a maximum of 14 years (which is a direct indication for the law makers). This is a simplistic system for giving effect to the child's consent in adoption proceedings, and as such, is easy for the states to follow. Nevertheless, and once again, the Committee on the Rights of the Child, reinforce the idea of not putting age barriers to children's participation, arguing that age is not a sufficient criterion for deciding the weight to be given to children's views<sup>91</sup>. The age barrier for children to consent is controversial. It is clear that babies do not have enough capacity to give their views about being adopted, nor to consent to their adoption. However, minors who are already mature enough, who can communicate, not only must be given the chance to voice their opinion, but also must have their views taken into account. Accordingly, the Committee emphasizes the idea of taking into account the child's evolving capacities and highlights the provision of taking into account children's views according to their age and maturity and also bearing in mind their ability to understand the consequences of their consent.

The Committee's views, regarding the implementation of the right to be heard in adoption proceedings, are set out in several State Observations. For example, in the case of Australia, the Committee was concerned that *"(...) the State party require the consent of the adopted child (as of 12 years of age) prior to adoption. Furthermore, the Committee is concerned that adoption proceedings are not undertaken with the best interests of the child as the paramount consideration"*<sup>92</sup>. In this occasion, the Committee examined the adoption proceedings in Australia, finding that the best interest of the child was the paramount consideration and it should be taken into account when setting an age threshold.

Parkes argues that bringing children before the court in family proceedings could harm him or her in terms of anxiety, or damage to familial relationship<sup>93</sup>, and this should be taken into account when

<sup>90</sup> (Fenton-Glynn, 2013) P.595-600

<sup>91</sup> Committee on the Rights of the Child. General Comment n°.12.

<sup>92</sup> CRC "Concluding Observations: Australia". 2012. CRC/C/AUS/CO/4.

<sup>93</sup> (Parkes, 2013) P. 91.

implementing the Convention. However, it is also true that it can produce anxiety and irreparable harm to children who go through adoption, when it occurs against their consent. It is for this reason that the best interest of the child should be evaluated according to his or her abilities and considering their opinions when they exist.

Paraphrasing the *Sahin* case again, the Court stated that children's participation was not even mentioned during the proceeding. The German national court just took into consideration the report made by a psychologist who claimed that questioning the child would be harmful. Chamber four of the court hold the following:

*“It is essential that the competent courts give careful consideration to what lies in the best interests of the child after having had direct contact with the child. The Regional Court should not have been satisfied with the expert's vague statements about the risks inherent in questioning the child without even contemplating the possibility to take special arrangements in view of the child's young age (5 year old)”*<sup>94</sup>

Chamber four found that direct participation of the child was the best way to fulfil his or her best interest. However, the Court overturned the decision holding that direct participation was not necessary because children views were already represented before the court indirectly<sup>95</sup>. The Grand Chamber judges who were in dissent argued that although a child's opinion is not consistent enough to decide on an adoption case, it is important for domestic courts to hear and be able to know their will and their wishes to succeed in the decision<sup>96</sup>. This judgement was the first from the ECtHR satisfying the mandate of Article 12 where the child shall be heard in proceedings affecting her or him, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law<sup>97</sup>.

According to Parkes, in the context of family law proceedings, the provision under Article 12, gives many ways where the child might be heard and represented<sup>98</sup>. Children can be heard by direct participation, which is the model supported by the Committee, or indirectly through different means. Although Article 12 contains both models of participation, the Committee is most likely to support direct participation. However, direct participation rests on the assumption that the hearings are in a child friendly environment, and are being assessed in a case-by-case analysis in order to avoid age

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<sup>94</sup> *Sahin v Germany* (2003). ECtHR.

<sup>95</sup> (Fenton-Glynn, 2013) P. 610- 611.

<sup>96</sup> (Parkes, 2013) P.112.

<sup>97</sup> Article 12 (2) UN CRC.

<sup>98</sup> (Parkes, 2013) P.120.

barriers<sup>99</sup>. The main problems which children face in a family law proceedings are the lack of professional training, and the age barriers that are imposed by most states without taking into account their maturity.

In order to solve the controversies discussed above, the States parties need to improve the legal mechanisms to ensure the implementation of the right of the child to be heard. Furthermore, assessing each situation on a case-by-case basis, and giving voice to the child with due weight being given to his or her capacity to understand the process and the consequences that the process might have in her or his future seem to be decisive factors in reaching a balanced decision. In the field of the adoption procedures, it seems clear that the Committee is of the opinion that the decisions must be taken with children rather than about them<sup>100</sup>.

## **2. Medical Law**

The right of minors to participate in their medical affairs is one of the most controversial areas when it comes to implement the right of the child to be heard. Many ethical and legal issues are highlighted in terms of children's rights in medical law. Do children have the right to decide if they want to donate organs to their families? Do they have the right to refuse treatment themselves? In addition, there may also be a clash of rights between the right to life and the right to be heard and not to be discriminated<sup>101</sup>. This section will consider the applicability of international law in respect of the right of the child to be heard and the main challenges that appear in it.

When we talk about children and their right to express their opinion on the treatments to which they are exposed, we must first ask ourselves if they have the capacity to decide, if they can give consent, and if this consent has been informed, what is known as “informed consent”. If informed consent, i.e. the opportunity of the individual to fully express its own views, be heard and be informed, is present, this fulfils the right to participate. Thus, a full participation requires that the child receives all the information about the treatment, has access to the information, and that the information is communicated to the child in language that they understand. It is understood, then, that children cannot fully participate if they have not been duly informed, about the consequences of medical treatments, their implications and / or their results. For example, children in hospital settings should

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<sup>99</sup> This child based approach is taken by Switzerland Courts in a family proceedings.

<sup>100</sup> (Taylor, Tapp and Henaghan, 2007) P. 63.

<sup>101</sup> (Freeman, 2005) P.3-9.

know who can inform them about their treatment, if this treatment is going to be long and what side effects it may have<sup>102</sup>.

Although Article 12 CRC acts as a limit when considering that children's views should be taken into account according to their age and maturity, Article 13 and 17 fully covers the right of children to be informed in everything that concerns them and in the form that best suits them. This provision is very relevant for children with disabilities of any kind (blindness, mental, etc.)<sup>103</sup>, because they have special needs, requiring them to be informed in an understandable manner and hence to empower them to make their own opinions<sup>104</sup>.

However, Article 14.2 CRC states that “*States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child*”. Again, the Convention, takes in account the evolving capacities of the child, meaning that the views of the child must be taken into account and given due weight, due to the fact that medical treatment clearly and directly affects the child.

In this regard, the Committee highlights that adolescent's right to health and development is only realised when their views are expressed freely and taken into account. Article 12 CRC is fundamental for the full realisation of children's right to health and development<sup>105</sup>. Moreover, the Committee also remarks that achieving the right of participation in the early childhood, requires a “child friendly” adaptation of health care facilities. The right to express their views is also important and recommend that facilities, professionals working in health care, and also adults (parents and child-guardians), adopt a child-centred attitude, with a child friendly level of communication<sup>106</sup>. Hence, as the Committee noted, there is a legal duty to implement Article 12 when realizing children's right to health and development (ranging from early childhood to adolescence).

Given that children are to participate in decision making processes, they have the right to be informed, but also the right to have confidential counselling without the intervention of their parents if it is considered to be in the child's best interests. Thus, the legal obligation for consent, namely that children have to be of a certain age to enjoy the right to make decisions about their treatment, means that the main focus has been the concept of capacity in the field of medical law. In this regard, the

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<sup>102</sup> (Franklin and Sloper, 2005) P.15

<sup>103</sup> Article 12, 24CRC and General Comment n° 9: The Rights of Children with Disabilities.

<sup>104</sup> (Franklin and Sloper, 2005) P.16.

<sup>105</sup> Committee on the Rights of the Child. General Comment n°4.

<sup>106</sup> Committee on the Rights of the Child. General Comment n°7.

duty that is made explicit in Article 12, to listen and respect the views of the child in healthcare settings, has been ignored<sup>107</sup>.

Moreover, as the General Comment 14 expressed, to fulfil the provision of Article 24 CRC about the enjoyment of the highest attainable standard of health, adolescents' right to express their opinion and given due weight has to be realized. The committee emphasize that adolescents must participate directly in the decision-making process about their treatment, not only being informed, but also having their opinion taken into account<sup>108</sup>.

Hence, the controversial issue is again the age barrier, where some countries establish a minimum age below which parents are entitled to make such decisions.<sup>109</sup> Furthermore, controversies are also met regarding the age barrier when implementing Article 12 in medical law.

## **2.1 Barrier of free consent to medical treatment**

At this point we must differentiate the right to consent to treatment from the right granted by Article 12 CRC. While the right of the child to consent is just based on an age threshold, Article 12 CRC ensures that the child's perceptions are heard depending on their maturity. Therefore, Article 12 allows children to influence the decision making, but not to make the final decision as the right to consent does.

At the international level, there are no parameters nor guidelines to establish a minimum age to consent to receive medical treatment and thus, there exists a wide range of age limits in different countries. However, while some countries set a minimum age for the child to decide on medical treatments, others prefer to consider the suitability of the age limit on a case by case basis. Although the Committee welcomes to set age limits allowing children to give their consent, it has been not given any guidelines in this regard<sup>110</sup>.

Both terms (consent and be heard) must be considered in conjunction with one another. In this regard, when there exists an age limit to give consent, Article 12 should apply to those ages below the limit. The Committee, emphasised that Article 12 places importance on the private participation within family decision-making, so that the views of every member of the family are respected. In the GC 14, the Committee said:

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<sup>107</sup> (Kilkelly and Donnelly, 2011) Pp 110-118

<sup>108</sup> (Kilkelly and Donnelly, 2011) Pp 110-120.

<sup>109</sup> (Parkes, 2013) P.81.

<sup>110</sup> (Parkes, 2013) P.82.

*“Before parents give their consent, adolescents need to have a chance to express their views freely and their views should be given due weight, in accordance with article 12 of the Convention. However, if the adolescent is of sufficient maturity, informed consent shall be obtained from the adolescent her/himself, while informing the parents if that is in the best interest of the child”*<sup>111</sup>

In a nutshell, the countries which set a high minimum age to give consent as well as those countries which does not have age limit for the consent of medical treatment, must also comply with Article 12. Consequently, according to the convention, it is required to include children in the decision-making process in health care settings<sup>112</sup>. However, the reality shows that Article 12 is not applied to its full extent. The Convention is not implemented holistically and thus, the right to be heard might again clash with the concept of the best interest of the child.

In medical law and bioethics are significant here as they can give rise to many conflicts of interest, sometimes simultaneously. These may range from a clash of different rights and freedoms, such as freedom of expression, to the right to life or the right to decide about oneself. Without the need to explore other aspects of these topics, the right to consent a medical treatment by a minor may be said to suggest special care.

In medical law, decision-making can literally be question of life or death. In these situations, minors may be even more vulnerable, so the decision-making process is controversial. Skivenes and Archard, find three models of decision-making by observing the jurisprudence in the English judicial system: Decisions based on the best interest of the child, decisions based on the opinion of the child or decisions based on a balance between the best interest of the child and their opinions<sup>113</sup>. When it comes to complying with Article 12, the latter model is the one that the Committee has repeatedly suggested is more in line with the essence of the Convention.

When the child is considered to lack sufficient capability to decide, it is clear that the decision is made on the basis of their best interest. However, discussion arises when the child is mature enough to give strong arguments about his or her medical treatment. In this case Skivenes and Archard, are in favour of applying the principle of equity, where *“a child should not be judged against a standard of competence by which even most adults would fail”*<sup>114</sup>. Hence, and always depending on each circumstance, the minors should be treated in a manner consistent with their age and maturity, avoiding the age barrier to consent. In this regard, the difficulty of considering a minimum age to

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<sup>111</sup> Committee on the Rights of the Child. General Comment n°. 4.

<sup>112</sup> (Parkes, 2013) P85.

<sup>113</sup> (Archard and Skivenes, 2009) P.7.

<sup>114</sup> (Archard and Skivenes, 2009) P. 10.

consent to medical treatment was evidenced in *Gillick v West Norfolk*<sup>115</sup> case, ruled by the UK House of Lords. In that case a mother of a girl under 16 years of age, objected to the advice and contraceptive treatment given by a doctor without parental allowance. The Lordships decided that children under 16 have the legal capacity to decide receiving medical treatment if their maturity and understanding is sufficient. Under the common law, the Gillick Competence is understood as any child who is under the age of 16 can consent, if he or she “*reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision. This doesn’t mean that they have also the competence to refuse a treatment*”<sup>116</sup>. Furthermore, and according to the views of the Committee, States parties, under Article 4 CRC, shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the context of the rights of adolescents to health and development. The Committee recommends in its GC.6 that legal provisions need to be guaranteed in domestic law regarding the possibility of medical treatment without parental consent, saying that “*minimum ages should closely reflect the recognition of the status of human beings under 18 years of age as rights holders, in accordance with their evolving capacity, age and maturity (arts. 5 and 12 to 17)*”<sup>117</sup>.

Another situation that may occur is the when a child under 16 years of age, but with enough maturity to decide about her/his medical situation, refuses treatment. To what extend does a minor have to be forced to follow a treatment to which he or she refuses? Archard and Skivenes argue that, if children's are not treated as equal to an adult, courts must act above all in what they believe is in the best interest of the child. Nevertheless, they also must consider the consequences of acting against the will of the minor. Hence, they must balance the benefits of medical treatment and the costs they may have if they are doing so without the consent of the child<sup>118</sup>.

Finally, and regarding the latter scenario, it is of importance to highlight that full implementation of Article 12 is not only a way to comply with the international law, but is also good for children’s well-being. In some studies, it has been find that letting children participate is also good for her/his treatment and produces successful results<sup>119</sup>. Empower children and letting them to participate in the decision-making process within the health care practice, is also important for the good outcome of treatment.

<sup>115</sup> *Gillick v West Norfolk and Wisbech AHA* [1986]

<sup>116</sup> <http://ministryofethics.co.uk/index.php?p=7&q=2>

<sup>117</sup> Committee on the Rights of the Child. General Comment n°.6.

<sup>118</sup> (Archard and Skivenes, 2009) Pp 7-15.

<sup>119</sup> (Kilkelly and Donnelly, 2011) P. 125.

### 3. Refugee law

The CRC appears to be the legal basis for the protection of refugee minors in international law. Although there are a number of legal texts covering the status of refugees, such as Convention on the Status of Refugees (1951) and its Protocol, none of them specifically addresses refugee rights from a child-based perspective. In fact, it was not until the drafting of the CRC that refugee minors were treated as subjects of law. Thus, although the Convention specifically considers the situation of refugee minors in Article 22 CRC, interpreting the Convention as universal, and as having the principle of non-discrimination, the right to life, the principle of the best interests of the child and the principle of participation, legal coverage for refugee minors can be understood to be complete. However, the universal nature of the Convention is not reflected in the practice of member states when it comes to dealing with children migrants.

Minor migrants can easily be excluded in important aspects of society such as health, access to social security or education. Children with foreign, migrant, asylum seeker or refugee status suffer from endless barriers to their full development as a person. Cultural, religious and linguistic barriers can still exacerbate the vulnerability of these children. However, the CRC equates the rights of the child without any discrimination regarding origin and / or movement. Moreover, the Convention treats both asylum seekers and refugees in the same way<sup>120</sup>.

As Crock points out, the overwhelming majority of migrant children, whether they are refugees or not, not only suffer the hardships of long physical journeys, but also from a long bureaucratic and administrative procedures. It is a common practice by the States parties during these procedures, not to interview children at all, their voices being represented by their guardians or accompanying persons (in the case of unaccompanied minors this is not so deliberate)<sup>121</sup>. This is a clear example of the invisibility of children. Obviously, this invisibility also results in a lack of direct listening of the child regarding their needs and / or their opinions. In this regard, as we will see below, administrative processes that deal with migrants and refugee minors tend to fall into the traditional paternalism, going against the essence of CRC and its fundamental principle, as set by Article 12.

As Crock states, “*under international law, child migrants have suffered from a form of double institutional blindness born of their minority and status as non-citizens*”<sup>122</sup>. Thus, migrant children are vulnerable not just because of their age, but also because of its movements and status. In addition, according to articles 12 and 16 of the Convention, children’s participation should also be ensured in

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<sup>120</sup> (Crock, 2015) Pp. 221-225.

<sup>121</sup> (Crock, 2015) P. 229.

<sup>122</sup> (Crock, 2015) P. 222.

cases of deportation of their parents, in aspects related to status changing or in family reunification procedures. The CRC provides full recognition of children's rights even considering the conditions of their parental status, and, therefore, the best interest of the child should prevail over any other status such as a refugee, asylum seeker or migrant. The rights protected in the Convention, shall apply with no distinction between national and non-national children<sup>123</sup>.

Pursuant to Article 12 of the Convention, regarding refugees and non-accompanied children, *“To allow for a well-informed expression of such views and wishes, it is imperative that such children are provided with all relevant information concerning, for example, their entitlements, services available including means of communication, the asylum process, family tracing and the situation in their country of origin (arts. 13, 17 and 22 (2))”*<sup>124</sup>. For migrant children, then, Article 12 operates as a mandate for states parties to implement the necessary administrative processes (Article 4 CRC), and make them accessible to these children. To comply with, the administration must adapt its procedures, its language, ensure its accessibility and provide interpreters when necessary. Again, children have to be involved in the process in everything that concerns them. For that reason, they must be informed at all stages of the process. They must be informed in what situation their file is, they must be informed of their rights and they also must be consulted before any decision is made about their future. If necessary, children should be assisted in order to be able to understand what is going on, as well as being able to express their views<sup>125</sup>.

However, despite the efforts made by the Committee, the reality is that access to the right to obtain an effective remedy is denied in several cases. Unaccompanied minors, in this case, are usually deprived of the right to access both judicial and non-judicial proceedings. The guarantees of access to asylum procedures are not fulfilled and, in addition, the obligations to provide legal assistance and assistance of an interpreter are not met<sup>126</sup>. Several recommendations of the Committee have been issued to States parties to readdress the situation. For example, in its Concluding Observations on Australian implementation of the Convention, the Committee asked to undertake all necessary measures to ensure that the domestic law guarantee the right of every migrant situation to a fair procedure<sup>127</sup>. In Switzerland, the Committee was concerned about the proceedings of the asylum-seekers, because there were no persons of confidence or legal advisors present at the hearings<sup>128</sup> and

<sup>123</sup> UNICEF submission in the 2012 Day of General Discussion (Committee on the Rights of the Child). The Rights of all Children in the Context of International Migration.

<sup>124</sup> Committee on the Rights of the Child. General Comment n°.6.

<sup>125</sup> Committee on the Rights of the Child. General Comment n°.6.

<sup>126</sup> (Muiznieks and Kempf, 2015) P. 300.

<sup>127</sup> CRC Concluding observations: Australia CRC/C/AUS/CO/4 – 2012.

<sup>128</sup> Council of Europe Committee Against Torture CAT/C/CHE/CO/7 (9/2015) Switzerland.

thus, they had no access to proper information nor the opportunity to fully participate in the proceedings.

In the case of unaccompanied children, the principle of the best interest and the right to be heard must be ensured at all stages, bearing in mind that they do not have parents who can watch out for them. Moreover, unaccompanied or separate children might find themselves in another dangerous situation, such as being involved in an armed conflict.

### **3.1 Prevention of military recruitment and protection against effects of war**

Children are especially vulnerable in armed conflicts and, as such, the need to secure their rights is highly significant. International Humanitarian Law (IHL), which applies in times of war, offers protection to children under the Geneva Conventions. Moreover, children are protected under the Geneva Conventions not only under the provisions relating to civilians in general, but are also covered by specific provisions that apply when children are involved in armed hostilities. Indeed, Article 77 of the Additional Protocol I (API), dealing with children's protection, states that children who have not attained the age of fifteen years should not take a direct part in hostilities<sup>129</sup>. This provision does not take into account the voluntary involvement of children in armed groups. Hence, the Additional Protocol II (APII), added that children under the age of 15 should not be allowed to take part in hostilities.

The CRC protects children affected by armed conflicts in times of war but also in times of peace. Indeed, Articles 38 and 39 of the Convention cover the situation of children being affected by armed conflicts. Interestingly, the Convention sets an age limit for child recruitment at 15 (Article 38(2)), using the same words as the first sentence of article 77 API of the Geneva Convention. However, in Article 38 (3) the Convention encourages the parties involved in armed conflicts to recruit the oldest children from within the age-range of 15 to 18. This provision was highly criticised by Non-Governmental Organisations (NGO's), for letting children between the age of 15 and 18 participate in armed conflict<sup>130</sup>. Hence, the First Optional Protocol (2000) of the CRC, about the involvement of children in armed conflicts, was drafted in order to solve the situations where children under 18 are recruited to actively participate in armed conflicts. Thus, this Protocol represented a big step concerning the recruitment of children in armed conflicts. Article 1 of the Protocol says that 'States Parties shall take all feasible measures to ensure that members of their armed forces who have not

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<sup>129</sup> Paragraph 2 of Article 77 of Additional Protocol I (1977) of the Geneva Convention (1949).

<sup>130</sup> (Coomaraswamy, 2010) p 537.

attained the age of 18 do not take direct part in hostilities'. However, the following articles 2 and 3 of the Protocol, which deals with the voluntary recruitment, just recommends States parties to raise the age of voluntary recruitment in national forces at the age of 18 instead of setting the limit at 18 years of age. Hence, the Additional Protocol failed to raise the age threshold for voluntary recruitment into armed conflicts to 18. It is of importance to highlight that there are still 31 countries which are not part of the Protocol. Once again, the principle of the best interest of the child is at stake, along with other provisions of the Convention. Clearly, letting children participate in armed conflict at the age of 15 is not in their best interest. Moreover, although there was an attempt to solve this issue in the Optional Protocol on the Involvement of Children in Armed Conflicts, the Convention and its protocol permit children between the age of 15 and 18 to participate actively in armed conflict within the national forces.

Moreover, the Committee, in GC. 6, states that 'State obligations deriving from article 38 of the Convention and from articles 3 and 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict also apply to unaccompanied and separated children'<sup>131</sup>. The Committee added that these provisions also apply to former child soldiers, to make sure that they cannot be re-recruited. Child soldiers often are unaccompanied when the conflict ends. Hence, it is important to follow-up with former child soldiers and ensure special protection for rehabilitation. For that purpose, it is important to understand their needs and, thus, the children need to be heard actively. The Committee pushes for particular efforts to be made regarding the reintegration of girls 'who have been associated with the military, either as combatants or in any other capacity'<sup>132</sup>. Indeed, Article 39 CRC deals with children in armed conflict, but treating them as victims, ensuring that States parties 'take all appropriate measures to promote physical and psychological recovery and social integration of a child victim of armed conflict (...)'.

It is a paradox, that Article 38 CRC and the Optional Protocol allow children to be actively involved in an armed conflict, while under the principles of the same Convention, which in the view of the Committee must be implemented 'holistically', protect the best interest of the child, the right to live and child development. Furthermore, it is important to note that while the Convention understands that children are mature enough to voluntarily join the armed forces at the age of fifteen, while in other situations it is ambiguous and gives power to States parties to discretionally set age barriers. In that sense, the paradigmatic situation where States parties have a wide range of age criteria, is when children are in conflict with the law.

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<sup>131</sup> Committee on the Rights of the Child. General Comment n°.6. Para-54.

<sup>132</sup> Committee on the Rights of the Child. General Comment n°.6. Para-23.

#### **4. Children in conflict with law**

The term "children in conflict with the law" refers to all persons under the age of 18 (according to Article 1 CRC definition of the child) who commit an offense punishable by law<sup>133</sup>. With this definition, hundreds of young people are brought to justice each day accused of committing a criminal offense. As a result, they face a criminal justice system that is generally intimidating, hostile and specially designed to serve the adult population<sup>134</sup>. When minors enter into such criminal justice systems, they face institutions and professionals which lack of capacity and ability to create spaces of communication with minors and thus, to meet the requirements of fair access to justice as provided for by Article 40 CRC<sup>135</sup>.

The convention dedicates two articles to protecting the rights of children when they come into conflict with the law. On the one hand, there is Article 37 CRC, which protects minors when they are deprived of liberty (also establishes a recommendation to use deprivation of liberty as a measure of last resort), and, on the other hand, there is Article 40 CRC, which appears to be the most extensive provision in the Convention. Article 40(1) reminds States parties that minors who are in conflict with law must be treated with dignity and with respect for the rights granted by the Convention. In turn, the provision of Article 40(2) enumerates the guarantees that must be covered to protect the rights of the child in conflict with the law, such as procedural guarantees and fair trial. However, in its General Comment n°.10, the Committee reminds States parties that effective implementation of the Convention is not limited to the specific articles governing the situation of minors in conflict with the law, but also must be systematically applied in accordance with the general principles provided for in articles 2, 3, 6 and 12 of the same convention<sup>136</sup>.

In this regard, the Committee appeals to the general principles of the Convention to defend a position favouring restorative justice, to the detriment of retributive or repressive justice. Consequently, the role played by the principle of participation when the minors are involved in a criminal law proceedings, together with the principle of the best interest of the child, are of paramount importance. Indeed, the Committee recommended that protecting the best interests of the child when they are in conflict with law means, for example, that States parties must take the necessary steps for the transition from repression and traditional criminal justice, towards rehabilitation and restorative

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<sup>133</sup> (Hamilton and Barnes, 2011) P.99.

<sup>134</sup> (Landsdown, 2011)P. 67.

<sup>135</sup> In particular, Article 40 (2) (b) (iv): "Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality".

<sup>136</sup> Committee on the Rights of the Child. General Comment n°.10. Para- 4.

justice<sup>137</sup>. In order to realise such a request, the Committee also recommended that States parties should promote the involvement of children, parents, NGOs, and social workers, in the development and implementation of prevention and enforcement programs where appropriate<sup>138</sup>.

Despite the efforts made by the Committee to achieve a more child-friendly justice, the implementation of Article 12 in criminal law proceedings seems to stand in the way of achieving restorative justice. Several voices have claimed that the right of the child to be heard is avoided in cases where children are in conflict with the law. In this scenario, children are not only in a particularly vulnerable situation, but in most cases, they also come from marginalized and vulnerable social sectors. For this reason, it is crucial for the right to be heard to be implemented as effectively as possible. As Landsdown argues, one of the major challenges of juvenile justice systems is to eliminate communicative barriers with minors in conflict with the law. He argues that juvenile justice lacks mechanisms to ensure the right of minors to be heard<sup>139</sup>. To fulfil the requirements of Article 12(2), it enumerates 4 key moments of the criminal proceeding where this right must be recognized and implemented according to the guidelines given by the Committee: during the pre-trial stage, when the child is arrested or interviewed by public authorities (police, judges), in the process of judicial disposition and in the implementation of any measures taken. Moreover, it is also important to note that it must also ensure the right of the child to remain silent and not to declare during all the proceeding.

Regional development of children's rights has progressively evolved in Europe. In recent years, the European Union, as well as the Council of Europe, have been progressing in this area by drafting important documents that are very relevant to the improvement of practices in juvenile justice. A good example of this is the EU Agenda for Children's Rights, which aims to protect, promote and fulfil children's rights through the relevant EU policies and actions<sup>140</sup>. Interestingly, the EU Agenda includes, in one of its 11 action points, the promotion of the Council of Europe Guidelines on child-friendly justice (The Guidelines hereinafter). These guidelines represent another key tool for the Member States of the CoE (which are also part of the CRC), to guarantee children's rights and to implement them in the law proceedings. Indeed, the guidelines have several fundamental guiding principles on how to approach different justice systems, including the best interest of the child, participation, dignity, protection from discrimination and rule of law<sup>141</sup>. As Rap states, the Guidelines are one of the most complete texts that provide an extensive account of how child-friendly justice

<sup>137</sup> Committee on the Rights of the Child. General Comment n°10. Para-10.

<sup>138</sup> Committee on the Rights of the Child. General Comment n°10. Para-20.

<sup>139</sup> (Landsdown, 2011) Pp 63-69.

<sup>140</sup> [http://ec.europa.eu/justice/fundamental-rights/rights-child/eu-agenda/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/rights-child/eu-agenda/index_en.htm)

<sup>141</sup> (Parkes, 2013) P.165.

should be applied in national juvenile justice systems. Also, the participation of children in criminal legal proceedings has been given a prominent position in the guidelines<sup>142</sup>. Interestingly, the Guidelines don't give any recommendation to set an age limit for criminal responsibility. On the contrary, notes that the age barriers should be removed from the legislation, giving more weight to the evolving capacities of the child and, thus, assessing the maturity of the child in a case-by-case basis. In words of the Guidelines, "*States are discouraged from introducing standardised age limits*"<sup>143</sup>. Moreover, the text also recommends giving the child the 'benefit of the capacity' in the following terms: "*Instead of assuming too easily that the child is unable to form an opinion, states should presume that a child has, in fact, this capacity*"<sup>144</sup>. Thus, the European approach to juvenile justice seems to be closer to the theory of restorative justice rather than the traditional and repressive justice. The principle of participation takes a central role in the Guidelines but, once again, the reality differs from what the theory states. Indeed, regarding the jurisprudence of the European Court of Human Rights, it is interesting to note that was not until 1999, that the Court dealt with the issue of children participation in criminal law proceedings<sup>145</sup>. In *T v UK* (1999), the Court stated that was not clear to set a minimum age to standardize criminal responsibility (the child convicted was 11 years old). The court also emphasised that a child charged with an offence should be dealt according to his/her age, level of maturity and intellectual and emotional capacities. Thus, in Court's views, there was a need to take steps to promote the ability of the child to understand and participate in the proceedings<sup>146</sup>. Age, once again, has become a contentious issue when dealing with criminal responsibility and, as discussed below, different systems are taken by States parties.

#### **4.1 Age and children in conflict with the law.**

Although the CRC does not set any specific age limit to hold children criminally accountable, it does recommend that states parties set a minimum age as it follows "[The Committee recommend] *the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law*" 40(3)(a) CRC.

The Beijing Rules, which are the UN Standard Minimum Rules for the Administration of Juvenile Justice<sup>147</sup>, established that the minimum age required to be held accountable in criminal proceedings

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<sup>142</sup> (Rap, 2016) P. 98.

<sup>143</sup> (Council of Europe, 2011) P. 50. Para 52.

<sup>144</sup> (Council of Europe, 2011) P.51. Para 33.

<sup>145</sup> *T v United Kingdom* application n°24724/94 (1999). Para. 83.

<sup>146</sup> *T v UK*. Para. 84.

<sup>147</sup> General Assembly Resolution 40/33 of 29 November 1985.

should not be too low, using these specific terms “*In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity*”<sup>148</sup>.

Clearly, States parties set a minimum range of ages for children under the age of 18 to be held criminally responsible without considering their individual maturity<sup>149</sup>. Furthermore, every jurisdiction has discretion to decide in this matter and, consequently there is a wide range of ages set among states regarding children criminal responsibility, which goes from 7 to 18 years of age<sup>150</sup>.

As Parkes argues, the alternative to this diverse range of standards would be one set by the Committee, when interpreting Article 40, requiring a certain age limit<sup>151</sup>. The fact that the Committee's interpretations do not establish any age limits does not help to standardize the concept of criminal responsibility of persons under 18 years of age. Nonetheless, the Committee may assert that not setting any age limit is in accordance to the criteria given by the provision of Article 12. Obviously, Article 12 does not deal specifically with the criminal responsibility age barrier, but as a principle, it seems clear that the Committee set a general rule of understanding the evolving capacities of the child (art 5). In light of Article 12, taking into consideration that the decision whether to hold children accountable is clearly a decision affecting them, children must be treated according to their age and maturity. As Parkes points out, “*establishing a minimum age for criminal responsibility, requires that states parties treat children as an homogeneous group in society ignoring its individuality*”<sup>152</sup>. It is also clear that the CRC guides states parties on how to deal with children in conflict with the law, and thus, all the measures taken must be in accordance with the CRC principles, such as the right to be heard<sup>153</sup>. However, the Committee position on this particular issue (which is keeping silent) creates an uncertainty among the States parties, when setting the minimum age for minor's criminal accountability.

Setting the limits of criminal responsibility too low generates a paradox in understanding the maturity of children. Normally, in countries with a lower criminal age, their participation in civil proceedings is barely visible until they reach a certain advanced age (16-18 years of age). In this regard, these legal systems (as we will discuss in the last chapter) keep the age of criminal responsibility much lower, to "protect" society. It is clear that this model of children's justice is contrary to the principles

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<sup>148</sup> Beijing Rules. 4(1).

<sup>149</sup> (Parkes, 2013) P152.

<sup>150</sup> Thailand, Lebanon or Yemen have set the minimum age responsibility at 7 years of age; Australia at 10; Ireland at 12; Sweden sets the minimum age at 15 years of age; and in Liechtenstein at 18.

<sup>151</sup> (Parkes, 2013) Pp151-153.

<sup>152</sup> (Parkes, 2013) P153.

<sup>153</sup> (Parkes, 2013) Pp. 153-154.

of the Convention: it does not seek out the best interests of the child, it misrepresents children's understanding and maturity, and it discriminates against a particularly vulnerable group. The official commentary of the Beijing Rules is as follows, "*If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.)*"<sup>154</sup>.

Furthermore, a model used by different countries has been the presumption of *doli incapax*. This model considers a range of ages (the common range is between 10 and 14 years of age) where the determination of criminal responsibility depends on the capacity of the child. This capacity is analysed based on the understanding of the right and the wrong caused, as well as the understanding of what is prohibited by law. Some countries, such as the UK, have recently eliminated this provision, reducing the age of criminal responsibility to 10 years.

As it was pointed out above, the Committee doesn't set an age limit when interpreting the Convention. However, it strongly recommends not to set the criminal age responsibility lower than 12 years of age (and not to lower if it was higher). At the same time, and according to Article 40(3) CRC, the Committee recommended that children who commit a crime, and at the time of the offence were over the minimum age need to be provided with the same human rights and legal safeguards as children above the age threshold<sup>155</sup>. Finally, in the same General Comment, States parties are recommended to ensure the application of juvenile justice laws to those young people between the ages of 16 and 18, observing a common practice of some States parties in treating them as adult criminals. In doing so, the Committee observed that they risk applying the law in a discriminatory manner. It also encourages increasing the age for juvenile justice measures (for example, up to 21 years of age) so that the process for young people facing criminal trials would not be harmful<sup>156</sup>.

## **4.2 Participation as a guarantee of a fair trial**

As we pointed out above, Article 40 CRC, is in charge to ensure that States parties comply with the right to fair trial when children are in conflict with law. This provision takes children's participation in the proceedings into consideration, guaranteeing the right to be informed (40.2.b.ii), the right to

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<sup>154</sup> Official Commentary of rule 4 from the Beijing Rules.

<sup>155</sup> Committee on the Rights of the Child. General Comment n°10. Para. 32-34.

<sup>156</sup> Committee on the Rights of the Child. General Comment n°10. Para. 37-38.

fair hearing (40.2.b.iii), the right to have a free assistance of an interpreter (40.2.b.vi) and the right not to be compelled to give testimony or to confess guilt (40.2.b.iv).

The Committee, considering the right to be heard in order to guarantee children participation, obliges States parties to undertake the necessary measures to ensure that children and juveniles are informed promptly in a language that they understand. It also states that the proceedings should be “*conducted in an atmosphere enabling the child to participate and to express her/himself freely*”<sup>157</sup>. With these clarifications made by the Committee, it is clear that the right to be informed is understood as a prerequisite to successfully implementing the right to be heard in criminal proceedings<sup>158</sup>. Thus, the right to be informed is composed of a number of state duties, this includes a duty to inform children promptly, to inform them in every stage of the process and in a manner and language that children can understand. This also means that when necessary, an interpreter must be used to facilitate children participation.

For the effective protection of children, as well as to ensure their freedom of expression, the Committee explicitly refers to the need to hold the hearings of a child in conflict with the law behind closed doors. Only minor exceptions under national law are permitted and these must always work in favour of the best interest of the child<sup>159</sup>.

### 4.3 Directly or through a representative

Article 12 (2) already provides that in court proceedings children must be heard directly or indirectly, according to their age and maturity. Thus, both in civil proceedings and in criminal proceedings, this provision must be applied.

In relation to children in conflict with the law, the right to be heard directly has a double meaning. On the one hand, if the child is heard directly, he or she ensures that her or his views will be heard before the court, as accurate as she or he sees them. As Parkes argues, although *a priori* it seems beneficial to communicate directly in front of the judge, in practice it can be intimidating<sup>160</sup>. However, in these cases, whoever makes the decision should create a good environment for the judicial hearing. Consequently, the child needs to be prepared to speak before the court, in a pre-trial stage and during the hearing, with adequate explanations of the significance of the oral hearing to them. Furthermore,

<sup>157</sup> Committee on the Rights of the Child. General Comment n°.12. Para. 60.

<sup>158</sup> (Parkes, 2013) P.156.

<sup>159</sup> Committee on the Rights of the Child. General Comment n°.12. Para. 62.

<sup>160</sup> (Parkes, 2013) P. 159.

the Beijing Rules goes beyond the scope of the Convention stating that “*the proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely*”<sup>161</sup>. Once again, participation in the proceedings is of paramount importance, meaning the views must be expressed freely either direct or indirectly. It worth noting that the right to legal representation, to be informed and the right to participate directly, is also covered by the Convention on Civil and Political Rights in its Article 14 (3) (d), and therefore also applicable to children.

On the other hand, besides the provision of Article 12(2), the Convention also states that every child alleged as or accused of having infringed the penal law, have the guarantee of being represented with the presence of legal assistance<sup>162</sup>. The representation of children in legal proceedings is also intended to increase make the voice of the child equal to that of other parties. In some States parties, the provision of separate legal representation is mandatory, as in the case of Lebanon. In other states, other types of children’s representation take part in the process. This is the case of prosecutors and juvenile justice lawyers or special attorneys. In any case, the juvenile justice system must comply with the international requirements to guarantee a fair proceeding and ensure that the views of the child or the juvenile are being expressed accurately<sup>163</sup>.

#### **4.4 Listening to Juveniles deprived of liberty**

As the Committee acknowledged in its general comments, significant steps have been taken in the implementation and evolution of the children's right to be heard since the approval of the CRC. Notwithstanding this, the committee also recognizes that children with particularly vulnerable situations also suffer a deterioration in the exercise of this right. Juveniles in conflict with the law, specifically the ones which are deprived of liberty, must enjoy the full implementation of this right as well. Nevertheless, too often they are treated distinctly, and usually without the guarantees established by the international standards<sup>164</sup>.

It is difficult to argue that depriving children of liberty is in their best interest. Although the CRC expressly states that arrest, detention or imprisonment shall be used as a measure of last resort, this is far from the reality. In addition, as Muiznieks and Kemps argue, imprisoning juveniles is the main

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<sup>161</sup> Beijing Rules (1985). Rule. 14(2). (official comentary of the Rules)

<sup>162</sup> Article 40 (2)(b)(iii) CRC.

<sup>163</sup> (Parkes, 2013) 163.

<sup>164</sup> Committee on the Rights of the Child. General Comment n°.12. Para-4.

response of the states when there is a criminal offense committed by young<sup>165</sup>. Hence, this approach of the States parties to youth justice, is closer to the retributive justice than restorative, and explains (as this section will assess below) why authorities usually neglect to listen to juveniles when they are deprived of their liberty.

The Convention, deals with the situation of children deprived of liberty in Article 40 and, more specifically, in Article 37. The latter provision, guarantees children human rights in the situations where they are arrested, detained or imprisoned, and specifically appeals to physical integrity, humanity and dignity. The relationship of Article 37 with Article 12 is not free of controversy when it comes implementing the right to be heard in detention facilities. In fact, Article 37(c) states that *“every child deprived of liberty shall be treated (...) in a manner which takes into account the needs of persons of his or her age”*. Thus, this provision does not give importance to the maturity of the child and only takes age into account. In addition, Parkes highlights that this specific provision, in conjunction with the age attribution of criminal responsibility, promotes the belief that in the context of children in conflict with the law, age is all important<sup>166</sup>. However, this interpretation of Article 37 would be contrary to the spirit of the principle of Article 12, which is implemented and interpreted holistically, give the premise to take into account not just the age of the children, but also their maturity.

There is no doubt that depriving children of their liberty is an issue concerning them, and the best interest of the child, as the paramount consideration, should be taken into account. This means that, when the provision of Article 37 (b) is met, the determination of children’s best interest has been assessed when deciding whether the detention was lawful or not<sup>167</sup>.

In addition, as Hamilton and have Barnes argued, in order to be a lawful detention (and extended to other forms of deprivation of liberty), the best interest of the child as a paramount principle and the right of the child to be heard in terms of Article 12, must be guaranteed. They state that, during administrative detention, states usually fail to meet the criteria of the best interest of the child and the right to be heard, hence, their actions might become unlawful and/or arbitrary<sup>168</sup>.

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<sup>165</sup> (Muiznieks and Kempf, 2015) P. 295.

<sup>166</sup> (Parkes, 2013) P. 155.

<sup>167</sup> (Hamilton and Barnes, 2011) Pp.1-20.

<sup>168</sup> (Hamilton and Barnes, 2011) Pp. 12-18.

#### 4.4.1 International mechanisms and complaint procedures

The CRC is an incomplete tool when it comes to protecting the rights of children deprived of their liberty. Three other UN tools deserve special consideration with regard to the protection of such rights and the promotion of good practices within a national and comprehensive juvenile justice policy. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the “Havana Rules”), and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the “Riyadh Guidelines”) complete the international standards to protect children in conflict with the law and, in particular when they are deprived of liberty<sup>169</sup>.

Although none of those texts are legally binding, their implications for when juveniles are deprived of liberty in relation to their right to be heard, are of importance for setting common international standards. The concept of participation of children who are in conflict with the law was first set by the Beijing Rules in its Rule 14 (2), which provides that the proceedings should take place in an atmosphere of understanding, allowing the juvenile to participate therein and to express himself or herself freely<sup>170</sup>. As the official comment on the Beijing rules states, this provision is clearly an example of the adoption of the right to be heard in situations when children in conflict with the law<sup>171</sup>.

Moreover, two different sections of the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (the Havana Rules) take children's participation into consideration: in Disciplinary Procedures, and also in the section on Inspection and Complaints. Within the section on disciplinary procedures, Rule 70 (which applies when a juvenile deprived of liberty is sanctioned) ensures the right of the juvenile to be informed in a manner appropriate for a full understanding and ensures he or she has the opportunity to defend him or herself. Furthermore, when dealing with the inspection and complaints section, the Havana Rules state that every juvenile placed in any detention facility should have the right to talk in confidence to an inspector<sup>172</sup>; the opportunity to make requests or complaints to the director of the detention facility<sup>173</sup>; the right to make a request or complaint, without censorship, and be informed of the response<sup>174</sup>. Thus, these two provisions are a clear example of the implementation of Article 12 when children are in conflict with the law. However, neither the Beijing rules nor in the Havana rules give consideration to the maturity of the child. Thus, there are no

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<sup>169</sup> Committee on the Rights of the Child. General Comment n°.10.

<sup>170</sup> Beijing Rules. Rule 14(2),.

<sup>171</sup> (Rap, 2016) P. 94.

<sup>172</sup> Havana Rules. Rule 73.

<sup>173</sup> Havana Rules. Rule 75.

<sup>174</sup> Havana Rules. Rule 76.

international guidelines within the UN framework, to assess the views of children according to their age and maturity when they participate by making a request or complaint.

Last but not least, the Riyadh Guidelines state that for the purposes of the interpretation of the text, young persons should have an active role within society and should not be considered as mere objects of socialization or control. Furthermore, point 9(h) of the guidelines states that youth participation in policies about children in detention should be instituted at every level of the government. Again, the texts of the UN clearly affirm the idea of children's participation in all matters concerning them, but provide rather less information about how to take their views into consideration.

In Europe, the Member States of the CoE have another key tool for implementing the right to be heard of children in a detention facilities: the Child-friendly Justice Guidelines. Indeed, the Child-friendly Guidelines, although they are also not binding, aim to be accessible, age appropriate, speedy, diligent and adapted to the needs of the child<sup>175</sup>. The Guidelines propose another justice system for juveniles (separate from system for adults) to avoid the 'adultification' of the juveniles which are deprived of liberty. It also holds that a restorative approach to criminal justice should be implemented by member states<sup>176</sup>. In this way, member states are encouraged to follow the international standards for the protection of the child when he or she is deprived of liberty, and also to build a justice system reconciled with the idea of the best interest of the child and also taking in consideration the provision of Article 37 (b) stating that measures depriving children of liberty should be a last resort.

Interestingly, the CoE goes further in relation to listening to children deprived of their liberty and the right of participation. The Recommendation (2008) of the Committee of Ministers<sup>177</sup>, states that the imposition and implementation of sanctions shall be based on the best interest of the child and take into account their age, physical and mental well-being, development, capacities and personal circumstances. Thus, although the age barrier is still a real threshold within the member states, the CoE recommends to not only assess the child's age, but to also other circumstances such as development and capacity into consideration. Furthermore, in the same recommendation, it is stated that Juveniles deprived of their liberty "*shall be encouraged to discuss matters relating to general conditions and regime activities in institutions and to communicate individually or, where applicable, collectively with authorities about these matters*"<sup>178</sup>. Thus, the vision of the CoE in relation to

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<sup>175</sup> (Council of Europe, 2011) Section II.

<sup>176</sup> (Council of Europe, 2011) Guideline 80-85.

<sup>177</sup> Recommendation of the Committee of Ministers to Member States on the European Rules for Juvenile Offenders Subject to Sanction or Measures. CM/REC (2008) 11.

<sup>178</sup> Recommendation CM/REC(2008)11.

children's participation in situations when they are deprived of liberty, seems to largely satisfy the provision of Article 12 CRC. Hence, children not only have to be heard when they have complaints or requests, but in any matter concerning them.

However, again the theory is different from the reality. The Committee of for the Prevention of Torture of the CoE (CPT), found in different member state reports, that the right of the child to be heard had not been satisfied. In the CPT report on Spain<sup>179</sup>, they found that, although there were enough complaint mechanisms and ways to make requests, most of the juveniles which were interviewed stated that they saw no purpose in making a complaint or request as it would have no impact on their situation. This situation evidences the lack of weight given to juveniles' views. In Serbia, the CPT determined that steps needed to be taken in order to offer a full programme of educational, vocational and recreational activities, taking into account the specific needs of children's age group<sup>180</sup>. Thus, these examples demonstrate that states are not very willing to treat the views of juveniles deprived of liberty with due weight. Moreover, the CPT, in its report on Ireland (2011), also emphasised that juveniles who are deprived of their liberty ought to be held in detention centres *"specifically designed for persons of this age, offering regimes tailored to their needs and staffed by persons trained in dealing with the young"*<sup>181</sup>.

The needs of juveniles must met whether they are deprived of their liberty or not. Hence, it is of vital importance that they can request certain activities (leisure, workshops, etc) which, according to Article 3 CRC, are in their best interest. The CPT asserts when they argue that a lack of activities is detrimental for any prisoner, and is especially harmful for juveniles taking into account their needs as such. In this regard, the CPT has noted in its report on UK that it is important that young persons with potential grievances are able to make themselves heard either through the formal complaints system or expressing themselves directly to the staff<sup>182</sup>. However, as the case of Spain, juveniles do not have confidence in the success of their proposals, complaints or requests.

As Goldson and Kilkelly have argued, the reality in centres of deprivation of liberty, is that many child prisoners belong to/or become part of a profoundly vulnerable group. They live with a strong feeling of fear and an enduring feeling of being unsafe.<sup>183</sup> There is a big gap between international human rights standards and the reality in most detention centres. They also consider that the situation

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<sup>179</sup> CPT Report Spain: CPT/inf (2013)6.

<sup>180</sup> CPT Report Serbia: CPT/inf (2016)21.

<sup>181</sup> (Goldson and Kilkelly, 2013) P. 360.

<sup>182</sup> CPT Report United Kingdom: CPT/inf (2009)30.

<sup>183</sup> (Goldson and Kilkelly, 2013) p. 367.

and issues above mentioned in these facilities represent standard and routine aspects of a wider global phenomenon<sup>184</sup>.

It seems clear that the more vulnerable the children are, the less they are heard. In cases of multidiscrimination, children not only appear to be less visible to society, but also to the law. Although many efforts have been made to protect children's participation in matters concerning them, there appears to be a gap between the rhetoric and the reality. Finally, despite the universality of human rights, and the universality of the rights of the child, the implementation of the convention appears to be discriminatory in areas of special vulnerability: when a person is minor, when a child is ill, when children have a foreign status or when children are in conflict with the law.

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<sup>184</sup> (Goldson and Kilkelly, 2013) p. 367-368.

## CHAPTER III. DISCUSSIONS

### A. Listening in whose interest?

As this dissertation has depicted so far, there is a gap between the original text of the Convention and the implementation of its provisions. Although children participation is one of the principles of the Convention, the principle of best interest of the child is understood to be ‘the paramount principle’ and, when applying the Convention, children’s opinions are just taken into account under the umbrella of the principle of best interest of the child. Hence, although there is no hierarchy between the rights of the Convention, all the rights provided shall be understood for the best interest of the child and no other right must be implemented with a negative interpretation of the child's best interests<sup>185</sup>. At the same time, the provision set by Article 3, should not be applied if clearly contradicts other provisions of the Convention. This means, for example, that implementing the principle of the best interest of the child, cannot justify the violation of the right to life or development, the right not to be discriminated nor the right to be heard.

Bearing this in mind, many questions arise around the concept of the best interest of the child in the legal proceedings. Not just determining what is the best interest in a particular situation, but also, we must ask ourselves in what is based the decision of the best interest, or, who decides for the best interest. The Committee realised that the concept of child’s best interest has been used by some State authorities to justify some policies in their own interest; by parents to act in their own interest in a custody disputes; and by decision-makers to determine what they think is best for him or her without taking in consideration children views<sup>186</sup>. Thus, the principle of the best interest of the child, which in the views of the Convention shall be of primary consideration, may lack of consistency when other rights of the Convention are at stake.

One of the main issues that scholars dealt with it, is the lack of tools to consider children’s opinion and the ‘imposition’ of adults’ decisions towards situations affecting the child. The paternalistic approach of children’s rights is understood as the adults’ protectionists views on matters affecting the child, which allows to think in children’s best interest but, too often, without taking children’s views into account. As Federle states, one of the main problematics is that adults may manipulate children’s rights for their own purposes, and thus, children’s rights might not serve children’s interests<sup>187</sup>. Moreover, he highlights the opinion of Guggenheim in this situation, who pointed out that the

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<sup>185</sup> Committee on the Rights of the Child. General Comment n°.14.

<sup>186</sup> Committee on the Rights of the Child. General Comment n°.14. Para. 34

<sup>187</sup> (Federle, 2009)p. 321.

indeterminacy of the concept of the best interest of the child, allows the exercise of official discretion based on adult beliefs, without a real purpose of advancing children's interest<sup>188</sup>. Hence, the rights of the child might suffer from the indetermination of the concept of best interest of the child which, at a certain point, will only be based on the opinion of judges, legislators, lawyers or parents. Archard and Skivenes, argue that the promotion and protection of children's rights are basically paternalist because the law asks adults to what adults, but not necessary the child, thinks is for their best interest<sup>189</sup>. Usually, the main judgements concerning the child are made by relevant professionals or official authorities and then, the views of the child, might be diminished.

However, Article 12 CRC appears to be the provision that empowers children to participate in all matters affecting him or her. Thus, seems that on the counter part of the 'paternalistic theory' of children's rights, there is one of the core elements of the CRC, the right of the child to be heard. Indeed, applying Article 12 in all of its extension, means to empower the child to decide him or herself according to his/her age and maturity. Hence, the more mature the child is, the less 'adult interferences' should be in children's participation. Putting these barriers to the evolving capacities of the child, the law ain't nothing but underestimate children's self-determination.

The best interest of the child is based in different criteria depending which branch of the law we deal with. While in adoption proceedings the best interest (considered of paramount consideration) is for the child to consent the adoption family, when children are in conflict with the law, the best interest of the child appears to be more simplistic, and based in attending basic standards of Human Rights. In criminal proceedings, the balance between Article 3 and Article 12, is poor in all its extension. First, the broad definition of the best interest of the child does not help to tackle children's vulnerabilities within criminal justice. Secondly, and as a consequence of the indetermination of the concept of best interest, children's capacity are usually overestimated, and thus, the assessment of their maturity might be misunderstood. The criminal system tends to believe that children are able to understand their 'wrongdoings' when they overreach the age threshold to be criminally accountable. For that reason, to understand children needs, and protect them as such, it is of paramount importance to actively listen to them, specifically when they belong from a vulnerable situation.

Listening to children's views, and giving them due weight according to their age and maturity, should be something done previously. Often, when children face criminal proceedings, means that society has not listened them before. Sometimes, listening children in conflict with the law arrive too late, and then, the legal system, implement the right to be heard in criminal proceedings as a mere rule of

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<sup>188</sup> (Federle, 2009) P. 322.

<sup>189</sup> (Archard and Skivenes, 2009) P.2.

procedure. Hence, juvenile justice mechanisms must be adapted to identify children's vulnerabilities in order to provide them for a proper and individual answer, not only during the proceeding, but also as a guarantee of protecting them from committing criminal offenses.

For that reason, and as the Committee points out, not taking into account the views of the child according to Article 12 CRC, would be, indeed, not respecting the best interest of the child<sup>190</sup>. Thus, to respect the provision of Article 12, a proper assessment needs to be done about children's capacity, taking into account their age and maturity. Moreover, the Committee explains that, in order to assess the level of maturity of the child, it should be taken into account the physical, emotional, cognitive and social development of the child<sup>191</sup>.

Considering the explanation given by the Committee in its General Comment 14, the best interest of the child as a principle, as right and as a rule of procedure, was supposed to guide the interpretation and implementation of the legal concept of 'best interest'. Although the General Comment 14 contributed to clarify the implementation of the best interest of the child, the legal approach of the principles is still under discussion. The new paradigm of children being regarded by the legal system as subjects of law, left, however, several questions to be answered<sup>192</sup>. Taking the best interest of the child as a rule of procedure, implies to satisfy Article 12 of the convention and thus, the views of the child have to be taken into account. Nonetheless, the broad concept of child's best interest, is usually confronting the views of the child in legal or administrative proceedings. As discussed above, in different legal proceedings, the best interest of the child challenges the right of the child to be heard. Indeed, the conception of the best interest of the child taken by different judges, or decision-makers, in different branches of the law, differs from one to another. For example, within the family law proceedings, the ECtHR in *Sahin* as well as in *Sommerfeld*, the primacy of the best interest of the child prevailed over the opinion of the child. However, while in *Sommerfeld* the Court based its understanding of best interest according to what the child expressed, in *Sahin* the best interest was based in an expert opinion.

Considering the processes in medical law, the Gillick case is a good example of a good balance between the principle of best interest of the child and the right to participate in decisions affecting the child. Although the best interest of the child is perceived to be above children's opinion about their medical treatment, the 'Gillick competence' set a good criterion to balance both principles and taking into consideration the capacity of the child.

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<sup>190</sup> Committee on the Rights of the Child. General Comment n°14. Para-53.

<sup>191</sup> Committee on the Rights of the Child. General Comment n°14. Para-83.

<sup>192</sup> (Council of Europe, 2016). P.17.

Moreover, when children are in conflict with the law, is difficult to determine what is in his/her best interest, because the law just assess the capacity of the child taking age as a criterion. In these situations, where children might face a limitation or restriction of their rights, the protection measures are to be applied in conjunction with children empowerment in order to help balancing these protection measures in relation to children participation<sup>193</sup>. Finally, in criminal proceedings, when deciding provisions about the imprisonment of the child, is clearly not in his or her best interest.

Thus, it is not clear that in the different legal proceedings, the best interest of the child is satisfied. Although the CRC recognises that children have their own views on matters affecting them, they are often not considered mature enough to judge for their own best interest. Hence, as Bentley argues, there is a need to balance the best interest of the child and their autonomy and so the personality and self-sufficiency of children are recognised and that are not abandoned as a mere right holder<sup>194</sup>.

In conclusion, the law should be more consistent in conceptualising the principles ruling the CRC. Therefore, it's the role of the Courts to determine the concept of "sufficient maturity", and what means to give "sufficient weight" to children's views. In assessing case by case, and taking into account the maturity as explained, the Courts should, finally, express what is in children's best interest<sup>195</sup>.

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<sup>193</sup>Committee on the Rights of the Child. General Comment n°.14. Para. 83.

<sup>194</sup> (Anne Bentley, 2005) P. 109.

<sup>195</sup> (Archard and Skivenes, 2009) P. 4.

## B. More responsibilities but less rights

Another contradiction we find about the implementation of children's rights is that, whereas the legal system is willing to protect children understanding them as subjects of law, they charge them with more duties and responsibilities.

For example, in Ireland a child with the age of 10 can be held criminal liable<sup>196</sup>, while in the same jurisdiction, within medical law, their consent to a medical treatment are taken into account when they are over 16<sup>197</sup>. Thus, at the age of 10 years, children are supposed to understand the law and the wrongs of their behaviour, whereas when they are 15 they still cannot decide about their own body.

Furthermore, in relation to the age of criminal responsibility, the abolition of the presumption of *doli incapax* and the repeated assertion that children are 'responsible enough' at a low range of age to hold them criminally accountable, can only be described, as Keating says, as *wilful political blindness in the face of an overwhelming argument for reform to the law, a law which has rightly been condemned as 'unsafe, unsatisfactory and harmful to wider society'*. It is contradictory to say that a child might be criminally responsible at the age of 10, but within the same legislation, cannot freely decide about his or her own treatment, or cannot decide with whom wants to live in a custody dispute.<sup>198</sup>

Thus, the law has not a common approach towards something that protects and, therefore, the legal system appears to be inconsistent. Furthermore, there is a wide range of age limits within different jurisdictions when children are in conflict with the law. For example, while in Switzerland a child can be criminally held accountable at the age of 10<sup>199</sup>, just crossing the border, in Germany, no one younger than 14, at the time an alleged offence was committed, can be held criminally responsible<sup>200</sup>. Hence, the CRC failed to set a common criterion to assess the responsibilities of the child when they are in conflict with the law.

As we have seen so far, the law is protecting children within the family environment; in medical law, exist a lack of empowerment of children's participation; when children are in conflict with the law, the system criminalises them; in refugee law, children are abandoned by the procedures, which tend to avoid listening children's voice; and in humanitarian law, children at the age of 16 can be directly involved in armed conflicts. In a nutshell, we can say that the approach of the law of children's rights

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<sup>196</sup> Criminal Law (Rape) (Amendment) Act 1990 or aggravated sexual assault.

<sup>197</sup> The non-Fatal Offence against The Person's Act 1997.

<sup>198</sup> (Keating, 2015) P. 299.

<sup>199</sup> [Loi fédérale régissant la condition pénale des mineurs, 2003](#), Article 3(1).

<sup>200</sup> Jugendgerichtsgesetz (Juvenile Courts Act), Sections 1 and 3.

is illogic, because, although the principle of best interest of the child has to be respected in all legal proceedings, it appears that the system is friendly but aggressive at the same time.

### **C. Listening what is not visible**

The Committee emphasised that, children in specific vulnerable situations, such as belonging to a minority group, as a migrant or being deprived of his or her liberty, does not mean that they must be deprived of their right to be heard, and the weight given to the child's views shall not be reduced. Furthermore, it encourages States parties to undertake special or further measures in order to guarantee the equal rights when children are in such situations. An individual assessment of every child shall be undertaken in order to determine which role must take the child in the decision-making process, (ensure the full participation of the child taking into account its particularities) in the assessment of their best interest<sup>201</sup>.

Indeed, children who are mostly at risk to have their human rights violated are the ones who usually suffer from multiple vulnerabilities, and precisely the ones who have not access to information about remedies for such violations<sup>202</sup>.

Furthermore, it is worth to underline that the best interest of the child in specific vulnerable situation does not mean that every child in same situation has the same needs. Hence, the Committee notes that the authorities need to bear in mind different kind of vulnerabilities even within the same vulnerable group, 'each child is unique and each situation must be assessed according to the child's uniqueness'<sup>203</sup>.

When implementing the CRC, States parties enjoy certain degree of discretion that might turn to a discriminatory behaviour towards vulnerable children. Too often, children are being silenced by the society, by the family or by public authorities. Hence, it is when children speak up, that many issues come up such as sexual abuses, or violence in institutions, churches, school, or detention centres. If the interests of child are not highlighted, they tend to be overlooked and consequently, in situations of voiceless children, it is difficult to realise which are the interests of the child<sup>204</sup>.

Thus, it appears that when children suffer from more vulnerabilities, the less listened they become. There are no legal mechanisms to address such situations, nor legal tools which can identify such

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<sup>201</sup> Committee on the Rights of the Child. General Comment n°.14. Para-54.

<sup>202</sup> (Parkes, 2013) P95.

<sup>203</sup> Committee on the Rights of the Child. General Comment n°.14. Para. 76.

<sup>204</sup> (Council of Europe, 2016) P. 16.

vulnerabilities and, hence, that can put children at risk, not giving the protection they deserve. For that reason, is of paramount importance to set mechanisms available for children to speak up and, at the same time, train professionals which can identify such vulnerabilities, and tackle them on time.

Taking as example children deprived of liberty, appears that the law does not protect them, indeed, the law protects the society from them. Juveniles which are deprived of liberty, suffer from a high vulnerability and, although the Havana rules recognises them as a special vulnerable group, States parties does not pay special attention or does not take enough efforts to protect them<sup>205</sup>. Moreover, as Goldson and Kilkelly point out, children which are deprived of liberty are usually coming from the poor, the most disadvantage parts of the society, structurally vulnerable section, and thus, increase their discrimination while increase their vulnerability<sup>206</sup>. Thus, taking into account that most of the young offenders come from the poor living conditions, juvenile offenders should be primarily regarded as victims in criminal cases. Nevertheless, States are keener to ‘protect society’ rather than protect children in these particular situations<sup>207</sup>. Bentley asserts arguing that, children deprived of liberty, are no longer treated as children, and that the provisions enshrined in the CRC should be implemented primarily to protect such children with difficult circumstances<sup>208</sup>. Once again, the approach of the rights of the child regarding children vulnerabilities, makes the system being illogic for human dignity. The law protects the child as a vulnerable minority but at the same time as an enemy of the system who is responsible of committing crimes. When children face criminal prosecutions, usually it increases thier vulnerability, and the law does not know how to tackle such situation. Criminal justice, hence, does not know how to handle the situation when children commit an offense, because the system tend to increase children’s vulnerability when they are in conflict with the law. The criminal justice should take into account that child belongs to minority, and should protect them as such. Nonetheless, the lack of measures to approach children’s vulnerability within the legal systems, usually become to an unfair discrimination towards children.

#### **D. The gap between the legal rhetoric and the reality**

The approach of the law towards the rights of the child, as we have seen so far, seems to be inconsistent and contradictory. The Preamble of the CRC highlights the recognition from States parties, that every child ‘should grow up in a family environment, in an atmosphere of happiness, love and understanding’. Moreover, although the efforts made by the Committee to guide States

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<sup>205</sup> Havana Rules. Rule 2.

<sup>206</sup> (Goldson and Kilkelly, 2013)

<sup>207</sup> (Anne Bentley, 2005) P. 114

<sup>208</sup> (Anne Bentley, 2005) P. 115

parties to achieve a child friendly justice, appears that narratives of children's best interest without a realistic approach of the worldwide situation, will not result in a successful implementation of the CRC.

Hence, the consistency of the law is weak when it comes to regulate different situations of children's rights such as when children are in a particular vulnerable situation. Furthermore, the provisions given by the CRC seem not to be enough to deal with the real problems which children are facing day after day. The actual statistics show that more than 700 million woman alive today, were married before the age of eighteen; at least 200 million girls and woman alive today, have been their genitals mutilated; around 6 in 10 children between the ages of 2 and 14 worldwide are subjected to physical punishment by their caregivers on a regular basis<sup>209</sup>; around 150 million children are forced to work; about 120 million girls suffered for sexual violence; an estimated amount of 300.000 child's joined armed forces (mainly armed groups); millions of children are deprived of liberty with serious violations of Human Rights; and one child dies every two minutes due to diseases caused by poor water and sanitation<sup>210</sup>.

In this scenario, the protection given by the international standards is not enough. Regulation of specific situations, with specific mechanisms to approach multiple vulnerabilities, should be set and assessed in a case by case basis. At the same time, in order to fully protect the child, public policies should also be implemented regarding the prevention of children vulnerability. Finally, the Convention should become not only the most widely ratified Human Rights treaty, but also the most widely respected. Their provisions should be respected in all of its extension, and respect for other rights such as the right to health, the right to water, the right to education or to social security should be guaranteed for every single child.

Thus, a legal system which protect and empower the uniqueness of the child, would gain more consistency and determination. Unfortunately, in many situations, the system forgets that children belong to a vulnerable minority and, instead of protecting them as such, increase its vulnerability until making them, too often, invisible and silent.

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<sup>209</sup> <https://data.unicef.org/topic/child-protection/>

<sup>210</sup> <http://www.wateraid.org/what-we-do/the-crisis/statistics>



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