Tell me! The right of the child to information
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Chapter 4

Evolution of the Rights of the Child in international law

In their own narratives, the previous chapters have pointed to the importance of information in the developmental process of human beings. Growing as authentic human beings is the core of human life. In the case of children, we speak of 'growing up', unconsciously referring not only to physical size but also to spiritual height, an upward movement. The information processes involved, affecting the development of a child's personality and his social participation, take place in the private sphere of parents and siblings, the informal encounters in the street and in clubs, and in the public sphere of school education, administration and mass media.

When information plays such a crucial role in a child's life, it is important that all children have access to information and can benefit from such information processes, regardless of the place and time in which they live. The main question is therefore whether children are legally protected while they grow up, seek information and develop as human beings. As this question regards all children, an international approach is useful. After an introduction on children's rights and international law, the focus of this chapter will be on the evolution of children's rights and the Convention on the Rights of the Child as a result of that development. In this way, a broad context is prepared in which the child's right to information finds its place.

Children's rights

Children's rights belong to the family of human rights and correspond partly to these rights. In order to give a brief survey of the emergence of children's rights, attention is first drawn to the development of human rights as such, and then to the very concept of children's rights. This concept is related to the evolving image of childhood, the notion of children as legal subjects and the various approaches to children's rights.

Development of human rights

The concept of human rights is very much related to history and human civilisation and as such is subject to evolution and change. The first examples of human rights formulations date back to the Enlightenment, but their roots can be traced in much older texts which contain principles of law, for example the principle of equality in the Old Testament, and other documents of the great traditions, as mentioned in Chapter 1. Generally, the concept of human rights is considered as having begun its development in the Greek antiquity. The discovery of patterns or order in nature led to the assumption that human life was also subject to a natural order. These un-
changeable laws were based on human reason. The concept of natural law which derived from this natural order led to the conviction that human beings are equal by nature. The Stoics took up this notion and elaborated the idea of universal brotherhood. They, in turn, influenced the Roman philosophy on state and law. Although equality was accepted as a philosophy of law which would form the basis of human rights to be developed in later ages, the reality in the Greek and Roman world was different, as slavery existed and was accepted.

A further contribution to the development of human rights can be found, some ages later, in the works of Church Fathers who developed the doctrine of law which was different from worldly laws and ranked higher. In this meta-physical approach to law, the individual was hardly visible, but the Christian concepts of God as a father taking care of all of his children and the eternal destination of every human being were fundamental to the recognition of the human dignity of every human being. In the Middle Ages, another notion also developed, namely that worldly power depended on the approval of those who were governed by this power, who could resist tyranny, and claim certain rights and freedoms. The Magna Charta of 1215 was an early attempt to create privileges for certain groups in order to liberate themselves from the all-powerful sovereign.1

Szabó points to various approaches of human rights and their historical foundations. He considers freedom and equality as central characteristics of human rights, and stresses the importance of social and economic conditions in society which have called forth the concept of human rights. According to him, freedom and equality have to do with economic circumstances and envisaged free ownership and later free enterprise, and equal access to ownership, which means the possibility to acquire property. Human rights therefore, attacked the feudal system. Whereas freedom was considered as an absolute right, equality was a political right. This division continues in the notions of rights attached to man as a human being, and rights attached to him as a citizen. Szabó states that the former refers to a situation of man prior to society, possessing natural rights. The notion of citizen refers to the existence of the state, and the citizen being subject to the state’s authority. He therefore needs certain rights to protect him from the state, which are positive rights.2

In another approach, human rights are based on a further development in political philosophy. In the seventeenth and eighteenth century, the philosophical method of departing from a state of nature in order to find the origins and purpose of social structures and law, led to the recognition of freedom and equality as fundamental principles for a social community and to the concept of a social contract as the expression of the common will of free people to establish a common legitimised authority. ‘Men being ... by Nature, all free, equal and independent, no one can be put out of his Estate, and subjected to the Political Power of another, without his own Consent.’3 This recognition of the human person, the individual, developed under

the influence of John Locke's philosophy which acknowledged that a human being has certain fundamental and inalienable rights which must be guaranteed by the government and can be exercised against the government.

The concept of human rights was developed during various revolutionary periods, all striving for more freedom for, admittedly, certain individuals and less influence and power for the sovereign, the elites and the state government. The spirit of Enlightenment depicts a human being as rational and autonomous, who should be guaranteed his freedom to think for himself, to speak and express himself on various matters, etc. Early examples of 'Declarations of Rights' are found in the eighteenth century: The United States' Declaration of Independence in 1776 and its Bill of Rights of 1791, and the French Déclaration des Droits de l'Homme et du Citoyen in 1789, following the French Revolution. The transition of theories of natural rights – a man has certain rights simply because he is human – required several centuries to become universally recognised, taken up in national constitutions and become part of binding international law.

The first human rights focused on civic and political life. Civil rights or liberties seek to secure the freedom, the security and the physical and spiritual integrity of the human person. The state should refrain from intervening in the private life of the citizens and thereby respect their civil rights or liberties. Political rights place the human being not in opposition to the state, but instead consider him as a member of society exercising a number of rights: the freedom of assembly; the freedom of the press; and, the freedom of thought and religion.

The emergence of industrialisation and its effects on political and social life made it evident that civil and political rights were not enough to establish a human community with equal chances and circumstances, as Karl Marx pointed out, laying the basis for a social philosophy of law. Social life in the nineteenth century became more complicated by the effects of the Industrial Revolution. Large groups of the population lived in desperately poor circumstances, at the complete disposal of the owners of the factories and industries. Some groups of people were put in marginal positions with few possibilities of ameliorating their situations. New movements were organised which demanded that the state take on a new role in order to support the social and cultural well-being of all citizens. The evolving group of social, economic and cultural rights includes the right to health care, social provisions, education and participation in culture.

The twentieth century showed an increase not only in formulations of human rights, but also in the weight attached to them. They should protect a human being as a dignified being, even in times of economic crisis, conflict or war. Fundamental rights are regarded as inviolable. States may not derogate from these rights even during a war or national emergency. These rights include the freedom from torture, the freedom from slavery and the freedom from ex post facto laws.

Although the main purpose of human rights was to protect the individual against the state, the maintenance of a human rights standard has become a matter of inter-

national concern. The inter-dependency in world politics and economy, the increasing traffic between countries and the universal desire to establish stability and peacefulness are the main reasons. This global concern was explicitly recognised after the Second World War, in the creation of the United Nations Charter, its Universal Declaration and subsequent human rights treaties. The latest developments concern not so much individuals but the communities to which they belong: the rights of minority groups and indigenous peoples. Another group of rights is discerned as solidarity rights, which include the right to peace; the right to development; the right to a sound environment; the right to partake in the common heritage of mankind; the right to communicate; and, the right to humanitarian assistance. The actual status of these rights is questioned. Another type of human rights is formulated as rights of the individual, but is concerned with social groups which have been marginalised: women, handicapped people, and children. The common denominator is an elaboration of the principle of equality and non-discrimination, which has a universal basis.

Universality of human rights

Universality of human rights has two meanings: it means that human rights apply to every human being; and, that human rights are applied everywhere, internationally, globally. In the early years of human rights, those rights were not applicable to all human beings. Certain classes of men, and women in general were excluded from several rights. The latter’s right to vote was an issue of intense struggle at the turn of the twentieth century and was finally settled in the twenties when women’s suffrage was accepted. Differences in voting rights have gradually disappeared, but children have no voting rights at all. Franklin has pleaded for strengthening of children’s political rights as he has noted that children are excluded from many areas of decision making, but that their exclusion from the right to vote is especially significant since what is being denied is not merely citizen rights but the right to be a citizen. Should the conclusion be drawn that children are an exception to the universal applicability of human rights?

In describing the roots of human rights, Scheltens notes that even the Universal Declaration was still lacking universal thought, and that it took some decades for the idea of human rights to acquire width and depth, and penetrate all layers of people’s consciousness to the extent that human rights apply to all human beings without exception. This means that there is universal understanding that ‘when we allow each other the highest possible freedom and want to form a community, which creates precisely the possibility thereto, then the basis which unites us all as citizens of one community, has to be acknowledged and valued consciously. That basis can be nothing else than respect for the human being as such. Without that basis, a society or a real human community is excluded.’ The UN Declaration emphasises as a final basis for all law and justice, the inherent human dignity and the inalienable rights which every human being possesses by nature. This dignity of a hu-


man being concerns his very being, and imposes an unconditional requirement on the whole mankind, both individuals and the state. ‘Every human being imposes, by his mere existence – his human being-ness – a law upon the whole of humanity; he is so to speak by his very being a universal legislator, even he is not so by his own decision.’ Respect for others, and the unassailability of a human being is the very heart of ethics. Without this basis, the difference between good and evil, justice and injustice loses its meaning. Respect for the dignity of others supposes a higher norm which governs the relationship with others. Human rights derived their force from this higher, non-instrumental norm, and have their own moral motivation which should not be encapsulated in a definitive form but instead maintain the flexibility to appear at actual moments. Scheltens draws a further conclusion from the universality of human rights, which according to him have too long been considered from a Western point of view and been reserved for the population in the Western hemisphere. True recognition of human rights requires not only a well-formulated theoretical acknowledgement but also, at the very least, such a declaration must guard against contradictory actions. When rights and the law must limit the freedom of some in order to ensure a similar freedom for others, this definition should also be applied to the social and economic situation in the world and the North-South relationship. ‘Should we not admit that we live in a situation of injustice, which we voluntarily maintain, as long as we resist a more just economic order?’ Such unjust situations can also easily be discerned with respect to children.

In the Universal Declaration, no mention is made of any reference to religion, which is in accordance with the secularisation of politics and society in general, although outside of the Western world state-neutrality is less present. The universality of human rights has been proclaimed by some and at the same time doubted by other authors. During several UN draft processes of the last decade, moslem-countries especially have criticised the supposed universal character of the human rights. They referred to the dominance of Western, Christian-capitalistic values, which do not correspond with other values systems like those in Islamic countries. In reply to Eisenstadt a different comment is given by an Asian scholar, Coomaraswamy, who does not accept the premise ‘that the human rights idea is Western. The legal and

political institutions may be, but the idea has been articulated in Asian societies long before – one needs only to look at the edicts of King Asokā.12 As has been indicated in Chapter 1, a thorough study of the values which are basic to all great traditions may reveal that the original roots have more in common than nowadays is visible to the modern eye as a result of the evitable crystallisation of organisations.

In discussions on universality, several aspects have been discerned: exclusiveness versus inclusiveness; and, universal values and universality versus uniformity. The first aspect regards the gradual inclusion of the population of the whole world, as a consequence of the first and strongest statement in the Universal Declaration:

Article 1
All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

This article has been invoked by various groups, including children, to justify recognition of their rights on the basis of equality. The emergence of the rights of indigenous people is an indication that they do not yet feel represented in the international community. Van Boven recommends greater consideration of the opinions – one could also say stories – of the victims and persecuted instead of the rhetoric of political and religious leaders. With regard to the last aspect, he points out that universality cannot be equated to uniformity. Plurality and differentiation can merely support the universality of human rights.13 In the same sense, Baehr concludes: ‘Whatever the cultural differences may be, universal acceptance of the international standards of human rights is not excluded. The main reason is that most governments appreciate to be regarded as civilised and respectable. (...) Universality of human rights norms exists, or at least there is a tendency in that direction. It is surely possible. Whether it is necessary is answered positively by this author. Human rights are necessary for an existence worthy of a human being. In that true sense of the word they are a must.’14 From this development of human rights and their universal applicability, the next step may be taken towards the development of children’s rights.

Concept of children’s rights
The concept that children have rights is of relatively recent origin. The idea that a child needs special protection and provisions was recognised earlier than the fact that he is entitled as a right to protection and provisions. The recognition that apart from these special needs, a child has the same rights as every other human being is a further step, the consequences of which are not yet fully taken into account in many fields of family and social life.

Two historical sources can be discerned underlying the concept of children’s rights. The result of the evolution of childhood is the first source; the other source is the concept of the child as a legal person entitled to the protection of law. The image of the child in the legal context has undergone a change from merely being a legal object to a legal subject.\(^\text{15}\) As a legal object, the child is the object of concern and measures, in the relationship between parents and the state, for instance in the case of parental care and health. The child is the object of certain obligations which others have to fulfil. His rights are subsumed in the rights and obligations of others. As a legal subject, the child is considered as a partner or a party in these relationships, having rights of his own. His rights are clearly discerned from the rights of others, and have not necessarily to be exercised by others as representatives.

**Concept of childhood**

As the idea of human rights is related to an ideal concept of man, the question of whether children have human rights is also related to the concept of childhood and the notion of a child. Freeman points to the underlying mechanism: ‘The question “What is a child?” is one answered by adults. Adults impose their conceptions of childishness on beings they consider to be children. There have been different conceptions of the nature of childhood at different periods of history. Childhood is a social construct, a man-made phenomenon.’\(^\text{16}\) The constructive character of child and childhood is also reflected in the language used to denote the various stages of childhood and human development. The Latin word *puer* denoted both ‘child’ and ‘slave’. Moreover, slaves remained their whole life more or less in the category of children. In a French study, the changes in the meaning of various Latin words and their French equivalents, reveal the radical change in the concept of childhood. ‘*L’infans* (qui ne sait pas parler) devient *l’enfant* (qui n’a pas le droit à la parole); transformation opérée probablement dans les premiers siècles de notre ère. *L’adolescens* (qui a grandi) devient *l’adolescent* (qui est en train de grandir), l’inversion de sens s’est opérée au cours du Moyen Âge. *Le juvenis* (qui est dans la maturité physique) devient le jeune (qui est dans l’immaturité psychologique); transformation opérée vers le XVIe-XVIIIe siècles. *L’adultus* (qui est parvenu à l’adolescence) devient l’adulte (qui est sorti de l’adolescence): inversion opérée aux XIXe et XXe siècles.’ This analysis of the changes in terminology have led to the conclusion that the concepts of adolescence and youth have been devalued.\(^\text{17}\)

This rather revealing concept only started being studied to a broader extent in the second half of this century, and even then it was limited to one culture or country in the Western hemisphere. As a result, a cross-cultural study of childhood throughout the ages seems to be still lacking. One of the reasons could be that children have long been – and still are – an invisible force in history. There are few references to children

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in historical records: ‘Crowds and crowds of little children are missing from the written record... There is something mysterious about the silence of all these multitudes of babes in arms, toddlers and adolescents in the statements men made at the time about there own experience... It is in fact an effort of mind to remember all the time that children were always present in such numbers in the traditional world, nearly half the whole community living in a condition of semi-obliteratiuon.’18 This experiment of the mind, proposed by Laslett, should also be carried out today, as children are still invisible in the big world of adults. Many statistics only collect material from persons from age 12 and older, leaving out a part of the population. In politics and in urban planning, children are neither seen nor heard, they form in many aspects a quantité négliée, although they are not a quantité négligeable of the population.

Although no generalisation of childhood can be made, DeMause begins his study by noting: ‘The history of childhood is a nightmare from which we have only recently begun to awaken. The further back in history one goes, the lower the level of child care, and the more likely children are to be killed, abandoned, beaten, terrorized, and sexually abused.’19 These, in our eyes, barbaric practices towards children, which were pervasive in all social classes throughout history, did not evoke public protest until the end of the eighteenth century. In spite of these protests, practices of ill-treatment, abuse, exploitation and neglect still continue today in all countries of the world, as UN-reports show.20

In general, children have been silenced in history because they have an insignificant position in social life. At the bottom of the social scale, they have been treated like slaves, serving others, worked to death and exploited by others as a cheap and dispensable labour force.21 During periods of high mortality rates, such attitudes were even more common.

It has been argued by some scientists that people have not always recognised the specific nature of children, or childhood as a separate stage of life, but that this concept has undergone dramatic change in certain periods. In the period from the Middle-Ages until the mid eighteenth century childhood was rather short. As soon as children were physically able they were put to work, at about the age of six or seven. Parents and adults took care of the very young children, and were aware of their helplessness and need for care, as is reflected in the songs and rhymes which date from this period. Nevertheless, as life was hard and short, due to war, famine, diseases, persecution and other disasters, children had to be prepared for the hardships of life as soon as possible. They had to do hard work at home or in the service of oth-

21. Children have been called ‘the last slaves’ pinpointing the fact that although slavery is generally regarded as below human dignity, children still have to bear slave-like conditions of life, not only physically but also psychologically. See for example: Bergström, M., Barnet, den sista slaven, Brain Books, Jönköping, 1992.
ers. Boys started to learn a craft in their father’s workshops, where they lived with adults, who expected real achievement and did not adapt their own behaviour or communication to the younger pupils. After some years the boy was sent to a new teacher, joined his household, and became co-responsible for production and services. A pupil could wander as a journeyman from teacher to teacher, until he could be called a master himself. Although this education was hard with long and intensive working hours, it was an integrated education, and the values of craftsmanship and human life were learned as in a school of life based on experienced stories. Benjamin notes: ‘Die reale Erstreckung des Reiches der Erzählungen in seiner ganzen historischen Breite ist nicht ohne die innigste Durchdringung dieser beiden archaischen Typen denkbar. Eine solche Durchdringung hat besonders das Mittelalter in seiner Handswerksfassung zustande gebracht. Der seßhafte Meister und die wanderden Burschen werkten in den gleichen Stuben zusammen; und jeder Meister war Wanderbursche gewesen, bevor er in seiner Heimat oder in der Fremde sich niederließ. Wenn Bauern und Seeleute Altmeister des Erzählens gewesen sind, so war der Handwerkstand seine hohe Schule. In ihm verband sich die Kunde von der Ferne, wie der Vielgewanderte sie nach Hause bringt, mit der Kunde aus der Vergangenheit, wie sie am liebsten dem Seßhaften sich anvertraut.’

This type of education as a way of life has continued into these days in the institute of ‘compagnonnage’, which supports the ‘compagnons’ who are active in all forms of creative craftsmanship, based on the ethics of the ‘good work’. Profession is experienced as an art of life.

Forms of exploitation, especially in the book printer profession, were common. Girls also had to work hard, running the household; fetching water and wood; cleaning, spinning and making clothes; taking care of the ill; and, tending to the animals. The situation was not very different for the children of the higher classes. Although they did not have to do manual labour, because neither did their parents, they were quickly introduced to adult life, learning to fish and to hunt. They were also sent to be educated and to serve in another household of the nobility. Introduction to adult life without hardly any distinction meant that children were quickly confronted with the-realistics and characteristics of life such as illness and death. They also watched public executions and were not excluded from the sexual lives of adults. In general, young and old lived together and the emergence of shame for the feelings of others, the taste for refinement and self-control, resulting in more rules of etiquette, including the use of a fork, handkerchiefs, and night-dress and the separation of sleeping rooms to name but a few new habits, was developed by the bourgeoisie and reached the lower classes much later.

Therefore, lower class children had to become adults long before their upper and middle class counterparts. Dasberg characterises children in this whole period as pocket-sized adults, because

23. Ichter, F., Les Compagnons ou l’amour de la belle ouvrière, Gallimard, Paris, 1995. It is from the wandering pupils that the ‘Tour de France’ has been derived.
children had to meet the same demands as adults, wore the same clothes, and had their own responsibilities. Even the early school books had subjects taken from adult life.\textsuperscript{25} Gradually, schools changed from places of technical instruction to separate institutions of general education for children only, in the beginning mostly boys of middle and higher classes. Training and discipline should better the child, who was considered as 'bad' by the Moralists in the sixteenth and seventeenth century.

The clear awareness that a child was a human being with a specific nature, which was more vulnerable and dependent, first emerged during the seventeenth\textsuperscript{26} or eighteenth\textsuperscript{27} century in Western European countries. The period of Enlightenment and Romanticism increased the separate attention which was paid to children, however with different approaches, demonstrated by the writings of John Locke\textsuperscript{28} and Jean Jacques Rousseau, the latter wishing to prolong the period of childhood as long as possible.\textsuperscript{29} Both, however, stress the importance of reason in the educational process. The idea was that a human being could learn to avoid mistakes and create his own happiness. The training of the child changed into education, which is based on two different concepts of human-beingness: the concept of the child as a being which still had to be educated; and, the concept of the adult who has his fixed role in society and is aware of his place in the world.\textsuperscript{30} From this perception, it may be clear that the child is a cultural invention – and, one could add, likewise is the study of the child.\textsuperscript{31}

Focusing on adult-child relationships is an approach to study the concept of childhood, as has been undertaken by DeMause. He takes the various modes in the adult-child relationship to indicate the subsequent periods of its development. When an adult is face to face with a child who needs something, he can react in three major ways. His reaction is projective when he uses the child as a vehicle for projection of the contents of his own unconscious. There is a reversal reaction when he uses the child as a substitute for an adult figure important in his own childhood, for example his own father or mother. He can also react empathically when he empathises with the child's needs and acts to satisfy them. Projective and reversal reactions, which often occur simultaneously in parents in the past, and produced a 'double image' of the child, as being both bad and loving. Such contradictory attitudes of adults towards children still remain today, resulting in difficult family situations, and may be part of the cause of child abuse and schizophrenia.\textsuperscript{32}

\textsuperscript{25} Dasberg, L., Groothrengen doar kleinouden als historisch verschijnsel, Boom, Meppel, 1981, especially p. 28-45.
\textsuperscript{29} Rousseau, J-J., Émilie ou de l'éducation, Garnier, Paris, 1762.
Yet, 'it is, of course, not the love which the parent of the past lacked, but rather the emotional maturity needed to see the child as a person separate from himself. It is difficult to estimate what proportion of today's parents achieve with any consistency the empathic level. As the child was seen full of dangerous adult projections, as a devil, ghost, or punitive figure, the child was often restrained, including swaddling, nursing outside the home, or abandonment. Battering or whipping were other methods to discipline the child.

In describing the concept of childhood, an evolution or several periods of parent-child relations can be discerned. One has to bear in mind, however, that this is based only on the study of childhood in Western countries in the more prosperous families. There are different rates in different family lines, and also differences in class and area, whereby parents can get 'stuck' in an earlier historical mode.

The infanticidal mode characterises the first period from antiquity to the fourth century, in which the parental anxieties about taking care of children were 'solved' by killing them. The tragedy of Medea can be seen as a mythical reflection of this reality. Both projective and reversal reactions of parents of the children who were allowed to grow up were widespread. Until the thirteenth century, the idea that children had a soul evolved and caused new anxieties for parents, who in trying to escape their projections abandoned their children, sent them to monasteries or nunneries, or to other families as servants or as foster children. The projection of the devil in the child urged the parents to beat children, but their reversal reaction, using the child as their father or mother diminished. The third period showed ambivalence in the parents' mode of reaction. The child was allowed to enter the emotional life of parents, but had to be moulded, because he was still considered to be a container for dangerous projections. Manuals for child instruction and art showing 'close-mother' image, reflected the new mode, which lasted until about the eighteenth century.

The intrusive mode expressed in the parent-child relationship marked the definitive transition in which the child was no longer so full of dangerous projections, and was less less threatening; and, therefore could be met empathically. Nevertheless, parents made attempts to control his mind and behaviour, punishing and threatening him when he did not obey.

From the nineteenth to the mid-twentieth the parents' approach was less obsessed by conquering the will of the child, but by training and guiding him to behave properly. In this socialisation process, the father also plays a role.

The helping mode which developed after the Second World War involves both parents in the child's life. The child is supposed to know better than parents what he needs and parents have to devote a lot of time and energy to raising their children. There is no attempt to discipline or to form habits. Children are neither struck nor scolded. Parents are involved in playing, serving, providing objects of interest, discussing, tolerating and interpreting emotional conflicts. They apologise for their own stress. Few parents have yet consistently attempted this kind of child care.

34. Idem, p. 51-54. The enumerated types of reactions can also be seen as archetypes, which form part of the unconscious heritage in each parent-child interaction.
Dasberg reflects on the dramatic changes in the culturally defined relationship between parents and children, as some researchers think that life programmes break down more quickly than humankind is able to produce new ones, and wonders: ‘But how then shall we pass on to children the experience of earlier generations? How do we present a living picture of ourselves as bearers of a culture which expresses, evaluates and gives meaning to our collective way of life? What do we do to hand on a set of values corresponding to what we wanted, and, in particular, a critical judgement of where we fell short?\textsuperscript{35}

The research on the history of childhood seems to be a battleground for various disciplines, whose researchers also have been reproached for having an adult-centred attitude. The attempts to set up distinctive lines in history and mark where childhood as a concept began have been criticised for the material and research methods used for these propositions.\textsuperscript{36} Much seems to depend on the material used: paintings, diaries or historical records. Another point is the criticised linear concept of history, used by Ariès, and the value-judgements attached to it by DeMause, who speaks of gradual improvement. It might also be that change is stressed too much, and continuity has been overlooked. Even if childhood was perceived as a distinct stage of life, as early as in the Middle Ages, the question remains how well this worked in all social classes for children as human beings. The concept of childhood remains a relative one, depending on local culture, geographic area, social and economic conditions; and, changing over time.

Dasberg draws a far-reaching conclusion from the change of economic and social circumstances which evolved from the increasing power of the bourgeoisie. According to her, four steps or periods can be discerned, in which a separate sphere for children, called youth-land has been created and finds its rise, blossom and decay. Beginning in the eighteenth century, children gradually no longer had to do heavy work – a development which took 150 years to also apply to the lower classes. They no longer had to be adults, and subsequently children were excluded from adult life. They could be free to play, to learn and to explore, as Rousseau envisaged. A further step is the period in which children no longer wish to be adults. They create their own sphere and oppose fixed patterns of life, being together in their own youth organisations. The last stage appears after the Second World War when children can no longer be adults. This could be the end of this (hi)story. ‘For, if the generation which is now growing up, would prove to be unable to become adult, then no adulthood will be achieved and hence, no longer a separate “youth-land” would exist, but only one uniform, infantilised civilisation.’\textsuperscript{37} Examples of the similarities between children and adults can easily be seen in the style of dressing, playing games and literacy through television. Postman has described his fear of the latter development as the disappearance of childhood.\textsuperscript{38} Others have pointed to the increasing public involvement with the child, both political and commercial, in a situation where the isolated family finds

\textsuperscript{35} Liljestrom, R., Children and culture, Council of Europe, Strasbourg, 1980, p. 3.
\textsuperscript{36} Veerman, Ph., The Rights of the Child and the Changing Image of Childhood, Nijhoff, Dordrecht, 1992, p. 3-10.
it difficult to create a more stimulating environment for the child, if not local initiatives are transformed into local public services.39

In the European context, studies have been made on the present concept of childhood in various countries.40 The results of this large-scale project, Childhood as a Social Phenomenon, show that research on the complexities of child-being, which takes a different approach than the psychological and pedagogical studies, often have taken the adult world as the point of reference, with respect to the question of how the child develops into a responsible human being, and how children can be integrated in our world. The world and the behaviour of adults are thereby not questioned. The interest in children is mostly anticipatory, as they will be the next generation of adults.

Consideration of the child-being as a social group, as a minority group, provides a different perspective. There are other activities in childhood which have intrinsic and authentic value than just playing. Childhood is considered as part of society, in the sense that children effectively participate in organised activities. Childhood is part of the social structure which operates in inter-actions with other parts of the system. An attempt has been made to identify the social forces and factors which create and reconstruct childhood as a social category. The legal system, as the epitome of the adult society's view on children, still shows paradoxes. On the one hand childhood is considered as a category while, on the other hand, children have their individual status as not-yet adult in common. Individual children are treated equally under the law, but at the expense of their individuality.

Another paradox is that children are treated as beings with child-specific abilities and needs which require particular attention and special treatment from society, and in this way they are protected from the adult world. On the other hand, society is ruled by principles which do not care about children. Therefore, they are at the same time excluded from adult life and marginalised because they are disturbing. Marginalisation is often legitimised on paternalistic grounds. In a world which is dominated by the interests of adults, who also have the power to define, children are considered to become autonomous, not to be autonomous.

Descriptions of childhood should take into account the intrinsic value of children themselves and not be measured against standards of adulthood. There seems to still be a long way to go, as the nature of the image of childhood in social science itself contributes to the image of childhood and the way it is looked upon in modern society. It has proven difficult to research the activities and leisure time of children themselves as phenomena with their own intrinsic value. There is no coherent image of childhood from the point of the activities and well-being of children.41

Children as legal subjects

As the social status of children has risen in many countries, a change in the legal status of children became possible. Prior to the nineteenth century’s acknowledgement of a child as a human being worthy of concern with regard to his physical and psychical well-being, children were treated as property and could be sold, abandoned and abused without legal reaction in the form of punishment or otherwise. In many legal systems, the child was not a legal person by himself but considered as paternal property. The father as head of the family had unlimited power over his children regardless of age. In the Roman tradition this power was called *patria potestas*. The mother as a woman had no rights to the custody of minors, the administration of minors’ property or decisions in matrimonial life. This powerless legal position for both mother and child has only recently undergone substantive change. This process started when industrialisation caused the massive exploitation of children, risking their health and lives in poor circumstances. Social legislation introduced firstly child labour laws in the nineteenth century and secondly, compulsory education at the beginning of the twentieth century. Such educational opportunities provided by the state made state intervention in the family possible: children became a subject of public responsibility.42

At the turn of the twentieth century, the care of children became a societal responsibility, leading to many regulations and provisions by the state, for example interference in the case of parental abuse, prohibition of work and obligatory education, and insistence on vaccination. Children could no longer be considered as parents’ property and subjected to arbitrary treatment. Apart from penal law, other provisions were made to restrict parental power. The underlying motives were the state’s need for social control of families and the youth. Special treatment of children also led to a separate penal law which focused on the pedagogical measures ‘in the best interests of the child’ at the cost of legal safeguards based on due process of law. A minimum age for application of the penal law was abandoned in the Child Penal Law of 1901 in the Netherlands.

The principle of best interests of the child gave immeasurable power to both the state and non-governmental organisations with respect to the care of children, thereby neglecting the rights and views of both the child himself and his parents. Nowadays, the principle can no longer be considered as a reasonable and acceptable criterion as it depends on subjective interpretation, is open to whim, and cannot be understood by the child and his parents. Broad legal grounds for interference leaves less legal protection of the child.

Much is also left to experts, who are even more untouchable than the charity organisations. In the sixties and seventies, doubts arose about the possibilities of treatment outside the family and the desirability of state interference, and on treatment of the child without involving the child himself. Therefore, alternative care and treatment were organised, stressing the participation of children themselves. In

42 In fact the Minimum Age (Industry) Convention adopted by the International Labour Conference in 1919 can be regarded as the first international instrument protecting children.
the same way, the necessity of protection is discussed in the field of sexuality and morals.

Another measure taken by the state under the influence of a changing concept of childhood was the establishment of legal procedures adapted to children, especially in the field of penal law and civil law, resulting in the creation of a juvenile judge or juvenile courts. In a sketch of the development of juvenile justice in the Netherlands, Hudig points to the fact that the first juvenile courts were based on the principle of *parens patriae*. The state has to interfere when children need help; and, a child who commits a crime has to be protected and helped, not punished. The juvenile court adopted a treatment model, that even questioned whether a jurist or a pedagogue should be appointed. Hudig favours the strength of the juvenile judge as far-reaching decisions have to be weighed in a judicial setting for the sake of justice. The power of child-saving and protecting organisations has to be balanced as she notes 'that individuals grow when they have to bear more responsibility, but institutions generally do not so.'

The mixing of judicial and executive power has only later been discerned and discovered as a serious problem, and led to changes in the position and task of the juvenile judge.

The emergence of women's rights and the increasing equality of women also supported the elevation of the child's social status. Most civil codes changed from being concerned with only marital affairs to also covering the duties of parents, the equality of both parents in these duties and responsibilities for the protection of the child.

Nowadays, most states have legislation which contains sanctions for parental cruelty and neglect, with the possibility of depriving parents of their parental rights. Although this legislation can be appreciated as it reflects the state's concern for children or rather the next generation, which emerged from the changing social circumstances and the image of childhood, from the beginning of this century, recently, doubts have been expressed and criticism made with respect to state interventions in family life.

Freeman concludes: 'We need to base our standards of intervention on a theory which limits interference with child-rearing to cases where this is necessary to protect children or their autonomy. Enabling children to escape from abusive or inadequate parents is only part of the equation. What escape do they have from negligent social workers? Our concern with parental autonomy should be matched by fear about the autonomy of agencies such as the police, the prison service and, in our context, local authority social services departments. We have allowed agencies to develop and expand their own definitions of the proper boundaries of their works and the courts have been reluctant to curtail such autonomy.'

Criticism of state interference is therefore partly based on the sometimes disastrous results of taking children away from their parents and putting them into institutions and also partly on the overload of detailed legislation in the field of family and juvenile law 'which

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exceeds the limits of meaningful and acceptable legislation; such can be regarded as an unjustified state exertion with the family and private life of citizens', as De Langen concludes.46

The social changes of increasing rights for women and regulation of labour conditions have lead to an improvement of the legal status of children. In many legis systems, the position of children born out of wedlock has improved, although not to a sufficient extent.47 Handicapped children and children in institutions have increasing rights and the age of majority has been lowered. However, legal reality usually differs from social reality. The struggle for children’s rights has not yet come to an end.

**Approaches to children’s rights**
From the base slave-like position in early history in which children could only try to survive and were considered as property, children have been gradually accepted as not being miniature adults but as human beings in a specific period of human life, needing care and protection. Due to their innocence and weakness, they were separated from the hard adult life and put on a pedestal. Since they were regarded as a social group which would form the society of the future, 'children were gradually put in a position of not yet being; not yet knowing, not yet being able to; therefore not yet able to express themselves, not yet responsible,... Their master status became one of not-yet-being, their well-being not-yet-well-being. Children ended up in limbo, they were put on hold until...'.48 As Verhellen points out, such a definition puts children in a dependent position, and this situation has even extended over the years in Western countries where children have to follow a longer range of education and schooling and are forced to stay outside the labour market because of lack of experience. Although the educational orientation is still focused on 'preparing children for societal life as adults', there seems to be little space left in the actual world for this superfluous age. One wonders how they can become full-fledged citizens, living in the margin of society or in a vacuum.

The acknowledgement by a growing group of adults that children are human beings and can no longer be treated as objects, but instead should be regarded as subjects, also in a legal sense, has found a response at an international level. As human beings, children are entitled to the same rights as all other human beings. They have human rights, and they do not have to deserve them, they do not need to be given rights.49 Yet, the simple syllogism, “Human beings have human rights; children are human beings; children have human rights”, is often doubted by adults who question the ability of children to think rationally, to decide in their best interests, and particularly to exercise their rights themselves. De Langen puts forward an inquisi-

49. Idem, p. 18.
tory reflection: 'The fact that children are not yet grown up is used as an excuse by parents, social workers, teachers, judges and many other adults to follow their own interpretation of the child's interest and to set demands and make decisions that may have far-reaching consequences for children which no one can foresee. (...) Why are adults, who are in a much stronger position in many respects, so afraid to take children seriously and to grant them a large degree of autonomy?'\(^{50}\)

This debate on children's competence has troubled the generous acknowledgement of children's rights and lead to various opinions on children's rights. Verhellen discerns various motives which have been used to argue both for and against granting human rights to children, including their weak position, apart from psycho-pedagogical, legal, social and moral motives.\(^{51}\)

It might very well be that this discussion on children's (in)competence is just a modern version of earlier beliefs and attitudes towards children, earlier in history. The debate, which has also been scientifically discussed, masks the adult fear of losing control. This control over their children is executed by means of parental rights. However, 'parental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child and towards other children in the family.'\(^{52}\) It is not necessary to oppose parental and child's rights. 'There is no dichotomy of rights, but a shifting balance of power and influence – from the right of control, to the offering of advice – among parents and children, a kinetic relationship which the law recognises.'\(^{53}\)

The other point which parents might fear is that children are less formed by the habits and opinions of others and have a natural curiosity to find out for themselves and express themselves. This practical creativity coupled with continuous questioning causes unease, as it forces parents and adults in general to re-think and re-view their own habits, thoughts and feelings. This latter approach is stimulated by the projects on philosophy for children and has also led to the description and establishment of a child's right to inquiry.\(^{54}\) The presence or absence of willingness of adults to keep an open mind and act accordingly seems to be a decisive factor in the different approaches of children's rights.

Houlgate writes concerning this attitude: 'To make a more radical suggestion, we might (if all else fails) consider requiring parents to obtain certification prior to having children. In order to obtain the certificate a parent must show that he or she has

sufficient knowledge about such crucial matters as early childhood nutritional needs and the symptoms of childhood disease. In this way the state can ensure that no parent can reasonably claim ignorance as an excuse for failing to meet the corresponding basic needs of a child. Although there is little or nothing that such programs can do to create parents who care for and love their children, it might at least impress on them the seriousness with which the state regards the decision to bear children. This might, in turn, give some potential parents pause to rethink their decision, and that, in itself, would represent an advance over the situation that exists at present.55

Three types of opinions or trends regarding children's rights are discerned by Verhellen.56 Reformist opinions accept the arguments of incompetence, but are convinced that children will gradually gain competence, often much earlier than generally expected. Therefore, this underestimation should be counteracted by lowering the age of majority: children should gradually acquire their rights. As a reaction to the development of child care and child protection, new proposals for the position of the child have been prepared. A Dutch commission considered: By specially protecting the child until the age of majority, one underestimates what the young human being holds in himself. By protecting too much and too long, the self-development is not stimulated, at least not enough. By stressing protection, the notion that a minor has rights of his own, which he has to learn to exercise himself, has been lost from sight. The commission chooses becoming independent rather than protection. The safety and security which are achieved by protection, appear, in practice to be a little less safe than the independence one has acquired by doing things oneself.57 This transition from passive protection to active exercise of proper rights is difficult to harmonise with family rights, which explains why compromises are found in the establishment of age limits in order to have a clear-cut majority achieved step by step. The caesura lies at twelve years of age. Below that age the child has no legal capacity. From the age of twelve years on, the child has legal capacity with the written consent of his legal guardian for specific legal acts or for a specific aim. Normal legal acts which are accepted in daily life, like buying a ticket, are not considered. From 16 years on, related to the possible completion of school, a child has full legal capacity, except for legal actions for which the consent of the legal guardian is usually required. A proposal would lower the age of majority from 21 to 18 years old.

Several attempts have been made to take refuge in social science and developmental psychology in order to establish age limits, but as the Dutch Youth Policy Council concludes the social sciences do not allow the drawing of firm conclusions. The Council, nevertheless, proposes to apply age limits, and discerns independent decision making, which comes first, and independent action, which mainly follows a later stage of development.58

58. Jeugd met recht. Een perspectief voor de rechtspositie van minderjarigen, Raad voor het Jeugdbeleid, Ministerie van WVC, Rijswijk, 1988, p. 64.
The radical trend related to children's rights puts equality of all human beings at the forefront and rejects the arguments of incompetence on moral grounds, as no discrimination among human beings is tolerable. Therefore, there is no reason to discriminate against children or to deny them human rights. The right to self-determination is considered as a basic right which also has to be applied in all fields of life: social, political, educational, economical and sexual. Farson also elaborates on the necessary prerequisites, including the right to information and the right to educate oneself. 'For the most part, we don't think much about children's need for information and don't believe that we should make special provisions for them to enter the world. As a result, children are denied information by being denied access to adult life, and in turn are denied access to information by being denied information.'

Holt is another radical thinker, who sees the best strategy for children is to escape from childhood, as he writes: 'The fact of being a 'child', of being wholly subservient and dependent, of being seen by older people as a mixture of expensive nuisance, slave, and super-pet, does most young people more harm than good. I propose instead that the rights, privileges, duties, responsibilities of adult citizens be made available to any young person, of whatever age, who wants to make use of them. These would include among others: The right to equal treatment at the hands of law - i.e. the right, in any situation, to be treated no worse than an adult would be. The right to vote, and take full part in political affairs. The right to be legally responsible for one's life and acts. (...) The right to do, in general, what any adult may legally do.' Holt stresses also the right to financial independence and responsibility and the right to choose one's home environment.

A third approach gives children at least the benefit of the doubt and supposes they have all the civil rights, including the right to exercise these rights autonomously, unless it is proven in practice that children are incompetent to exercise certain rights. Such a pragmatic approach shifts the burden of proof from the child, who had to prove his autonomy to exercise his rights, to the person who wants to deny children certain rights because of supposed incompetence. It makes a whole difference whether self-determination is at the end of children's rights - no rights unless proven competence - or is the point of departure: all rights unless proven incompetence. It is clear that self-determination is favoured by the latter option. De Langen has no doubts about the applicability of human rights to children: 'Because nowhere in the law is it established that freedoms should not be applicable to minors, there is no reason to doubt this principle. One only has to take into account that these freedoms generally find their limits in the rights of others in the current system of the law and in social organisations. Concerning social constitutional rights, which are not very far from protection rights, there is little doubt that they likewise, and perhaps even more so should apply to young people. Beside these protection rights, which have to safeguard the young person from infringements against his existence and especially, his dependent situation, which he has as every other citizen, but the young person because of his de-

pendent position especially, the right to certain minimum conditions of existence.61 The right to self-determination follows subsequently, described as the right to think, speak and if necessary, to decide for oneself.

Although Franklin approaches children's rights as a political issue, which should take advantage of similar liberation movements like women and blacks,62 one can hardly speak of a Children's Rights Movement, as there is such a diversity of opinions and approaches. Pennink concludes that the Children's Rights Movement is a collection of strongly varying thoughts. A general manifest or spokesman for the movement has never existed. The only characteristic the movement has had, is the central theme which can be found in all articles and declarations which have been published in recent years: the recognition of the child as an individual, as a real and active member of society. The various trends within the movement to concretise this recognition of rights leads to differing compositions of welfare rights, protection rights, equality rights and freedoms.63

Apostel has reflected deeply on the ideas and strategies of children's rights, but not reached satisfactory conclusions (even in his own eyes) as he had to confess: 'I consider children to be an endangered species. I have strong misgivings about the way adults, both at home and in institutions treat them. I wish strongly to contribute to their defense, as I feel strongly about the defense of the underdog in general. But I do not know what the best strategies are to reach these aims. One of the most popular strategies that have been used by the 'Child Liberation Movement' is the defense of children's rights, as derived from Human Rights. One of the few results, I have been able to convince myself of is that this strategy can not really be taken seriously (except in a rhetorical sense).64 Apostel's confession should rather than a plain criticism be regarded as an incentive to continue to reflect on the situation of children and to seek methods to ameliorate that situation beyond children's rights.

During the last two centuries, the changing image of childhood has led to attempts to formulate how children should be protected and treated, and what rights they have. Not all rights are always rights in the legal sense that they can be invoked before a court. The first article on this subject, which appeared in 1852, was totally concerned with protection of the child.65 Quite remarkably in the field of children and law, numerous rights have been formulated which will by their nature never be invokable before a court, for example the right to be loved, or the right to be rocked

as an infant. Many rights are formulated as claims, often based on perceived needs of children. As soon as these claims go beyond basic needs, the word ‘right’ becomes suspect and there is reluctance to keep these rights within a legal context, regarding them as mere privileges or preferences. In a recent attempt to define children rights, LeBlanc discerns survival rights, membership rights, protection rights and empowerment rights, the latter category being the newest and least elaborated with respect to children.66

The strongest form of rights are those which suppose a duty of others, who acknowledge this obligation. Such rights have strength in the legal sense.67 Another sense of strength may be found in rights which demand a more lasting inner change of attitude, for example the right of the child to respect and his right to the present.68 Such rights show a greater awareness of the psychological aspects of adults’ attitudes towards children and aim for a higher aspiration of all human beings, regarding the care and education of children, living with them, as an example and main test case for human behaviour.

Both child protection and children’s rights can be regarded as society’s striving for respect for the child. The child has to be regarded as an individual with rights of his own as a human being. Due to his situation, he also needs rights for protection and to guarantee access to services. Legal protection includes having rights and being informed about them; having the possibility to exercise these rights effectively; protecting one’s interests; and, eventually being able to enforce these rights. The latter conclusion is still under discussion and a pragmatic approach might be most realistic.

Surveying the many formulations of children’s rights which have recently been studied,69 one can be both impressed by so much good-will and at the same time be ashamed that such things have to be formulated. Self-evidence in the exercise of human relations seems to have been lost, and guiding principles have to be formulated. Many of these formulations are only moral rights but show, nevertheless, an intrinsic force, directing the attention of adults to their behaviour vis-à-vis children. Moral rights can also ‘grow’ and acquire general recognition which will make it more likely that they will be taken up in a legal context. The word ‘right’ is

69. See the enormous work of Veerman, Ph., The Rights of the Child and the Changing Image of Childhood, Nijhoff, Dordrecht, 1992. He has treated more than 45 listed formulations of children’s rights.
used in philosophical, moral, political, legal, social and rhetorical context. It might therefore lose some of its strength as a legal concept, to the detriment of children.

All these attempts to formulate human rights for children show a process which has not come to an end: 'We now tend to talk of “human” rather than “natural” rights, and this is because their derivation has changed. Rights are no longer derived from operation of natural reason, but rather from our ideas of what it is to be human. We think that a person who is malnourished, tortured, wrongly imprisoned, illiterate, and perhaps lacking in regular paid holidays is not living in a manner appropriate to a human being. Again, natural rights, being abstract and eternal, were in principle available to any thoughtful caveman who considered the matter, but we tend today to regard the idea of rights as one that evolves from generation to generation.”\(^70\)

**Children’s rights in international law**

The history of children’s rights in international law is short, less than a century. This is partly because international human rights law itself is of recent origin, and partly because children’s rights have paralleled the development of human rights in international law. According to Van Boven, 'Children’s rights are an integral part of human rights. The whole human rights programme of the United Nations is of direct relevance to children inasmuch as the ultimate aim of the programme is the well-being of every individual person in national as well as international society. But even more, the whole human rights endeavour may be said to be built on the foundation of care and love for children and respect for their rights. The special place of children in society is recognised in the Universal Declaration of Human Rights and pervades the whole framework of international human rights standards.'\(^71\)

The first step in the developmental process of human rights in international law was the recognition by the international community that all human beings, including children were objects of international law and therefore international legal protection for all individuals was required. A second step includes the granting of specific substantive rights to individuals. In this way, rights have been specified for, *inter alia*, criminal procedure, health, education and freedom of expression. This process is still evolving and is elaborated for specific groups: women, minorities, and children.

The next step is the acknowledgement that individuals, including children, are capable to exercise and claim the granted rights and freedoms. It is here that development goes slowly and where children are lagging. ‘Although recognising in principle that children are entitled to enjoy the full range of civil rights, this has not always been acknowledged in practice by states or by human rights tribunals; this is


particularly so regarding the child’s right to freedom of expression. A similar reluctance has marked the international community’s recognition of the right of the child to possess sufficient procedural capacity to act on his or her own behalf.\textsuperscript{72}

It is difficult to survey children’s rights in international law. The general doctrine is that all human rights are indivisible and interdependent.\textsuperscript{73} This doctrine means that a human right may not take priority over others or be more fundamental than others. Nor is it possible to declare only a part of a human right applicable, for example the right to freedom of torture which would only be applicable in international conflicts and not in domestic situations, or the right to health service or education which would only be applicable, if the state has the necessary resources. Nevertheless, in the field of implementation distinctions are made between civil and political rights on the one hand, and economical, social and cultural rights on the other hand. The latter group would be more dependent on a state’s resources to perform its duties. In the case of children, some have contested the application of political and economic rights.\textsuperscript{74}

In general, there is no reason to exclude children from categories of rights. In practice, there might be some rights which cannot be easily used by children, for example the right to choose one’s residence, or, with regard to adults, the right to be cared for by one’s parents. Not all the rights which have been generally mentioned apply in practice to children, nor do specific children’s rights apply to adults. There might very well be a category of children’s rights, which could also apply to adults, but has not been mentioned in general human rights instruments. This is possible as most children’s rights formulations are more recent than formulated human rights. One such right could be the right to protection from abuse and neglect. Another one could be the right to information, which as such is mentioned in the recent Convention on the Rights of the Child.

The position of this Convention with respect to other instruments of international law on the rights of the child, can only be valued, when two types of human rights instruments are taken into consideration. One group of instruments contains global human rights instruments, the other group contains instruments specific to the rights of the child.\textsuperscript{75}


\textsuperscript{73} UN Document GA Resolution 32/13.


\textsuperscript{75} Source documents without any commentary or explication of selection criteria are collected in: Van Bueren, G., \textit{International Documents on Children’s Rights}, Nijhoff, Dordrecht, 1994. An attempt to provide source documents and commentary on youth rights has been made in: Angel, W., \textit{The International Law of Youth Rights}, Nijhoff, Dordrecht, 1995. This compilation, however, is based on rights of the ‘youth’, a term which envisages often the group of human beings between 15 and 25 years of age. Besides, it follows solely the development related to the United Nations-system and its predecessor. To speak of ‘youth rights’ seems confusing, where the general public is just getting used to children’s rights, and these groups and rights are partly overlapping.
Children's rights in global human rights instruments

Global human rights instruments contain two types of formulations: one is about human beings in general. This means children are not explicitly mentioned, nor are they emphatically excluded. Generally speaking, these rights also apply to children. The other type of formulation is specifically directed at children. In the search for such formulations, one could trace the emergence of children’s rights.

The United Nations Charter 1945

The United Nations was established in 1945 by a constitutional document: the Charter of the United Nations, which contains the purposes, principles, membership and the structure of the new international organisation created after the Second World War. It forms the basis of the combined efforts to create international stability and promote the ‘observance of human rights and fundamental freedoms for all without discrimination as to race, sex, language or religion’ (article 55(c)). The Economic and Social Council ‘may make recommendations for the purpose of promoting respect for, and observance of, human rights and freedoms for all’ (article 62) and must set up commissions in economic and social fields and for the promotions of human rights (article 68). States not only pledge themselves to take joint and separate action with the United Nations but also to cooperate with the specialised agencies of the Organisation. Those agencies focus on, *inter alia*, labour, (International Labour Organisation, ILO), health, (World Health Organisation, WHO), and education, science and culture (Educational, Scientific and Cultural Organisation, UNESCO).76

Children are not expressly mentioned. Nevertheless, there was international concern about the fate of large numbers of children who were victims of the World War. In 1946, a temporary body was set up for the benefit of children and adolescents of countries ‘which were the victims of aggression.’ This International Children’s Emergency Fund (UNICEF) did not have the status of a specialised agency.77 The function and position of UNICEF has somewhat changed over the years. It is now a permanent body of the United Nations and is no longer limited by the prerequisite which requires the existence of armed conflicts before it can help children. It is only recently that UNICEF is clearly supporting children’s rights. Possibly, there was reluctance to join forces because of the ‘political character’ which might interfere with the supposed function of UNICEF. It might also partly be due to the way in which UNICEF has operated under its Director J. Grant. ‘When the UN Convention on the Rights of the Child was a project, he was not convinced that it would succeed and looked at it with scepticism during seven of the ten years of the drafting process. But when he felt that the Convention had a chance of being adopted and could have a major impact, he became a passionate advocate of it. With the remarkable concreteness instilled by Grant, UNICEF became the most supportive UN Agency of the Committee on the Rights of the Child, and in 1993 the Universal Ratification of the Convention became one of UNICEF’s mid-decade goals.78

During its fifty year long history, the United Nations has been the subject of scepticism. The euphoria over Declarations and Resolutions adopted by the General Assembly, as a result of a talk and print consuming machinery with an incomprehensible attention for the choice of words and punctuation marks, is often misunderstood. In spite of such criticism numerous items have been placed on the agenda of the General Assembly, thereby creating an international forum for universal concern about humanity and its environment. Due to this creative function, the General Assembly has been regarded as the midwife of international law.  

The Universal Declaration on Human Rights 1948

The spirit of fundamental renewal of state-relationships established by the UN Charter, was expressed in the Universal Declaration on Human Rights, which was accepted by the General Assembly. This catalogue of human rights applies to all human beings, therefore, children are implicitly included. Two articles contain express references to children. Article 25 concerns special care and assistance, which – as usual in international law – links motherhood and childhood.

Article 25
1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. 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.

The other explicit reference to children is found in article 26 on access to and the aims of education, and the role of parents.

Article 26
1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental

freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

These two examples clearly show that the image of childhood is still based on the child as a human being who needs protection. This right to protection is closely linked to the protection of the mother, providing special care and assistance to both of them. The role of the father in this respect is absent. The moral approach, rather than legal, is also noteworthy. The article speaks of social protection for children born (in or) out of wedlock, not of the prohibition of ‘legal’ discrimination.

Without giving a clear definition of who is a child, the article states that parents have a prior right to choose the kind of education they want for their child. This prior right is probably not linked to the right of the child, but to the possible interference of the state. The right to education is granted to everyone, but children cannot make a choice for themselves. This corresponds to the image of childhood in which adults know best about what is good for and in the best interest of the child. The child remains mainly an object of concern.

The formulation of the right to education shows that children definitely have a world of their own, which is defined by others: elementary education is compulsory.\(^{81}\) Education is directed to the full development of the human personality and its values are closely related to human rights. This inspired formulation is but one example of the spirit which pervades the Universal Declaration and makes it a document which has gained authority in the years following its adoption.

The Universal Declaration does not stop at proclaiming rights but also calls for a transformation of the social and international order in such a way that the rights established can be enjoyed in practice. The significance and impact of the Declaration can therefore be found in the moral, political and legal sphere.\(^{82}\)

The discussion on the status of the Universal Declaration has arisen because the General Assembly has no power under the United Nations Charter to make binding decisions on such matters. As a result, the Universal Declaration could be viewed as a non-binding resolution of the General Assembly. Nevertheless, its normative power can be given more force as the Universal Declaration provides an authoritative interpretation of the human rights provisions of the Charter. The frequent reference to this Declaration, in many resolutions, declarations and conventions in the field of human rights, and its incorporation in national legislation, support the view that the Declaration has grown in authority and acceptance and is, as regards state practice, treated as binding. As human rights should not be considered as static, but instead

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as a dynamic development, the Universal Declaration can be said to be an expression of international customary law. As such it is essentially binding, and derogations cannot easily be permitted.

The Universal Declaration has been fervently defended against attacks from all sides: the negligible participation of Third World countries in the drafting; the exclusively Western ideological roots; the individualistic approach; the scant regard to economic rights and the poor attention paid to Third World’s traditions and needs; and, the overlooked importance of international solidarity. Alston replies: ‘The main thrust of the analysis is that while many, if not all, of the criticisms which have been made have some validity, the declaration’s philosophical underpinnings are sufficiently eclectic, its text sufficiently flexible, and recent developments sufficiently responsive, to ensure its continuing relevance as a ‘living’ instrument of incomparable importance in the field of human rights.’

Heavy discussion on the universality of human rights took also place at the World Conference on Human Rights, held in Vienna in 1993. Serious attacks were launched by a group of non-aligned countries, headed by Indonesia, to prevent further international interference into affairs considered as domestic. A Programme of Action was adopted which should form a broader basis for the development of human rights and underline its universal application.

The International Covenants on Human Rights 1966
Although the Universal Declaration was adopted on 10 December 1948, the work on two specific Covenants on Economic, Social and Cultural Rights, and on Civil and Political Rights had already begun the previous year. Both Covenants reflect the spirit of the Universal Declaration, but as their objective was to be binding human rights instruments it was only in 1966 that they were adopted by the General Assembly. It took another ten years before they could enter into force. Several procedures monitor their implementation: reports to the Committee on Human Rights; an optional right of complaint between states; and, an individual right of complaint in a separate Optional Protocol. Even in these Covenants which apply to all men and women, the application to children is only implicit. In the Covenant on Economic, Social and Cultural Rights, some articles refer explicitly to children: in article 10, the protection of children is related to the family, motherhood and employment.

87. UN Doc. GA Res. 2200 A (XXI).
Article 10
The States Parties to the present Covenant recognize that:
1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

The protection of the child's health is incorporated in article 12.

Article 12
1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (...)

The right to education including the choice of education is taken up in article 13 in an elaborated version of the provisions in the Universal Declaration:

Article 13
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.
The attitude towards children and their rights has not changed significantly. The focus has shifted to the protection of the child's immediate environment, family life. The child's need for special measures of protection and assistance are explicitly recognised. Thereby, the status of children in international binding law has increased.

In the Covenant on Civil and Political Rights, the protection of the family is likewise stressed, whereby a practical reference is made in case of divorce: 'provision shall be made for the necessary protection of any children' (article 23). The balance of power between state, parents and children is further defined in the provision on the freedom of thought, conscience and religion.

Article 18
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

It is made very clear that children have little choice in their own moral and religious education. The freedom of thought does not appear to exclude children when regarded as individuals, but is invisible when considered with respect to their parents.

Attention is given to the position of children as offenders and provisions for protection are set forth which guarantee due process of law (article 14). The imposition of the death penalty is prohibited for crimes committed by persons under eighteen years of age and cannot be carried out on pregnant women (article 6).

An important protection is given to the legal identity of children in a specific article on children:

Article 24
1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

The article provides for measures to be taken by the states parties in addition to the general measures which are ensured to all individuals (article 2). The provision is an example of the combination of general and specific rights for children.

It is noteworthy that a serious debate took place about the relevance and urgency to incorporate a specific article on these rights of children in the Covenant, as the draft did not contain any. Poland proposed including article 24, which was adopted with only few amendments. The known arguments about competence can be traced in the report on the debate.89 Supporting a general article on children's rights were those states parties which stressed the need for children to develop freely without

89. UN Doc. A/C.3/SR.1174.
discrimination. They accepted that children could not fully exercise all rights enshrined in the Covenant and required therefore special protection provisions, and considered it important that the few already acknowledged rights of children in the Universal Declaration and the Declaration of the Rights of the Child should be included in legally binding instruments. Moreover, a specific article on children was already included in the Covenant on Economic, Social and Cultural Rights.  

However, other states were opposed to a special article in the Covenant on Civil and Political Rights because protection against discrimination was already contained in article 2, which applies to all human beings, and therefore to children as well. A special article should also specify for which rights children ought to receive protection. These states also argued that if an article for this special group was made, doubts might rise about the universal applicability of other articles.  

Although the Preamble recognises the indivisibility of human rights and acknowledges that all human rights are interlinked and of equal importance, there are differences between the two Covenants. The most important difference concerns the implementation obligations. Immediate implementation, regardless of resources is required by the Covenant on Civil and Political Rights. For the implementation of economic, social and cultural rights a state party is under a duty to the maximum extent of its available resources to implement progressively the rights enshrined in the other Covenant. As it is supposed that the implementation of economic, social and cultural rights is costly, a broader 'margin of appreciation' is given to states parties as to the speed and magnitude of the implementation.  

Children’s rights in regional human rights instruments  
The Universal Declaration has inspired the adoption of separate human rights treaties which have been applied on a regional basis. Such regional instruments may be more adapted to the social and cultural circumstances and characteristics of the specific regions. An overly close relationship with these societies, however, may also weaken the universality of the human rights concept and risk lowering the standard of human rights. It may also serve to maintain a higher standard of human rights as in affluent societies.  

The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950  
As a result of efforts to introduce a judicial machinery to make the enforcement of human rights effective, the European Convention for the Protection of Human Rights and Fundamental Freedoms was signed on 4 November 1950, and came into force on 3 September 1952. The Convention contains only civil and political rights. Social and economic rights are taken up in the European Social Charter, which is also discussed below.  

Although the final result was weaker than envisaged, the Convention has substantial procedures for supervision and enforcement, consisting of the European Com-

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90. Van Bueren states that this fear is shown to have been unfounded. Van Bueren, G., The International Law on the Rights of the Child, Nijhoff, Dordrecht, 1995, p. 21.
mission and the European Court of Human Rights, and the Committee of Ministers of the Council of Europe. The most important is the system of individual applications and the jurisdiction of the Court provided for in an optional article 25. The human rights set forth in the Convention have to be ensured by the contracting states for everyone within their jurisdiction; there is no limitation based on nationality.

The supervision of the implementation of the Convention rests primarily with the national authorities, in particular the national courts, at least where the Convention is directly applicable. In case a national procedure is not available, or does not provide for an adequate remedy, or in the last resort has not produced a satisfactory result in the opinion of the prejudiced party or of a contracting state, the Convention provides for a supervisory procedure, involving the organs described above. Standing to submit an application to European organs has no set age limits and children have been accepted as applicants since they are considered as being included in ‘everyone’. The Convention has few specific references to children. Provisions on legal proceedings for juveniles are contained in article 5(1)(d) and 6. The former reads:

Article 5
1. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law; (...) d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.

The latter provides for the possibility to hold closed hearings, in order to protect the privacy of the child from the interests of the press and general public. Both provisions are clearly based on protection, and the reference to detention for educational supervision reflects the practice in Western countries.

The litigation at the European Commission and Court has increasingly gained importance since the early eighties, especially in the field of family life, and therefore also with regard to children’s rights. Through the refining interpretation of ‘family life’, a whole code of juvenile law seems to be subsumed within article 8. Everyone’s right to respect for private and family life, his home and correspondence, includes the rights of the parents, but also those of their children as individuals. Particularly in situations where the state has interfered, or measures are taken on behalf of the state for the best interests of the child, complaints may be put forward to question whether such interference is within the limitations set forth by the second part of article 8, namely:

in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Although states have a broad margin of appreciation, state interference must be critically considered, as abuse of power is prevalent, and the image of childhood has not been completely modernised.94

Children have on their own behalf or together with parents successfully brought their cases before the Strasbourg organs, and the impact of its jurisprudence has been greater than was previously estimated. National judges have taken more account of the Strasbourg interpretations and sometimes national legislation has to be adapted, after it is held up to the European standard set by Strasbourg.95 Jurisprudence may also give rise to other European measures, for example the European Convention on the Legal Status of Children Born out of Wedlock,96 which was adopted after a remarkable decision on the establishment of the legal relationship between an unmarried mother and her child.97

Within certain limits, the procedures annex to the European Convention provide for the hearing of children's complaints. As De Langen puts it: 'Even more than in the case of other court decisions, the individual child may not really benefit, but the result is that certain problems of children are exposed, such as flogging in schools or detaining children, even in prisons, without proper legal procedures; in these cases the government concerned is called to answer before an international forum.'98 The significance of the European Convention should therefore not be underestimated in a long-term view on the development of children's rights.

The European Social Charter 1961
This Charter prepared within the Council of Europe was opened for signature on 18 October 1961 and entered into force on 26 February 1965.99 The main purpose was to safeguard the protection of social rights, as these were not included in the European Convention on Human Rights. It contains several articles referring to children. Article 7 sets the minimum working age at 15 years, subject to exceptions for children employed in light work without harm to their health, morals or education, and provides for other conditions of employment. Article 8 protects the rights of working women on paid leave or other provision before and after childbirth, and ensures suf-

ficient time for employed mothers to nurse their infants. Children are also directly concerned in the right to free vocational guidance and assistance 'both to young persons, including school children, and to adults' as protected in article 9. A general clause and obligation for states to take measures is found in article 17 on the right of mothers and children to social and economic protection. The provision has been taken up by parliamentarians within the Council of Europe for proposals on the proper care of young children, 'enabling parents to make a realistic and free choice between remaining in the home and taking paid employment without prejudice in either case to the upbringing of their small children or to their own interests in terms of social security and other social benefits.'

Article 19 is devoted to the rights of migrant workers and their families to protection and assistance. This legal protection is later elaborated in one of the latest conventions: the International Convention on the Protection of the Rights of all Migrant Workers and their Families, 1990. In this Convention, attention is paid, *inter alia*, to the freedom of expression, cultural identity, linguistic needs, name and nationality of children, access to education, vocational guidance, social and health services, cultural life, and teaching of the mother tongue.

**The American Convention on Human Rights 1969**

The Convention was signed at San José on 22 November 1969 and entered into force on 18 July 1978. The Organisation of American States (OAS) is the oldest regional society of states and has been working since 1890 for the protection of human rights in a region with widely differing states. A few months before the United Nations Universal Declaration, the OAS adopted the American Declaration on the Rights and Duties of Man in 1948. The concern for children in this region was manifested early on by the establishment of the American International Institute for the protection of Children in 1927, which was linked to the OAS in 1949. The American Declaration contains several articles speaking of the family, whereby children are protected. Article 5 describes every person’s right to protection against abusive attacks upon honour, reputation, private and family life, whereas article 6 protects the right to establish a family and to receive protection therefore. Children are expressly mentioned in article 7 stating:

Article 7

All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.

The right to education in article 12 clearly mentions that the education should be based on the principles of liberty, morality and human solidarity. As the title of the Declaration indicates, duties are also envisaged. Article 30 provides:

Article 30

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It is the duty of every person to aid, support, educate and protect his minor children, and it is the duty of children to honour their parents always and to aid, support and protect them when they need it.

The idea of a balance between rights and duties has gradually disappeared in the discussions on human rights, but comes up once in a while when children’s rights are discussed.102

The American Convention of 1969 contains several articles protecting the rights of children. Some examples are noteworthy. The well-known discussion on when the legal protection of children begins, is solved in this Convention by article 4, which clearly states that every person has a right to life, and ‘shall be protected by law, and, in general, from the moment of conception’. Equal rights for children born out of wedlock and those born in wedlock are also envisaged. The role of parents in the education of children and the protective approach is recognisable in the provisions of article 12(4) on the freedom of conscience and religion where parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children, or wards, that is in accord with their own convictions. More clear than in other instruments is the restriction on the freedom of thought and expression, as article 13(4) states: ‘Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship, for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.’ As can be expected, the role of the family is protected in various articles, including 15 and 17, but article 16 is devoted to the rights of children:

Article 16
Every child, whatever his parentage, has the right to protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicial-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational systems.

Other provisions regard the right to a name and the protection of minor children. In general, the American Convention reflects the ideology of its time to strengthen the role of the family, and to let parents decide on child-related matters and to protect children.

Children’s rights in specific human rights instruments
Apart from global human rights instruments, which contain both human rights applicable to all human beings, including children, and human rights in which children are expressly mentioned, there are human rights instruments which are in their

102. See for example the Dutch promotion campaign on the introduction of the Convention on the Rights of the Child, in which rights and duties are emphasised: Werkboek De Rechten van het Kind in het kader van het gemeentelijke jeugdbeleid. Met praten kom je tot je recht, Ministerie VWS, Rijswijk, 1996.
entirety specifically directed at the rights of the child. This second type of instruments will be surveyed here. For reasons of completeness, one could point to a third category of human rights instruments, namely those which are not global, nor specific to the rights of the child, for example the Convention on the Elimination of all Forms of Racial Discrimination. Such instruments are in general equally applicable to children; they might even contain specific reference to children. Within this category, human rights instruments which are specific to a situation which mostly applies only to children are discernable, for example the Unesco Convention against Discrimination in Education. The last group of human rights instruments would be those human rights instruments which are specific to children, but only contain rights in a specific field, like the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

The effort to classify different human rights instruments with respect to the Rights of the Child can be helpful in tracing the development of children's rights in international law, as demonstrated by the separate classification model presented in this study in Figure 4 on page 163. At the same time, such an endeavour shows the scattered nature of children's legal protection. Children are now permitted to join with other human beings, but at the same time they are treated as a special species, needing specific provisions. This ambiguous approach will be the case as long as we discriminate against certain human beings on the basis of young age and attach a special word to them, with many connotations. The following description of human rights instruments which are specific to children shows a fluctuating line between specific and general protection of children, with more and less attention for their recognition as legal subjects.

The Declaration of Geneva 1924
Throughout the history of human rights, the following seems true: 'Suffering must have reached a high degree of intensity before there is readiness to alleviate and to remedy.'103 The chaotic and poor position of women and children after the First World War activated people to call for remedies against the trafficking in them and to pay more attention to the protection of children and child welfare. To support this spirit, a declaration was formulated, inviting the states members of the League of Nations to be guided by its principles in the work of child welfare.

This image of the child is of one who needs to receive from others, from men and women of all nations, who clearly have an urgent duty to fulfil towards children. Although children still are seen as objects of international law, the Declaration has its value. It is the first time that the concept of children's rights was introduced in international law. Further developments in this field have sustained the spirit of this first attempt. It is also remarkable that the call on states members to be guided by the principles of the Declaration with respect to child welfare, forms the first attempt to set international standards in the field of human rights, long before even the Universal Declaration. In fact, the Declaration of Geneva is not so much about

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Figure 4: Classification of children’s rights in human rights instruments
children’s rights as it is about states’ obligations with regard to the welfare of children.

Declaration of Geneva
By the present Declaration of the Rights of the Child, commonly known as the Declaration of Geneva, men and women of all nations, recognising that mankind owes to the child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed:
I. The child must be given the means requisite for its normal development, both materially and spiritually;
II. The child that is hungry must be fed; the child that is sick must be helped; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured;
III. The child must be the first to receive relief in times of distress;
IV. The child must be put in a position to earn a livelihood and must be protected against every form of exploitation;
V. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.104

Some other remarkable points are discussed in the following paragraphs. The Declaration explicitly mentions that children should be the first to be relieved in times of distress. This is an unconditional priority for children. As the instigator of the Declaration, Egelantyne Jebb, – also founder of Save the Children Fund – said: 'It is children who pay the heaviest price for our shortsighted economic policies, our political blunders, our wars.'105

Another point is the responsibility that is required of children to earn a livelihood and to be at the service of their fellow-men. Children (or maybe human beings in general) are considered to be social beings, thereby stressing the importance of work and other contributions to society. Freeman comments: 'The Declaration views children very much as an investment for the future, with a dividend of peace and harmony between nations (note the emphasis on socialization to serve others).’106

The Declaration maintains a practical spirit of ‘first things first’, which is understandable to everyone. Therefore, there are only ‘rights’ formulated in the social, economical and cultural field; and, no traces of civil or political rights are found. Protection and help are the keywords of the Declaration.

105. Quoted in: Making reality of children’s rights. International Conference on the Rights of the Child, Radda Barnen/Swedish Save the Children, Stockholm, 1989. It is interesting to note that Egelantyne Jebb was arrested for obscenity when she displayed pictures of starving children in Europe, who were damaged by World War I. In 1995, the Benetton firm was sued in Germany for the use of poor children in its advertisements. Poor children are used for better and for worse.
The Declaration of the Rights of the Child 1948

In this Declaration of the Rights of the Child dating of the same year as the Universal Declaration on Human Rights, only some slight, but nevertheless significant adjustments were made, and a new paragraph was added to the Declaration of Geneva. The duty of adults is expressly mentioned as an obligation to be met in all respects. The role of the family is strengthened: 'The child must be cared for with due respect for the family as an entity.' Traces of the welfare-state become likewise visible: 'The child must enjoy the full benefits provided by social welfare and social security schemes; the child must receive a training which will enable it, at the right time, to earn a livelihood, and must be protected against every form of exploitation.' Here it also becomes clear that education or training comes first and self-determination by means of earning a livelihood for oneself, seems to come in second place. One wonders who will decide about the right time.

The image of a delinquent child was replaced by 'the maladjusted child [who] must be re-educated.' In the same way, a backward child received a new title: the physically and mentally handicapped child who should be helped. A last remark is the extension of normal development: materially, morally, and spiritually. The insertion of morals fits well into the orientation on training of behaviour and education.

In general, this adapted version of the Declaration of Geneva with the title, the Declaration of the Rights of the Child, is not mentioned very often in texts on international law and children's rights, although it shows that the international community was willing to take up the best of the heritage of children's rights immediately after the Second World War and placed it in the larger movement of human rights' development. It seems that the General Council of the International Union for Child Welfare revised and extended the Declaration of Geneva. It remains unclear whether the text was adopted by the General Assembly, as in the same year discussion began on the different possibilities to formulate a Child's Charter, by means of a UN Commission. Whatever the status of this Declaration, it forms the trait d'union between the early proclamations of children's rights and the post-war developments. As such it contributed to a finally binding instrument for the rights of children.

The Declaration of the Rights of the Child 1959

In this Declaration, for the first time, the it-character of the child disappeared from the language used and was replaced by 'he' and 'his'. In contrast to the formulations of 1924 and 1948, the child is now clearly acknowledged as a subject of law with specific rights. The spirit of the Universal Declaration pervades the Preamble and the

107. See Appendix for complete text of the Declaration.
ten formulated Principles. Such principles include the (first) principle of non-discrimination with respect to the entitlement to the rights enshrined in the Declaration. In the Preamble, the child is regarded as needing special safeguards and care 'by reason of his physical and mental immaturity'. The concept of the child needing protection prevails, for example:

Principle 2
The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the best interests of the child shall be the paramount consideration.

Due probably to a greater knowledge of childhood, several aspects have been added, as compared to the Declarations of 1924 and 1948. A crucial formulation is the phrase 'the best interests of the child'. This formula has become a yardstick in many applications of childcare, as well as in legal contexts. It remains a tool for the actual interpretation of children's rights.

It is noteworthy that in contrast to the Declaration of Geneva, children should be 'among the first to receive protection and relief' (Principle 7), making the priority for children less absolute or 'more realistic'. Other forms of protection include protection against neglect, cruelty and exploitation; against practices which foster discrimination; and, against work which jeopardises the child's health or education. A minimum age is required for employment (Principle 9).

Children are covered before as well as after birth, recognising their need for adequate pre-natal and post-natal care (Principle 4) and legal protection (Preamble).

There are also rights which include making the effort to provide services for the child, entitling the child to health and care; to social security; to an atmosphere of affection and of moral and material security; to education and equal opportunity; and, to play and recreation 'which should be directed to the same purpose as education' (Principle 7). The entitlement to a name and a nationality is the first trace of a civil right in the context of children's rights in international law (Principle 3). It is remarkable that this is exactly the right affirming the child's legal identity. Great stress is placed on the responsibilities of parents, who should take the best interests of the child as their guiding principle.

Principle 6
The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and in any case in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to the children without a family and to those without adequate means of support. Payment of state and other assistance towards the maintenance of children of large families is desirable.

During the drafting process, controversy arose between states with a liberal orientation, who defended the parents as the primary caretakers, and other – socialist – states who stressed the role and duty of the state for the new generation.113 In the quoted principle, one can trace the compromise, leaving state support mainly to children in special circumstances.

This division of responsibilities to realise the rights of children and to fulfil their needs is further proof of the possible influence of knowledge about child development, care and institutionalisation. This knowledge becomes largely visible in the Preamble:

The General Assembly proclaims this Declaration of the Rights of the Child to the end that he may have a happy childhood and enjoy for his own good and for the good of society the rights and freedoms herein set forth, and calls upon parents, upon men and women as individuals and upon voluntary organizations, local authorities and national governments to recognize these rights and strive for their observance by legislative and other measures progressively taken in accordance with the following principles:

At the same time, this formulation makes clear that the implementation of children's rights is a concern that goes beyond the obligations of the states and involves the recognition of these rights by human beings, in their social roles and societal work as well. The Declaration creates therefore the rather exceptional effect on 'horizontal' relationships between human beings themselves, apart from effects between the national state and its citizens.114

Furthermore, with regard to the legal force of the Declaration, the use of the word 'principles' is associated with the non-binding character of the Declaration. There was a serious debate from the very beginning of the draft about the legal character of the 'Charter'. Some states declared that they preferred a convention, incorporating the obligation to implement by means of directives; while, others considered that the moment was not yet appropriate for a convention, as there were so many

differences in important aspects and divergent views on morality and religion.\textsuperscript{115} As the Declaration was finally adopted unanimously by the General Assembly, this can still be considered as the largest support possible, and strengthens the authority and status of the Declaration. This consensus is the best indication of the normative force of the Declaration, which serves as guidance for action and provides interpretations of actions when children are concerned. The Declaration is rather an instrument for policy and public opinion than a directly applicable norm for the national and international judge.\textsuperscript{116} As long as the Declaration remains in force, its content may continue to inspire new approaches to children's situation.

The Convention on the Rights of the Child 1989

In the history of children's rights, some countries have played an initiating role. Poland is the country with the inherited spirit of Janusz Korczak, who formulated several rights of children, beginning with their right to respect. At decisive moments in history, Poland pleaded for the recognition of children's rights and took the initiative, sometimes together with or supported by other states to formulate them in a, preferably, binding agreement.\textsuperscript{117} As a result, even Poland's acceptance of the Declaration of 1959 took place with the explanation that it was only a step towards a convention.\textsuperscript{118}

Drafting process

Poland took a next step itself by presenting a draft of a Convention on the Rights of the Child to the Commission on Human Rights.\textsuperscript{119} Being aware of the UN-community's sensitivity for anniversaries and commemorations, it was the intention of the Polish government to celebrate the proclaimed International Year of the Child, with a separate children's rights convention, twenty years after the Declaration of the Rights of the Child. In spite of the good intent, due probably to factors of time, and with the wish to avoid long discussion, the draft was no more than the verbatim text of the Declaration of 1959, the principles replaced by articles, and the word 'declaration' replaced by the word 'convention'. A simple implementation mechanism was added.

As a result, when the Secretary-General asked for views, observations and suggestions from member states and competent bodies, there was ample commentary on


\textsuperscript{117} E/CN.4/SR 626 (1959). To the list of Polish initiatives belong various attempts to create a binding instrument of children's rights: See for example E/CN.4/SR. 527 (1959) and E/CN.4/SR 1349 (1979) and the initiative of the first regional UN Conference on Children's Rights which was held in Warsaw, 1963. The Open-ended Working Group which was set up in 1979 to review a draft proposal for a Convention on the Rights of the Child was chaired during its 10 years by a Polish scientist, Adam Lopatka.

\textsuperscript{118} E/CN.4/SR.626.

the proposed text. However, as often seems the case with children’s rights in international law, there were no objections or doubts expressed on the idea of a convention as such or of the need to strengthen the rights of children in international law.

There seems to be a taboo on being opposed to all well-meaning initiatives which have to do with children. This has also its effect when one weighs the value of the acceptance of a convention on children’s rights. Such acceptance says little about substantive implementation in reality.

The commentaries of 28 member states, 4 specialised agencies, and 15 non-governmental organisations (NGO’s) objected to the text on the basis of a lack of precision and clarity required in the formulation of legally bindings texts; and, a lack of a whole range of rights, including the right to life; adoption of children; the right to own property; and, the right to cultural development. To summarise:

It is not considered sufficient to merely try and copy the Declaration of the Rights of the Child which dates back as early as 1959 and does not reflect the social, economic and cultural developments and changes since then. Moreover, the formulation of the principles in the present draft Convention is rather vague. A lot of them are already covered in the mandates of agencies like the ILO, WHO and UNESCO, or in more appropriate judicial wordings, in instruments like the Covenants on Civil and Political, and on Economic, Social and Cultural Rights. In these contexts the implementation and observance of the principles is taken care of in a far more extended and concrete manner. (...) A draft convention must consist of timely, up-to-date and concrete principles, accompanied by practical guidelines for application, and supplementary to already existing instruments and activities, in order to avoid unnecessary duplication.120

During the International Year of the Child, 1979, an Open-Ended Working Group was set up on the Question of a Convention on the Rights of the Child. The drafting process took ten years, showing some characteristics which have seldom been observed in international settings. To mention some of these, the open-ended nature of the Working Group implied that any of the forty-three states represented on the UN Commission on Human Rights could participate. All other member states and international organisations could send observers, which even could take the floor. NGO’s in consultative status with the UN Economic and Social Council were also welcome but had no absolute right to speak. During the drafting process, these NGO’s started to form a group, which prepared in advance alternative texts and amendments to the draft. Although these organisations had very different backgrounds, they were all involved in work with and for children and concerned with their rights. Their work was appreciated by the governmental delegates, which frequently used their experience and proposals.121 Meetings were held in public.

As the Working Group operated on a basis of consensus, there were some implications: it stimulated the spirit of the discussions, but made them rather lengthy as all members had to agree on proposals. Sometimes proposals on which a majority of the participants agreed, were nevertheless dropped, due to the lack of an all-satisfying formulation.122

In most cases, whenever a difficulty on an issue or on a formulation arose, an informal working party was formed, consisting of participants with various opinions and proposals, who had to reach consensus en petit comité. Many times this procedure had good results, as delegates were willing and pushed for a workable solution.

The drafting process was also influenced by the political climate, the East-West relationships, which became better after 1985 and speeded up the process. The amelioration of the drafting process was also due to continuity in the government delegations of about ten countries, which created a cooperative atmosphere. At the beginning of the drafting process about thirty countries participated, with an over-representation of industrialised countries; only in the last stage of the process did more more countries from the South, especially from Islamic states send delegates.123

It was unavoidable that in such a setting some issues could not be settled. These were issues on the ‘minimum age’ of the child, in other words permitting the outlawing of abortion; the freedom to choose (another) religion, which is prohibited under Islamic law; the protection of children in inter-country adoption; and, the age at which children should be permitted to take part in armed conflicts.

Another issue was raised several times but never solved. It was of a different order and raised the fundamental question of the relationship to other human rights instruments, such as the Covenants: ‘Many rights which under the International Covenants already apply to children, were included again specifically for children in the draft convention, but on the other hand, not all rights guaranteed by the Covenants appeared in the draft, for example the right to self-determination (...) even though they also should apply to children. The delegate said that this selective double regulation of rights would create problems and even contradictions with the Covenants and that a general clause ensuring the application of general human rights to children, should be substituted for the present article 2.’ The proposed new article said that the states parties shall ensure: a) that all human rights recognised by them also apply to children; b) that general human rights as enshrined in the Inter-


national Covenant on Civil and Political Rights apply to children, even if a state party to the present Convention is not a party to the Covenant.124

Yet, as the drafting process had already come a long way and was, by 1988 rather in a hurry to have a Convention adopted in 1989, thirty years after the Declaration of the Rights of the Child, the proposal was rejected and the issue was not debated.125 The result was the formulation of 'the highest possible standard' rule:

Article 41
Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:
(a) The law of a State Party; or
(b) International law in force for that State.

Despite the shortcomings, as described above, in the drafting process, it was possible, after a thorough second reading which evoked 67 working documents even at such a final stage, to present a text to the appropriate bodies. After passing the Commission on Human Rights, and the Economic and Social Council, it reached the General Assembly, which adopted it unanimously on 20 November 1989.126 Two months later, it was officially signed by 61 countries and entered into force after the ratification by at least 20 countries, reached on 2 September 1990.

Content of the Convention
The Preamble forms the frame of reference of the Convention and references are made to both the principles in global and specific human rights instruments – mentioned above – and the need to take particular care of children, in human rights instruments specific to children and other instruments, of which some examples are given. The exceptionally difficult conditions in which children live are recognised. Attention is given to the importance of tradition and peoples' cultural values in the raising of children. International cooperation for improving the living conditions of children is stressed, thereby requiring solidarity within the international community.

Although not intended in the first draft, the final convention now contains a comprehensive catalogue of children's rights. One could traditionally subdivide them into the rights discerned in the two covenants: civil, political, economic, social and cultural. Although the indivisibility of human rights is also applicable to the Convention, there is one paragraph which expressly refers to the traditional classification:

126. UN Doc. GA Res 44/25, 1989.
As was already shown in the Declaration of Geneva, it is especially the above mentioned group of rights which most urgently has to be protected in the case of children. However, the traditional idea that the implementation of such rights is too costly has prevailed over an alternative approach in which human rights are viewed from the principle of protecting a basic human life.

According to the objectives of the Convention, three main goals can be discerned: the right to self-determination; the right to protection; and, rights which are specific to children (non-separation from parents, adoption, right to play) and to categories of children, such as refugees, handicapped children, children of minorities and children caught up in armed conflicts. These main objectives show that the traditional objective of protection has remained but is now sided with the right to self-determination in a wide sense, and specifications are made for the special circumstances of children.

The popular presentation of rights enshrined in the Convention is according to four P’s: protection, provision, prevention and participation. Participation is considered to be the most innovative recognition in the Convention. It refers to the rights of children to participate in society, to act in certain circumstances and to be involved in decision making; and, to take part in decisions affecting their own destiny, by receiving information (article 17), by forming and expressing an opinion (article 13), by discussing and being heard on issues which matter to themselves and to their surroundings (article 12), by the freedom of religion (article 14) and the right to freedom of association (article 15). It is clear from this cluster of rights that information and participation are closely linked.

Prevention of harm to children, is another approach, not always recognised: 'Much of human rights implementation on both a governmental and non-governmental level has not focused on prevention. The preventative role in the form of technical advice and assistance has largely been overshadowed, although this is now beginning to change.' The protective rights of children are extended to various situations. Not only are discrimination, cruelty and abuse included, but also trafficking,

130. Van Bueren, G., The International Law on the Rights of the Child, Nijhoff, Dordrecht, 1995, p. 15. Prevention remains a difficult term as children seem not to be the subject: it is others who have to be prevented from doing harm to children.
abduction, sexual abuse, and drugs abuse. The provision rights entitle children to food, health care, education, play facilities, and social insurance. Special care is given to children in specific circumstances. These rights are especially significant in difficult circumstances: orphaned children, institutionalised children, adopted children, children in prison, refugee children, minority children, and children in armed conflicts.

**Evaluation of the Convention**

In many respects the Convention shows improvements and innovations compared to other human rights instruments and especially those specific to children. In particular, the Convention is a binding treaty. In ratifying the Convention, states parties take on obligations with regard to children and their rights. It is a clear reinforcement of the notion that children have human rights. This should have already been clear from other human rights instruments, but because of their non-binding character – with for the most part the exception of the International Covenants on Human Rights – less force is attached to them. As a result, the Convention has transferred many non-binding obligations with regards to children, into a binding treaty. Nevertheless, caution is advised as the extent of the binding force depends on the formulation of the obligation in the Convention itself, for example whether one can invoke the provision in question before a court.

The Convention contains rights in a global treaty; it is a comprehensive instrument for the rights of children, which are scattered over many different human rights treaties and other human rights instruments. This is not to say that all other formulations of the same rights should now be forgotten. The Convention has added new force to existing rights or has given them a broader scope, and often, but not always, more modern and better protection. Two interpreting principles are used in the Convention: the best interests of the child, which was already introduced in the Declaration and ‘the evolving capacities of the child’, which means that in the application of rights account has to be taken of the developmental differences in children.

New rights were also introduced in the Convention, for example the right to preservation of identity, which means that states are obliged to protect, and if necessary, re-establish the basic aspects of a child’s identity: name, nationality and family ties (article 8). Furthermore, the right of indigenous children to enjoy their own culture, to profess and practice their own religion or to use their own language (article 30).

The most important new right is the clear statement that children have the right to express their views freely in all matters affecting them, and that the provision is made that they must be heard in any judicial and administrative proceeding affecting them (article 12). This article is considered to be crucial, as it contains a general principle characteristic of the underlying approach of the Convention: ‘that children are not only objects but also subjects of rights, and that a determination of the child’s best interests should be based not only on what adults think, but also on what the child thinks.’

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Evidence is given that in the field of children’s rights there are not only obligations for the state, parents and other adults, but also possibilities, and opportunities for children to participate in daily life and at least have a say in their own lives. Article 17 also supports a participatory approach to children as it ensures the child access to information and material from a variety of sources.

The modern or more mature approach is also visible in the avoidance of gender-based language: the child is no longer an ‘it’ or necessarily a ‘he’. The Convention’s use of ‘he or she’ to refer to ‘the child’ is highly significant: this wording caused ongoing debate at the drafting stage, since major religious and cultural differences meant that some states were reluctant to accept that children’s rights extended to girls; even so it was eventually agreed that the Convention should apply equally to all children. The translations of the Convention appear, however, to not always reflect to this conscious shift and continue to use the traditional neutral and masculine grammatical form or use repeatedly the word ‘child’.

In the field of protection, the Convention provides for refinement and takes account of additional areas: for example the prevention of abuse and neglect in intra-family circumstances (article 19), firmer adoption safeguards (article 21), protection from the use of narcotic and psychotropic drugs and from being involved in their production or distribution (article 33). Even in schools children will be more protected as ‘school discipline has to be administered in a manner consistent with the child’s dignity’ (article 28).

New obligations are established for states in the field of health and access to care, namely to work towards the abolition of traditional practices which are prejudicial to the health of children. Children placed in institutions for reasons of care, protection or treatment have to be periodically reviewed in order to determine whether such placements are still appropriate (article 25). The care for handicapped children also includes the obligation to work towards their fullest possible social integration (article 23).

Another factor which is quite specific to a child’s situation is that possible discrimination of the child’s parents, legal guardians or family members also has a discriminatory effect on the child himself. The Convention is sensitive to this phenomenon and obliges states parties to take appropriate measures to provide protection against this tendency (article 2).

Although the obligation to make the treaty known to the general population may not be a novel concept in international treaty law, it is, at least, new that children are explicitly mentioned in this aspect of implementation:


133. See for example the Swedish text which keeps to the word ‘child’, and the possessivum ‘its’, whereby the notion of the child as a person is absent: Rönquist, A., Mänskliga rättigheter. Konventionen om barnets rättigheter, Utrikesdepartementet, Stockholm, 1990 (UD informerar 1990:6).

Article 42
States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

This article shows a specific and explicit recognition of the need for children to receive information on their rights.

The Convention has raised both feelings of joy and scepticism. Everyone who knows how difficult it is to compose a common text, especially on an international level, can be happy and satisfied that a Convention on the Rights of the Child has finally emerged from the ten year long process.135 Doubts and fears which were expressed during this process that governments might not be willing to encumber themselves with duties regarding children have proven unfounded. As the rapid ratification shows, governmental delegates and non-governmental organisations have succeeded in finding sufficient support within their countries and areas. The Convention can thus be regarded as an international expression of the universal principles and rights which apply to children.

Nevertheless, before and after the adoption of the Convention, criticism has been expressed about various aspects, including doubts about the appropriateness of a separate convention on human rights for children.136 A major criticism on the (draft) convention was expressed by Bennett, considering it generally to be an anomaly for a multilateral convention to impose duties upon individuals. Furthermore, he states that the Convention creates ‘confusion by failing to sufficiently identify the parents’ rights and to relate those to the rights of the child.’137

Such remarks are to the point with regard to the weak legal precision and formulation and therefore clearly show the weaknesses of the Convention. Part of this critique is based, however, on the more traditional approach to international treaties and human rights instruments, which concerns only relationships between states and between the nation-state and its citizens. The considerable production of human rights instruments, the development of human rights in national constitutions, and the judicial application of such rights demonstrate the tendency to consider at least some of these human rights as also influencing the relationships between individuals. This issue which will be taken up in Chapter 6 on the legal significance of the Convention.

One of the criticisms directed at the Convention relates to the working method employed during the drafting process, which was so heavily based on consensus that impermissible compromises had to be made, leading to a lower standard of legal protection than has already been achieved. An example is the lack of a fixed minimum age for access to work, while the ILO-standard is 15 years. Another example is

the state’s ‘appropriate assistance to families’ in articles 18 and 27 whereas the International Covenant on Economic, Social and Cultural Rights requires, in article 10, that the states give ‘the widest possible protection and assistance’. Article 41 of the Convention on the highest possible standard, brings little comfort.

The monitoring mechanism of the Convention is also considered to be a weak point. The established Committee on the Rights of the Child, composed of ten experts, persons of high standing, from all over the world, has no means of imposing sanctions or taking other measures against states who do not fulfil their obligations. The short history of the Committee shows that progress has been made by adopting a working style which supports a constructive dialogue between the reporting state and the Committee, but maintains the international public opinion as a severe judge.138

Several authors have pointed to the fact that states cannot make complaints to a special body or the Committee, claiming that other states have not fulfilled their obligations and have violated the rights of children. Some observers consider it even more serious that an individual right of petition is lacking. Such a provision would have given individuals the means to file a claim before a competent body, when they felt that rights ensured by the Convention had been violated. ‘The one major shortcoming of the Convention’s implementation mechanism is its omission of a method for reviewing the individual complaints of children whose rights have been violated. It is possible that this will one day be rectified by an Optional protocol or by the addition of an amendment to the Convention’s present text.’139

The impact of the Convention at a national level has received differing appraisals, based on the criticised vagueness in the formulation of the rights in the Convention. Sometimes, for example, it is not possible to discern on whom an obligation is imposed.140 The main question is whether rights enshrined in the Convention can be invoked before a national court. There are some general rules for deciding upon the self-executing force of an international treaty. One prerequisite is the ratification of the treaty. The next is whether a state has recognised the principle of direct applicability of international treaties in national legislation, either in the constitution or as a part of its case-law. Provisions in a treaty are directly applicable when they have met certain conditions: being clear and comprehensive, and not needing further elaboration.141 As different terminology is used in the Convention, it is not clear


which articles, or part of articles can be invoked before a national court, signifying a weakness and point of criticism about the Convention.142

Critical references have also been made with respect to the scanty participation of Third World countries and the relatively limited attention paid to the special circumstances and difficulties children are experiencing in those countries.143 An intrinsic criticism is directed towards the requirement of children’s participation: ‘One of the most serious flaws of the Convention is that it does not give children a voice in the international implementation process.’144

The final point of criticism is the status of the ratifications by the states parties. The rapid pace of which ratifications have taken place, raises doubts about the seriousness of the state’s commitment. The fear of losing international prestige – highly sensitive in the case of children – might well be a motive for ratification. The relationship between the state’s intentions and reality might become clear when the Status report is delivered by the state party two years after the ratification to the Commission on the Rights of the Child. In this report, the state has to provide an account of the situation of children in relation to the obligations in the Convention, including statistics on social, cultural and economic aspects and the status of legislative measures taken (article 44). However, the vague nature of many of the Convention’s provisions facilitates avoiding or negating the serious impact which the Convention should have on the recognition of children’s rights.

Reflection of the Convention in specific instruments

The drafting process and the adoption of the Convention have led to subsequent activities within the United Nations and its specialised agencies and elsewhere, which are inspired by or at least refer to the Convention. Examples include The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, and the Declaration and Plan of Action from the World Conference on Human Rights in Vienna, both adopted in 1993.145 The impact of the Convention and its drafting process can also be discovered by examining the various specific human rights instruments, which focus on children’s rights, as a result and a reflection of the UN Convention. These instruments are global or apply to different regions of the world. Not all of these instruments have the same status. The World Declaration on the Survival, Protection and Development of Children


adopted in 1990, expressed the seriousness of states' concern with children's rights. The African Charter on the Rights and Welfare of the Child, also adopted in 1990, is the embodiment of the wish to have a recognisable proclamation adapted to the region. The European Convention on the Exercise of Children's Rights, presented in 1996, shows the desire to add the means to the Convention, with which children can exercise their rights effectively. The emphasis on specific situations in a particular region could undermine the universality of UN human rights treaties, such as the Convention on the Rights of the Child. On the other hand, more involvement of governments and NGO's in working and elaborating on the UN Convention can only be welcome, as processes of conceiving, drafting, debating and reflection may raise the consciousness of a larger group of people in the field of children's rights. Legal protection may not always be the result, but moral protection will increase.

The World Declaration on the Survival, Protection and Development of Children 1990

The importance of the Convention on the Rights of the Child has immediately been recognised by many countries. In order to facilitate quick signature and ratification, a World Summit on Children was held in New York on 29-30 September 1990. The Summit was dedicated to the serious problems children encounter in daily life. Seventy-one Heads of State signed a World Declaration and a Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children. These documents should support the implementation of the Convention and contain a joint commitment and universal appeal to give every child a better future. Paragraph 15 outlines the conditions for this future:

Paragraph 15
All children must be given the chance to find their identity and realize their worth in a safe and supportive environment, through families and other caregivers committed to their welfare. They must be prepared for responsible life in a free society. They should, from their early years, be encouraged to participate in the cultural life of their societies.

In this Declaration, the poorer position of girls is also stressed, as two-thirds of the 100 million children without basic schooling are girls. Basic schooling and literacy are important topics in the Declaration and the Plan of Action. The Heads of State solemnly promise in paragraph 20(1):

Paragraph 20(1)
We will work to promote earliest possible ratification and implementation of the Convention on the Rights of the Child. Programmes to encourage information about children's rights should be launched world-wide, taking into account the distinct cultural and social values in different countries.

They will also promote the values of peace, understanding and dialogue in the education of children, and look especially to children themselves to participate in the
challenge and effort. The realisation of the Plan of Action could provide serious support for developing countries, when transfer of additional resources takes place, especially as it is promised 'to make available the resources to meet these commitments, as part of the priorities of our national plans.' Results will not come overnight; the right of the child 'to the day of today' seems somewhat lost as the Declaration ends with the words: 'We do this not only for the present generation, but for all generations to come. There can be no task nobler than giving every child a better future.' Some countries have realised that the future begins now and have seriously attempted to prioritise children in their development policy.\textsuperscript{146} The Plan of Action requires that national actions plans be made to mobilise the necessary resources, especially for the low-income countries. The accent is on social and economic development and hardly on children's civil and political rights.\textsuperscript{147}

Scepticism about the idea of the World Summit and the states' commitment is acceptable because – as Hammarberg expresses – 'few wanted to be seen as insensitive to the fate of children. This was no surprise. It is a well-known phenomenon that politicians make gestures to appear child-friendly. (...) Children's issues on the international scene often have been seen as a matter of charity – feeling pity and being kind to small ones. Problems related to children are non-controversial and have therefore been put outside the political agenda to the detriment of children. The Convention challenges the charitable approach and defines children's issues as political, which should be put high on the political agenda.'\textsuperscript{148} Where the Summit and the Plan of Action have contributed to a political awakening, the Convention has proven to be a starting-point for further standard-setting.

\textbf{The African Charter on the Rights and Welfare of the Child 1990}

By far the most traces of the Convention on the Rights of the Child can be found in The African Charter on the Rights and Welfare of the Child, adopted in 1990. It refers both to its predecessor the Declaration of the Rights and Welfare of the African Child 1979, and the UN Convention. The Declaration contains several specific references to the region, such as 'to seek for alternative strategies when conventional school systems cannot be provided, in the sense of non-formal and out-of-school opportunities based on the principle of self-reliance.' The provisions in general reflect the special attention to collective goods and support of group life and the extended family in Africa.

The African Charter resembles in particular the UN Convention, as many formulations are similar. The rights of the child, however, have sometimes been formulated with broader margins for the state to limit the exercise of the rights by legislation. For example:


Article 7
Every child who is freely capable of forming his own views shall be assured the right to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as prescribed by law.

The Charter pays extra attention to the child’s right to enjoy the best attainable state of physical, mental and spiritual health. Although developing countries have had serious debates on the role of mass media, which can not only be a tool in educational and developmental policy, but also distributes images and views in a Western setting, no provision has been adopted. Some provisions are formulated as duties. Article 20(1)(c) establishes the duty of the parents ‘to ensure that domestic discipline is administered in moderation and that the child is treated with humanity and with respect for his inherent dignity.’ The child also has duties as article 31 lists the following:

Article 31
Every child shall have duties towards his family and society, State and other legally recognized communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty:
1. To work for the cohesion of the family, to respect his parents at all times and to maintain them in case of needs.
2. To serve his national community by placing his physical and intellectual abilities at its service.
3. To preserve and strengthen social and national solidarity.
4. To preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society.
5. To preserve and strengthen the independence and the integrity of his country.
6. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of the African Unity.

This presentation makes clear that individual children’s rights, as a possibly Western approach, are balanced with duties carried out for the sake of the community. Van Bueren points to the risks of exploitation and abuse, and the internal contradiction for the child to be protected from abuse within the family as well, and – in case of abuse – nevertheless be obliged to respect the abuser. However, ‘parents are not entitled to withdraw their protection if a child fails in his or her duties. The duties placed on children by these international instruments are often overlooked in discussions on whether international law places duties directly on individuals.’

However, she can hardly imagine that parents would initiate actions against their children before human rights tribunals based on their children's failure to support them in times of need. One wonders whether the reverse case is more realistic, as is sometimes echoed in a popular view on children's rights.

Whereas the regime in South Africa has long been the subject of UN Resolutions and special Declarations to eliminate racial discrimination – the African Charter also condemns *Apartheid* in article 26 – the situation has nowadays changed so much that principles of human rights are eagerly adopted, in the field of children as well. As children have been witnessing and still witness the results of segregationist politics, they are well able to speak out about their rights, complaining that children are not given the opportunity to express themselves and are seen to have no ideas, feelings and experiences about things that affect them in their everyday life.\(^{151}\) The Children's Summit with participants aged 12-16, held in Cape Town 1992, resulted in the *Children's Charter of South Africa*, with a basis for better child policy, which respects the rights of children in South Africa. As children are still subjected to discrimination, racism and violent suffering, they should be put first on the political agenda. Children should also have the right to participate in the government of the country and be consulted on their rights and situation. Education should be considered as a right not a privilege. All teachers should be qualified and should treat children with patience, respect and dignity. Many articles are concerned with protection from violence, not only domestic violence, but also from the media. The latter has the duty 'to prevent the exploitation of children who are victims of violence and should be prohibited from the promotion of violence'. The Summit and the Charter are designed to be steps towards establishing a culture of children's rights.\(^{152}\)

**The European Convention on the Exercise of Children's Rights 1996**

Within the European context, both the Council of Europe and the European Union address children's rights; some of their activities will be described.\(^{153}\) The Council of Europe has a long tradition of concern for children's conditions. Initially the focus was on protection, as various studies show, as well as in the field of public communication, for example on the role of the press: 'We must aim at creating circumstances in which abuses will no longer occur, and even at increasing the educational value of young people's publications. A press which is content merely with not being harmful does not satisfy the requirements of a genuine protection policy.'\(^{154}\) In the International Year of the Child, 1979, when the UN discussion on a Convention on the Rights of the Child had just begun, the Parliamentary Assembly was presented the *Havroy-Tabone report* which considered the children's need for protection in various fields, and suggested improvement of legal protection as well, by creating an official authority for the rights of children at community level, and by providing an of-

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152. *International Conference on the Rights of the Child*. Papers and Reports of a Conference Convened by the Community Law Centre, University of the Western Cape, Bellville, 1992.
 officia advocate in case of conflicts between parents, whereby the interests of the child should be paramount. The subsequent Recommendation concerning a European Charter on the Rights of the Child was, however, not adopted by the Committee of Ministers.\textsuperscript{155} In the following decade, several attempts were made by NGO's and parliamentarians to draw up a Convention, which was actually done by the International Union for Child Welfare and led to motions to the Parliamentary Assembly to initiate a legally binding instrument on children's rights.\textsuperscript{156} The push for a European Convention was motivated by the slow progress of the UN Working Group and by social developments in Europe which could be injurious to children, such as the abuse of mass media, and syncopated ultrasonic music, but also rigid school systems, and discrimination against immigrants which also affects children.\textsuperscript{157}

Apart from concern for an overall instrument protecting children's rights, the Council of Europe has adopted a whole series of recommendations and resolutions in specific fields, such as the age of full legal capacity, ill-treatment, and juvenile delinquency.

A long lasting concern within the Council of Europe regards the role of the family. In 1977, Edlbacher (Austria) prepared a report on the duties of parents, which was still elaborated from the perspective of parents, but also noted: 'It is increasingly accepted that a child is not an object belonging to his parents but an independent being with his own rights of personality. Accordingly, it is increasingly necessary to consult him, listen to his opinion and take it into account. In this way the old relationship of submission will develop, as the child grows up, to become one of friendship between parents and children.'\textsuperscript{158} In recent years, the Steering Committee for Social Policies has launched the Childhood Policies Projects, which includes various studies and meetings related to children's rights. In this respect, Wintersberger has commented on the UN Convention's principle of participation: 'While the need for protection emerged already in the wake of industrialization, and provision of resources and services became an item with the expansion of the welfare state, the implementation of children's participation is still a project which is ahead of us. Quantitatively, the text of the Convention also reflects this state of affairs. However, it would be wrong to assume that participation will make protection and provision redundant. Children's access to material and non-material resources is an essential prerequisite for their participation in society, and from there it will be necessary to reformulate the principle of protection.'\textsuperscript{159} The role of information in the implementation of children's participation is manifest.

\textsuperscript{155} Parliamentary Assembly, Recommendation 874 of 4 October 1979 on a European Charter on the Rights of the Child.

\textsuperscript{156} Conclusions of the 48th Meeting of Non-Governmental Organisations holding Consultative Status with the Council of Europe and interested in Human Rights, Council of Europe, Strasbourg, 9 May 1984. Appendix I contains the motion.

\textsuperscript{157} IUCW Report to the Council of Europe on the situation concerning children's rights in Europe, H/ONG (84) 1.

\textsuperscript{158} Edlbacher, O., Duties of parents towards their children and parental authority, Council of Europe, CJ-DF (77) 2, p. 2.

\textsuperscript{159} Wintersberger, H., Children and society, Steering Committee on Social Policy, Project III.8 Childhood Policies, Council of Europe, Strasbourg, 21 June 1993, CDPS III.8 (93) 16, p. 17.
The consequences of the changing perception of children were, however, not readily accepted. In order to facilitate a discussion on a possible European Convention on the Rights of the Child, Boucaud collected the scattered motions, recommendations and other initiatives and measures in the field of children’s rights undertaken within the Council of Europe. Jurisprudence from the European Convention was also considered, in order to describe the position of the child in respect of his legal personality, his family relationships and social life. The study shows the difficulty in surveying all of the means to protect the child, developed by the Council of Europe. It was concluded that a European text on children’s rights should not be a duplicate or impede a universal text, but be precise enough to be applied and restricted to the socio-cultural and economic context of Europe.160

Another thoroughly elaborated study, a Report on the rights of children presented by Ekman (Sweden) in 1989, was more effective. Based on an international questionnaire and hearing, the study focuses on ‘the rights children have or should have, and the ways and means there may be for them to exercise these rights themselves – even when confronted by adult opposition. Strictly speaking the distinction between the rights of children and their protection is not always that important. The question at stake is whether a young person would need intervention and assistance or not when asserting the rights granted to him.’161 The study notes that states make great distinctions depending on age and that there is a great difference between legal theory and practice in daily life. In the field of religion, parental authority is predominant in most countries, even forcing the child to attend certain services, or leaving no choice to the child in the case of a state church. In general, children have no rights of their own to institute legal proceedings, but must be represented by the person who exercises parental authority. It is therefore concluded that children should have two basic rights: the right to take legal action; and, the right to receive legal assistance from the person of their choice. The appointment of a children’s ombudsman is also recommended. Furthermore, attention should be drawn to the fact that children already have rights; more information on their rights needs to be provided both to children and adults. These elements were taken up in the Recommendation which was adopted by the Parliamentary Assembly on 1 February 1990.162 When considering a specific instrument for the protection of children’s rights, a choice existed between a separate convention and an additional protocol to the European Convention. The Recommendation proposed to elaborate on the latter option, which would have the advantage of bringing the application of its provisions – the protection of the rights of the child – under the control of the organs of the Convention.

Although the European Convention on Human Rights has been invoked by children and they have been admitted to proceedings before the European Commission and Court, attempts have been made to adapt the European instruments to the

needs of children. Instead of an optional protocol to the European Convention, the final result has become a separate European Convention on the Exercise of Children’s Rights which opened for signature in the beginning of 1996.163

The choice was made to not have a convention with substantive human rights for children, but instead to have a separate convention focusing on the exercise of rights by children, ensuring that they are informed and allowed to participate in proceedings affecting them before a judicial authority. The Convention will, however, not be supervised by the European Commission and Court of Human Rights but by a Standing Committee (articles 16-19). As it is limited to procedural rights, and also limited with respect to enforcement, the Convention is far less supportive of children’s rights than the other regional and specific human rights instrument for children: the African Charter on the Rights and Welfare of the Child. Neither of these instruments has entered into force. Nevertheless, other instruments may also serve the case of children. The Parliamentary Assembly has also adopted a recommendation which seeks to develop a European strategy for children.164

An integrated or combined strategy with the activities of the European Union in the field of children’s rights may be necessary. Until recently, the EU has had only little concern with children, but their rights are implicitly affected by measures concerning their parents, for example in the field of labour and migration.165 An early exception, with direct application to children is the Directive on Children of Migrant Workers, adopted in 1977, on the teaching of the mother tongue and the culture of the country of origin.166 Another example is the European provision of transborder television.167 The promotion of Europe among the youth by means of school and exchange programmes has a longer history within the European Communities.

Initiatives have been taken by the European Parliament, which has established a policy in the fields of human rights168 to support the UN Convention, by adopting a resolution on a European Charter on the rights of the child169 and a resolution on the situation of children in the European Community, known as the Gröner-report.170 The

latter paid attention to a variety of developments threatening the situation of children, such as medical technology, traffic, religious sects and media violence, and pleaded for ratification of the UN Convention; cooperation with the Council of Europe to establish a European Convention; the establishment of a European Ombudsperson; and, to make ample information on the rights of the child available in order 'that these rights not remain only declarations of principles, but are engraved in the conscience, acts and behaviour of each of us. Only in this way the most original right of all children to happiness can be realised.'

The final result was an elaborated report by Bandrés-Molet who presented a draft of a European Charter on the Rights of the Child, on which a Resolution was adopted in July 1992. The 45 articles of the draft contain provisions which go beyond the UN Convention, such as the minimum age for taking part in direct warfare (18 years); the right to a clean environment; protection against venereal diseases; and, the right to sexual education and information. Other provisions are vaguely formulated: specific programmes in developmental aid projects to combat youth criminality, and protection against the negative influences of religious sects. No attention is paid to protection of the unborn child and intercountry adoption. Verhellen concludes that the Charter has mainly symbolic value, designed to bring about a social Europe. Therefore no monitoring mechanism is included.

NGO's are working for a sounder foundation in the European Union to establish and develop a European policy for children and youth, and to clarify the position of children in the European Union. The revision of the Treaty of Maastricht is the focal point, and amendments are being presented. For example, that 'children shall enjoy the rights of other citizens of the Union with the exception of those matters excluded to minors by law.'

Summary

The evolution of children’s rights is closely related to the changing image of childhood and the notion of children as legal subjects. From consideration of the child as an adult in miniature, the approach has shifted to viewing the child as a special species of human beings, needing protection and a place of their own, shielded from the hazards of adult life. Only recently, this image has begun to vanish as children can no longer be excluded from society, nor barred from their rights. The latter notion emerged from the changing legal status of children, when child labour laws and compulsory education extricated the child from permanent paternal authority. This development was supported by the increasing acknowledgment of women’s rights. Child abuse and neglect are considered as offences, which clearly set limits on pa-

rental rights, which are monitored by the state and can, if necessary, be taken away. Recent decades have show a slow and oscillating attempt to rebalance the relationships between child, parents and state, in which the notion of children’s rights is approached in a reformist, radical or pragmatic way.

In search of human rights instruments which provide children with the protection of their rights, several types of instruments have been discerned. Some contain a global story of human life, protecting the most important aspects of human life, others are directed towards a more specific part of human life, life’s special circumstances; others again are specific to children. The stories are told in different styles, pragmatic in the Declaration of Geneva, spiritual in the Universal Declaration of Human Rights, and compromising in the Convention on the Rights of the Child.

This Convention is not only the most recent human rights instrument specific to the Rights of the Child, but also one of the most recent comprehensive treaties. The abundance of human rights instruments which have sprouted from the United Nations Charter seems now to have covered almost all groups of human beings who need special attention because of their specific characteristics. Children have been one of the last groups. Although animals and the basic elements in nature, earth, water and air are not considered as competent bearers of rights, it is only respect for them, which remains to be treated in a separate ‘natural’ rights document.175

The positive aspects of the Convention have been mentioned. It is more comprehensive than any other human rights treaty or instrument specific to children, including all types of rights, both traditional and those of the newer generations of rights. It has binding force and expressly imposes obligations on states as regards children’s rights. It also poses obligations on parents, and other parties involved in the care of children. Therefore, it has an outstanding place in international law.

The Convention combines both legal and psychological knowledge, important in the field of child development, referring to ‘the evolving capacities of the child’. This new principle of interpretation is added to the older known but now more directing principle of the best interests of the child. The influence of expert knowledge, especially from NGO’s, in the drafting process and beyond shows the relation between legal and other forms of protection of children’s needs and interests.

Most important in the view of this study: the Convention recognises the importance of self-determination of the child, of the child’s willingness to participate in many ways in the life which he has entered. This orientation on rights supporting participation is also found in various articles pointing to a right to information. It is this right which will be studied in the following chapter.

175. It is noteworthy that in a faculty library on philosophy the titles on rights of children were placed in the same box as rights of animals and outnumbered by the latter.
See for respect for nature the famous speech of the Indian chief Seattle at the occasion of the transfer of land for the benefit of the railway exploitation in 1854, which can be considered as a universal declaration on behalf of nature: Smith, H., Seattle, in: Sunday Star. 29 October 1887; reprinted in: How can one sell the air? The manifesto of an Indian Chief, Prism, Dorchester, 1984.
As something rather novel, in the aims of children’s education ‘the development of respect for the natural environment’ is included in article 29(1)(c) of the Convention on the Rights of the Child.