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Innocenti Insight
**LAYING THE FOUNDATIONS
FOR CHILDREN'S RIGHTS**

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LAYING THE FOUNDATIONS FOR CHILDREN'S RIGHTS

An Independent Study of some Key Legal and Institutional Aspects
of the Impact of the Convention on the Rights of the Child

by

Philip Alston
and John Tobin

with the assistance of Mac Darrow

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FOREWORD

The adoption of the Convention on the Rights of the Child on 20 November 1989 represented the culmination of a long process to secure international recognition of a comprehensive and path-breaking statement of children's rights. More importantly, however, it also marks the beginning of a new stage during which due attention has been given to the challenge of translating the new international standards into the domestic law and practice of States and of ensuring that the international community, in its many manifestations, contributes in all relevant ways to the promotion of children's rights.

This study explores the extent to which these efforts have succeeded. It has been conducted by two well-known scholars, Philip Alston and John Tobin and it is an important component of the research conducted by the Innocenti Research Centre on the process of social change generated by the Convention on the Rights of the Child. The study addresses the legal and institutional arrangements which have been put in place at the international, regional and national levels to ensure that the Convention is promoted effectively and to create the structures of accountability which are the hallmark of the realization of human rights. While law is by no means the only dimension of these efforts – and indeed in many contexts it will be less important than other approaches – it nonetheless remains a crucial ingredient in securing the effective implementation of the Convention.

The study situates the Convention on the Rights of the Child within the process of the historical evolution of children's rights and examines the extent to

which the international human rights regime and the systems developed at the regional levels – in particular in Africa, the Americas and Europe – have been adapted to take full account of the principles and provisions of the Convention. It presents an impressive survey of achievements at the national level, in terms of the constitutional recognition of children's rights and the development of national institutions designed to ensure their promotion.

Consideration is also given to the adequacy of efforts undertaken by the international community to promote children's rights, including the approach adopted by the UN Commission on Human Rights and the importance accorded to the rights of the child by the international financial institutions. The study concludes with an examination of the approach adopted by the World Bank and the International Monetary Fund, both in general terms and in response to the crisis that Indonesia endured in the late 1990s within the broader Asian financial crisis.

The major strength of this study is its systematic focus on the steps needed to establish adequate legal and institutional foundations at the various levels to ensure that the rights recognized in the Convention will be respected and promoted. The study reflects extensive empirical research as well as careful legal analysis and constitutes a major contribution to our understanding of the global impact of the Convention on the Rights of the Child.

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OVERVIEW OF THE STUDY

The Convention on the Rights of the Child was adopted 15 years ago. This study seeks to evaluate the extent to which States and the international community have subsequently succeeded in putting in place the foundations of legal and political accountability, which are an essential component of efforts to make a reality of children's rights. The study begins by noting some of the criticisms which have been leveled at the CRC as a result of the gulf between the principles that it proclaims and the dire situation of vast numbers of children around the world. By way of background, it seeks to put the Convention into historical perspective by reviewing the different phases that the movement for children's rights has undergone since the beginning of the twentieth century. It then reviews the ways in which the Convention has come to be reflected in the law and institutions at various levels and specifically examines: (a) the challenge of attaining universal ratification; (b) the extent to which children's rights have been reflected in the regional human rights arrangements in Africa, the Americas and Europe; and (c) the extent to which national-level constitutional arrangements have been adapted to acknowledge and entrench respect for children's rights.

Part III of the study is concerned with the principle and practice of accountability in relation to children's rights. In particular, attention is given to the role of some of the key actors in this endeavour such as the UN Commission on Human Rights, national institutions for the promotion and protection of human rights, and civil society. Consideration is then given to two of the major challenges to the emerging accountability arrangements which are the impact of the trend towards decentralization of governmental administration and the growing role and power of non-state actors whose obligations under the CRC remain somewhat unclear.

Part IV of the report presents a case study of the role played by two of the most important and influential of international institutions – the World Bank and the International Monetary Fund. In addition to reflecting on their general role in this regard, the study takes an applied approach by examining the roles and responses of the Bank and the Fund in the context of the impact of the Asian financial crisis of the late 1990s on Indonesia.

Introduction

The CRC is the most widely ratified treaty in history, the first virtually universal human rights convention, and the most far-reaching and comprehensive of human rights treaties. It has brought about a qualitative transformation of the status of children as the holders of rights. Nonetheless, observers have understandably demanded to know how these achievements can be reconciled with the fact that massive violations of children's rights continue unabated in many parts of the world. The study argues, in line with an approach advocated by Abraham Lincoln, that the achievement of rights is inevitably a gradual, time-consuming, and aspirational process. The immediate challenge is to ensure that the legal and institutional foundations upon which a rights-based system can be built are in place.

Putting children's rights into perspective

The study identifies five different phases in the evolution of children's rights at the international level since the beginning of the twentieth century. The first phase (1901-1947) ended the relative invisibility of children on the international agenda by drawing attention to issues such as child labour, hazardous work, trafficking and sexual exploitation. This phase saw the emergence of international children's rights

NGOs, the adoption of key child-related ILO Conventions, and the proclamation of the 1924 Declaration of the Rights of the Child by the League of Nations. Phase 2 (1948-1977) saw the adoption of the four Geneva Conventions of 1949 which recognized children as a specific category of protected persons, the proclamation of the UN Declaration of the Rights of the Child of 1959, and the adoption of provisions relating to children in the Universal Declaration and the two International Human Rights Covenants.

Phase 3 (1978-1989) focused on the International Year of the Child and the lengthy process of drafting and adopting the CRC. Phase 4 (1989-2000) saw the continuation of international standard setting for children, including the landmark ILO Convention on the Worst Forms of Child Labour, the Landmines Convention, and the two Optional Protocols to the CRC. During this period, the Commission on Human Rights also developed a major focus on children. Phase 5, which began in 2001, has involved both consolidation of previous gains, but also a reaction against the entrenchment of children's rights in some respects. The latter is a natural response to the success of previous efforts but the years ahead will be crucial if the gains achieved are to be protected and built upon.

Securing universal ratification of the CRC

There are now 192 States Parties to the CRC. The absence of Somalia and the United States from the list is all that stands between the convention and a claim to full-fledged universality. The study argues that while many observers seek to play down the refusal of the U.S. to ratify, there are two reasons why the time has come when its non-participation can no longer be ignored: (i) U.S. non-participation is gradually being transformed into more active opposition to the CRC in various settings; and (ii) the reasons for the U.S. position, which are rarely spelt out in any detail, are often exaggerated or misrepresented. The study calls for a major study to be undertaken, which would analyze in a systematic and balanced manner the real impediments to U.S. participation. The study should be prepared in the name of a group of distinguished individuals and be widely disseminated.

Regional-level recognition of children's rights

In *Africa*, the African Charter of Human and Peoples' Rights of 1979 contains only a brief, albeit sweeping, specific reference to children. The adoption of the African Charter on the Rights and Welfare of the Child in 1990 has sought to make up for this relative neglect. The study identifies several priorities for future action: (i) extend the acceptance of the 1990 Charter from the present 27 States towards the maximum of 53; (ii) provide a serious impetus to the African Committee of Experts on the Rights and Welfare of the Child, established under the Charter; and (iii) encourage the African Union to devote greater attention to children's rights than it has to date.

In the *Americas* the child-specific provisions of the American Declaration of the Rights and Duties of

Man of 1948, the American Convention on Human Rights of 1969, and the Additional Protocol on Economic, Social and Cultural Rights of 1988 are limited and somewhat dated. The good news, however, is that the principal organs of the inter-American system – especially the Commission and the Court – have been notably progressive in their interpretation of the relevant provisions. The study provides a review of some of these developments, including the Court's important Advisory Opinion on the 'Legal Status and Human Rights of the Child'.

In *Europe*, the European Convention on Human Rights contains no provision specifically addressing children. Not until 1984 were children explicitly mentioned in one of the Protocols to the Convention. It is sometimes sought to justify the non-inclusion of children's rights in the Convention on three grounds: (i) civil and political rights protected by the Convention are fully applicable to children; (ii) children's rights are adequately dealt with in the European Social Charter; and (iii) the Council of Europe has adopted a range of specialist treaties, some of which are entirely devoted to the rights of children, such as the European Convention on the Exercise of Children's Rights of 1996 and other conventions dealing with adoption, the legal status of children born out of wedlock, the recognition and enforcement of custody decisions and on nationality. The study challenges each of these justifications and calls for the Council of Europe either to adopt a comprehensive children's rights convention or a Protocol to the ECHR.

The study reinforces this need by reviewing the role accorded to the CRC and children's rights in the judgments of the European Court of Human Rights. By September 2004 the CRC had been referred to in 28 cases over a period of 12 years. In statistical terms the frequency with which the Court makes reference to the CRC has not increased significantly over the years. The study concludes, however, that while the Court has been prepared to refer to the CRC, it has not consistently had regard to the jurisprudence of the Committee on the Rights of the Child. In general, the Convention is more likely to be used either to marginally reinforce an already strong case, or in concurring or dissenting opinions. The study calls upon advocates appearing before the Court to take greater account of the CRC, and for a seminar on the CRC to be designed specifically for the judges of this and other international Courts.

In relation to the European Union the study notes that the Charter of Fundamental Rights of the European Union, which is part of the proposed EU Constitution, contains several provisions relating to children. Two relate to education and child labour respectively and are formulated in classical pre-CRC welfare rights terms. This is partly true also of Article 24 which specifically addresses the rights of the child in general terms. Some of its provisions, however, are clearly modeled on the CRC. Overall the Charter provisions relating to children leave much to be desired.

Constitutional recognition of children's rights

The advent of the CRC has given a strong impetus to efforts to include children's rights provisions in national constitutions, even though such measures are not necessarily required by the Convention. The study examines the progress made in this regard and divides the world's constitutions into three categories: (i) the invisible child constitutions in which there are no express provisions relating to children; (ii) the special protection constitutions which reflect a pre-child rights approach calling for special privileges to be accorded to ensure that children are protected from threats to their well-being; and (iii) the children's rights constitutions which reflect at least some of the principles recognized in the CRC. The study undertakes a thorough examination of the extent to which different provisions of the Convention have been reflected in these constitutions. While pointing to the especially relevant experience of South Africa in this regard, the study cautions against assuming that there is a positive correlation between the extent of constitutional recognition and respect for the rights in practice.

The principle of accountability

Accountability is the lynchpin of the international human rights regime, but the study notes that it has been given disparate interpretations by different commentators. It advocates the adoption of a relatively modest and practically-oriented conception for the purposes of examining the effectiveness of the CRC in promoting accountability mechanisms in relation to children's rights.

The role of the UN Commission on Human Rights

The Commission is an important barometer of the status of children's rights in the international system as a whole. In order to evaluate the Commission's performance the study looks at three aspects of its work: (i) its special initiatives relating to children; (ii) the content of its annual resolution on children's rights; and (iii) its attention to these issues in its work with country and thematic rapporteurs. The study concludes that while considerable progress has been made since the adoption of the CRC, there remains great room for improvement. In particular, the special rapporteurs who play a crucial role in the system as a whole should be provided with training which focuses on the content of the CRC, the potential of adopting a child rights approach in some aspects of their work, and their use of the outputs generated by the Committee on the Rights of the Child.

The role of national human rights institutions

Despite the dominant focus of the present study on international arrangements, it remains the case that accountability is to be sought principally and primarily within a domestic, rather than an international, setting. While courts can play an important role in some societies, this is by no means the case universally. Over the past decade or more one of the most important developments in the human rights

field in general has been in relation to the creation of national human rights institutions, which include ombudsman offices, national human rights commissions, hybrid institutions combining ombudsman and commission characteristics, human rights commissions with a focus on particular issues, parliamentary human rights bodies, and national humanitarian law-focused bodies.

While the number of general-purpose national human rights institutions has expanded greatly in recent years, some children's rights advocates continue to argue in favour of specialized institutions with a children's rights mandate. In 2002 over thirty such institutions were active. The study looks at the debate over whether children are better served by general or specialized institutions, the appropriate role of children in participating in the work of national institutions, and the need for evaluative studies of the work of existing institutions, with respect to children's rights. It also looks at the contribution being made by regional groupings in this area.

Civil Society

The CRC and civil society are integrally linked. NGOs have played important roles in drafting the Convention, in promoting its ratification, in publicizing it within local communities, and in promoting governmental accountability. In some cases new NGOs have been formed primarily for Convention-related purposes and new networks have grown up with a view to promoting the CRC in a range of different contexts. The study documents many of these developments but concludes that there remains considerable room for an even stronger role to be played, especially in relation to accountability. The study suggests that the efforts of NGOs continue to be overly fragmented and that consideration should be given to the preparation of a consolidated annual report put together by a consortium of civil society groups. In this regard the 'Landmine Monitor Report' could serve as something of a model.

Decentralization

A major policy development of the late twentieth century, which continues apace today, involves the systematic decentralization of responsibility for administrative matters to local government units or to special statutory bodies. There are strong pros and not inconsiderable cons involved in this trend, but from the perspective of this study, the consequence is the need to devise new means for ensuring that the newly empowered local or statutory authorities are able to be held accountable. The challenge is especially important given that most of the traditional mechanisms used in the human rights field are not currently geared for this purpose.

Non-State actors

Another major challenge confronting international law in general, but also of major relevance to efforts to ensure respect for children's rights, is the rapidly growing role of non-State actors. While a considerable amount has been written in relation to corpora-

tions, the challenge also applies in relation to a range of other groups including private groups performing important welfare and other functions that were formerly the exclusive preserve of governments. The study argues that while codes of conduct and other voluntary initiatives are important they are not sufficient. Proponents of children's rights will need to devise new and innovative approaches as well as to adapt existing approaches if non-state actors are to be held properly to account under the CRC.

The role of the World Bank and the IMF in relation to the CRC

The influence of the IMF and the World Bank on development policy, and thus on issues of fundamental relevance to the rights of the child, can easily be, and often is somewhat overstated. Nevertheless, the bottom line is that these two institutions wield very significant influence over the policy options open to most developing countries as well as over the policies of the major aid donors. It is thus essential to scrutinize closely the nature of the relationship between their policies and children's rights in general and the CRC in particular. This is the goal of Part IV of the study. The approach is applied rather than abstract and begins with a detailed case study of the role accorded to the CRC in the context of the East Asian financial crises of the late 1990s, with particular reference to the experience of Indonesia. Why Indonesia?: (i) it was arguably the Asian country most dramatically affected by the crisis; (ii) the impact on children was especially significant; (iii) the Indonesian case represents an important turning point in the evolution of the thinking of the international financial institutions in relation to social issues; and (iv) the importance now being attached to the concept of 'country ownership' of policies and programs owes a good deal to the lessons learned in Indonesia.

The study concludes that neither institution paid much attention to the CRC or to children's rights in responding to the crisis. It then turns to examine some of the reasons for this relative neglect, includ-

ing the issue of whether legal obstacles prevent or significantly inhibit a focus on rights issues by the Bank or the Fund in their work. Other reasons which are sometimes cited include: the historical separation of human rights and development issues; the argument that everything the institutions do contributes by definition to the enjoyment of human rights; the suggestion that human rights policies cannot avoid double standards and thus should themselves be avoided by the institutions; the suggestion that children's rights-based policies could only be adopted to the extent that they can be shown to be empirically warranted; and the critique that promoting children's rights constitutes a form of economic or cultural imperialism. After refuting these arguments the study shows that the Bank in particular is fully capable of embracing human rights concerns when it suits its own purposes.

A range of policy recommendations emerge from this part of the study. They include: (i) there is a need to distinguish anti-poverty strategies from much broader children's rights-based empowerment strategies; (ii) economic, social and cultural rights need to be taken seriously by the Bank and the Fund; (iii) governments need to ensure that the CRC is accorded appropriate status in the domestic legal order; (iv) national institutions have a vital role to play in promoting children's rights; (v) the children's rights constituency need to be as broad as possible; (vi) without adequate data, the monitoring of children's rights is extremely difficult; (vii) the process of reporting under the CRC needs to be taken seriously at the national level; (viii) the Bank and the Fund should adopt official policy statements affirming their commitments to children's rights and the CRC; and (ix) international officials need to be trained in relation to the CRC.

Finally, attention is given to the importance of ensuring that the CRC and children's rights form an important part of the strategies designed to achieve the Millennium Development Goals and of the national Poverty Reduction Strategy processes. This is not currently the case, rhetorical assurances notwithstanding.

1

PUTTING CHILDREN'S RIGHTS INTO PERSPECTIVE

1.1 Introduction to the study

In May 2002, in advance of the UN General Assembly's Special Session on Children, a meeting was held in New York of the representatives of independent children's rights commissioners or ombudsmen with legal authority to promote, protect and monitor children's rights from some thirty countries around the world. In assessing the progress that had been achieved in the twelve and a half years since the Assembly's adoption of the Convention on the Rights of the Child (the CRC), the commissioners and ombudsmen proclaimed:

We cannot tolerate another decade of non-compliance with the Convention on the Rights of the Child. ... After decades of international standard-setting activities and ratifying human rights treaties, States must focus on their full implementation. Having rights on paper means little or nothing when they are not known about or cannot be enforced. We can and must do better!⁴

A year later, in May 2003, a UNICEF report entitled *A Future for All Our Children* concluded that while 'the countries of East Asia and the Pacific have taken enormous strides in recent years', especially in terms of economic growth and the movement towards democracy, 'the harsh reality' remains that 'too many countries in this region continue to fail their children.' The situation in other regions of the world is not dramatically different.

This study provides a critical and constructive

analysis of how far the international community and individual states have come in their efforts to establish the normative, legal and institutional frameworks which are essential if the aspirations of the Convention are to be translated into reality. Within this context the study seeks to achieve three objectives: (1) to draw up a balance sheet of some of the Convention's achievements and shortcomings in terms of laying the foundations for an effective Convention-based regime; (2) to provide a balanced perspective on the Convention's importance within the overall range of endeavours to improve the well-being of children in the world; and (3) to expose and examine some of the dilemmas and complexities which arise in efforts to promote and give effect to the Convention.

The focus thus is limited to a specific range of issues designed to promote the principle of accountability in relation to the policies and conduct of some of the key actors, both at the national and international levels. The study does not aim to tackle the much broader question of whether, and by what proportion, the children of the world are better off today as a result of the CRC than they were in the 1980s prior to its adoption. Such an analysis would involve too many variables to yield a particularly useful or compelling report. On the other hand, the principle of accountability is central to efforts to achieve widespread respect for human rights and many of the indicators of accountability are easier to identify. It is that project which provides the principle objective of this study.

The basic paradox

It is not difficult to find superlatives to describe the achievements of the CRC. It is the most widely ratified treaty in history, the first virtually universal human rights convention, it is the most far-reaching, the most forward-looking, the most comprehensive, it is the embodiment of a whole new vision for children, a definitive turning point in the struggle to achieve justice for children, and a document with an unprecedented potential to bring about dramatic change. In a submission to the Inter-American Court of Human Rights, quoted in the latter's 2002 Advisory Opinion on the 'Legal Status and Human Rights of the Child', the Government of Costa Rica expresses the view that the CRC had achieved "a true qualitative transformation of interpretation, understanding of and attention to minors and therefore of their social and juridical condition."⁵

But the paradox is that it is equally easy to recite a litany of terrible abuses which continue to be committed against children, some of which seem to be even more chronic and less susceptible to resolution today than they were before the Convention existed. It is lamentably commonplace to read reports of the sexual exploitation of children on a large scale, of their involvement and systematic abuse in the context of armed conflicts, of the vast numbers who are refugees or asylum-seekers, of their enslavement for a range of exploitative purposes, of their being condemned to perform hazardous and debilitating forms of child labour, until the shells that remain can be discarded, of the deliberate deprivation or uncaring neglect of their fundamental rights to food, education, shelter and health care as a result of which their development and life chances are stunted, perhaps irreparably, and of the many forms of discrimination to which they are subjected. All of these evils can now be more easily labeled and are perhaps more widely condemned as a result of the prominence accorded to the Convention, but they seem nevertheless to continue unabated. The question arises as to whether, to adapt an old aphorism, the road to hell has been paved not only by good intentions but also by a magnificent Convention?

Perhaps the paradox was best captured by Kofi Annan in his report to the May 2002 Children's Summit in which he observed that:

The idea of children's rights, then, may be a beacon guiding the way to the future – but it is also illuminating how many adults neglect their responsibilities towards children and how children are too often the victims of the ugliest and most shameful human activities.⁶

Other commentators have taken the gap between rhetoric and reality and expressed grave concerns about it. In 1997, a highly respected journalist and author, Caroline Moorehead, concluded that the CRC had become "something of a sham"; primarily because it is violated "systematically and contemptuously" by many countries. Articulating a criticism which is taken up in Chapter 3 of the present study,

she wrote that "No countries violate it more energetically than those that were quickest to sign."⁷

One of the enduring and oft-noted paradoxes of human rights is that efforts to recognise and promote them and to ensure accountability are likely to be least effective in countries that are most in need and conversely most effective in those contexts in which the problems are relatively minor and the existing legal and institutional arrangements are already functioning effectively. This has led some commentators to suggest that it might be pointless to seek to plant the seeds of children's rights in soil which has not been carefully prepared in advance through the creation of a functioning democratic system, and the establishment of processes of governance which are at least moderately transparent and equitable. A study on Latin America for UNICEF put a related concern in a more nuanced way when it observed that "where the legal framework and justice system are weak, the institutional framework less developed and national budgets more restrained, the transition [to a rights-based approach] would have to be more gradual and [would] encounter more difficulties"⁸

But despite the attention which is all too often accorded to it, the gap between the stirring rhetoric of human rights and the grim realities of human existence is a very old story. Does it mean that it is a mistake to have promoted the near universality of the CRC before a great many other initiatives had been satisfactorily undertaken? Does it mean that the CRC is different from other human rights treaties such as the Genocide or Torture Conventions and that while these last two should have been proclaimed, the CRC should not have until conditions in the real world were more in line with the aspirations of the drafters?

For the most part, the expression of such criticisms is to misunderstand both the nature of rights, and more importantly in the present context, the functions served by international treaty commitments. Abraham Lincoln's response to this age-old problem, which afflicts most attempts to improve the human condition through the adoption of progressive legal formulations might still be the best. In explaining the gap between the rhetoric and the reality of the rights component of the United States' Declaration of Independence, he noted first of all that the founders "did not mean to assert the obvious untruth, that all men were then actually enjoying that ... equality, nor yet that they were about to confer it upon them. In fact, they had no power to confer such a boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard ... constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated ..."⁹ This way of understanding the role of declarations of rights is, of course, strongly reminiscent of the language chosen a little over ninety years later by the drafters of the Universal Declaration who proclaimed it, in the Declaration's preamble, as "a common standard of

achievement for all peoples and all nations” to keep “constantly in mind ...”

The emptiness of the critique of rights as being utopian at best, and counterproductive at worst, is well illustrated by an oft-repeated critique of the Universal Declaration of Human Rights for having sought to consecrate as rights, things which were simply unattainable. Only twenty years ago Maurice Cranston based such a critique on the identification of ‘practicability’ as the first criterion or test which a right, or a manifesto of rights, must satisfy. In his view, recognition of economic and social rights, such as the right to education or to food, served only to push human rights “out of the realm of the morally compelling into the twilight world of utopian aspirations.”¹⁰ He sought to demonstrate the obvious validity of his approach by arguing that since India could never aspire to feed its people, there could be no such thing as a right to food. Yet today, India not only feeds its own population but there is a thriving civil society movement dedicated precisely to the right to food¹¹ and the Peoples Union for Civil Liberties has pursued far-reaching litigation to ensure respect for the right to food in India, litigation which is still on-going but has already achieved a considerable amount.¹²

In brief, the thrust of the present study is that the near-universal ratification of the CRC is a development of the highest importance, but one that mainly serves to highlight the challenge of transforming that act of commitment into a world in which children’s rights are accorded the respect and priority that they demand. Applying the wisdom of Abraham Lincoln, cited above, the CRC is a historic declaration of the rights of every child in the world and its “enforcement [should now] follow as fast as circumstances should permit.” It sets a universal “standard ... constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated ...”

1.2 Putting children’s rights into historical perspective

Since the beginning of the twentieth century international efforts to promote the concept of children’s rights have gone through five different phases. An understanding of both the current significance of the Convention and of the prospects for its future development requires us to have some sense of this historical evolution.

a) Phase 1: 1901-1947

This is not the place to trace the evolution of attitudes towards children in general, in the course of preceding centuries. That is a story that has already been well told elsewhere.¹³ Suffice it to say that in the course of the preceding century, a range of movements to protect children in the home, at work, in the care of the state, and in times of warfare, had all contributed to a rapidly expanding movement to focus specifically on the plight of children as individ-

uals in their own right rather than as the property of one or other of their parents, or of a legal guardian. But these movements had garnered relatively little international momentum and they rarely formulated their agendas in terms of children’s rights.

The relative invisibility of children on the nineteenth century’s international agenda was to begin to change dramatically in the first quarter of the twentieth century. There were, of course, a large number of different catalysts, but the most important of them were the reactions to the plight of exploited working children, horror at the sexual exploitation of children and especially its suspected cross-boundary dimensions (the ‘white slave trade’), and deep community concern about the situation of children in times of war and the aftermath thereof. Concern that the attraction of communism would spread after the successes of the Bolshevik Revolution in the Soviet Union was another important factor.

In each of these areas international organizations began to play important roles and to focus much more explicitly than had ever been the case before on the impact of the relevant phenomena on children. This was also the era in which the international community began to make effective use of legal instruments to reinforce their broader efforts to eliminate abuses and to encourage the adoption of specific remedial measures by states.

Many of the international labour standards adopted by the ILO in the first few years after its creation in 1919 focused directly on children and helped to develop the notion that, in the labour field, they possessed certain rights. The earliest ILO conventions included the Night Work of Young Persons (Industry) Convention, No. 6 of 1919; the Minimum Age (Sea) Convention, No. 7 of 1920; the Minimum Age (Agriculture) Convention, No. 10 of 1921; and the Medical Examination of Young Persons (Sea) Convention, No. 16 of 1921.

In the areas of trafficking, exploitative labour, and slavery, all areas in which children were prominent victims, the League of Nations was to play a major role. This was ensured by Article 23 of the League’s Covenant which provided inter alia:

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:

Will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations;

Undertake to secure just treatment of the native inhabitants of territories under their control;

Will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs;

To implement these provisions the League set up a

Child Welfare Committee which, in terms of composition, was significantly more advanced than a great many comparable endeavours today. It consisted of 12 governmental representatives and 13 'assessors' who represented the major NGOs working in this area as well as the ILO and the League's Health Organization. It was later merged with a committee dealing with the trafficking of young women, and became the Advisory Committee on Social Questions. The League's principal historian observed that the work of these committees "had no great influence on the general course of world affairs"; although "foreign ministers and diplomatists were apt to regard them with distrust"; partly because they were considered to be interfering in internal affairs of states which should have remained beyond the League's purview.¹⁴ Nonetheless, the historian conceded that their achievements, including that of having "brought fifty countries to accept the Geneva Declaration on the Rights of the Child"; may well "continue to produce their effects long after many a frontier dispute has been forgotten".¹⁵

And indeed the adoption of the Declaration was by far the most significant action taken by the League of Nations in relation to children. It was largely a result of the work of Eglantyne Jebb, the founder of Save the Children Fund UK, who subsequently played a leading role in the establishment of the international coalition called the Save the Children International Union, which was set up in Geneva in 1920. In 1923 the International Union adopted a Declaration on the Rights of the Child which had been drafted by Jebb. The following year it was adopted, unchanged, by the League of Nations on 26 September 1924. The brevity and succinctness of the Declaration are among its hallmarks and its provisions are worth recalling in full:

- The child must be given the means requisite for its normal development, both materially and spiritually.
- 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.
- The child must be the first to receive relief in times of distress.
- The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation.
- The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.

While the principal flavour of the Declaration was determinedly welfarist in orientation, and its origins lay clearly in a wish to follow up on and consolidate some of the achievements of post-World War I humanitarian relief work, it has nonetheless been widely portrayed as the crucial moment in international efforts relating to children. According to UNICEF's historian, the approval of the Declaration marked 'the formal establishment of an international

movement for children's rights'.¹⁶ While this statement is open to question, it is clear that the Declaration provided the inspiration for much that was to follow during the second phase of international efforts on behalf of children during the twentieth century.

b) Phase 2: 1948-1977¹⁷

This phase, which began with the creation of the United Nations in 1945, saw relatively little activity relating specifically to children's rights. It was essentially a period in which the emphasis was on the building and consolidation of the human rights regime as a whole, combined with the non-differentiation of children's rights from other human rights. From the perspective of the rights of the child, the major achievement was the consolidation of the pre-War World II *acquis* (in the sense of the accumulated body of law) which emerged during the first phase. The resistance to distinguishing children from adults in the human rights context was forcefully demonstrated in the text of each of the three major human rights instruments adopted in the post-war phase. The Universal Declaration of Human Rights of 1948, mentions children in two places. The first is Article 25, which affirms that "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 second is article 26(3) which states that "Parents have a prior right to choose the kind of education that shall be given to their children." The American Declaration of the Rights and Duties of Man, adopted some seven months before the Universal Declaration, took the same protective approach, but also went further in spelling out duties towards children. Article VII provides that "all children have the right to special protection, care and aid"; while Article XXX asserts that "It is the duty of every person to aid, support, educate and protect his minor children and it is the duty of children to honor their parents always and to aid, support and protect them when they need it." The European Convention on Human Rights, adopted almost two years after the Universal Declaration, makes no specific mention of children. Nevertheless, in the aftermath of the Second World War, the plight of children was far from forgotten in other settings. In terms of rights, it was again the non-governmental organizations which were to lead the way and in the same year in which the Convention for the Suppression and Punishment of the Crime of Genocide and the Universal Declaration of Human Rights were adopted, the International Union for Child Welfare (IUCW) adopted a revised version of the Declaration of the Rights of the Child. In essence, it reaffirmed the principles contained in the Geneva Declaration and asserted, in the name of "men and women of all nations" that "Mankind owes to the child the best that it has to give." They sought to match rights with duties, by insisting that along with these rights went a "duty to meet this obligation in all respects". But the main significance of the 1948 Declaration was its expanded focus and its revival of an interest in children's rights. It also marked the beginning of a concerted lobbying effort *vis-à-vis* the

UN by the IUCW, which had been formed in 1946 through the amalgamation of the Save the Children International Union and the International Association for the Promotion of Child Welfare.

In an interesting footnote to the writing of history in this area, it has been widely reported that the UN General Assembly took action on children's rights issues in 1948. Thus UNICEF states that also in 1948, the General Assembly adopted a second Declaration of the Rights of the Child,¹⁸ and that it included seven points of concern related to children,¹⁹ and an Indian non-governmental organization notes that the Declaration of Geneva was further revised and extended in 1948 by the UN.²⁰ But a thorough search of the records of the UN General Assembly for 1948 reveals no such action on its part, despite the fact that the possibility of such a Declaration was placed on the agenda of the newly established UN Economic and Social Council (ECOSOC), as early as 1946. It would seem therefore that the IUCW Declaration of 1948 has been widely misattributed to the UN General Assembly, thus giving a somewhat distorted picture of the extent to which it was focused on children's rights issues at that stage.

In fact, however, the first post-war moves to build upon the 1924 Declaration arose within the framework of ECOSOC and first involved the Social Commission (the predecessor to the Social Development Commission as it is known today) and the Commission on Human Rights. As early as 1946, during its first session, the Social Commission expressed its view that the terms of the 1924 Declaration "should be as binding on the peoples of the world today as they did [sic] in 1924."²¹ This was, in some respects at least, a curious assertion, since no one would have suggested that the Declaration had ever achieved a legally binding status. This leads to the conclusion that the Social Commission could only have been extolling the Declaration's morally binding status.

Nevertheless, this was the first step towards getting the matter on the Commission's agenda and four years later, in 1950, it adopted a draft Declaration on the Rights of the Child.²² Subsequently, at the request of the Council, the draft was scheduled for consideration in 1951, by the Commission on Human Rights. The latter, however, was preoccupied with the drafting of the International Human Rights Covenants and then by the crisis engendered by the full-blown arrival of the Cold War in 1953. As a result, it did not even hold a preliminary discussion of the draft until 1957. The possibility of drafting a convention, or some other form of binding instrument, was raised during these debates, but the clear majority sentiment favoured maintaining the status of a non-binding declaration.²³ The 1950 draft was then sent to governments and others for comments -- a request to which 21 governments replied along with two NGOs: the International Federation of Women Lawyers and the International Union for Child Welfare. It was another two years before the Commission took up the matter again and turned to serious drafting at its session in March, 1959.

The drafting process was completed by the

Commission in the course of its four-week long session and the draft was sent to the General Assembly for consideration. The draft was substantially longer than the original version provided by the Social Commission.²⁴ A senior British diplomat described it at the time as "verbose and repetitious"²⁵ and the Assembly proceeded to cut it down and make very significant changes, before finally adopting the Declaration on the Rights of the Child on November 20, the same date which, precisely thirty years later, was to see the adoption of the CRC. This is not the place for a detailed comparison of the two drafts. But it is worth noting that the final version was, from a human rights perspective, inferior in some respects to the draft endorsed by the Commission on Human Rights. The word 'progressively' was added in the chapeau of the Declaration, thus diluting the nature of the measures expected to be taken by governments. A separate provision affirming equality of rights for children whether born in or out of wedlock, was struck out. The means to enable the child's development were no longer to be "given" to the child, but instead the child was to be "given opportunities and facilities".

The 1959 Declaration on the Rights of the Child was ground-breaking in several respects. But perhaps its major significance lay simply in the fact that it gave a broad imprimatur to the concept of children's rights per se. At the time, none of the major international human rights instruments, including the Universal Declaration of Human Rights and the two International Human Rights Covenants (which were then only in draft form), used the term children's rights or rights of the child. Instead, it was assumed that since the overall corpus of human rights applied to children in the same as to all other groups, there was no need to give particular recognition to children. The Declaration remains significant today for (i) its emphasis on children's emotional well-being ("the child needs love and understanding. He shall, wherever possible, grow up ... in an atmosphere of affection ..."); (ii) the relative priority accorded to children's entitlement to emergency assistance ("The child shall in all circumstances be among the first to receive protection and relief"), which was to find an echo many years later in UNICEF's slogan affirming the 'first call for children'; (iii) the maintenance of the emphasis on the individual child and his or her rights, which had been a major contribution of the 1924 Declaration; and (iv) recognition of the key role of non-state actors: ("calls upon parents, upon men and women as individuals, and upon voluntary organisations, local authorities and national Governments to recognise these rights and strive for their observance").

In hindsight and with the standards of a later era in mind, the 1959 Declaration had a significant number of shortcomings. The most striking were: (i) the relative absence of the recognition that children are entitled to civil and political rights above and beyond a right to non-discrimination in relation to the specific rights that were recognized; and, closely linked to the first, (ii) an emphasis on the need to safeguard and protect the child, rather than to empower him or her. Thus, variations of the word

'protect' appear six times in the rather brief Declaration and the phrase 'special safeguards' appears twice. The word 'safeguards' also appears twice in the 1989 Convention. But the difference is that the Convention references are to legal safeguards applicable in the specific contexts of accused juveniles (art. 40) and inter-country adoption (art. 21), whereas the concept of children in need of being safeguarded is virtually the leitmotif of the Declaration ("the child, by reason of his physical and mental immaturity, needs special safeguards").

But despite the significance of the rights approach reflected in the 1959 Declaration, most of the international agencies continued to maintain a welfarist approach to children and this effectively excluded any particular significance being attributed to the concept of children's rights. Indeed, rather than UNICEF being a catalyst for the 1959 Declaration, it was the latter that acted as a catalyst to help move UNICEF beyond its narrow focus on health and nutrition, towards the more holistic approach that began to emerge in the 1960s.²⁶ Similarly, it was not for a number of years that the Commission on Human Rights, which had done much of the drafting of the Declaration, attached much importance to following up on it. This neglect can perhaps be explained by a distinct lack of enthusiasm for children's rights on the part of some of the key actors. One such person, who was the Director of the UN's Division of Human Rights and thus head of the Commission's Secretariat, wrote about the Commission's initial consideration of the matter in 1957:

I doubted whether the purpose [such a declaration] would serve could possibly justify the time and effort the United Nations was devoting to it. It was, I suspected, a stopgap which was being used to give the impression that the Human Rights Commission was doing something. There were certainly other more important matters that needed attention.²⁷

Two years later, after the Commission had completed its work, he wrote:

I had some reservations about the wisdom of adopting such a declaration; a proliferation of United Nations declarations would undermine the authority of the Universal Declaration of Human Rights. I also thought that there was something wrong with our priorities. It was easier to draft a declaration on the rights of children than to devise practical measures for the protection of human rights.²⁸

The other major development of this initial era was the inclusion of children as a specific category of protected persons, within the context of the four 1949 Geneva Conventions on International Humanitarian Law. In the aftermath of the brutal excesses of the Second World War, this effort to update and upgrade what are often referred to as 'the laws of war', led to a very significant improvement in the protections offered specifically to children. That protection was to be extended even further at the very end of this first phase, by the adop-

tion of the two Additional Protocols of 1977, which extended the reach of international humanitarian law -- especially in relation to non-international armed conflicts which had hitherto enjoyed only limited coverage from the 1949 Geneva Convention regime.

It is noteworthy, however, that, especially in the humanitarian context, the treatment of children in such international legal instruments remained almost inexorably linked to their mothers in particular and to women in general, rather than being considered in its own right. A good example of this phenomenon is one of the instruments that was adopted by the General Assembly in the years leading up to the adoption of the 1977 Additional Protocols – the Declaration on the Protection of Women and Children in Emergency and Armed Conflict.²⁹ The word 'children' appears fifteen times in the text and on all but one occasion, it is part of the phrase 'women and children'. The sole exception deals with the "destiny of mothers, who play an important role in society, in the family and particularly in the upbringing of children."³⁰

c) Phase 3: 1978-1989

This period was principally characterized by the emergence of a strong children's rights consciousness at the international level.³¹ Preparations for the International Year of the Child in 1979, prompted the Polish Government to propose the drafting of a Convention on the Rights of the Child. Despite the very limited aspirations of the draft first presented by Poland to the Commission on Human Rights in 1978, this initial step was to prove more significant than might first have been expected. It acted as an effective catalyst for a variety of actors to observe a rights-based approach to at least some aspects of the welfare and well-being of children. In particular, it began a gradual process of building an element of rights-consciousness within the principal international agency dealing with children, UNICEF. It thereby managed to reverse a longstanding (but largely unconscious) policy of avoiding the human rights dimension of issues, or at least portraying them so that they seemed less threatening to governments. Thus, even as late as 1978, UNICEF responded to a request for information on the exploitation of child labour from the UN Commission on Human Rights, by indicating certain NGOs were better placed to address such issues. At the same time, some of those NGOs were emboldened to repackage their programmes and concerns in terms of children's rights. The Anti-Slavery Society, for example, was to play a vital role during the International Year of the Child and later, by bringing a human rights perspective to issues such as child labour, debt bondage, child sexual exploitation and female circumcision (as it was then called).

It is worth underscoring the fact that 25 years on, programmes to eliminate the worst forms of child labour have been adopted by a wide range of international agencies, ranging from UNICEF and the ILO, to the World Bank and the various regional development banks. Bringing such previously con-

tentious human rights issues as child labour, child soldiers and inter-country adoption, out of the development agencies' closets and into the mainstream of their activities, can be attributed to a very significant extent to what might be termed 'the CRC process' (the activities surrounding the drafting, adoption and implementation of the Convention and the accompanying legitimization of discourse about children's rights).

d) Phase 4: 1989-2000

This phase began with a great enthusiasm for human rights in general. The optimism generated by the fall of the Berlin Wall, the resulting withdrawal of East European opposition to many initiatives to enhance the effectiveness of the international human rights regime and a sense that human rights would be one of the foundation stones of a new world order, all served to create a climate which was propitious for multilateral initiatives in the human rights area. Children's rights seemed to fit in well with the new ethos. Already midway through the previous decade, UNICEF had made clear its unqualified support for the draft Convention and in the 1990s, it mounted a concerted diplomatic push to encourage and facilitate ratification of the new Convention. This did not prove hard at a time when governments were eager to demonstrate their solid human rights credentials. Despite Congressional reservations, the United States was generally supportive of the Convention and its decision to sign the treaty in 1995, sent a strong signal of support. NGOs also worked hard at both the national and international levels to promote ratification and to urge the adoption of measures designed to ensure that the domestic consequences of ratification would be meaningful. UNICEF also organized a highly successful World Summit for Children in 1991, which enhanced the profile of children's issues generally, mobilized support for the CRC, began the process of setting targets for evaluating countries' performance and put in place a regular review process.

The movement for women's rights, although largely separate from the children's rights groups, demonstrated at the 1993 Vienna World Conference on Human Rights, the impact that an organized coalition could have. The children's rights groups became more effective and engaged in the various world conferences that took place during the remainder of the decade most notably those on population and development (Cairo in 1994), social development (Copenhagen in 1994), women (Beijing in 1995) and housing (Istanbul in 1998).

During the 1990s, the CRC was widely feted and only a few governments had really begun to feel the potential sting of implementation arrangements at the national or international levels. For the most part, the post-ratification honeymoon continued for quite a while.

The Committee on the Rights of the Child was set up and was blessed by a strong composition and good support from international agencies and NGOs. The Committee plunged into the task of establishing its

procedures and its place in the world with considerable fanfare and goodwill. And initial reports were prepared with some enthusiasm by a good number of governments. The UN Commission on Human Rights mandated several child-specific special procedures (special rapporteurs) and for the first time, placed on its agenda a comprehensive item dealing with all aspects of children's rights. NGOs were actively engaged in education efforts around the Convention, new groups were set up and new coalitions were formed and a series of impressive 'alternative' reports were submitted to the Committee in relation to a wide range of countries which had submitted governmental reports. UNICEF took the Convention to heart and began the unprecedented process of seeking to re-orient its priorities and its programming to reflect a CRC-based approach to its work. Other agencies also began to engage with the Convention, albeit in widely varying degrees.

At the normative level, several new initiatives were launched, which resulted in considerably strengthening the legal framework for the protection of children's rights. One exception was Landmines Convention (officially known as the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction) which was adopted in 1997 and became operative two years later. In 1999, the International Labour Conference adopted a new 'Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour', which marked a major step forward in the international battle against the exploitation of child labour. In the following year, the General Assembly adopted two Optional Protocols to the CRC, one dealing with 'the Involvement of children in armed conflict' and the other with 'the sale of children, child prostitution and child pornography'.

The close of the twentieth century thus witnessed the putting in place of a normative framework for children's rights which would have been unimaginable even a quarter of a century earlier.

e) Phase 5: 2001-Present

With the new century, there began a phase of both consolidation and reaction, in relation to children's rights. Consolidation was called for on the part of the principal actors involved in the CRC process, as the relative euphoria of the third phase began to wear off and governments, NGOs and international agencies all began to realize the true enormity of the task they had set themselves. This has already given rise to a period of reaction in which governments seek to reclaim some of the ground that they fear was conceded in the 1990s and as they come under greater financial and other pressures (many of which will be both rightly and wrongly attributed to globalization) which accord no particular priority to children. Many will also begin to resist either passively or actively some of the demands for greater accountability, which are an integral part of the philosophy of the CRC.

The post-September 11 syndrome in many countries

has focused attention on a phalanx of 'security' concerns, often at the expense of human rights. We can expect a diminution in human rights consciousness on the part of governments, an increased hesitance on the part of human rights groups to insist on the respect for human rights in the face of new threats, both real and imagined and what appears to be a growing public tolerance of measures to limit the enjoyment of human rights in the name of security and related objectives. These general trends will also put increasing pressure on children's rights proponents in relation to issues such as maintaining a reasonable age of full criminal responsibility, the imposition of blanket curfews, the curbing of student protests, the diversion of public funding from social rights expenditures to 'security' purposes broadly defined and in various other ways. Funding for national human rights institutions and for initiatives designed to promote and protect children's rights will be squeezed, as new priorities are identified. And the decisive shift in the position of the US administration vis-à-vis children's rights, manifested most clearly in the context of the postponed Children's Summit, will begin to generate a variety of often subtle pressures to avoid the discourse and even much of the substantive agenda associated with the Convention.

But the outlook in this fourth phase is by no means all negative. And many of the challenges which children's rights proponents will face, will be a conse-

quence of the relative success of their agenda to date. Increased government resistance to the scrutiny applied by the Committee on the Rights of the Child, is in many respects an indication that the process is starting to bite in the ways that it should. Efforts to reduce the age at which childhood is considered to end in relation to criminal responsibility or for other purposes, are in part a function of the pressures generated by the Convention to move to a standard benchmark of 18. Arguments designed to justify the detention of refugee children are being made with increasing vehemence, precisely because the Convention challenges such practices directly. And even the continuing reluctance to set firm targets in the context of development assistance programmes, an approach which has been given a significant push by the outcome of the Monterrey Conference on Financing for Development, can probably be attributed in part to a backlash on the part of governments which had resented being called to account for their failure to meet the targets set in the Declaration and Programme of Action adopted in 1991, at the Children's Summit.

Perhaps the most optimistic assessment of the stage that has been reached in the context of this fourth phase is that, in the words of the Inter-American Court of Human Rights, the CRC has wrought a fundamental transformation of the law governing children. They have now become "subjects entitled to rights, [and] not only objects of protection".³²

Notes

- 4 UNICEF Press Release, 8 May 2002, 'First Global Meeting Of Independent Human Rights Institutions For Children', www.unicef.org/specialsession/activities/ihri-pr.htm
- 5 'Legal Status and Human Rights of the Child', Inter-American Court of Human Rights, Advisory Opinion OC-17/2002 of Aug. 28, 2002, para. 15.
- 6 K. Annan, *We the Children* (2002), p. 12.
- 7 Press Release, 'Despite Safeguards, Children's Rights Are Still Ignored', 26 March 1997, at http://pangaea.org/street_children/world/unconv3.htm
- 8 Elisabeth Lewin, Supporting the Change of National Frameworks to Meet the Demands of the CRC: The Role of UNICEF, A Study of UNICEF Programming with a Rights-Based Approach: The Case of Brazil, Costa Rica and Venezuela, Final Report (UNICEF, 2001), p. iii.
- 9 Speech delivered at Springfield, Illinois, 26 June 1857, cited in A.N. Holcombe, *Human Rights in the Modern World* (1948) 27, n.4.
- 10 M. Cranston, 'Are There Any Human Rights?', 112 *Daedalus* (1983) 1, 12.
- 11 For details of the Right to Food Campaign see www.righttofood.org
- 12 See, e.g. the interim order granted by the Supreme Court of India on 2 May 2003 in the case of *People's Union for Civil Liberties v. Union of India & Ors.*, available at www.righttofood.org
- 13 See for example Giovanni Levi and Jean-Claude Schmitt (eds.), *A History of Young People* (2 vols, Cambridge, Harvard University Press, 1997); and Mary Ann Mason, *From Father's Property to Children's Rights: The History of Child Custody in the United States* (New York, Columbia University Press, 1994).
- 14 F.P. Walters, *A History of the League of Nations* (London, Oxford University Press, 1952) p. 186.
- 15 *Ibid.*, p. 187.
- 16 Maggie Black, *The Children and the Nations: The Story of Unicef* (Sydney, Unicef, 1986) p. 199.
- 17 This period is dealt with in a little more depth than the others solely because part of the historical record which it details, appears not to have been brought together in one place before.
- 18 www.unicef.org/crc/convention.htm
- 19 UNICEF, "Child rights in action: Path to the Convention on the Rights of the Child," May 2002, <http://www.unicef.org/specialsession/rights/path.htm> (accessed 16 March 2005)
- 20 <http://childrensrightrightsindia.org/articles/hisevol1.htm>
- 21 UN doc. E/41 (1946).
- 22 UN doc. E/CN.4/512.
- 23 UN doc. E/CN.4/753/Rev.1 (1957), para. 113.
- 24 A detailed comparative table was included in the resolution adopted by the Commission on Human Rights. See Res. 5 (XV) (1959), UN doc. E/3229 (1959), para. 197.
- 25 Samuel Hoare, 'The UN Commission on Human Rights', in Evan Luard (ed.), *The International Protection of Human Rights* (New York, Praeger, 1967), p. 76
- 26 See Maggie Black, *The Children and the Nations: The Story of Unicef* (New York, UNICEF, 1986) pp. 199-213.
- 27 John P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (Dobbs Ferry, Transnational Publishers, 1984) p. 231.
- 28 *Ibid.*, pp. 255-56.
- 29 General Assembly resolution 3318 (XXIX) of 14 December 1974.
- 30 *Ibid.*, preambular paragraph 8.
- 31 For a detailed and insightful history of this and following phase see Maggie Black, *Children First: The Story of UNICEF, Past and Present* (New York, Oxford University Press, 1996).
- 32 'Legal Status and Human Rights of the Child', Inter-American Court of Human Rights, Advisory Opinion OC-17/2002 of Aug. 28, 2002, para. 137 (1).

2

LAYING THE LEGAL AND INSTITUTIONAL FOUNDATIONS AT THE REGIONAL AND NATIONAL LEVELS

While there are many different ways in which children's rights can be promoted and protected, the establishment of an appropriate legal framework at all levels is unquestionably a central element. The Convention itself emphasizes this requirement and one of the most enduring contributions of international human rights law in general has been the establishment of a legal or normative platform for human rights within domestic law. It is upon such foundations that a diverse range of other activities can be built. Appropriate institutional arrangements complement and supplement this legal framework.

For this reason, any evaluation of the impact of CRC during the first decade or more of its existence, needs to look very carefully at the extent to which universal ratification of the Convention has become a reality -- taking account both of the actual number of ratifications and the quality of those ratifications. The latter can be significantly jeopardized if excessively broad reservations have been lodged to key provisions of the Convention and which serve to limit in practice the extent of the commitment which has been made by ratifying States. The present chapter will thus explore those issues before moving on to examine the extent to which the various regional arrangements designed to promote the international legal framework of human rights accountability, have reinforced the children's rights commitment of the States concerned.

Once the Convention has been ratified by a State, attention must turn to the extent to which all appropriate measures have been taken to give effect to the provisions of the Convention. In view of the

essentially legal focus of the present study, we are especially concerned with the ways in which constitutional arrangements have been adopted or adapted, in order to reflect commitment to the CRC; and with finding out whether an effective domestic legal framework has been put in place, to enable the proponents of children's rights, including children themselves, to assert and vindicate those rights through domestic legal processes. This is not to suggest that the law is the only, or even necessarily the principal, means by which effect can be given to the rights of the child. Nevertheless, in virtually every society the law has an important part to play; and where the legal framework is inhospitable, hostile or even just indifferent to children's rights, the impact of ratification of the Convention is likely to be severely limited.

2.1 Securing universal ratification of the Convention

As noted at the outset of this study, there is no shortage of superlatives which have been used to describe the achievements of the CRC. In terms of treaty-making it ranks as the international legal equivalent of Tiger Woods, the golfer who has broken almost every record in the book. Thus, the Convention entered into force more rapidly than any other human rights treaty. Where the two International Human Rights Covenants took ten years to garner the necessary threshold number of ratifications (which was set at 35), the CRC took only

nine months to achieve an admittedly lower threshold of the 20 States Parties provided for in article 49 (1) of the CRC. The same threshold was established in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which was adopted in December 1990, only one year after the CRC. Yet it was some twelve years before the Migrant Workers' Convention was to obtain the twenty ratifications required to bring it into force.

The CRC also set many other records along the way, in terms of the speed with which it was ratified by additional countries, the relative rapidity with which the various ratification processes in many countries were satisfied and the number of countries for which it became either the first or the second human rights treaty that they had chosen to ratify. In that sense, it helped to open the door to a greater willingness to participate actively in the overall international human rights treaty regime and probably set a pace which benefited efforts to improve the rate of ratification of other key human rights treaties, such as the Convention on the Elimination of All Forms of Discrimination against Women.

But the Convention's single most significant achievement and one which is highly unlikely to be matched by any other treaty, is the total number of States Parties to the Convention. The figure is well known to those working in the human rights area, but far less well known beyond that domain. The 192 States Parties (Timor Leste having acceded on 16 April 2003) means that there are even more parties than there are States Members of the United Nations itself (191). More States have become parties to this particular treaty than to any other treaty. Perhaps the closest competitors are the Geneva Conventions which were adopted in 1949 and which, like the CRC, have had the considerable advantage of having an organization (in the case of the Geneva Conventions, the International Committee of the Red Cross) which committed itself to encouraging and assisting Governments to ratify them. But even after more than fifty years of concerted efforts, the Geneva Conventions have secured fewer ratifications than the CRC.

Nevertheless, the feat of persuading 192 countries, of dramatically differing orientations, to agree to accept the same set of binding legal obligations, has led some critics to question or even discount its significance. As noted earlier, Caroline Moorehead has observed that "no countries violate [the CRC] more energetically than those that were quickest to sign". And indeed it is true that when there is a comprehensive global campaign to sign on to such a wide-ranging set of commitments, there are clearly going to be an important number of instances where the necessary preparatory work will not have been done thoroughly enough. But while this can be presented as an indictment of a process undertaken or promoted with undue haste and in which the relevant obligations have not been taken to heart, there is a different and much more accurate way of looking at the situation. That is to acknowledge that ratification is far from the final step in the process of compli-

ance. In many ways it is the first step and therefore needs to be reinforced by a range of measures which will build upon the initial foundation stone and which will seek to remedy any of the negative consequences of unduly hasty ratification.

By any standard, the near universality of the CRC is an achievement of the first order. It testifies to a degree of consensus and a level of formal commitment on the part of almost every country in the world. There would seem to be good reason to publicize more widely the fact that there are 192 ratifications and the significance of that achievement. At present it remains a reality which is little known to the general public but which could surely form the basis of a concerted public relations campaign designed to emphasize that while the governments of the world are able to agree on all too few matters of fundamental importance, there is one outstanding exception. The principle of children's rights is one area where there is virtual unanimity.

The need to use the qualifying term 'virtual' in this context, highlights the one major issue that remains in relation to the ratification of the CRC. Somalia's non-ratification can reasonably be attributed to the fact that the necessary constitutional processes cannot be achieved until the political and social situation improves dramatically. That leaves the United States as the one country in the world which has not been prepared to accept officially the obligations contained in the Convention. It is true that President Clinton authorized his Secretary of State, Madeleine Albright, to sign the Convention on behalf of the US in February 1995. But although legal arguments (invoking Article 18 of the Vienna Convention on the Law of Treaties) are often put forward to emphasize that countries which have signed but not yet ratified such a treaty are bound to abstain from any measures which are inconsistent with the terms of the treaty, it is unconvincing to attach any great significance to that fact, in the face of consistent signals that neither the government nor Congress are inclined to move towards becoming a party. Although this issue became controversial when the US administration insisted on a hitherto unrecognized right to 'unsign' the Statute of the International Criminal Court, which President Clinton had signed but to which President Bush has fundamental objections, the fact remains that no real practical significance can be attached to the eight year old signature of the US on the CRC.

Responses to this situation have varied. In United Nations forums, such as the Commission on Human Rights, governments regularly call upon those who have not ratified the Convention to do so, as though their call was directed at some unspecified group of countries. Mentioning the United States by name is simply not diplomatic and not doing so avoids the prospect of a focused debate on the issue. Some children's rights proponents gloss over this fact, for fear that highlighting it will harden opposition within the US and incite American opponents of the Convention to take their case outside their own country. Others play it down on the basis that it is of little consequence for the rest of the world in practical terms, since one country alone cannot destroy a consensus

forged by countries representing the remaining 95 per cent of the world's population.

Another response is to suggest that US's non-ratification makes little difference, since that country has in fact become a party to a significant number of other treaties which go a long way towards covering the same ground as the CRC. They point to U.S. acceptance of the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture, all of which apply as much to children as they do to adults. In addition, mention can be made of the fact that the US has shown itself ready to ratify highly specific texts dealing with issues which have made a large impact on public opinion and the contents of which have been assiduously drafted in such a way as to facilitate US acceptance. Three instruments fall into this category: ILO Convention No. 182 dealing with the worst forms of child labour, the optional protocol to the CRC to strengthen the provisions dealing with the sale of children, prostitution and pornography and another optional protocol to the CRC dealing with the minimum age of recruitment into the armed forces.

Some other proponents of international law and of children's rights tend to assume that it is self-evident that any country which finds itself totally alone and isolated on such an issue is mistaken and it follows therefore that change will inevitably come from within. Linked to this is an assumption that participation in such a treaty is an issue which is purely a matter for the country concerned and advocacy of ratification is not a matter on which the international community should expend any energies. This, of course, is completely inconsistent with the attitude of the US and many other countries, to the question of whether countries such as China or others should become a party to treaties such as the Covenant on Civil and Political Rights.

Another approach is to explain the problem away as though it were only a matter of priorities or of the time required to undertake the required pre-ratification processes. One analysis provided by UNICEF seems to suggest such reasons:

As in many other nations, the United States undertakes an extensive examination and scrutiny of treaties before proceeding to ratify. This examination, which includes an evaluation of the degree of compliance with existing law and practice in the country at state and federal levels, can take several years – or even longer if the treaty is portrayed as being controversial or if the process is politicized. For example, the Convention on the Prevention and Punishment of the Crime of Genocide took more than 30 years to be ratified in the United States and the Convention on the Elimination of All Forms of Discrimination against Women, which was signed by the United States 17 years ago, still has not been ratified. Moreover, the US Government typically will consider only one human rights treaty at a time. Currently, the Convention on the Elimination of

All Forms of Discrimination against Women is cited as the nation's top priority among human rights treaties.³³

But what most of these responses would seem to have in common, is a refusal to face the fact that the single most powerful actor in world affairs continues to place itself outside the formal reference framework for the global consensus on children's rights. In other words, non-ratification of the CRC by the United States is more problematic than it might seem at first sight.

There are two reasons why the strategy of glossing over the fact of U.S. non-participation by using phrases such as 'virtually universal ratification', is no longer sufficient. The first is simply that the US is not a country which can be ignored and its opposition to the CRC will, over time, manifest itself in a more damaging and destructive way *vis-à-vis* the overall enterprise of promoting children's rights in general and the Convention in particular. The second is that the reasons for US opposition, which by definition have never been officially spelled out, are frequently either exaggerated or misrepresented, or are assumed to be synonymous with the views of radical groups of one type or another, whose agenda is wholly antithetical to any reasonable notion of children's rights. The result is that these supposed reasons for non-ratification are invoked with increasing regularity in campaigns undertaken by opposition groups in a wide range of countries which contest the validity of the principles and urge denunciation of the Convention, by some of the States that are already parties to it.

The need to address the US position more openly has recently been highlighted by the approach adopted by US representatives at the Children's Summit in May, 2002 and at subsequent annual sessions of the UN Commission on Human Rights. In the latter context, the US regularly expresses its strong objection to two provisions in the annual resolution on children's rights. The specific objection is to a reference to capital punishment of persons for offences committed before the age of 18 -- a provision of the CRC to which the US has long objected. The more general objection put forward, however, is more ominous for the CRC as a whole. The US opposes the very first preambular paragraph of the resolution on the grounds that it gave priority to the CRC rather than to other instruments. The objection was based on the contention that the Convention is not the standard instrument in the field of children's rights and that its provisions conflict both with parental authority and State sovereignty.³⁴

Many US groups have urged the Senate to approve ratification of the Convention, including the National Council of Churches, the American Bar Association, Amnesty International USA, the Children's Defense Fund, Human Rights Watch, the American Council for Social Services, Planned Parenthood, the National Education Association, the International School of Psychology Association, the National School Board Association, the International Council on Social Welfare and the American Academy of Pediatrics.

A great many of the arguments invoked by opponents of the CRC are unsustainable and easily refuted. They include the following: the requirement in Art. 7 that children be registered after birth means that “Government tracking of all children will be required”; the health provisions of the CRC will obligate the US to adopt “a mandatory federal health insurance plan”; that Article 28 (2) outlaws corporal punishment (which, on the face of it, it does not³⁵) and that “this Treaty will essentially outlaw spanking”; that the right to freedom of expression “essentially gives children the right to listen to rock music, watch television and even have access to pornography”; that the child’s right to freedom of thought, conscience and religion “will give children the right to object to their parents’ religious training and participate in religious services of other cults”; that the right to freedom of association would prevent parents “from prohibiting their children from associating with certain other children or gangs”; that the child’s right to privacy would “of course ... open the door for children to get access to abortion over their parents’ objection’ and “would virtually invalidate all parental notification laws concerning abortion”; and that “public education for the first time would be a ‘right’ to all” US children.³⁶ These concerns are best encapsulated in the conclusion that

this Treaty would virtually undermine parents’ rights as we know it [sic] in the United States. Parents no longer would have the basic right to control what their children watch on TV, whom they associate with and what church they attend. Parents could be prosecuted and children be taken away, simply because they spank their children or refuse to honor the various rights that the children are guaranteed...³⁷

Linked to these clear distortions of the content of the CRC, is a fear of the role of the Committee on the Rights of the Child, whose power “to criticize other nations is very dangerous and attacks the sovereignty of that nation.” Failure to “follow the recommendations of the Committee of Ten could easily result in the United Nations enacting some type of sanctions on that nation.” And in the US itself “the authorities, in the government and the courts ... will thus be forced into following recommendations of the Committee.”³⁸

In point of fact, there are important issues which the US will need to address prior to ratification. The problem is that the reasons offered by many of the Convention’s opponents in the US are not the real ones, yet they help to perpetuate an impression that there really are many CRC provisions which are very deeply objectionable and thus influence the way in which many Americans who know little or nothing about the Convention, react to it when they encounter it either in a domestic or a foreign setting. The ‘real’ issues include what have been termed structural rights such as the balance between children’s rights and parental rights, the degree of any resulting public intrusion into the private domain and questions of respective federal or state responsibilities. Specific concerns relate to the

Convention’s implications for abortion, juvenile justice and corporal punishment.³⁹

One of the ways forward will be for the proponents of children’s rights to align themselves more closely with women’s rights groups which support the CRC. Thus, for example, the National Organization for Women (NOW) and its Legal Defense and Education Fund have sought to invoke the CRC in their efforts to frame childcare concerns in the United States as matters of human rights, rather than of general public policy. Because article 18 of the Convention addresses this issue directly, women’s rights advocates have been urged to “turn their focus to international law” and to “work for ratification of the CRC.”⁴⁰

While there have been various attempts to analyze the arguments invoked in the US,⁴¹ the time has come for the issues to be addressed in a systematic and balanced manner in a major study which would command respect and insert itself as an unavoidable reference point in future debates on this issue. If it were done in the name of a group of distinguished individuals and widely published, it would not only form one of the key bases for future debates, but would make available a reasoned and powerful refutation of the type of arguments that are likely to be inserted with increasing frequency into the debate, both internationally and at the national level in both the US and in other countries where groups opposed to the CRC begin to imitate aspects of the American debates.

2.2 Promoting regional-level recognition of children’s rights

Elsewhere in this report, it is argued that international human rights treaties and the way in which they address issues relating to children can have a major bearing on the approach adopted at the national level. The same is true of regional level legal instruments, whether they be in Africa, the Americas, or Europe. For the most part, however, developments at that level have not kept pace with the standard set by the CRC. This is certainly true historically, as we shall see, but there have been some encouraging developments in recent years. In general, while the text of many of the most important regional level instruments continue to be rather out of date when it comes to children’s rights issues, the way in which these instruments are being interpreted, serves to demonstrate the possibilities for children’s rights to gain the recognition they warrant and for the Convention on the Rights of the Child to have a significant influence in that process.

a) The African Charters

The sole reference to children which is contained in the African Charter of Human and Peoples’ Rights, of 1979, is Article 18(3) which requires the State to “...ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.” Although this is, as has been reproachfully observed, “the briefest of express ref-

erences to the rights of children”,⁴² at another level it is a far-reaching and comprehensive provision. It is nevertheless very general in nature and could have given rise to a variety of questions of interpretation, such as whether it could refer to instruments not ratified by the State concerned, or which were adopted subsequent to the ratification of the Charter itself by a particular State Party. But the significance of these issues was greatly diminished by the adoption of a separate African Charter on the Rights and Welfare of the Child in 1990.⁴³

Another provision of the African Charter which has specific significance for children is Article 29(1), which imposes a duty on the individual to respect his parents at all times and also to maintain them in times of need. A similar provision was proposed during the drafting of the CRC but was not accepted on the grounds that the Convention was not the most appropriate context in which to be imposing duties upon children. As far as can be ascertained, little attention has so far been accorded to this provision in practice. While it undoubtedly reflects the traditional approach followed in many African countries,⁴⁴ it is unclear what the consequences might be if it were to be taken seriously as a legally enforceable right, which could be invoked against children under the age of 18.

Although the African Charter on the Rights and Welfare of the Child was completed after the adoption of the CRC, it was actually drafted on the basis of an early version of the CRC and thus contains a number of formulations which reflect significant differences between the two treaties. Thus, for example, in all circumstances a person under 18 is categorized as a child, whereas the CRC gives governments some leeway to set a lower age for a given purpose. The best interests of the child is said to be ‘the’ rather than ‘a’ primary consideration. Marriage below the age of 18 is prohibited, harmful social and cultural practices, although not identified, are to be eliminated.⁴⁵ But these differences have not yet proved to be problematic and it may be that they will not be in the future. There are two factors that should ensure this. The first is that Article 1(2) of the African Charter provides that “nothing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that state.” The second is that every African state except for Somalia, has ratified the CRC.

The African Charter entered into force on 29 November, 1999, after it had been ratified by 15 States. To date, however, it has still only been ratified by 27 of the 53 States which could become a party. It is not surprising then that civil society groups which are working to improve the situation of children in Africa and especially in relation to the serious problem of child soldiers, should be calling upon governments in the region to move towards ratification.⁴⁶ A Charter which has the consent of barely half of the governments of the African Union is less likely to be effective than one which achieves universal acceptance throughout the continent. The time is surely

ripe for a major campaign to encourage ratification and to ensure that the obligations are respected, in tandem with those under the CRC, which apply to every African State except one (Somalia).

Another step that needs to be taken is to ensure that the implementation mechanism provided for in the Charter – the African Committee of Experts on the Rights and Welfare of the Child – begins to take full advantage of the unusually wide-ranging functions accorded to it in the Charter. It is required to meet at least once a year and has done so since 2001. Like its UN counterpart, the Committee on the Rights of the Child, it has been given the task of examining reports submitted by States. But its other functions more closely resemble those of the African Commission on Human and Peoples’ Rights, than of the UN Committee.⁴⁷ In addition to being empowered to consider complaints from any “person, group or non-governmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by this Charter” (Article 44(1)), the Committee also has an extensive promotional mandate. Among its specified functions (Article 42) are the following:

- To promote and protect the rights enshrined in this Charter and in particular to:
- Collect and document information, commission inter-disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child, organize meetings, encourage national and local institutions concerned with the rights and welfare of the child and where necessary, give its views and make recommendations to governments.
- Formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa.
- Cooperate with other African, international and regional institutions and organizations concerned with the promotion and protection of the rights and welfare of the child.
- To monitor the implementation and ensure protection of the rights enshrined in this Charter.
- To interpret the provisions of the present Charter at the request of a State Party, an Institution of the Organization of African Unity or any other person or institution recognized by the Organization of African Unity, or any State Party.

It is thus an important challenge for the children’s rights community to ensure that the African Committee of Experts begins to fulfil its sizeable potential and acts as a catalyst for greater attention to the rights of the child within Africa and that it takes an approach which complements rather than replicates or competes with that of the UN Committee on the Rights of the Child.⁴⁸

A third step that is required in the African context is for the African Union to devote greater attention than it has to date, to the rights of children. As in other regions, there has been no shortage of strong pro-child rhetoric in its declarations. Thus, for exam-

ple, the OAU's first Ministerial Conference on Human and Peoples' Rights, held in April 1999, adopted the Grand Bay (Mauritius) Declaration and Plan of Action, which sought to integrate human rights into the policies of the Union at large. It calls for better protection of children's rights, the abolition of discrimination against children, an end to cultural practices which dehumanize or demean them, measures to eradicate violence against them, an end to the use of child soldiers and a range of other measures.⁴⁹ It is not clear, however, that the African Union has in fact taken significant steps to ensure that these noble objectives are being moved closer to realization as a result of the activities of the Union.

In conclusion, one of the most important aspects of the African Charter on the Rights and Welfare of the Child is that it is a classic example of the very strong and direct influence exerted by the CRC, even before its own entry into force. The fact that such a Charter was adopted at all, is due to the CRC and its drafting process. And the range of rights which the Charter addresses as well as the approach which it adopts to the rights in the great majority of cases, all serve to reinforce the clear evidence of the impact of the CRC upon African regional approaches to children's rights. But the brief survey above demonstrates that there remains much that can be done in order to secure the foundations of children's rights in Africa.

b) The Americas

When it concerns the rights of the child, the Inter-American system for the protection of human rights has proved to be something of an anomaly within the international system. On the one hand, the normative provisions relating to children within the key inter-American instruments are both limited and somewhat dated. On the other hand, the institutions set up to implement the human rights obligations of the Member States of the Organization of American States have proven to be sensitive to children's rights and prepared to make important contributions to their promotion.

The region of the Americas has no specialist charter or convention dealing with children's rights, but the two principal human rights instruments contain various relevant provisions. The first of them, the American Declaration of the Rights and Duties of Man of 1948, provides in Article 8 that "All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid." Article 31 states that "It is the duty of every person to aid, support, educate and protect his minor children and it is the duty of children to honor their parents always and to aid, support and protect them when they need it." In essence the provisions enshrine a welfarist approach to the child and one which links the child's well-being inextricably to that of his parents.

This approach is more or less maintained in the 1969 American Convention on Human Rights. The main provision of general applicability proclaims that "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the

state" (Article 19). In reading the Convention, the first mention of children comes in connection with the right of parents or guardians "to provide for the religious and moral education of their children or wards ... in accord with their own convictions" (Article 12(4)). In recognizing the right to freedom of speech, the Convention stipulates that "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" (Article 13(4)). The remaining provisions that address children are those dealing with the protection of any children solely on the basis of their own best interests, in the event that a marriage is dissolved and the requirement of equal rights for children born out of wedlock (Article 17(4) and (5)).

The most detailed provision relating to children in any OAS legal instrument is that contained in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. It provides that:

Every child, whatever his parentage, has the right to the 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, judicially-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 system.⁵⁰

This, too, is essentially a reflection of pre-CRC approaches to children's rights. The difference between this approach which emphasizes protection and dependence and the one reflected in the CRC, is striking. The principal explanation is that the Protocol was drafted in the 1980s and adopted in 1988, one year before the CRC was adopted. It is clear that although the draft of the CRC would already have been available in a largely developed form, no account was taken of it. The formulation contrasts dramatically with the African Charter on the Rights and Welfare of the Child, adopted only two years later in a different regional system. It reflects the full influence of various drafts of the CRC. In many respects the anachronistic flavour of the 1988 Protocol is itself a tribute to the extent to which the CRC has in fact changed fundamentally the way in which children's rights are perceived today. Such a formulation could never have been adopted subsequent to the widespread ratification of the CRC by States of the Americas and it is clear that provisions of inter-American human rights law, such as this one, which pre-date the CRC, will have to be interpreted as far as possible in light of the new understanding enshrined in the CRC.

But despite what might disparagingly be termed the 1960s flavor of these provisions and the extent to which the child seems to be addressed not in his or her own right but as an extension of his or her parents, the principal organs of the Inter-American system have been notably progressive in their interpre-

tation of the provisions and the application of the American Convention as a whole to children. In the context of the present study, the most significant element is the degree to which the CRC has been relevant in this process. While this is not the place to undertake a systematic review of the role of the CRC in the case law of the Inter-American Court or the Commission, we can get a sense of the approach by looking at a representative case such as that concerning the Guatemalan Street Children, a case which the court decided in 1999,⁵¹ the *Villagrán Morales and Other Cases* which involved the torture and murder of five street children. The Casa Alianza, a prominent child advocacy NGO, had gathered an extensive dossier of police abuse of the children which was so compelling that the Guatemalan Government did not seek to contradict it before the court.

The court began by remarking upon the fact that Guatemala had been a party to the CRC since September 1990 and it made reference to Guatemala's initial report to the Committee in 1995, in which it acknowledged that street children were mistreated. The court recalled that the Inter-American Commission, in its earlier consideration of this issue, had held the declaration contained in the report to the Committee on the Rights of the Child to amount to "a unilateral acknowledgement of facts generating international responsibility".⁵² It then went on to invoke the definition of a child contained in Article 1 of the CRC, with which the Guatemalan Constitution is consistent, in order to show that three of the victims were covered by the relevant treaty provisions. In determining the applicable standards, the court relied initially upon the child's right to measures of protection under Article 19 of the American Convention. But in order to give content to this very general provision, the Court then turned to a range of provisions contained in the CRC and recalled the full text of Articles 2, 3, 6, 20, 27, and 37,⁵³ which it summarized as calling for 'non-discrimination, special assistance for children deprived of their family environment, the guarantee of survival and development of the child, the right to an adequate standard of living and the social rehabilitation of all children who are abandoned or exploited'. It concluded that all of these rights in the CRC had been violated by the State in this case. In its judgment, the Court formulated the obligations of a State Party to the American Convention in such circumstances, in the following way:

When States violate the rights of at-risk children, such as 'street children', in this way, it makes them victims of a double aggression. First, such States do not prevent them from living in misery, thus depriving them of the minimum conditions for a dignified life and preventing them from the full and harmonious development of their personality... Second, they violate their physical, mental and moral integrity and even their lives.⁵⁴

In adopting this formulation, which underscores the integrated nature of the civil, economic, and social rights of the child, the court explicitly invoked the relevant preambular paragraph of the CRC.

In a follow-up to this case, the court considered the need for Guatemala to pay reparations for the rights violations which had occurred. In addition to ordering the payment of monetary damages to the families of the victims, the court ordered Guatemala to adopt measures to protect the rights of the child, the proper burial of the remains of one of the victims in accordance with the wishes of his next of kin, the establishment of an educational centre dedicated to the memory of the victims and a full investigation of the facts of the case and the identification and punishment of those responsible.⁵⁵

Reference must also be made in this context to what is perhaps the single most significant pronouncement on children's rights in general, by any international judicial body. In August, 2002, in response to a request made to it by the Inter-American Commission less than a year and a half earlier, the court provided an Advisory Opinion entitled 'Legal Status and Human Rights of the Child'. In a wide-ranging and not uncontroversial opinion, the court proceeded not only to spell out what it termed the legal subjectivity of the child as the holder of rights, but also to read into the American Convention on Human Rights a great many of the explicit protections provided by the CRC, despite the brevity and selectivity of the American Convention's own provisions in that regard. In particular, the Court endorsed the various submissions made to it by some governments and a wide range of Latin American NGOs, to the effect that outdated doctrines according to which children in 'irregular situations' are best dealt with by the courts in a punitive or repressive mode, must be replaced by new approaches reflecting the CRC and privileging rehabilitation and respect for individual rights.⁵⁶

The Inter-American Commission on Human Rights has also taken an active role in upholding children's rights. It has done so (i) in its general promotional activities; (ii) in response to petitions or complaints presented to it; and (iii) in its reporting on the human rights situations in specific countries. In terms of (i), the Commission had already compiled, as early as 1991, an assessment of the extent to which children's rights issues had been taken into account in the national legislation of OAS Member States. It concluded that "many...have tailored their national legislations [sic] to the principles set forth in the Convention on the Rights of the Child and have formulated special programmes designed to deal with the current situation of children in the various groups of society in which they live".⁵⁷ In subsequent years the Commission called upon Member States to take account of the fact that "the American Declaration, the American Convention and other instruments of universal character, reflect a consensus that children have the right to special measures of protection" and that the best interests of the child principle should be respected in all contexts.⁵⁸ It was not, however, until the beginning of the 2000s, that the Commission began to move significantly beyond its focus on protective measures to take a more proactive approach fully reflective of the CRC. In addition to referring cases such as the Guatemalan Street

Children case to the court, it also requested the court to provide the Advisory Opinion on the 'Legal Status and Human Rights of the Child', described above.

One of the most important of the possibilities open to the Commission in a promotional context, is the appointment of rapporteurs. In 1998, it appointed a Rapporteur on the Rights of the Child (Dr Hélio Bicudo, followed in 2002 by Susana Villarán). It is significant, however, that while the Commission's Annual Report for 2002 records that it had received reports from its Rapporteur on the Rights of Women (Marta Altolaguirre), its Rapporteur on Migrant Workers and their Families (Juan Méndez), its Rapporteur on Children and its Special Rapporteur for Freedom of Expression (Claudio Grossman), the report on children seems not to be available on the Commission's website.⁵⁹ The reports submitted by the other rapporteurs serve to illustrate the immense potential of this technique. This is illustrated by the report of the Rapporteur on the Rights of Women on her on-site visit in February, 2002, to evaluate the situation of women's rights in Ciudad Juárez, Mexico, in response to a "grave situation of violence faced by the women and girls of Ciudad Juárez, including murder and disappearance, as well as sexual and domestic violence". It is to be hoped that in the years ahead there will be a more sustained and active approach to the mandate relating to the rights of the child. It is encouraging to note that the Inter-American Development Bank has financed a project aimed at strengthening the Rapporteurship and that a seminar "to examine the Inter-American system for protection of human rights in so far as promotion and defence of the rights of children and adolescents are concerned".⁶⁰

Another example of a promotional activity undertaken in this area by the Commission, is the general hearing which it held in October, 2002, on the situation of violence against children in Latin America. It included presentations by UNICEF, the Mexican Commission on Human Rights, the Colombian Commission of Jurists and various other NGOs.

The Ciudad Juárez case is also an example of one of the ways in which the Commission has responded to petitions complaining of violations of children. A wide range of other individual cases could also be cited, but such a review would be beyond the limited scope of the present study.

The third technique open to the Commission for the promotion of children's rights consists of reporting on the relevant issues in the context of its country reports. While many examples could be cited, it must suffice to focus on one recent report. In March, 2001, the Commission produced its 'Third Report on the Situation of Human Rights in Paraguay'. One of the chapters of the report is devoted exclusively to 'the rights of children'. The starting point for the analysis is the extent to which the CRC has transformed the framework for protecting children's rights within the Americas and thus in Paraguay. The report observes that the adaptation of domestic legislation to reflect the values contained in the CRC is essential. In addition to invoking specific CRC norms throughout the analysis of specific problems, the

report concludes by recommending, inter alia, that Paraguay should comply with the provisions of the CRC with respect to imprisonment as a last resort and take a specified action in order to do so.⁶¹ An equally detailed analysis of the situation in Guatemala also concludes that the State should "adopt the necessary legislative and other steps necessary to give effect to ... its specific obligations under the Convention on the Rights of the Child".⁶²

Similarly, in reporting on Canada's treatment of asylum seekers, the Commission not only devoted particular attention to the situation of children, but specifically invoked and applied the provisions of the CRC to shed light on Canada's obligations under the American Declaration of the Rights and Duties of Man (since Canada has not ratified the Inter-American Convention on Human Rights). The Commission also relied significantly upon findings of the UN Committee on the Rights of the Child, especially in relation to its findings relevant to Articles 3 and 12 of the CRC.⁶³

In sum, the influence of the CRC is more clearly apparent in relation to the work of the Inter-American Court and Commission than is the case with almost any other international human rights bodies. Its impact to date has been very significant and there seems no reason to think that it has yet reached its peak.

c) The Council of Europe

The disparity between the standards set in the CRC and the regional-level approach is particularly noteworthy in relation to the Council of Europe system for the protection of human rights. The latter is generally recognized as the most advanced and sophisticated of the regional systems – an assessment which is borne out by several factors including: the extent to which the European Convention on Human Rights has been ratified by every European State; the existence of the European Court of Human Rights with its reasonably ready access to petitioners; the large and rapidly growing number of cases that come before the court; and the amount of money and other resources devoted to the promotion of human rights within the overall context of the activities of the Council of Europe.

The Council of Europe's normative framework for the protection of human rights consists of a diverse range of instruments. But the foundation stone and the treaty which attracts by far the most resources and attention, is the European Convention on Human Rights. Yet that Convention contains not a single provision which is specifically addressed to children. Indeed it was not until 1984 that children were mentioned for the first time in the context of the extensions that are made from time to time to the scope of the rights protected under the Convention. In that year, Protocol No.7 was adopted and its Article 5 contained a reference to children. But rather than addressing the rights of the child, the focus of that first child-specific provision was on the equal rights and responsibilities of spouses including "in their relations with their children". In so far as the child's own interests were concerned, the focus

was still very much on protection, in this case to be exercised by the State if necessary: “This Article shall not prevent States from taking such measures as are necessary in the interests of the children.” Notably, there was no reference to the need for measures designed to promote the rights of the child, even if in theory, these could retroactively be read into the reference to children’s interests.

In essence, there are three arguments that may be used to justify the non-inclusion of children’s rights within the text of the Convention itself. The first is that the civil and political rights protected by the Convention are equally applicable to children and adults and that there is accordingly no need to spell out any rights which are specific to the former group. Up to a point, this argument is reasonable. The European Court, as well as national governments and courts, have considerable leeway in interpreting and applying the provisions of the Convention to ensure that it is done in such a way as to take account of new dimensions of those rights that are developed or highlighted by the provisions of the CRC. In practice, however, the situation is not so different from that which applies in relation to the “special protection constitutions”, described in Chapter 5 below. It is in fact unlikely that, in the absence of more explicit provisions requiring that the rights of child be given the importance and the scope accorded to them in the CRC, the full range of children’s rights could be effectively protected by the European and national institutions which base their actions upon the European Convention. It is precisely for this reason that various proposals have been made by the Council of Europe’s Parliamentary Assembly, as well as by non-governmental organizations and other commentators, calling upon the Council of Europe to consider the adoption of a specialist treaty dealing with the rights of the child.

A second justification is that a specialist treaty is unnecessary, in view of the existence of the other major treaty of general scope which has been adopted by the Council of Europe – the European Social Charter. The argument is that the most important children’s rights which are not spelled out in the European Convention are economic and social rights and that these are adequately dealt with in the Charter. But again, a close look at the child-specific provisions of the Charter reveals that they are limited to measures of protection, both in the workplace and, more generally, to address the broader problem of the social and economic vulnerability of children. Thus the two major provisions are, first, that “children and young persons have the right to a special protection against the physical and moral hazards to which they are exposed” (Part I, para. 7), which applies in effect to the workplace and, second, that “mothers and children, irrespective of marital status and family relations, have the right to appropriate social and economic protection” (Part I, para. 17). Although the latter is potentially capable of broader interpretation, the main thrust is towards the provision of appropriate social welfare services and institutions. Although this is not the place to undertake a detailed review of the approach which

has been adopted in practice in interpreting these provisions, it seems fair to say that the approach has not strayed far from the narrow and traditional perspective which inspired the inclusion of these provisions, rather than a more broadly-based approach, in the first place.

The third argument is that the Council of Europe has adopted a range of other specialist treaties, some of which are entirely devoted to the rights of children. Again, this is true up to a point. The most far-reaching treaty of recent origin is the European Convention on the Exercise of Children’s Rights of 1996. The Convention refers explicitly in its preamble to the CRC, but for the most part, it addresses issues relating only to the opportunity for children to exercise their rights in family proceedings which affect them. Somewhat curiously, the Convention also contains a provision which requires States Parties to encourage, through appropriate bodies, “the promotion and exercise of children’s rights” (Article 12). While the provision is useful in drawing attention to the potential role that might be played in the domestic context by various legal and other bodies, it stops well short of adding anything to what would in any event be required by the CRC. The Council of Europe has also adopted Conventions dealing with adoption, the legal status of children born out of wedlock, the recognition and enforcement of custody decisions and on nationality.

On balance, however, the situation is that there remain no specific provisions within the ambit of the principal treaty, the European Convention on Human Rights, which either ensure that the full range of CRC rights is addressed in this context, or which ensure that the European Court as well as the various national institutions interpret existing rights in the light of the CRC. There are strong grounds therefore for concluding that the Council of Europe should either press ahead with the proposal to adopt a comprehensive children’s rights convention at the regional level, or a potentially more effective approach might be to adopt a protocol to the ECHR, which would ensure the addition of the various rights contained in the CRC which are appropriate for inclusion in the ECHR, but are not yet adequately covered by it.

■ *The CRC-related Jurisprudence of the ECHR*

The conclusion emerging from the preceding analysis is reinforced by a thorough review of the extent to which the European Court of Human Rights has taken account of the CRC in its judgments. As of September, 2004, reference to the Convention had been made in 28 cases, spread over a period of 12 years. On the face of it, this is a not insubstantial number of references to a treaty dealing with children (given that only a small proportion of ECHR cases are concerned with rights claimed by or for children) and which by definition is not the principal reference point for the court in its deliberations. Importantly, it demonstrates that the court is open to considering arguments based on the CRC, to the extent that they can be used to assist it in interpreting relevant provisions of the ECHR.

Before seeking to draw any conclusions as to the way in which the court has approached the Convention on the Rights of the Child, it is appropriate to consider briefly some sample cases which illustrate how the issue has arisen in proceeding before the court.

In general, the weight that should be attributed to the CRC in the proceedings of the ECHR, has been described in varying terms in the court's judgments. In one case, it stated explicitly that the obligations of the ECHR in respect of Article 8 "must be interpreted in the light of' the CRC".⁶⁴ In that case, involving a claim that the Portuguese authorities had failed to take all reasonable steps to enforce the order of a French court that a child be returned to the custody of his father, the court specifically referred to the obligation under Article 11 of the CRC to "take measures to combat the illicit transfer and non-return of children abroad".⁶⁵ Although Portugal was found to be in violation of Article 8, the court refused to order the return of the child, partly on the grounds that "the interests of the child are paramount in such a case".⁶⁶ In another case, however, involving the rejection by French authorities of an application by a homosexual man to adopt a child, a partly concurring opinion by three judges observed that the CRC, "although not binding on our court, may provide it with guidance".⁶⁷

While the court has been prepared to refer to the CRC in order to reinforce its assessments of the general state of human rights law, it has not consistently had regard to the jurisprudence being developed through the work of the Committee on the Rights of the Child. Three cases brought against the United Kingdom illustrate different approaches in this respect. In the first, the court might usefully have relied upon the Committee's jurisprudence, but did not. It was a case brought against the United Kingdom by a boy who had been repeatedly caned by his stepfather, causing significant bruising. Although the perpetrator was prosecuted for causing actual bodily harm, he was found not guilty on the grounds that the punishment amounted to "reasonable chastisement", which was permissible under the circumstances according to English law. The applicant complained, inter alia, that as a result of the dismissal of the case, he had been denied a remedy under domestic law for violations of his rights and that the law discriminated against children. In its judgment, the court concluded that "children ... are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity" and relied for this purpose on various of its own earlier judgments as well as citing the United Nations Convention on the Rights of the Child, Articles 19 and 37.⁶⁸ The citation is actually a curious one, however, since while the two articles cited deal with violence and unacceptable forms of punishment, neither one per se outlaws corporal punishment. It is the emerging jurisprudence of the Committee on the Rights of the Child which has argued that those and other provisions of the Convention should be read together, in order to achieve that result.

But in the two other United Kingdom cases (both dealing with the same issue), the court did make significant reference to the work of the Committee.⁶⁹ These cases challenged both the manner in which

the trial was conducted and the indeterminate sentence imposed on two boys convicted of murdering a two year-old boy. The European Court, in reviewing the relevant international texts, cited articles 3, 37 and 40 of the CRC and also noted two paragraphs contained in the concluding observations adopted by the Committee on the Rights of the Child in connection with its examination of the report of the United Kingdom.⁷⁰ The applicants relied on these provisions to challenge the age of criminal responsibility (ten years) in England and Wales⁷¹ and the imposition of an indeterminate sentence on all young offenders convicted of murder, irrespective of the individual circumstances of the case or the offenders.⁷² The court found a violation in respect of the latter issue and also of the fact that the trial proceedings had been so structured as not to permit the applicants to participate effectively in the proceedings against them. The majority judgments did not, however, specifically invoke the CRC on these issues. In a separate concurring opinion, Lord Reed did consider the relevance of the provisions of the CRC in three respects and commented at one point that "it is appropriate to have regard to the UN Convention on the Rights of the Child, which is accepted by all of the member States, including the United Kingdom."⁷³ It must be concluded, however, that his judgment invokes the various provisions more in order to dispose of them, than to engage in any detailed consideration of their requirements. Finally, in a joint partly dissenting opinion of five judges, significant reliance was placed upon the provision in Article 40 of the CRC requiring that privacy be 'fully respected at all stages of the proceedings' and concluding that this threshold had not been met.⁷⁴

However, a considerable number of the cases which do cite the CRC, do not make any substantive use of its provisions. A typical case is one from Germany, in which the local courts refused to grant a father access to his daughter on the grounds that such contact would not be in the child's best interests "since her mother dislikes her father so deeply and opposes all contact so fiercely that any visits ordered by the court would take place in a tense, emotionally-charged atmosphere, which would probably be extremely harmful to the child".⁷⁵ The European Court devotes three paragraphs to the CRC, citing specifically Articles 3 and 9, and referring to it as setting out "the human rights of children and the standards to which all governments must aspire".⁷⁶ Nevertheless, no aspect of the Convention is relied upon in any substantive way in the judgment of the Court.⁷⁷ Nor does the partly dissenting opinion by two judges, which relies significantly on the fact "the courts reached their conclusions without hearing the child at all",⁷⁸ a ground which could readily have been given added force by reference to the relevant provisions of the CRC.

Two important examples may be cited of cases in which the CRC was raised, but was not taken into account in the final judgment. In at least the second of the two cases, a careful consideration of the Convention on the Rights of the Child could poten-

tially have made a major difference to the outcome. The first of the cases was one in which medical negligence led to the wrong operation being performed on a woman who was six months pregnant, leading to the death of the foetus. The European Court was confronted with the issue of whether the unborn child could be considered to be a person for the purposes of enjoying the protection of the Convention directly, rather than through rights enjoyed by the mother.⁷⁹ The CRC was raised at the national level when the case was considered⁸⁰ and it was also invoked by the Center for Reproductive Rights in its third-party intervention before the court. The Center drew attention to the fact that the CRC did not indicate that the right to life was applicable to a foetus and drew attention to the fact that the Committee on the Rights of the Child had on several occasions expressed concern about the “difficulties of adolescent girls in having their pregnancies terminated in safe conditions and had expressed its fears as to the impact of punitive legislation on maternal mortality rates”⁸¹ In a judgment decided by a vote of 14-3, the majority found that there was no consensus at European level on the issue of whether the foetus should be considered to be a person and accordingly concluded that “it is neither desirable, nor even possible as matters stand, to answer in the abstract” the relevant question.⁸² Surprisingly, however, there is not a single reference in a lengthy majority judgment, nor in any of the concurring or dissenting opinions, to the CRC, although there was an extensive debate on this very issue during the drafting of the Convention,⁸³ a considerable amount has been written about it since⁸⁴ and the Committee on the Rights of the Child has devoted a reasonable amount of attention to the right to life issue.

The second case is the one in which the Convention could have made a major difference had it been given any significant weight in the judgment. The case concerned the longstanding practice in France of permitting ‘accouchement sous X’, a system of anonymous births for those mothers who wish to have their child adopted at birth and who might otherwise contemplate abortion.⁸⁵ The applicant who had been subject to this procedure, was unable to discover the identity of her birth mother, when she was old enough to do so. She claimed a violation of her Article 8 rights to privacy and to family life. While she invokes the rights of the child,⁸⁶ it appears that she neither reinforced nor elaborated upon that claim by referring to the Convention on the Rights of the Child. In the majority opinion, which upheld the State’s argument that it was seeking to strike a balance between competing interests, children’s rights are never examined in detail and the CRC is not cited. Although the Convention is referred to in the joint dissenting opinion filed by seven judges, including the President of the Court, it is only in the form of a passing reference to Article 7 (the child’s rights “as far as possible ... to know his or her parents”).⁸⁷

The outcome of the case provides a clear illustration of the consequences of only factoring the rights of the child into a complex balancing process on the basis of very general considerations, as opposed to

the specific provisions of the CRC. This is clear in the statement by the majority of the issues to be weighed in which it concludes that:

... the court considers that France has not overstepped the margin of appreciation which it must be afforded in view of the complex and sensitive nature of the issue of access to information about one’s origins, an issue that concerns the right to know one’s personal history, the choices of the natural parents, the existing family ties and the adoptive parents.⁸⁸

On occasion, the CRC has been invoked only by dissenting judges,⁸⁹ or only in a concurring opinion. An example of the latter is the case of *X, Y and Z v. the United Kingdom*, in which a female-to-male transsexual (X) and his female partner (Y) sought to register X as the father of a child (Z) born to Y as the result of artificial insemination from a donor’s sperm. One of the judges characterized it as the first case in which the court had had to “deal with both transsexualism and the problem of a child’s right to know his biological origins”⁹⁰ Judge Pettiti, himself the author of a book dealing specifically with the subject of transsexuals,⁹¹ was the only member of the court who raised the relevance of the CRC. He supported the court’s rejection of the case brought under the rubric of the right to privacy, but argued that this outcome could have been strengthened if the court had explicitly addressed the issue of the child’s potential later interest in finding out who her biological father was, a quest which would have been rendered far more difficult if X had been registered as the father. In his concurring opinion, Judge Pettiti argued that for this purpose, the court should have “assessed the conflict between family law, the law of filiation and the direct effect” of the CRC.⁹²

This survey of the ways in which the CRC has been invoked by the ECHR over the past decade or so, leads to a number of conclusions.

On the positive side of the balance sheet, the CRC is very clearly on the radar screen of the court and it has been prepared in several instances to attribute a significant role to the Convention. In three cases, reference has also been made to the work of the Committee on the Rights of the Child, although in one of these the only reference was made by counsel for the applicant, rather than by the court.⁹³

On the critical side, it seems that while applicants or national courts might invoke the CRC, this opportunity is not always taken up by the court. Similarly, the Convention is more likely to be used either as a marginal reinforcement of an already strong case, or in concurring or dissenting opinions. And when the court has referred to the CRC, it is reluctant to go into issues in any depth by, for example, referring to the travaux préparatoires, the General Comments of the Committee, or other expositions of the Convention.

In statistical terms, the frequency with which the court makes reference to the CRC has not increased significantly over the years, especially when considered in the light of its burgeoning caseload. Its first reference came in 1992, only two years after the

Convention's entry into force.⁹⁴ More recently, there were four references in 2003 and three until September, 2004. Given the expanding jurisprudence of the CRC at the international level, the extent to which it is now reflected in domestic case law and its growing prominence in policy debates at all levels, it is perhaps surprising that there is not more of an upward trend. This would tend to suggest that neither the judges of the court nor those who argue before it, have yet appreciated its potential significance. Apart from calling upon advocates to take greater account of it, there might also be a role for a seminar on the CRC, designed specifically for the judges of the court, perhaps in conjunction with some of their colleagues from other international courts before which the Convention might reasonably be expected to be invoked.

Perhaps the most important conclusion which emerges from the case law reviewed above, is that the outcome of a reasonable number of the cases would certainly have been quite different if the court had been applying the provisions of a European treaty which reflected some or all of the rights contained in the CRC. In many of the cases, the court was only able to consider the problems raised through the lens of provisions such as the Article 8 right to privacy or to family life and these offer a poor foundation upon which to bring in any strong consideration of the rights of the child. The case law thus reinforces the desirability of maintaining efforts to extend the explicit range of rights conferred upon children beyond those contained in the ECHR itself.

d) The European Union

Children's rights groups and especially the European Children's Network (Euronet), have long called for the European Union to play a more direct and significant role in relation to children's rights. These pleas had been largely rejected by those concerned to ensure that the areas in which the EU has either exclusive or shared competence, vis-à-vis, its Member States, should not be expanded so as to cover such matters of domestic policy. On the other hand the relative invisibility of children within the EU legal framework, except in so far as they can be identified as factors assisting or impeding the creation of a single market, has led to calls to integrate children's rights more explicitly into the EU legislative processes.⁹⁵

In recent years, however, two developments of major relevance have occurred, in the form of the adoption of the Charter of Fundamental Rights of the European Union⁹⁶ and the drafting of an EU 'Constitutional Treaty'. The Charter, adopted in 2000, but as a non-binding statement of rights, contains several provisions relating to children. Two of the provisions are reasonably classical social rights formulations, but neither bears the hallmarks of a children's rights approach, nor of the comparable provisions of the CRC. The first of them, (Article 14), recognizes the right to education. But rather than following Article 28 of the CRC in relation to primary education it provides only that "this right includes the possibility to receive free compulsory education." It then goes on

to recognize the "freedom to found educational establishments" and reaffirms "the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right." This would have been an ideal opportunity to qualify parents' rights by reference to the need to conform to the provisions of the CRC when exercising such rights, but that opportunity was not taken, thus locking in a very traditional and certainly pre-CRC, approach. The second provision, Article 32, relates to the prohibition of child labour and protection of young people at work. Its terms are unexceptionable.

It is Article 24 of the Charter, however, which specifically addresses the 'rights of the child' in general terms. The text is as follows:

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis, a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

The orientation of the first sentence seems to be a classic welfarist or protective one, rather than one premised on the recognition of children as the holders of rights. The provisions that follow, however, reveal the direct impact of the CRC. The best interests principle is clearly modelled on Article 3 of the CRC and the provision for the child to freely express his or her views and the reference to age and maturity are clearly drawn directly from Article 12 of the CRC. An explanatory note adopted along with the Charter, suggests that Article 13 was also an inspiration for this provision, but if that is the case, the reference to freedom of expression amounts to a poor approximation of the CRC Article. Similarly, paragraph 3 is a rather unflattering attempt to mirror the provisions of Article 9 of the Convention.

The principal shortcoming however, is the highly selective and restrictive nature of the range of rights which the drafters of the Charter chose to include in relation to children. While these provisions certainly mark a step forward in terms of children's rights within the EU context, they leave a great deal to be addressed and dealt with outside that framework. Nevertheless, the proposal to incorporate the Charter either as part of, or as a protocol to, the draft EU Constitution, would ensure that some of the key principles contained in the CRC are accorded the status of EU law.

In addition, the Praesidium of the European Convention proposed, in its draft of 6 February, 2003, to include a reference to children's rights in the key Article 3, which spells out the Union's objec-

tives. Disappointingly, however, while the promotion of equality between men and women is listed among the internal objectives of the Union, the protection of children's rights is included only among a group of values to which the EU will contribute "in defending Europe's independence and interests".

There is thus a long way to go before the principles contained in the CRC find full reflection within the overall legal order being established by the European Union.

2.3 Promoting the constitutional recognition of children's rights

It is often assumed that a full-fledged commitment to the rights of the child will require a State to enshrine the relevant values within its constitution. There are strong historical reasons underlying that assumption, since the tradition of according constitutional recognition to rights enjoys a privileged place within the framework of human rights generally. This is hardly surprising in view of the fact that many of the key historical initiatives which were designed to affirm a strong commitment to rights took constitutional form, either from the outset, or over time. Thus, for example, many historical reviews of the antecedents of the modern movement for human rights take as their starting point the Magna Carta of 1215, a document encapsulating the various concessions made by King John to the barons and the church, which gradually assumed constitutional status over time, the English Bill of Rights of 1689 in which the Parliament asserted a range of "their undoubted rights and liberties"; the French Declaration of the Rights of Man and the Citizen of 1789, which was subsequently formally incorporated into the constitutional fabric of France and the United States Bill of Rights which emerged in 1791 in the form of a package of the first ten amendments to the Constitution of 1789. While it goes without saying that none of these initiatives to constitutionalize rights directly addressed children's rights, they established an assumption within the relevant legal cultures that the constitutional entrenchment of human rights is the highest tribute that can be paid to them.

Although these examples come from a limited range of country experiences, they clearly exerted a broad influence over the practice of a great range of other countries in the years that followed. Thus a large number of the newly independent states that emerged from the decolonization efforts of the 1950s and 1960s were endowed with constitutions that expressly recognized a range of human rights guarantees. The assumption that human rights will find constitutional reflection continues to be felt in the context of arrangements designed to give effect to current initiatives aiming to promote respect for human rights in general. Suffice it to mention in this respect the provision contained in article 2(a) of the Convention on the Elimination of All Forms of Discrimination against Women, which commits all States Parties to the

Convention "to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation ..."

The CRC, in Article 4, requires any state that becomes a party to it to "undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized". On the one hand, the Convention does not mandate, nor even specifically refer to, the possibility of constitutional action of any kind. On the other hand, it does require that "all appropriate ... measures be taken" and the constitutional practice of a country will be important in determining what is appropriate in the circumstances. Thus, for example, in the context of a State whose authorities or traditions attach great importance to the constitutional expression or recognition of social policy and related objectives, there is a strong case to be made that serious consideration should be given to such a measure following ratification of the Convention. This approach explains why the Committee on the Rights of the Child has on occasion welcomed instances in which States have incorporated sections on children's rights into their national constitutions⁹⁷ and has sometimes encouraged States without such provisions, to consider doing so.⁹⁸

Before looking at the arguments for and against constitutional recognition of children's rights, we survey the practice of states in this respect, both before and after the adoption of the CRC, with a view to assessing the scope of constitutional recognition of children's rights and the principal strengths and weaknesses of existing approaches.

An examination of the constitutions of the countries of the world reveals three different categories of approach to the constitutional status of children. They are:

- The 'invisible child' constitution
- The 'special protection' constitution and
- The 'children's rights' constitution.

In some respects, there is a historical or chronological aspect reflected in these three approaches, with older constitutions being least likely to make any significant mention of children per se and thus falling into the first of the three categories.

Constitutions adopted after the Second World War and before the finalization of the drafting of the CRC are generally more likely to have taken some account of the position of children, but to have done so from a protective or welfarist perspective.

Finally, those constitutions which have been adopted or revised since 1989, are the ones most likely to adopt a fully-fledged approach which is premised upon the recognition of children's rights per se. There are, however, as we shall see, some exceptions to this broad historical classification of the approaches adopted.

Before turning to examine each of these three approaches, it is important to note another alternative approach which does not fit neatly into this categorization, but which can have the effect of

expanding substantially the number of countries which can be considered to have adopted a children's rights constitution. Many States have a constitution which either accords constitutional status to ratified international human rights treaties or provides that they shall be considered to take precedence over inconsistent domestic law. Where such a provision exists, it will extend to the CRC – assuming that the State in question is a party to it. A list of some of the countries that have such a provision in their constitution and have ratified the Convention, is provided in Table 1.

Table 1: Some of the States whose constitutions provide for priority to be given in domestic law to treaties such as the CRC:

Algeria, Argentina, Belgium, Benin, Bulgaria, Chile, France, Honduras, Iraq, Italy, Japan, Republic of Korea, Kuwait, Libya, Mexico, Netherlands, Nicaragua, Panama, Portugal, Russia, Senegal, Syria, Tunisia, Togo.

In principle, this approach should result in the CRC becoming a part of domestic law. There are some States in which this has occurred, thus enabling those who allege that any of the provisions of the Convention have been violated, to seek an appropriate domestic remedy through the courts. In practice, however, there are various techniques which different States have used, in order to significantly limit the practical impact of this technique of automatic incorporation. While neither specific to the issue of children's rights, nor confined to them, there is a well-documented trend among States to resort increasingly to techniques designed to minimize the domestic impact of treaty obligations. One such method, which was noted above, is reliance upon excessively broad reservations made at the time of ratification, which have the effect of significantly reducing the practical significance of the fact that the State has become a party to the Convention.

Another technique is insistence by either the executive or the courts, that treaty provisions are non-self-executing, which means that the courts themselves are in no position to apply the treaty provisions in the absence of legislation spelling out the precise implications of the provisions of the treaty. Yet another technique, all too often adopted by the courts, is to insist that formulations contained in an international treaty such as the Convention, add nothing to existing domestic standards, as a result of which the courts can content themselves with a careful examination of national law and take virtually no account of the actual provisions of the CRC itself. The courts can also take it upon themselves to adopt a very conservative approach in interpreting and applying the provisions of the Convention. Finally, Governments can undermine or neutralize to some extent the impact of a constitutional provision which accords priority in domestic law to international treaties, by means such as a failure to translate the Convention, a failure to publish it officially and a reluctance to disseminate its content among

those who might be most likely to make use of it, ranging from children themselves, through welfare workers, government officials, lawyers and judges.⁹⁹

There is thus a strong need for studies to be undertaken in countries in which the Convention is automatically accorded this enhanced status, in order to assess the actual impact it has had and to evaluate the performance of the government and the courts in relation to the type of issues identified above.¹⁰⁰ There have been all too few such studies undertaken to date, despite the potential for governments to do very little in practice, while insisting that all necessary measures have been taken to give domestic legal effect to the Convention.

a) The 'invisible child' constitution

A number of national constitutions make no significant reference to children.¹⁰¹ A sample list of such constitutions is provided in Table 2.

Table 2: National constitutions in which children are invisible:

Antigua and Barbuda, Australia, Austria, Bahamas, Bangladesh, Barbados, Belgium, Bosnia & Herzegovina, Botswana, Canada, Cyprus, Czech Republic, Dominica, Dominican Republic, France, Israel, Jamaica, Kazakhstan, Kenya, Lebanon, Liberia, Libya, Luxembourg, Mauritania, Morocco, Netherlands, Nigeria, Norway, Oman, Saudi Arabia, Samoa, St Kitts and Nevis, Sri Lanka, Sweden, Tanzania, Tunisia, United States.

As already noted, it is generally the older constitutions that contain no provisions dealing with children. This is not surprising, given that these constitutions were often adopted well before the existence of any of the post-World War II international human rights treaties. But the invisibility of children in national constitutions is not confined to those which were adopted prior to 1945. Many of the post-colonial constitutions of the 1950s and 1960s followed the previous practice, in many cases because the human rights provisions which were included were modelled on the European Convention on Human Rights, which is silent in relation to children.

With respect to those constitutions adopted after the completion of the CRC in 1989, although a very significant number do include references to children's rights, as we shall see below, a number have maintained the old approach of not taking any specific account of children or of the concept of children's rights, despite the fact that the governments concerned have undertaken a wide range of obligations by virtue of having ratified the CRC.¹⁰²

It is important, however, not to misinterpret the significance of a constitution's failure to address children specifically. In the first place, there are still some constitutions which are almost innocent of any references to human rights at all, either because of their age or because of a preference within the prevailing constitutional culture to

address these issues in other contexts rather than through some form of entrenchment within the constitution. Secondly, a constitution which contains a significant range of human rights provisions is usually quite capable of being interpreted in such a way as to assure that those rights are applied fully to children. While the historical experience is not uniformly positive in this regard, there are many examples within the constitutional law of States with invisible children constitutions of the emergence of important jurisprudence upholding the rights of children. Thirdly, there is some basis for suggesting that historically there might even have been an inverse correlation in some cases between the extent of specific children's rights provisions in a constitution and the respect in practice for those rights. Thus some States with no provisions achieved an impressive record of respecting children's rights, while others whose constitutions contained a panoply of impressive provisions did very little to turn them into practice. This issue, to which we return below, provides a basis for exercising caution before assuming that this is an area in which more (in the form of child-specific constitutional provisions), is necessarily better.

Nevertheless, it seems fair to say that for the most part, those States which rely on general human rights provisions in their constitutions as the foundation upon which to promote children's rights, will be starting with a significantly less comprehensive range of rights than those whose constitutional arrangements have been drafted with at least one eye on the provisions of the CRC. Moreover, the fact that specific provisions have not been considered necessary in the past, can hardly be considered dispositive of the need to re-examine the issue in the light of evolving perceptions and standards. After all, in the lead-up to the drafting of the CRC, the fact that there were a range of international human rights treaties in existence whose provisions nominally applied to children, was not considered to have been a bar to drafting a separate specialist instrument devoted to the situation of children, both in so far as it was similar to that of adults and very different in that respect.

b) The 'special protection' constitution

The extent to which the children's rights approach reflected in the CRC represents a radical departure from what went before, it is perhaps best demonstrated by comparing it with the approach to children which was embodied in the key international human rights instruments of the post-1945 era. That comparison is of immediate relevance in the present context, because a very significant number of the constitutions drafted during this period took their lead in relation to children from the international treaties.

The Universal Declaration of Human Rights of 1948 began the tradition of treating children not so much as individuals bearing rights on their own behalf, as persons entitled to special care and assistance, which reflected the degree of their helplessness or vulnerability. The Universal Declaration was, of course, a product of its times and it is hardly sur-

prising that its principal focus in family matters was on the male as breadwinner. "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family ..." Article 25(1)), the woman as the carer for children ("Motherhood and childhood are entitled to special care and assistance." Article 25(2)), and the child as one in need of protection rather than of rights ("All children, whether born in or out of wedlock, shall enjoy the same social protection." Article 25(2)). This is not to suggest that children do not qualify as the holders of rights under the terms of the Declaration, but it is clear that this is not how they were principally envisaged. The image of a child endowed with rights of his or her own, which could if necessary be asserted against the State, the family, or other entities, is one that can be extracted from the Declaration in retrospect, since it was never denied or explicitly precluded by any of the provisions. But it was not one that emerged at the time. Consistent with this approach, the only other reference to children in the Universal Declaration is the affirmation of a right of parents, which is "to choose the kind of education that shall be given to their children" (Article 26(3)).

The regional human rights treaties adopted by both the Council of Europe and the Organization of American States merely served to reinforce this approach. We shall look at those more closely below, in section (b) of this Chapter.

When the time came to elaborate on the content of the Universal Declaration and to transform its provisions into the context of binding treaties which were to become the two International Human Rights Covenants of 1966, the approach to children changed hardly at all. Both Covenants paid tribute to the family, by affirming it as "the natural and fundamental group unit of society". It was said in the International Covenant on Economic, Social and Cultural Rights to be especially entitled to "the widest possible protection and assistance ... while it is responsible for the care and education of dependent children" (Article 10(1)). The interests, but not directly the rights, of children were further promoted by a provision which stated that "special protection should be accorded to mothers during a reasonable period before and after childbirth" (Article 10(2)). The most detailed provision concerning children in this Covenant is the most revealing in this sense. Article 10(3) provided that:

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.

Although this provision effectively accords the child a right to be protected and assisted, the focus is not

on the child as the bearer of rights but on the State, as the protector of children from abuse and exploitation. Although the same emphasis was repeated in the International Covenant on Civil and Political Rights, the net was cast wider to include the family and society among those responsible for providing protection. Article 24(1) states that:

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.

This Covenant's only other reference to children is to the need for provision to 'be made for the necessary protection of any children in the case of dissolution (Article 23(4)).

A very clear tone was thus set by the three key documents adopted by the United Nations between 1948 and 1966 that together make up the International Bill of Human Rights. It could not by any stretch of the imagination, at least by today's standards, be thought of as a Bill of Rights for Children. The emphasis was almost exclusively on protection, supplemented by a concern for non-discrimination. Anyone involved in the drafting of a constitution during this post-1945 period would have identified, on the basis of these international instruments, a checklist of child-related issues that looked something like this:

- Protection of the family and of motherhood
- Special measures of protection and assistance for children
- Non-discrimination in relation to these measures, including on the basis of parentage
- Protection of children from economic and social exploitation
- Protection from harmful or dangerous work
- Age limits for child labour

An analysis of the main themes that emerge from an examination of the approach to children which is reflected in national constitutions, reveals a striking similarity to this list. The results of this examination are summarized in Table 3. Although the terminology used in each constitution is often slightly different, the overwhelming similarities in both the formulations used and their substantive concerns, lead to the conclusion that the approach to children reflected in the International Bill of Rights had a very significant impact on the perceptions of the drafters of national constitutions throughout this period. While it could be argued that the opposite is true – in other words that the Bill of Rights merely reflected the approach already adopted in national constitutions – the most significant impact seems to have been in the direction already identified.

Those constitutions which adopt the special protection approach tend in addition to provide that parents have the primary obligation to raise and edu-

cate their children, which also has its origins in article 10(1) of the International Covenant on Economic, Social and Cultural Rights. Similarly, many of them also reaffirm the parental right to raise and educate their children in accordance with their own convictions – a right which finds its original expression in the Universal Declaration of Human Rights and was subsequently taken up in both Article 13(3) of the International Covenant on Economic, Social and Cultural Rights and Article 18(4) of the International Covenant on Civil and Political Rights. A sample list of States with constitutions that possess these characteristics is provided in the table 4 below.

None of the features of what we have termed the 'special protection constitutions' is necessarily incompatible with the approach reflected in the CRC. Indeed, like the earlier international human rights treaties, the Convention

- (a) calls for non-discrimination on grounds of parental status;
- (b) requires states to provide the child such protection and care as is necessary for his or her well-being and to protect them from all forms of exploitation and abuse; and
- (c) acknowledges that parents have the primary responsibility for the upbringing and development of a child.

Nevertheless, a special protection constitution falls well short, in a number of important ways, of the ideal approach reflected in the CRC. In the first place, the emphasis is on protection rather than rights, even though it will sometimes be the case that the child is said to have a right to the relevant forms of protection. Secondly, the principal lens through which the special protection approach views the situation of the child, is that of the parents and it is often their rights that are the major concern. Thirdly, the range of child-related issues canvassed in most such constitutions is extremely limited, by comparison with the standards set in the CRC. It can be concluded therefore that the great majority of constitutions that are limited in scope to a child protection approach fall well short of protecting the full range of children's rights recognized in the CRC. In each case there is thus considerable potential for reviewing the adequacy of the existing provisions and considering how a constitution which was, in most cases, inspired by the International Bill of Rights approach to children, can now be updated, to reflect the far more advanced levels of rights protection accorded to children by the CRC.

One caveat should, however, be noted in this regard. There is considerable scope for courts, governments and other actors to take the special protection approach as their starting point, but to supplement it by way of interpreting the general provisions calling for protection as implying or reflecting a much wider range of measures as indicated by the CRC. In other words, it is possible to use the Convention's provisions to spell out and elaborate what is required in determining the appropriate levels of special protection that are required and the

Table 3: Constitutional provisions focused on special protection for children

<i>Theme</i>	<i>Country</i>
A general obligation to protect children or childhood	Albania, s54(1); Armenia, s32; Belarus, s32(1); Bahrain, s5; Brazil, s6; Bulgaria, s14; Congo, s42; Croatia, s62 & 64; Egypt, s10; Greece, s21; Haiti, s261; Kuwait, s9; Kyrgyz Republic, s9; Latvia, s110; Lithuania, s38(2); Macao, s38; Madagascar, s21; Moldova, s49(2) & 50; Mongolia, s11; Nepal, s11(3); Nicaragua, s76; Poland, s72(1); Portugal, s69; Puerto Rico, s20; Romania, s45; Russian Federation, s7&38, Senegal, s15; Slovakia, s41(4); Slovenia, s53; Spain, s39(2); Suriname, s35(3); Syria, s44(2); Taiwan, 156; Turkey, s41; Angola, s30(1); Argentina, s23; Sudan, s14.
The equal status of illegitimate or abandoned children	Albania, s54(2); Andorra, s13(3); Brazil, s227(6); Bulgaria, s47(3); Congo, s40(2); Ghana, s28; Ecuador, s40; Ethiopia, s 36(4); Germany, s6(5); Guyana, s30; Italy, s30(2); Nepal, s9; Portugal, s36(4); Romania, s44(3); Slovakia, s41(3); Slovenia, s54(2); Spain, s39; Suriname, s35; Togo, s31; Ukraine, s52; Uganda, s11; Uruguay, s42.
A special obligation to protect/support certain groups of children such as orphans, the disabled and needy	Angola, s48; Bahrain, s5; Brazil, s227(1); Bulgaria, s47(4) Cambodia, s48; Croatia, s63(5); Ethiopia, s36(5); Indonesia, s34; Kyrgyz Republic, s26(2); Latvia, s110; Macedonia, s40(4); Moldova, s49(3); Mozambique, s56(5); Portugal, s69(2); Slovakia, s38(1); Slovenia, s52; Uganda, s34(7); Thailand, s53; Ukraine, s52.
A general obligation to protect children from exploitation, abuse and violence	Albania, s54(3); Bahrain, s5; Belarus, s32(2); Brazil, s227(4); Colombia, s44; Cambodia, s48; Congo, s43; Ghana, s28; Ethiopia, s36(1); Moldova, s50(4); Nepal, s26; Paraguay, s54; Philippines, sXV(3); Portugal, s69(1); Thailand, s53; Togo, s36; Ukraine, s52; Uganda, s17(duties citizen); Uruguay, s41; Zambia, s11(c) &24.
An obligation to protect children from exploitative labour and provide a minimum age for employment	Albania, s54(3); Belarus, s42; Brazil, s227(3); Congo, s43(2) & 44; Croatia, s64(2); Ethiopia, s36(1); Gambia, s29(2); Ghana, s28; Haiti, s35(6); India, s24; Ireland, s45(4.2); Italy, s37(3); Japan, s27(3); Macedonia, s42(1) & (2); Malawi, s23(4); Malta, s16; Mexico, s123(xv); Namibia, s15(2)-(4); Nepal, s20(2); Pakistan, s37(e); Poland, s65(3); Portugal, s59(2); Portugal, s69(3); Puerto Rico, s15; Romania, s38(2) & 45(3-4); Slovakia, s38(2); South Africa, s28; Switzerland, s34; Taiwan, s153(2); Uganda, s34(4); Uruguay, s54; Zambia, s24(1).

range of issues to which they apply. The Human Rights Committee effectively used such an approach when it adopted General Comment No. 17 (1989) in which it built upon the very limited child-specific provisions of the International Covenant on Civil and Political Rights by interpreting them in the light of the provisions of the Convention which was, at that stage, about to be formally adopted by the UN General Assembly.

c) The 'child rights' constitution

The third stage in the treatment of children under national constitutions is characterized by recourse to the discourse of children's rights, as opposed to mere concerns about ensuring their care and pro-

tection. Well over 20 national constitutions possess this characteristic and have provisions dedicated to the protection of children's rights. A list of these countries is provided below and the relevant provisions are provided as an attachment. This list is not exhaustive and does not identify every national constitution which has a provision dealing with the rights of children. Rather, it identifies the constitutions that have a special section or sections dedicated to the rights of children.

It would be necessary to examine the drafting debates for each constitution to determine the extent to which the CRC has played a role in the formulation of the final text. However, it is reasonable to assume that the existence of a reference to the

Table 3: Parental rights and responsibilities in relation to education

<i>Theme</i>	<i>Country</i>
Obligation of parents to raise and/or educate their children	Azerbaijan, s 17 & 34; Belarus, s32(2); Brazil, s229; Bulgaria, s47; China, s49(3); Congo, s40(1); Croatia, s63(1); Ghana, s28; Eritrea, s22(3); Estonia, s27(3); Germany, s6; Hungary, s70J; Italy, s30, South Korea, s31(2); Kyrgyz Republic, s26(1); Lithuania, s38(6); Macedonia, s40(3); Mexico, s4; Moldova, s48(2); Mongolia, s17(2); Mozambique, s56; Peru, s6; Portugal, s36(5); Romania, s44; Russian Federation, s38(3); Rwanda, s24(2); Senegal, s15; Slovenia, s54(1); Spain, s39(3); Ukraine, s51; Uganda, s32(4); Paraguay, s53.
Right of parents to raise	Andorra, s20(3); Brazil, s229; Cambodia, s47; Congo, s45; Ecuador, s38; Ireland, s42; Peru, s13; Portugal, s36(5); Romania, s44; Rwanda, s24(2); Slovenia, s54(1); Spain, s27(3).

rights of children is an indication that the CRC has had at least some impact, especially where the constitution has been adopted post 1989.

It should be noted that the level of penetration by the CRC in the text of each provision dealing with the rights of children, differs for each constitution. While some, like Brazil, have incredibly detailed provisions concerning the rights of children, others like Thailand are relatively brief. The table below provides some indication of the actual rights under the CRC that have found expression in child rights constitutions. It also summarizes the content of each constitution's treatment of children's rights and therefore provides an overview of the extent to which the CRC has had an impact on each 'child rights' constitution.

It should be noted that this list is not a comprehensive summary of the references to children's rights in national constitutions. Rather, it is an attempt to identify the sorts of rights under the CRC that find expression in those constitutions which have a specific section dedicated to children or youth. A number of other rights which appear in the CRC but which were first enumerated by other international human rights instruments, most notably the two International Human Rights Covenants, can also be found in national constitutions. The most common have already been referred to above in the discussion about 'special protection' constitutions and include constitutional guarantees relating to issues such as conditions of employment for children, the obligations of parents to raise children and the right to education and health. Certainly education is one of the most common rights to appear in national constitutions, as the table below indicates. However, it is difficult to attribute causation to the CRC where a right such as education existed as part of the normative framework of international human rights law long before the CRC and is often enumerated from the perspective of parents.

In any event, the previous table, which summarizes the content of 'child rights' constitutions, invites a number of conclusions about the impact of the CRC on the final text of these constitutions. First, each child rights constitution has adopted a unique

approach in its enumeration of children's rights. Thus there is no standard formulation for a constitutional provision dealing with children's rights. Second, although very few of the rights under the CRC fail to find expression in at least one constitution, there is a notable absence of any reference to the rights of refugee and indigenous children. Third, despite the wide spectrum of children's rights represented in national constitutions, there remains a bias towards rights which place an emphasis on protection and provision, rather than participation. In other words, many constitutions have provisions which guarantee children the right to protection against all forms of violence and exploitation and/or various rights under the juvenile justice system. But few have a specific provision that guarantees children the right to participation, free expression, or respect for their opinions and thoughts in accordance with their age and level of maturity.

Thus the persons responsible for drafting these constitutions have been able to make the transition from a welfare to a rights-based approach, in the way they describe matters concerning children. However, they have failed to match the expansion in the range of issues enumerated as rights under the CRC, preferring to maintain the traditional agenda of care and protection issues, albeit now canvassed in the discourse of rights.

Finally – although this is not evident from the table – the child rights constitutions listed above have either been adopted and amended since 1989, so as to include a specific section or sections on children's rights. This process has undoubtedly been influenced by the CRC, as evidenced by the terminology of the relevant provisions. Indeed it seems clear that the CRC has had a significant impact on the formulation of national constitutions despite the relatively limited conception of children's rights which has often been reflected.

In many instances, the Committee on the Rights of the Child has played a role in prompting States Parties to examine whether or not their legislative framework is adequate to ensure that the principles of the Convention will be applied in domestic law. It has also congratulated various States for having

CRC article	Constitution	
Art 2	non discrimination	Albania, s54(2); Brazil, s227; Ecuador, s50(5); Ethiopia,s36(4); Finland, s5(3); Ghana, s28(1)&(4); Malawi, s23(1); Moldova, s50(1); Nicaragua, s75; Paraguay, 53; Portugal, s69(1); Uganda, s34(3); Ukraine, s52.
Art 3(1)	the best interests principle	Ecuador, s48; Ethiopia, s36(2); Gambia, s29(1); Namibia, s15; South Africa, s28(3); Uganda, s34(1).
Art 3(2)	protection and care to assist in enjoyment of rights	Albania, s54(1); Ghana, s28(1); Moldova, s50(1)&(2); Portugal, s70(1); Romania, s45(1); Slovenia, s56; Suriname, s37(1).
Art 5	evolving capacities	Finland, s5(3); Poland, s48(1); Slovenia, s41(3).
Art 6(1)	right to life	Brazil, s227; Colombia, s44; Ecuador, s49; Ethiopia, s36(1), Namibia, s15(1); Uganda, s22(2)(abortion prohibited).
Art 6(2)	survival and development	Angola, s30(2); Colombia, s45; Ecuador, s47; Paraguay, s54; Portugal, s69(1).
Art 7(1)	name and nationality	Colombia, s44; Congo, s42(3); Ecuador, s49; Gambia, s29(1); Ethiopia, s36(1); Malawi, s23(2); Namibia, s15(1); South Africa, s28(1).
Art 7(1)	care by parents	Colombia, s44; Ethiopia, s36(1); Gambia, s29(1); Malawi, s23(3); Namibia, s15(1); South Africa, s28(1); Uganda, s34(1).
Art 7(1)	knowledge of parents	Ethiopia, s36(1); Gambia, s29(1); Malawi, s23(3); Namibia, s15(1); Paraguay, s53; Uganda, s34(1).
Art 9	non separation from parents	Ecuador, s49.
Art 12	participation	Angola, s30(2); Colombia, s45; Ecuador, s49; Finland, s5(3); Paraguay, s56; Poland, 72(3); Romania, s45(3); Switzerland s 11(2).
Art 13	freedom of expression	Colombia, s44; Ecuador, s49.
Art 15	freedom of association	Ecuador, s49.
Art 17	protection from the media	Ecuador, s50(7).
Art 18	parental responsibilities	Brazil, s229, Colombia, s44; Ghana, s28(1); Paraguay, s53.
Art 19	protection from violence & abuse	Albania, s54(3); Brazil, s227, Colombia, s44; Ecuador, s50(5); Ghana, s28(1); Paraguay, s54; Portugal, s69(1); Poland,s72(1); South Africa, s28(1);Thailand, s53.
Art 20	protection of child without family	Ethiopia, s36(5); Portugal, s69(2); Poland, s72(2); Slovenia, s56(4); Uganda, s34(7); Ukraine, 52;Thailand, s53.
Art 21	adoption	Brazil, s227(5).
Art 23	disabled children	Brazil, s227(1) & (2); Ecuador, s50(3); Romania, s45(2).
Art 24	health services	Brazil, s227; Colombia, s44; Ecuador, s49; Portugal, s64(2); South Africa, s28(1).
Art 26	social security	Angola, s31; Colombia, s44; Brazil, s203 & 227(1); Congo, s41(2); Ecuador, s49; Ghana, s28; Finland, s15(a); South Korea, s34(4); Moldova, s50(3); Poland, s68(3); Portugal, s70(1); Romania, s45(2); Uganda, s34(3).
Art 27	standard of living	Brazil, 227; Colombia, s44; Ecuador, s49; Portugal, s70(1); South Africa, s28(1).
Art 28	education	Angola, s31; Brazil, s227; Ecuador, s49; Portugal, s70(1); Suriname, s37(1); Uganda, s34(2).
Art 31	leisure, recreation and cultural activities	Angola, s31; Brazil, s227; Colombia, s44; Ecuador, s49; Moldova, 50(5); Portugal, s70(1); Suriname, s37(1).



Art 32	child labour	Albania, s54(3); Angola, s31; Brazil, s227(3); Colombia, s44; Ecuador, s50(1); Gambia, s29(2); Ghana, s28(2); Malawi, s23(4); Namibia, s15(2)-(4); Portugal, s69(3); Romania, s45(3)&(4); Slovenia, s56(3); South Africa, s28(1); Suriname, s34(4).
Art 33	drug abuse	Ecuador, s50(4).
Art 34	sexual exploitation	Brazil, s227(4); Colombia, s44; Ecuador, s50(4).
Art 35	abduction and trafficking	Colombia, s44; Ecuador, s50(4); Paraguay, s54.
Art 36	protection against exploitation	Brazil, s227; Ethiopia, s36(1); Moldova, s50(4); Paraguay, s54; Romania, s45(3); Poland, s72(2); Slovenia, s56(3); Ukraine, s52.
Art 37	torture and deprivation of liberty	Ghana, s28(3); Ethiopia, s 36(1) (compare Zimbabwe, s15(3)).
Art 38	armed conflict	South Africa, s28.
Art 39	rehabilitative care	Ecuador, 50(6).
Art 40	juvenile justice	
	- general rights when in detention	Malawi, s42; South Africa, s28;
	- prohibition against detention	Namibia, s15(5);
	- trial takes account of age	South Africa, s28(1);
	- privacy of criminal proceedings	Namibia, s 12;
	- right to defence	Brazil, s227(3);
	- age of criminal responsibility	Brazil, s228; Guatemala, s20; Nicaragua, s35; Ecuador, s51;
	- separate children from adults	Gambia, s29(3); Ethiopia, s36(3); Gambia, s29(3);
		Panama, s28; South Africa, s28(1); Uganda, s34(6).
	- detention as measure of last resort	South Africa, s28(1).
	- right to a legal practitioner	South Africa, s28(1).

included children's rights provisions in their constitutions. The Committee has not, however, called on States to give constitutional effect to the Convention – nor should it do so, since this is a decision to be made by each State in the light of its own constitutional system. Nevertheless, there is reason to think that the comprehensive reviews of domestic legislation mandated in connection with the reporting obligations under the Convention, have encouraged States in this direction. Thus, for example, in its 2002 First Periodic Report, Indonesia informed the Committee that “the Indonesian Parliament ... is currently planning changes and/or amendments to the constitution, into which recognition of human rights, including the rights of the child, would be integrated.”¹⁰³

This increasing prevalence of constitutional guarantees for children's rights is to be welcomed, but it must be accompanied by a critical discussion about the status and implementation of such rights. Formal recognition, accompanied by little or no practical significance, can do as much harm as

good, in terms of real protection of children and their rights.

d) The status and implementation of children's rights under national constitutions

The significance of any constitutionally-recognised human right quickly diminishes when no means of enforcement is provided for, or when the formulation is subject to a broad limitation or to an overly-permissive derogation clause. This applies equally to children's rights under national constitutions, with the additional complication that children often lack the capacity to exercise their rights, or otherwise to ensure enforcement, even in situations where the constitutional provisions look admirable on paper.

It is not possible to examine the justiciability (the extent to which a court can be called upon to uphold the right) of every right bestowed upon children under every national constitution. However, it is possible to make some general observations with respect to this issue. Firstly, the treatment of children under special care and protection constitutions rarely gives

Country	
Right to education	Albania, s57; Armenia, s35; Azerbaijan, s42; Brazil, s208; Belarus, s49; Bangladesh, s17(DP); Benin, s13(DP); Bolivia, s7; Bulgaria, s53; Colombia, s67; China, s46(1); Denmark, s76; Ecuador, s66; Estonia, s37; Finland, s13(1); Gambia, s30; Ghana, s25; Iceland, s71; India, s45(DP); Ireland, s42(4); Madagascar, s23; Mexico, s3; Namibia, s20; Nicaragua, s76&116; Paraguay, s73; Philippines, sXIV(1), Poland, s48(1) &70; Portugal, s74; Puerto Rico, s5; Russian Federation, s43; South Africa, s29; Spain, s27; Taiwan, s160; Togo, s35; Uganda, s30 &34(2); Ukraine, s53; Vietnam, s59; Yemen, s53.

rise to an enforceable right. Rather, the constitutional edicts that children and or childhood are to receive special protection tend to be aspirational in nature, while other matters that are of particular relevance to children, such as education, are often confined to the directive principles of a constitution.

Secondly, our identification of a constitution as being a 'child rights' constitution does not necessarily mean that the rights under that constitution will be enforceable. For example, article 44 of Colombia's Constitution details a number of rights to which children are entitled and goes so far as to say that the rights of children have priority over the rights of others. However, article 44 is not listed under article 85 as a right that is applicable immediately, which makes it difficult for a child to commence an action for a violation of his/her rights under article 86.

The same point applies in relation to countries which, in principle, adopt a monist approach, according to which a ratified treaty, such as the CRC, should automatically become a part of domestic law. An important example in this regard is France. The highest French court, the Cour de Cassation, has held in a number of judgments that the CRC, or at least the great majority of its provisions, is not directly applicable in French law. In the case of *Lejeune*, the court concluded that "it follows from Article 4 of the Convention that its provisions create obligations only for the States Parties, as a result of which they may not be directly invoked before national jurisdictions"¹⁰⁴ A Commission of Inquiry on the state of children's rights in France, set up by the National Assembly in 1998 and chaired by Laurent Fabius, a former Prime Minister of France, noted that this attitude had "given rise to very lively doctrinal polemics and a deep incomprehension on the part of childhood professionals"¹⁰⁵ This led the Commission to conclude not only that the task of translating the norms into domestic law was incomplete, but to note that it was regrettable that the courts had failed to complement the measures taken by the legislature.¹⁰⁶ It also observed that the highest administrative body, the French Conseil d'Etat, had rejected a blanket characterization of the status of the Convention in domestic law and had instead adopted an article by article approach, according to which certain articles were considered self-executing, while others were not.¹⁰⁷

Thirdly, despite the absence of a nexus between a 'child rights' constitution and the justiciability of children's rights, the majority of 'child rights' constitutions do in fact provide that the rights of children are enforceable. The constitutions of Albania, Ecuador, Ethiopia, Gambia, Ghana, Moldova, Namibia, Romania, Poland, Slovenia, South Africa, Uganda and Thailand, are among the constitutions that have some form of mechanism to allow for the enforcement of children's rights as enumerated under the respective constitutions. The majority of these justiciable rights fall under the categories of non-discrimination on the basis of parental status, the right to a name and nationality and protection from exploita-

tion, particularly in the area of employment. The adjudication of these rights is unlikely to require any complex examination of the allocation of resources and thus should not present significant jurisprudential difficulties for an adjudicative body. However, the same cannot be said with respect to enforceable rights such as the right to nutrition, health care, social security and accommodation. Nevertheless, it must be kept in mind that courts in many countries are very regularly called upon to adjudicate on issues which have major budgetary significance. But only a handful of constitutions provide children with such rights and where they are immediately justiciable, as for example under the South African Constitution, where the Constitutional Court in particular has taken some giant strides towards elaborating an effective methodology for the implementation of the economic, social and cultural rights provisions in the constitution, as well as the specific provisions dealing with children's rights.¹⁰⁸

Finally, although the majority of 'child rights' constitutions do provide a means of enforcement, very few have provisions that take account of the particular difficulties experienced by children in bringing an action to redress a violation of their rights. Most constitutions only grant standing to victims but in practice, children are unlikely to know about their constitutional rights --let alone how they can enforce them. There are exceptions to this rule and several constitutions do provide standing to persons or organisations acting on behalf of others or in the public interest. For example, article 38 of the South African Constitution, which is one of the most extensive standing provisions of any national constitution, lists the persons who may approach the Constitutional Court to allege a violation of the Bill of Rights as anyone acting in their own interest;

- anyone acting on behalf of another person who cannot act in their own name
- anyone acting as a member of, or in the interest of, a group or class of persons
- anyone acting in the public interest and
- an association acting in the interest of its members.

There is no specific reference to children in this provision, but it is immediately apparent that it would provide a number of options to commence an action on behalf of a child or children. However, the South African provision remains the exception rather than the rule and more consideration must be given to ensuring that children are provided with an effective means of enforcing their constitutional rights. Failure to do so, risks leaving the good sentiment underlying a child's constitutional rights confined to paper, rather than translating it into substantive change.

e) Conclusion

In concluding this review of the extent to which children's rights have received constitutional recognition, it is important to emphasize that there are two sides to this coin. On one hand, constitutional recognition can be an invaluable springboard from

which to launch a concerted effort to change the legal and policy frameworks within which children's rights are the subject of deliberation at the national level. It is therefore an important element in an overall effort to establish the foundations for children's rights and to entrench conceptions of accountability, which have in the past been all too lacking in this area. On the other hand, however, we do well to remember that in the days before the CRC, some constitutional formulations concerned with children proved to be worth little more than the paper they were written on. Indeed, in some cases prior to 1990, it might well have been possible to mount a solid argument that there was an inverse relationship between the constitutional recognition of children's rights and the respect which they were accorded. In other words, the more beautiful the formulations, the more likely that they were ignored. Conversely, in some of the States with the most child-friendly policies, not a single word of the constitution was addressed to children.

But this caveat should not be overstated and it is perhaps more illustrative of the difference which the CRC has made and could make in the future, to recall briefly the case of South Africa. Once an international pariah because of the policies of apartheid, the post-apartheid government set about framing a constitution which drew very significantly upon international human rights instruments. The children's rights provisions ultimately included in the constitution reflected various aspects of the CRC. The constitutional entrenchment of those rights, in turn paved the way for the Government of South Africa to announce its ratification of the Convention on June 16, 1995, which was the anniversary of the Soweto uprisings. At the time of the drafting of the constitution and afterwards, various voices in South Africa advised against the approach adopted. Some challenged the cultural appropriateness of such a rights-based approach, others argued that the provisions were likely to be of no practical impact, despite their rhetorical appeal. It was said that parental and community attitudes would not be changed in this way and strong objections were made to dealing with economic and social matters within such a framework.

In practice, however, much has been achieved, although it is inevitable that the full promise of the constitution and its CRC-inspired formulations remains to be realized. It is instructive, however, to note the following assessment of the achievements of the first few years under the new constitution:

Constitutionalization of children's rights in section 28 of the constitution marks a watershed period in the history of South Africa and it represents a meaningful attempt to provide a constitutional framework for a child-centred law reform programme. It also provides a basis for challenging racially oppressive and parent-centred apartheid laws which undermine the child's best interests. Prior to the implementation of the constitution, South African welfare policies were racially structured, patriarchal and parent-centred. Black children were denied basic human rights such as education, nutrition, and health care. They were denied South African citizenship under the homelands policy and their families were removed forcibly from their lands. They were victims of police brutality and they were detained for long periods without trial, under conditions that were in violation of international law.

Constitutionalization provides a basis for challenging the racially structured and parent-centred child welfare laws which are not in the best interests of the child. For example the child's constitutional right to nutrition contained in section 28(1) formed the basis for the attack on [a government] attempt to lower the child allowance. It also provided the ideological basis for the Children's National Feeding Scheme and the Children's Fund set up by the President, in furtherance of the political culture of children's rights. Other rights contained in the constitution that have succeeded in promoting a child-centred legislative programme include the following rights: 1) not to be involved in armed conflict 2) not to be detained except as a measure of last resort 3) to have legal representation 4) to be protected from exploitative labour practices 5) to have a name and nationality and 6) to be protected from maltreatment, neglect, abuse, or degradation.¹⁰⁹

Notes

- 33 UNICEF, Frequently Asked Questions on the CRC, at www.unicef.org/crc/faq.htm#009
- 34 As the U.S. Representative stated to the 2004 session of the Commission: "My government will call for a vote and vote No on this draft resolution because it ... contains unacceptable language. ... In particular, the Convention conflicts with the authorities of parents and other provisions of state and local law in the United States. We find the assertion that the Convention 'must constitute the standard in the promotion and protection of the rights of the child' and the exclusion of other international instruments that also cover children's issues unacceptable." United States Explanation of Vote, L.51: Rights of the Child, April 19, 2004, at <http://www.humanrights-usa.net/state->

- [ments/0419child.htm](http://www.humanrights-usa.net/state-ments/0419child.htm)
- 35 In fact, this Article provides that: "States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention."
- 36 In fact, a right to education is already recognized in the constitution of virtually every state in the US
- 37 Christopher J. Klicka, 'The UN Convention on the Rights of the Child: The Most Dangerous Attack on Parents' Rights In the History of the United States', on the Home School Legal Defense Association website at www.hslda.org/docs/nche/000000/00000020.asp?
- 38 It would seem that this has not been a problem in relation

- to the recommendations regularly made over more than a decade now by the equivalent committees established under the three major treaties to which the US has become a party.
- 39 David P. Stewart, 'Ratification of the Convention on the Rights of the Child', 5 *Georgia Journal of Fighting Poverty* (1998) p. 161.
- 40 Martha Davis and Roslyn Powell, 'The International Convention on the Rights of the Child: A Catalyst for Innovative Childcare Policies', 25 *Human Rights Quarterly* (2003) 688, at 711.
- 41 See, e.g., Howard Davidson and Cynthia Price Cohen, *Children's Rights in America: UN Convention on the Rights of the Child Compared with United States Law* (1990); B. Hafen and J. Hafen, 'Abandoning Children to their Autonomy: The UN Convention on the Rights of the Child', 37 *Harvard International Law Journal* 449 (1996); A.D. Renteln, 'United States Ratification of Human Rights Treaties: Who's Afraid of the CRC?', 3 *ILSA Journal of International and Comparative Law* 629 (1997); Susan Kilbourne, 'The Convention on the Rights of the Child: Federalism Issues for the United States', 5 *Georgia Journal of Fighting Poverty* (1998) p. 327; Susan Kilbourne, 'Placing the Convention on the Rights of the Child in an American Context', *Human Rights*, Spring 1999, p. 27; Andre R. Imbrogno, 'Corporal Punishment in America's Public Schools and the U.N. Convention on the Rights of the Child: A Case for Nonratification', 29 *Journal of Law and Education* (2000) p. 125; and American Bar Association Project on the U.N. Convention on the Rights of the Child, Briefing Paper: State Education Law Compared to the UN Convention on the Rights of the Child
- 42 G. Naldi, 'Future Trends in Human Rights in Africa: The Increased Role of the OAU?', in M. Evans and R. Murray, *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (2002) fn 66.
- 43 For the text see <http://www1.umn.edu/humanrts/africa/afchild.htm>
- 44 See generally M. Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties', 35 *Virginia Journal of International Law* (1995) 339.
- 45 See generally B. Thompson, 'Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism', 41 *International and Comparative Law Quarterly* (1992) 434; and Amanda Lloyd, 'A Theoretical Analysis of the Reality of Children's Rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child', 2 *African Human Rights Law Journal* (2002).
- 46 The call for ratification was included in a report on the involvement of child soldiers in the Great Lakes region of Africa, prepared by the coalition to stop the use of child soldiers and the African Network for the Prevention and Protection of Child Abuse and Neglect. See 120,000 Children Engaged in Armed Conflict in Africa, 19 Dec. 2002, <http://allafrica.com/stories/printable/200212190601.html>.
- 47 K. Arts, 'The International Protection of Children's Rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child', 5 *Revue Africaine de Droit International et Comparé* (1993) 139, at 155.
- 48 See generally Amanda Lloyd, 'An Evaluation of the African Children's Charter and the African Committee of Experts, Raising the Gauntlet', *International Journal of Children's Rights* (2002); and A. Lloyd, 'An Analytical Annotation of the Rules of Procedure and Guidelines for Initial Reports of State Parties: The African Charter on the Rights and Welfare of the Child and the Committee of Experts' 3 *African Human Rights Law Journal* (forthcoming 2003).
- 49 OAU doc. CON/HRA/DECL (I), reprinted in 11 *Revue Africaine de Droit International et Comparé* (1999) 352.
- 50 The 'Protocol Of San Salvador', 17 November 1988, *OAS Treaty Series* 69, Article 16.
- 51 *Villagrán Morales et al. v. Guatemala*, Judgment of Nov. 19, 1999, Inter-American Court of Human Rights, (Ser. C) No. 63 (1999) para. 196.
- 52 *Ibid.*, para. 183.
- 53 *Ibid.*, para. 195.
- 54 *Ibid.*, para. 191.
- 55 *The "Street Children" Case, Reparations (Art. 63(1) American Convention on Human Rights)*, Judgment of May 26, 2001, Inter-American Court of Human Rights (Ser. C) No. 77 (2001).
- 56 'Legal Status and Human Rights of the Child', Inter-American Court of Human Rights, Advisory Opinion OC-17/2002 of Aug. 28, 2002, para.
- 57 1999 *Annual Report of the Inter-American Commission on Human Rights*, chapter VI, at <http://www.cidh.oas.org/annualrep/91eng/chap.6c.htm>
- 58 <http://www.cidh.oas.org/annualrep/98eng/Chapter%20VII.htm>
- 59 <http://www.cidh.oas.org/annualrep/2002eng/chap.2.htm>
- 60 Inter-American Commission on Human Rights Press Release No. 28/02.
- 61 Doc OEA/Ser.L/V/II.110, Doc.52, 9 March. 2001, chapter VII.
- 62 *Fifth Report on the Situation of Human Rights in Guatemala*, Doc. OEA/Ser.L/V/II.111 doc. 21 rev., 6 April 2001, Chapter XII, para. 46.
- 63 Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, Doc. OEA/Ser.L/V/II.106, Doc. 40 rev., Feb. 28, 2000, para. 165.
- 64 *Maire v. Portugal*, Application No. 48206/99, 26 June 2003, para. 72.
- 65 *Ibid.*, para. 56.
- 66 *Ibid.*, para. 77
- 67 *Fretté v. France*, Application No. 36515/97, 26 Feb. 2002.
- 68 *A. v United Kingdom*, Application No. 25599/94, 23 Sept. 1998, para. 22.
- 69 *T. v United Kingdom*, Application No. 24724/94, 16 Dec. 1999; and *V v United Kingdom*, Application No.24888/94, 16 Dec. 1999.
- 70 *T. v United Kingdom*, Application No. 24724/94, 16 Dec. 1999, paras. 44-45.
- 71 *Ibid.*, para. 62.
- 72 *Ibid.*, para. 101.
- 73 *Ibid.*, p. 36.
- 74 Joint partly dissenting opinion of Judges Pastor Ridruejo, Ress, Makarczyk, Tulkens and Butkevych. *Ibid.*, p. 39, para. 2.
- 75 *Sahin v. Germany*, Application No. 30943/96, 8 July 2003, para. 16.
- 76 *Ibid.*, paras. 39-41.
- 77 Although a token reference appears in *ibid.*, para. 64.
- 78 *Ibid.*, para. 1.
- 79 *Vo v. France*, Application No. 53924/00, 8 July 2004.
- 80 The reference was made in the judgment of the Lyons Court of Appeal, quoted in *ibid.*, para. 21.
- 81 *Ibid.*, para. 63.
- 82 *Ibid.*, paras. 84-85.
- 83 Philip Alston, 'The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child', 12 *Human Rights Quarterly*, (1990) 156.
- 84 E.g. Abby F. Janoff, 'Rights of the Pregnant Child Vs. Rights of the Unborn under the Convention on the Rights of the Child', 22 *Boston University International Law Journal* (2004) 163.
- 85 *Odièvre v. France*, Application No. 42326/98, 13 Feb. 2003.
- 86 *Ibid.*, para. 30.
- 87 *Ibid.*, p.33, para. 15.
- 88 *Ibid.*, para. 49.
- 89 E.g. *Ignaccolo-Zenide v Romania*, Application No. 31679/96, 25 Jan. 2000, partly dissenting opinion of Judge Maruste.
- 90 Application No. 21830/93, decided on 22 April 1997.
- 91 L. Pettiti, *Que-sais-je?: Les transsexuels* (Paris, Presses universitaires de France, 1992).
- 92 *X, Y and Z v. the United Kingdom*.
- 93 The latter case was *Vo v. France*, while the other two were *T. v. United Kingdom* and *V. v. United Kingdom*.
- 94 *Olsson v. Sweden*, Application No. 13441/87, 27 Nov. 1992.
- 95 Euronet, EU Charter of Fundamental Rights – Rights of the Child (Jan. 2000), p. 2.
- 96 *Official Journal of the European Communities* C 364/1, 18 Dec. 2000.
- 97 See for example the concluding observations of the Committee for Nepal CRC/C/15/Add. 57, para. 3; Switzerland CRC/C/15/Add182 para 3; Belgium CRC/C/15/Add178 para 3; Cote d'Ivoire CRC/C/15/Add155 para 3; Columbia CRC/C/15/Add15 para 3; Cambodia CRC/C/15/Add128 para 4.
- 98 See for example the concluding observations of the Committee for Norway, CRC/C/15/Add. 23, para. 14; Niger CRC/C/15/Add179 para 10(a).
- 99 On these problems in relation to international human rights treaties in general see W. Kälin, 'Implementing Treaties in Domestic Law: From 'Pacta Sunt Servanda' to 'Anything Goes', in V. Gowlland-Debbas (ed.), *Multilateral Treaty-Making* (2000) 111; and S. Grant, 'The United States and the International Human Rights Treaty System: For

Export Only?’, in P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring*, (2000).

- 100 Indeed the Committee in its discussion day on the General Implementation of the Convention in 1999 noted “the need to clarify the extent of applicability of the Convention in States where the principle of ‘self execution’ is applicable and the precise meaning of statements indicating that the Convention ‘has constitutional status’ or ‘has been incorporated’ in the national legal order”: in Reports of General Discussion Days CRC/C/DOD/1, 108-109.
- 101 Some of these constitutions may make a passing reference to children in the context of, for example, the entitlements of a child and widow upon the death of a man. However for the large part there is no significant reference to the situation of children or the obligations of the State, family or society with respect to children.
- 102 See for example the constitutions of Bangladesh, Bosnia and Herzegovina, Czech Republic, Dominican Republic, Kazakhstan, Morocco and Saudi Arabia. This is not to say that the CRC is irrelevant within the jurisdiction of such countries as it may still be listed under the constitution either expressly or by implication as an instrument which is binding within the State by virtue of its ratification. See for example: constitution of the Czech Republic, Article 10: “Ratified and promulgated international accords on human rights and fundamental freedoms, to which the Czech Republic has committed itself, are immediately binding

and are superior to law.” The CRC may also be relevant to the interpretation of any general human rights provisions within the constitutions of such States. See for example: constitution of Saudi Arabia, article 26 ‘The state protects human rights in accordance with the Islamic Shari’ah.”

- 103 CRC/C/65/Add.23, submitted Feb 2002, p.6.
- 104 Assemblée Nationale, Rapport No. 871, Rapport fait au nom de la Commission d’enquête sur l’état des droits de l’enfant en France, notamment au regard des conditions de vie des mineurs et de leur place dans la cite *Journal Officiel*, 6 May 1998, p. 22. [Author’s translation].
- 105 Ibid.
- 106 Ibid., p. 12.
- 107 Ibid., p. 25.
- 108 See for example: *South Africa v Grootboom and others*, Constitutional Court of South Africa, Case CCT 11/00, 11 May 2000 (a case which dealt with inter alia a child’s right to shelter and housing under the South African Constitution); and *Minister of Health and others v Treatment Action Campaign and others*, Constitutional Court of South Africa, CCT 8/02, 5 July 2002 (a case which dealt with *inter alia* a child’s right to health care services under the South African Constitution).
- 109 Tshepo L. Mosikatsana, ‘Children’s Rights and Family Autonomy in the South African Context: A Comment on the Children’s Rights Under the Final Constitution’, 3 *Michigan Journal of Race and Law* (1998) p. 341, at pp.392-93.

3

TOWARDS ACCOUNTABILITY

A - MONITORING AND ACCOUNTABILITY

3.1 The importance of the principle of accountability

The principle of accountability is, in many respects, the linchpin around which the international human rights regime which has emerged gradually over the past sixty years or so, has been constructed. Governments are accountable both to their own citizens and to other governments, albeit in very different ways, for the extent to which they respect the human rights that they have pledged to uphold by virtue of both their acceptance of the United Nations Charter and of relevant provisions contained in the great majority of national constitutions. It is not surprising then that the greatest challenge confronting the international community in this domain at the beginning of the twenty-first century, is to develop approaches which give substance and meaning to that principle.

As a result, a great deal of work is currently being undertaken to give more precise content to the principle of accountability. The approaches that have been put forward, just in the past couple of years alone, vary considerably. They include (i) a model based upon conceptions of participation and empowerment in the development context, exemplified by some of the reports prepared in recent years by the UK Department for International Development;¹¹⁰ (ii) a relatively bureaucratic and legalistic conception of accountability applied especially in the context of intergovernmental organiza-

tions, as illustrated by the very detailed approach developed by the International Law Association's Committee on Accountability of International Organizations;¹¹¹ (iii) a model based more on indicators of formal transparency, such as the degree of control that members of an organization can nominally exert over its governance and the accessibility of information about the organization's activities, as reflected in the approach developed by the One World Trust in its 2003 *Global Accountability Report*;¹¹² and (iv) a model focused primarily on issues of participation and responsiveness in the work of non-governmental organizations, as illustrated by the 2003 draft report of the International Council on Human Rights Policy entitled 'Deserving Trust: Issues of Accountability for NGOs'.¹¹³

But there is also a distinctly human rights-based dimension to the concept of accountability and it is this which is of the greatest relevance to this study. In its ideal form, it involves a circle of accountability in which governments are accountable to their own citizens for their performance in upholding and promoting human rights. Those same governments are also accountable to the international community through the various reporting, complaints and other mechanisms designed to establish a system of checks and balances on governmental conduct, in so far as it affects respect for human rights. International organizations fulfil multiple functions. In addition to providing the institutional context for the reporting and other processes already described, they themselves are accountable to the governments which control the institutions, to the government with which they are working in a particular country and, albeit to a much lesser

degree, to the people affected by their activities. Former UN High Commissioner for Human Rights, Mary Robinson, underscored this latter dimension when she observed that “all partners in the development process – local, national, regional and international – must accept higher levels of accountability”. In relation to development assistance, she added that “accountable aid is the responsibility of every donor, aid agency and international financial institution.”¹¹⁴

For the purposes of the present study, rather than seeking to identify abstract definitions of accountability, a far more useful and concrete approach is to examine the role and responsibilities of some of the key actors involved in enhancing children’s rights accountability. In addition to looking at what some of these actors have or have not been doing to give effect to the rights recognized in the CRC, the study also looks at two of the principal developments which are taking place in the international arena and which pose a significant threat to the viability of the models of accountability which the international community has so far succeeded in building. Those threats are arising in the context of the process of decentralization and as a result of the changing role and increasing power of non-State actors.

The present study omits one major actor in terms of the accountability loop. That is the Committee on the Rights of the Child. In view of the extensive analysis which has been undertaken in recent years on the work of the Committee, by scholars, international agencies, and others,¹¹⁵ we have chosen not to replicate that work. Instead the study emphasizes the role of other key actors which have been less systematically studied. We begin in Section D with a focus on the role which has been played in the promotion and protection of children’s rights by the UN Commission on Human Rights. We then study the activities at the national level of a recently emerged category of national human rights and children’s rights institutions. The relationship between civil society and the CRC is then scrutinized. Finally we move in Section F to a sustained focus on two of the most influential of the intergovernmental organizations and consider the track record of both the World Bank and the International Monetary Fund in complying with, upholding and promoting, the CRC in particular and children’s rights in general.

B -THE ROLE OF SOME KEY ACTORS IN ENHANCING CHILDREN’S RIGHTS ACCOUNTABILITY

3.2 The UN Commission on Human Rights

Within the United Nations system for the promotion and protection of human rights, there is, both in theory and in practice, a division of labour between

bodies such as the Committee on the Rights of the Child which are established to carry out specific functions and the Commission on Human Rights. The latter retains a comprehensive mandate to address all aspects of the issues and in doing so, can make use of a much broader range of techniques. While the Commission is, within the organizational structure of the UN, answerable to both the Economic and Social Council and the General Assembly, its role and influence are actually far more important than this hierarchical image would suggest. The result is that if the Commission is not taking children’s rights and the Convention sufficiently seriously, then the system as a whole will not be working effectively in relation to this set of rights. Moreover, if the UN human rights system itself is not taking adequate account of children’s rights, then the situation is likely to be even less satisfactory in other contexts which might be considered to be important.

Expressed in a more positive way, the extent to which an issue forms part of the agenda of the Commission will influence the profile and status of that issue within the international community. It is therefore of particular importance to examine the role of the Convention in relation to the work of the Commission Rights. While various different criteria could be suggested, the most straightforward measure is to assess both the content of the resolutions adopted by the Commission and the content of the reports prepared under the Commission’s thematic and country mandates.¹¹⁶

a) An analysis of Commission resolutions

Prior to 1990, children were all but invisible on the Commission’s agenda. The clear and obvious exception concerned the work of its open-ended (i.e. open to all States rather than just those that were members of the Commission) Working Group which existed from 1978 to 1989, for the purpose of drafting the Convention on the Rights of the Child. But as the Convention neared, adoption issues relating expressly to the rights of children came to be far more prominent in the Commission’s work. This expansion can be traced from three separate lenses:

- Special initiatives with respect to children;
- The content of the Commission’s annual resolution on ‘The Rights of the Child’ and
- The directions given by the Commission to its country and thematic rapporteurs as to the relevance of the Convention in the exercise of their mandates.

■ *Special Initiatives*

The Commission has taken a number of special initiatives in the form of adopting dedicated resolutions, endorsing special programmes and appointing special rapporteurs and working groups to deal with issues of specific concern in relation to children’s rights. The Convention has played a significant role in shaping the content of these initiatives.

SEXUALEXPLOITATION

Some months before the Convention came into

Part I	Implementation of the Convention on the Rights of the Child (and other instruments) ¹³⁹
Part II	Protection and Promotion of the Rights of Children (identity, family relations and birth registration; ,poverty ¹⁴⁰ ; health; education; freedom from violence;)
Part III	Non discrimination (the girl child; children with disabilities; migrant children)
Part IV	Protection and Promotion of the Rights of Children in particularly vulnerable situations (children working and/or living on the street; refugee and internally displaced children; progressive elimination of child labour; children alleged to have or recognised as having infringed the penal law)
Part V	Prevention and eradication of the sale of children, child prostitution and pornography
Part VI	Protection of children affected by armed conflict
Part VII	Recovery and social integration

force in September 1990, the Commission appointed a special rapporteur on the sale of children, child prostitution and pornography, based on the provisions of the 1959 Declaration on the Rights of the Child.¹¹⁷ The mandate of the special rapporteur, which has been repeatedly extended, is now very clearly grounded in the principles of the Convention. The Commission also drew heavily on the Convention in the formulation of its programme of action to deal with these abuses in 1992¹¹⁸ and two years later it established a working group to draft an optional protocol to the Convention, to strengthen the provisions dealing with the sale of children, prostitution and pornography.¹¹⁹ After several years of discussion, the Working Group adopted the final text of the Optional Protocol which came into force on 18 January, 2002. As of mid-2003, 51 states had become parties to it.

ARMED CONFLICT

The Commission first expressed its concern at the effects of armed conflict on children's lives in 1993.¹²⁰ This was followed by an initiative in the Commission's annual resolution on the implementation of the Convention in 1994, to establish an open-ended working group to consider an optional protocol dealing with the minimum age of recruitment into the armed forces.¹²¹ This led to the adoption of the Optional Protocol on the Involvement of Children in Armed Conflict, which came into force on 18 January, 2002. It had been ratified by 52 States parties by mid-2003.

EDUCATION

In addition to the various resolutions it has adopted in relation to the right to education¹²² the Commission also decided in 1998, as part of its effort to impart a higher visibility to economic, social and cultural rights, to appoint a special rapporteur on the right to education¹²³. Both the Convention itself and the work of the Committee on the Rights of the Child (including in particular its General Comment No. 1 on article 29 dealing with the aims of education) have been accorded a central role in the work of both the rapporteur and the Commission's resolutions.

OTHER CHILDREN THE SUBJECT OF SEPARATE RESOLUTIONS AND PROGRAMMES

The Commission has singled out several groups of children as the subject of dedicated resolutions. Such groups include street children,¹²⁴ women and

girls who are subjected to trafficking;¹²⁵ children and juveniles in detention, children within the juvenile justice system;¹²⁶ and abducted children from Northern Uganda.¹²⁷ In each instance, the Convention is identified as an integral part of the normative framework for dealing with such matters.

b) The Commission's annual resolution on "The Rights of the Child"

In 1990, the Commission welcomed the adoption of the Convention and called upon States to sign and ratify it.¹²⁸ It also requested the Secretary General to prepare a report on the status of the Convention and make this an agenda item for the 1991 session of the Commission.¹²⁹ Despite the formalistic nature of such an initiative, it is in reality the Commission's way of according particular prominence to an issue, by ensuring that it will be discussed in some depth and on a regular basis. Every year since then, the Commission has adopted a specific resolution that deals with a range of issues arising under the Convention. The title of this annual resolution changed from 'Implementation of the Convention'¹³⁰ to 'The Rights of the Child' in 1995.¹³¹ This was a significant development as it indicated a change in the way the Commission perceived the relationship between the Convention and the situation of children. It represented a shift in focus from technical concerns about the implementation of the Convention, to a concern about the extent to which the rights of children are being fulfilled.

The structure and content of the annual resolution provide a useful basis for assessing the impact of the Convention on the work of the Commission. It consists of a general section dedicated to issues regarding the implementation of the Convention and several sections which address specific issues relating to children.

With respect to the implementation of the Convention, the early resolutions of the Commission were brief and limited to general comments encouraging states to ratify the Convention and withdraw reservations. This item itself has now moved to recommendations concerning training about the Convention,¹³² the registration of children at birth¹³³ and ensuring the competency of members of the Committee on the Rights of the Child.¹³⁴ Significantly, in more recent years, the Commission

has affirmed the general principles under the Convention that are to guide States in all their dealings with children. Its 2002 resolution for example, calls upon States to "...ensure that the rights set forth in the Convention are respected without discrimination of any kind, that the best interests of the child are a primary consideration in all actions concerning children, to recognise the child's inherent right to life and that the child's survival and development is ensured to the maximum extent possible and that the child is able to express his/her views freely ... on matters affecting him or her and these views are listened to and given due weight in accordance with his or her age and maturity."¹³⁵

In terms of specific issues concerning children, the Commission's initial practice was to adopt separate resolutions in addition to the general resolution on Convention implementation. But such a fragmented approach was far from optimal and risked downplaying the relevance of the Convention to the various issues under consideration. Thus in 1996, the Commission consolidated into a single resolution its previously separate resolutions dealing with the implementation of the Convention, armed conflict, the sale of children, prostitution and pornography, child labour and street children. It also added the girl child, refugee children, and internally displaced children, to its list of concerns.¹³⁶

This expansion in the list of specific groups which were of concern, continued in subsequent years with the addition of a separate sections on children with disabilities in 1998,¹³⁷ the rights of children alleged to have violated the penal law, the promotion of the child's right to health and the promotion of the child's right to education in 1999.¹³⁸ This recognition of the needs of special groups of children was commendable, but the process of expansion was occurring in a rather random and uncoordinated fashion.

In response, the Commission sought to adopt a more systematic approach in its annual resolution in 2000 (2000/85) and identified a series of general themes under which specific issues were located. This structure, which is outlined in the table below, has been maintained in the Commission's subsequent annual resolution on the Rights of the Child.

The Commission's resolutions do not always make specific reference to the relevant articles of the Convention. For example, the section on freedom from violence does not refer to articles 19 or 37(a). But to a significant extent the Commission does make reference to the text of the relevant Convention article. Thus, its comments on identity, family relations and birth registration draw directly on the wording of Article 8 and call upon States to, *inter alia*, "undertake to respect the right of the child to preserve his or her identity including nationality name and family relations as recognised by law without lawful interference..."¹⁴¹ Such an approach demonstrates the extent to which the Convention has penetrated the work of the Commission and provides a virtually unchallengeable way of formulating and thinking about an issue.

Indeed, the range of issues which now form part of

the Commission's annual resolution on children is so extensive, that it is perhaps easier to identify those issues that are not addressed under the Convention. The most noteworthy of them concern the rights of minorities (Article 30), the right to rest, play recreation and leisure (article 31); the role of the mass media (Article 17) and adoption (Article 21). And herein lies a potential problem. In making explicit reference to certain matters that are addressed under the Convention, the Commission elevates the status of these matters on the international agenda - a worthy goal. But the question remains as to whether one unintended consequence is that certain issues may achieve greater visibility relative to others and that the importance of the neglected issues might in some way be diminished.

c) The relevance of the Convention to the Commission's country and thematic mandates

The seeds for the integration of the Convention into the work done by the Commission's thematic and country rapporteurs were sown in a 1994 resolution which welcomed:

...the recommendation of the World Conference on Human Rights that matters dealing with human rights and the situation of children be regularly reviewed and monitored by all organs and mechanisms of the United Nations.¹⁴²

This was followed by an attempt by the Commission in 1995 to promote, if not full integration of children's rights into the overall analytical framework, then at least a specific focus on the situation of children by the various special rapporteurs. It recommended that they:

...pay special attention to particular situations in which children are in danger, including the plight of street children, children in armed conflicts and children who are the victims of sale, prostitution and child pornography.¹⁴³

Any doubt about the need to integrate children's rights into the work of the various mechanisms of the Commission was dispelled by a recommendation in 1997 that:

... within their mandate all relevant human rights mechanisms and all relevant organs and mechanisms of the United Nations system and supervisory bodies of special agencies pay attention to the situations in which children are in danger, when their rights are violated and take account of the work of the Committee on the Rights of the Child...¹⁴⁴

Not content to focus only on its own mechanisms, the Commission also called upon other actors to attach appropriate priority to issues relating to the Convention. Specifically it recommended that:

The organs and bodies of the UN, within the scope of their mandates as well as that of IGOs and NGOs, as well as the media and community at large, must make the principles of the Convention widely known to adults and children alike, in accordance with article 42 and encourage training on the rights of the child

for those involved in activities concerning children.¹⁴⁵

These various initiatives were then brought together and reiterated by the Commission in its 2000 resolution, in which it recommended that:

....within their mandates all relevant human rights mechanisms, in particular special rapporteurs and working groups and all other relevant organs and mechanisms of the United Nations system and the specialised agencies, regularly and systematically take a child rights perspective into account in the implementation of their mandates, especially by paying attention to particular situations in which children are in danger and where their rights are violated and that they take into account the work of the Committee on the Rights of the Child.¹⁴⁶

This recommendation, which has been affirmed in similar terms by the Commission in subsequent resolutions,¹⁴⁷ leaves little room for doubt as to the role envisioned for the Convention in the work of all human rights mechanisms. As a result, it is clear that such bodies and especially the Commission's own working groups and special rapporteurs, are called upon to:

- Adopt a child's rights perspective in the implementation of their mandates
- Identify those situations in which children are in danger and where children's rights are violated and
- Take into account the work of the Committee on the Rights of the Child.

This situation is a far cry from the approach to children and their rights which characterized the work of the Commission prior to the adoption of the Convention and helps to underscore the impact which the latter has had.

This was also evidenced by the fact that the Commission held a special debate on 'Children: Risks of Marginalisation and Exclusion' in April 1999.¹⁴⁸ The aim of the dialogue, which followed a similar focus on women the previous year, was to discuss the effectiveness and scope of the Commission's work on children and whether it was addressing issues concerning the marginalisation of children. In the event, however, there were remarkably few comments about the Commission's own role or performance. Among the exceptions, the UNICEF representative commented upon the lack of visibility of children in the reports prepared for the Commission¹⁴⁹ and the High Commissioner for Human Rights invited the Commission to consider the possibility of children participating in the next session.¹⁵⁰ In summing up the ideas that came out of the debate the Commission Chairperson pointed to the need to:

- Consider the impact of macroeconomic policy on children's rights
- Intensify cooperation between all organizations and
- Integrate children's rights in all activities undertaken by the Commission and its mechanisms¹⁵¹

The suggested participation of children in the work

of the Commission may well warrant consideration, but it is also the case that calls for the participation of children in such events are often not accompanied by the necessary analysis of what this might entail in practice and of the best ways of achieving the relevant objectives, without treating the child participants as tokens or generally underestimating the importance of providing conditions for meaningful participation.¹⁵²

d) An assessment of practice

In all aspects of human rights work, the gap between theory and practice is considerable. But the average observer could be forgiven for expecting that, despite the ubiquity of such gaps in general, the experts appointed by the Commission would take account of its entreaties in relation to children's rights. But while there are some outstanding positive examples, an analysis of the work of the various country and thematic rapporteurs reveals that a great many of the reports continue to fall short of the standards endorsed by the Commission.

■ *Country Rapporteurs*

Based on an examination of various country reports submitted to the Commission during the 2001-2002 period,¹⁵³ it appears that at least two make no substantive reference to children, the Convention, or the work of the Committee. The only reference to children in the report on Iraq, for example, is an observation that the rapporteur visited a hospital for children and a school.¹⁵⁴ Even on the basis of such a limited reference it might have been possible to venture some observations on the extent to which children's rights have or have not been respected.

Several reports recognise the particularly vulnerable situation of children in the relevant country. The report on Afghanistan, for example, acknowledges that the situation presents particular concerns for children¹⁵⁵ and the report on Myanmar notes the need to address pockets of vulnerability among juveniles and observes that "it is primarily the young generation that will bear the brunt of the HIV/AIDS epidemic."¹⁵⁶ But the significance and impact of such observations could be enhanced, by placing them within the context of the Convention.

There are a number of reports that include a specific section on children¹⁵⁷ or deal with matters which inevitably involve a focus upon children such as consideration of the realization of the right to education.¹⁵⁸ The attention accorded to children in these reports is to be welcomed, but closer scrutiny of the content of some of the analyses indicates that there is still a long way to go before the reports consistently go beyond providing a relatively undifferentiated list of matters relating to children, or which lack the sort of elaboration which would be required in order to achieve a significant impact. In the report on the Democratic Republic of Congo, for example, an extensive list of concerns is provided, ranging from the demobilization of child soldiers, through education, street children and malnutrition, to child labour and poverty.¹⁵⁹ But in most instances, relative-

ly little information is provided and it is difficult to draw informed conclusions as to the overall situation of children.

Another shortcoming which is difficult to express without risking an accusation of trying to downgrade the concern, is the tendency in some of the reports towards a preoccupation with the plight of child soldiers.¹⁶⁰ This is no doubt a response to the gravity of the issue, to the strong concerns of civil society and hence to the high profile which the issue has assumed within the Commission, as indeed it has elsewhere within the UN system. But there is a risk that some of the reports are so preoccupied with that single issue, that the broader range of grave threats posed to the rights of children within a particular country is obscured.

While not great in number, there have been some reports to the Commission which succeed in providing a detailed analysis of the situation of children by reference to the relevant provisions of the Convention. One such example is the 2002 report on the situation in the occupied Palestinian territory.¹⁶¹ The report includes two sections dealing in depth with aspects of children's rights. The first addresses issues such as personal safety, health, education and family life;¹⁶² the second focuses on children and the administration of justice.¹⁶³ The result is the provision of considerable detail and an analysis which is, to a significant degree, located within the context of the Convention.

Nevertheless, it is difficult to identify any specific country report which could be said to comply fully with the Commission's recommendations with respect to the integration of children's rights. Although an increasing proportion of the reports identify situations in which children are placed in danger, the assessments are usually far from comprehensive. Moreover, the resulting analyses are mostly developed around a traditional human rights framework, with the result that the various ways in which the Convention on the Rights of the Child extends and develops that framework is overlooked. References to the work of the Committee on the Rights of the Child are extremely limited. The core principles of the children's rights approach - non discrimination, best interests, survival and development and participation - are essentially absent from most of the reports.

■ *Thematic reports*

An analysis of the impact of the Convention on the work of thematic rapporteurs yields a more encouraging conclusion. In part, this is inevitable because there are two special rapporteurs whose mandate deals specifically with the situation of children - the special rapporteur on education and the special rapporteur on the sale of children, child prostitution and pornography. In addition, the subject matters that some special rapporteurs focus on, can be said to have an intrinsically limited children's rights dimension, although it is difficult to sustain such an argument beyond a rather superficial level. Thus, even subjects like the use of mercenaries, or the

disposal of toxic wastes, have a clear potential children's rights component.

Several of the thematic reports submitted to the Commission during 2001/02,¹⁶⁴ fail to include a separate section on children. Of course, this is not of itself dispositive of the question of whether the Commission's recommendations concerning the rights of the child have been followed. Indeed a separate section by itself risks the compartmentalization of issues pertaining to children and should be supplemented by the integration of children's rights throughout a report. But where there is no separate section, it is all too easy to include references to children that are only fleeting and appear to be largely inconsequential in terms of the overall report.

Thus, for example, the report of the Working Group on Enforced or Involuntary Disappearances contains few references to children and those that are included are of the type that note that "the victims include... people of all ages including children."¹⁶⁵ Similarly, while the report on the Right to Freedom of Opinion and Expression contains a comment about the quality and quantity of children's material provided by broadcasters and concerns about child pornography on the internet,¹⁶⁶ there are important systemic issues relating to these rights for children which are absent from the report.

In other cases, thematic rapporteurs devote considerable space to issues which affect children but do not situate their analysis by reference to the Convention on the Rights of the Child. Thus a recent report of the Special Rapporteur on Violence Against Women, provides a detailed discussion of practices that impact on the girl child¹⁶⁷ but reference to a child rights approach is essentially absent and no mention is made of the relevance of the Convention to the practices mentioned. For example, the detailed discussion of female genital mutilation does not refer to article 24(3) of the Convention.¹⁶⁸ The same is true in relation to the report's discussion of the pledging of girls for economic appeasement.¹⁶⁹ Although the reports are informative and sophisticated, there is a risk that the treatment inflicted upon girls will be seen only in terms of gender, rather than in terms of childhood as well.

The most encouraging news, however, is that there is a growing number of thematic reports that evidence an effort to follow the Commission's recommendations. In some cases, they expressly acknowledge the relevance of the Commission's exhortation to their mandate. Thus, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, after noting that the Commission requested her 'to pay special attention to violations of the right to life of children', included the following range of specific recommendations.

Governments, particularly those of countries with large child populations, should begin to reprioritize their national policies and expenditure of resources, so that there is a solid focus on the rights of the child. The use of children in organized crime should be made punishable for those exploiting the chil-

dren, rather than the children themselves being penalized. Special child-friendly police forces should be established and trained. These officers should be assigned to deal exclusively with children.¹⁷⁰

Other rapporteurs' reports also include a specific section on children or on matters such as child labour, which describe situations where children's rights are placed at risk and locate this discussion in light of the relevant articles of the Convention.¹⁷¹ Some reports recognize the Convention as an instrument which has specific relevance to their mandate¹⁷² and there is growing evidence of greater account being taken of the work of the Committee. The Special Rapporteur on the Right to Food, for example, notes his participation in meetings with the Committee on the Rights of the Child.¹⁷³

The report on the Right to Adequate Housing commends the important work carried out by the Committee, as well as providing a review of some of the Committee's Concluding Observations.¹⁷⁴ It also includes a specific section on children and housing rights, which is linked to the relevant provisions of the Convention,¹⁷⁵ identifies the importance of housing to a child's right to survival and development under article 6(2) of the Convention and draws attention to a Sub-Commission resolution on children and the right to adequate housing.¹⁷⁶ The special rapporteur also indicates his intention "to devote special attention to the impact that violations of the right to adequate housing have on the basic rights of children, especially the girl child..."¹⁷⁷ He calls upon bodies such as the IMF and World Bank to take a proactive approach to realizing children's rights to housing, which must include the participation of children.¹⁷⁸ In a number of ways, therefore, the report succeeds in integrating the Convention's core principles such as non discrimination, participation and survival and development, into the analysis.

e) The next steps

An illustration of steps that might be taken in the future, is provided by the report of a recent annual meeting of special rapporteurs.¹⁷⁹ In relation to children, it was agreed that the reports of the special rapporteurs/representatives, experts and chairpersons of working groups should contain a specific section. But the same report contained an entire section devoted to the integration of a gender perspective into the work of special procedure mandates. The report also provided a summary of initiatives already taken and others proposed, in order to achieve this aim, such as the convening of a workshop on gender mainstreaming and the need to create a manual for all rapporteurs on how to deal with gender issues. While it is important to reject simplistic comparisons between gender and children's rights initiatives, the approach followed in relation to gender in this respect would seem to provide important pointers to some of the steps that remain to be taken to ensure that a children's rights perspective is provided in the work of all relevant special rapporteurs and others.

In terms of future steps, it will not be sufficient for the

Commission merely to remind all special rapporteurs of its resolutions in respect to the integration of a child rights perspective into their work, the need to identify situations where children and their rights are at risk and a consideration of the work of the Committee into their reports. It would be desirable to move beyond that stage and to provide special rapporteurs with training about the Convention, about the meaning of a child rights approach and the potential ways in which they might make use of the work of the Committee. Guidelines or a manual could be prepared, in order to facilitate the meeting of these objectives. Such guidelines could promote the following features in the report of a special rapporteur:

- A separate section on children, especially in country reports, that is distinct from any section on the situation of women
- Sufficient details about the situation of children so as to provide an accurate account of their situation
- The identification of relevant issues concerning children which for reasons of time or resources, were unable to be examined
- The use of language which is consistent with a child rights approach and the principles of the Convention
- Recourse to the Convention and the work of the Committee to establish the context in which the discussion of the situation of children should take place and
- The integration of issues concerning children throughout the entire report where appropriate, to avoid the compartmentalization of children's rights

3.3 National Institutions

a) Identifying the key issues

This report is premised upon the assumption that the most important locus of attention for the implementation of the CRC must be the national and local levels within States. In other words, accountability is to be sought principally and primarily within the domestic, rather than the international, setting. No matter how well the UN Committee on the Rights of the Child might function, no matter how effective and active international agencies such as UNICEF or the World Bank might be and no matter how active and dedicated civil society might be, the real litmus test of accountability will lie in the quality of the domestic institutional arrangements for ensuring that the national and local levels of government, as well as other key actors, are accountable for any failures which might have been avoided to ensure respect for the rights of children.

In some cultures, particularly in the Anglo-Saxon world and quintessentially within the United States, it is often assumed that the courts should be the indispensable central focus of efforts to ensure such accountability. In this view, as long as it is possible for anyone whose rights have not been respected to

take legal action against the government or another responsible party, the requirement of accountability will have been satisfied. Hence the emphasis placed upon the need for treaty provisions to be directly enforceable before domestic courts, for legal aid to be provided, for the appointment of children's legal advocates and for the training of judges and lawyers in the intricacies of the CRC. But in countries where the culture of litigation is not so deeply engrained within the society, or in which processes or institutions other than the courts are the primary focus of accountability mechanisms, it may be of limited use to place too much store on the role that the courts might play in enforcing the CRC.

For this, as well as for several other reasons, there has tended to be a strong and rapidly growing emphasis in the human rights domain on the role to be played by what are termed national human rights institutions. They range from Ombudsman offices, whether modelled along the original Swedish lines or significantly adapted, through Commissions for Equal Opportunity, Equality, or Civil Rights, etc, to National Human Rights Commissions or Anti-Discrimination Commissions. For analytical purposes, one recent study has identified five different categories of such institutions: (1) ombudsman offices, (2) national human rights commissions, (3) hybrid institutions combining elements of both (1) and (2), (4) specialized human rights commissions, such as those dealing with children or indigenous peoples; (5) parliamentary bodies focusing on human rights issues and (6) national bodies devoted to implementing international humanitarian law such as the Geneva Conventions of 1949.¹⁸⁰ The work of these groups has been analyzed in considerable detail elsewhere and it must suffice to note in the present context that there are tremendous differences from one to the next, in terms of their legal authority, resources, staff size, structures, functions, and types of output. What is noteworthy, however, is the extent to which these institutions have proliferated in the past quarter of a century or so. It is estimated that there are now as many as 500 around the world, not counting sub-national institutions. The number of national commissions alone is said to have at least quadrupled since 1990.¹⁸¹

At the same time, children's rights advocates have long argued in favour of the establishment of specialized institutional arrangements to promote and protect the rights of children. Norway is generally credited with having established the world's first Children's Ombudsman in 1981 and reviews of the experience of that institution have generally been very positive.¹⁸² In the course of the past two decades, but especially since the entry into force of the CRC, a significant number of States, mainly in Europe and Latin America, have created special institutions with titles ranging from Children's Rights Commissioners or Ombudsman, through *Defenseurs des Enfants*, to *Procuraduría Especial de la Niñez y la Adolescencia*. In surveying these institutions in 1997, UNICEF identified 16 such institutions but only four years later, this number had almost doubled¹⁸³ and in 2002, more than thirty such institutions participated in a meeting at the UN in

New York, in advance of the General Assembly's Special Session on Children.

Although these two developments – focusing on either generalized or specialized institutions – are entirely consistent with one another, they have also generated some tension focused specifically on the issue of whether general human rights institutions which include a more or less specific mandate relating to children are sufficient, or whether it is necessary or at least preferable to have a separate institutional voice on behalf of children so that the needs of the latter will not be drowned out among the competing demands of different groups.

The advantages of an integrated versus a specialized institution have been well canvassed in a UNICEF study of independent institutions designed to protect the rights of children and need not be repeated here. What is important, however, is to place in perspective the role of national institutions and the question of whether priority should consistently be accorded to specialized institutions or whether the choice is one that depends on the circumstances rather than on any a priori determination. Although it has been argued that “without independent institutions focusing entirely on the rights of children, these rights will rarely receive the priority they deserve,”¹⁸⁴ the analysis that follows suggests that the matter is somewhat more complex. Indeed, as we shall see below, the General Comment on this issue adopted in 2002 by the Committee on the Rights of the Child, seems to adopt a much more flexible approach.

The other principal issues considered in this Chapter are threefold. The first concerns the appropriate role of children in participating in the work of national institutions designed to protect their rights. The second is the need for evaluative studies of the work of existing institutions with respect to children's rights and the third is the contribution being made by regional groupings in this area.

Before embarking upon these issues, however, it is appropriate to recognize that there are a number of issues surrounding any discussion about national institutions for human rights and/or children's rights, such as their powers and functions, accessibility, public legitimacy and their relationships with the media and civil society, which are important but which are not within the scope of the present study. This report is not designed as a manual for good practice but rather as a review of the impact of the CRC in promoting effective accountability in relation to children's rights. Hence the more limited focus of the analysis that follows.

b) Does the CRC obligate States Parties to establish a child-specific national institution?

In a 2001 report by UNICEF, it was suggested that the Committee on the Rights of the Child has “chosen to see the creation of [specialized children's rights] institutions as one necessary indicator of political will to promote and protect children's rights – one of the obligations each State Party takes on under the

terms of the Convention itself”,¹⁸⁵ And yet the CRC does not, on the face of it, impose a legal obligation on States to create a national institution to monitor its implementation. In this regard, it differs significantly from the African Charter on the Rights and Welfare of the Child, which specifically encourages the creation of a national institution to protect children.¹⁸⁶ The CRC does, however, contain at least two provisions which encourage States to create a national institution to monitor the implementation of the Convention. The first of these is article 4, which requires each State Party to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention. The second is article 42, which requires the States Parties to make the principles and provisions of the Convention widely known.¹⁸⁷

The Committee on the Rights of the Child has, from the outset, attached considerable importance to such institutions. Thus, for example, its guidelines for the drafting of periodic reports, request States to “provide information on ... any independent body established to promote and protect the rights of the child such as an ombudsperson or commissioner...”¹⁸⁸ The concluding observations adopted by the Committee have also commended those States which have established child specific institutions¹⁸⁹ and regularly called for their creation in States that are yet to do so.¹⁹⁰

But the Committee raised the stakes considerably when it adopted its General Comment No. 2 (2002) on ‘The role of independent national human rights institutions in the promotion and protection of the rights of the child’. In its statement, the Committee characterizes independent national human rights institutions as “an important mechanism to promote and ensure the implementation of the Convention”. No observer of recent trends could disagree with such a statement. But the Committee goes on to say that it “considers the establishment of such bodies to fall within the commitment made by States Parties upon ratification to ensure the implementation of the Convention and advance the universal realization of children’s rights.”¹⁹¹ This is a much more contentious proposition and one that has not been expressed in such terms by any of the five other treaty bodies which are charged with monitoring states’ compliance with human rights treaty obligations that are, for the most part, expressed in comparable terms. For example, in its General Comment No. 10 (1998) on the role of national human rights institutions in the protection of economic, social and cultural rights, the Committee on Economic, Social and Cultural Rights confined itself to stating that national institutions were “one means through which important steps can be taken” in relation to the rights in question and that where they exist, they “have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights.”¹⁹²

In so far as the formulation used by the Committee on the Rights of the Child purports to compel States to establish a national human rights institution, it would

be going well beyond anything contemplated in the drafting of the CRC and beyond any proposition that has been endorsed by either the UN Commission on Human Rights or the General Assembly in their extensive work on national institutions. The implication would be that every State which does not have such a national institution is in violation of its obligations under the Convention, which is a proposition that it would be hard put to defend in legal terms.

It is suggested, therefore, that the Committee’s observation is better interpreted as placing a burden of proof upon States Parties to show that the appropriate legislative, administrative and other measures which they have taken in accordance with article 4, are sufficient to satisfy the requirements of the Convention and that a national institution is not an indispensable element within their own national legal and public order.

This approach would be in line with that adopted in other contexts. Article 42 of the African Charter has already been referred to above, while the Riyadh Guidelines urge consideration of the establishment of “an office of ombudsman or similar independent organ, which would ensure that the status, rights and interests of young persons are upheld...”¹⁹³ The Council of Europe has recommended the appointment of a commissioner or ombudsman for children, to promote children’s rights¹⁹⁴ and the European Union Parliament has called on members states to appoint a children’s ombudsman.¹⁹⁵ A variety of commentators, NGOs and UNICEF, have also called upon States to establish a child-specific institution to monitor the implementation of the Convention. Finally, regional bodies such as the European Network of Ombudsmen for Children (ENOC), whose work will be discussed in more detail below, have also sought to give an impetus to this approach.

c) The trend towards the creation of national level child-specific institutions

Although there are now over thirty child-specific national institutions in existence and there has been a concerted push from various quarters in favour of the creation of more, it is important to keep the current situation in perspective. Some commentators would seem to have overstated the trend in this direction and progress to date has been relatively modest. Although there are 192 States party to the Convention, only 30 or so States have established national institutions dedicated to children since the CRC came into force. An additional three States had such an institution prior to 1990 and an indefinite number of States have been said at various times to be actively considering such a move.¹⁹⁶ These figures do not suggest an unstoppable rush, but they still suggest that States are accepting, albeit relatively slowly and more so in Europe than anywhere else, the need for a separate independent institution at the national level, to monitor the implementation of the Convention. Perhaps more importantly, as we shall see below, the general trend towards the establishment of ‘general purpose’ national human rights institutions, which can be encouraged to give

a particular focus to children, might be a more promising development.

While it is well beyond the scope of the present report to provide a detailed analysis of the role which the CRC has played in the work of each of these child-specific institutions, it is proposed to illustrate this impact by way of some case studies.

■ *Child-specific institutions established post-CRC*

The United Kingdom is an excellent example, if only one of many, of the impact of the CRC in encouraging the creation of specific offices to promote the rights of children in the light of the ratification of the CRC. Despite many calls made by children's rights advocates at the time of ratification, the early initiatives were non-governmental and they included detailed reports on the arguments for and against the creation of an office of children's rights commissioner and suggestions as to how such an office might work. As a result of these efforts and of the experience of the United Kingdom in reporting to the Committee on the Rights of the Child, a number of offices have now been established. Since the devolution of power in the United Kingdom to the four regions or 'nations', this is the level at which these responsibilities are now exercised. Wales was the first, in 2001, to appoint a Children's Commissioner, but it should be noted that the relevant legislation does not refer at all to the UN Convention nor to the rights of the child, *per se*.¹⁹⁷ In contrast, the more recent Scottish legislation creates a post of Commissioner for Children and Young People and the office-holder's principal function is to promote and safeguard the rights of children and young people.¹⁹⁸ In doing so, he or she is required to "have regard to any relevant provisions of the United Nations Convention on the Rights of the Child".¹⁹⁹ As of mid-2003, plans are in hand for the appointment of a Commissioner for Children and Young People in Northern Ireland,²⁰⁰ and a Bill has been introduced into the House of Commons, two of the purposes of which are to "establish a Children's Commissioner for England" and to make provision to ensure that the work of the Commissioner is compatible with the UN Convention on the Rights of the Child.²⁰¹ One result is that the Convention is very often called on to help, in relation to various aspects of the work on children undertaken by these and other statutory bodies in the United Kingdom.²⁰²

An important example of an institution which was created much sooner than its United Kingdom counterparts, is the Office of the Children's Ombudsman in Sweden, which was established on 1 July 1993. The Act to Establish the Office of the Children's Ombudsman specifies the relationship between the Ombudsman and the Convention in the following terms:

The Children's Ombudsman has the task of observing matters relating to the rights of children and young persons. In particular the Ombudsman shall observe the compliance of Acts of the Riksdag, other statutory instruments and implementation of the same with Sweden's

commitments under the UN Convention on the Rights of the Child.

The question of a special spokesperson for children had been on the agenda in Sweden since the 1980s. However, it is generally accepted that Sweden's ratification of the Convention was the impetus for the Riksdag's approval of an Office for a Children's Ombudsman.²⁰³

In 1998, Denmark established a permanent and independent institution to promote the rights of children, the National Council for Children. The motivation for the creation of this institution had its genesis in intense individual and NGO lobbying of the government, to establish an ombudsman for children. The Government was initially reluctant to do so, but eventually agreed to allow a trial in 1994. The positive evaluation of this trial led to the creation of the now permanent National Council for Children. This development took place against the obligations of Denmark under the Convention, which are reflected by the requirement under the relevant legislation that the Council shall assess the conditions of children in Denmark in light of the provisions and intentions of the Convention.²⁰⁴

Finally, the Commission for Children's Rights in the Flemish Community of Belgium, illustrates the impact not only of the Convention but also of the Committee on the Rights of the Child. The Commission was established by decree in July 1997 and commenced operation in June 1998. Its mandate requires it to defend the rights of children and promote the implementation of the Convention. The Convention has been said to inspire all the work done by the Commission including its lobbying, awareness raising and investigation of complaints.²⁰⁵ According to the first Commissioner, the creation of the Commission was motivated not only by the existence of the Convention, but by an effort to respond to the recommendations of the Committee on the Rights of the Child in its concluding observations on Belgium's report.²⁰⁶

■ *Child-specific institutions established pre-CRC*

Although there are several child-specific national institutions which pre-dated the CRC, the Convention has nevertheless also had an impact on these bodies.

Norway was the first State to create a national institution dedicated to children and its approach is often used as the point of departure for other States, when they seek to create their own institution. The Ombudsman for Children was established under specific legislation in 1981. So it was far from being a product of the CRC. Nonetheless, a 1993 evaluation of the Ombudsman's role led to a recommendation that the Convention should occupy an important place in the mandate of the office.²⁰⁷ In 1998, amending legislation was passed to implement this recommendation, so that the duties of the Ombudsman now include ensuring that all legislation and administrative action accords with the obligations of Norway under the Convention.²⁰⁸

Subsequently, the Ombudsman has observed that the Convention is considered to be the basis of all initiatives, activities and proposals undertaken by the office, whether in the areas of child care, family relations, schooling, health care or the media.²⁰⁹

Another of the child specific institutions which pre-dates the Convention, the Office of the Commissioner for Children in New Zealand, has also embraced the Convention in fulfilling its mandate. Unlike the Ombudsman in Norway, the Children's Commissioner was not established under a separate piece of legislation. Rather, it has its foundations in the Children, Young Persons and Families Act 1989 and one of its primary functions is to monitor the implementation of this Act, which deals with the treatment of children in state custody. However, its mandate also extends to the role of advocacy for children on a broader scale, which requires it to promote the welfare of children and young people.²¹⁰ Despite the absence of any reference to the Convention or children's rights in the Act, the Commission considers the Convention to be the foundation stone of its monitoring, advocacy and child rights activities.²¹¹

The only other country to have a child-specific institution before the Convention, Costa Rica, actually abolished the Ombudsman for Children in 1992 and created a general Ombudsman for the Inhabitants of the Republic, which has a special unit to deal with the rights of children.

d) The establishment of other child-specific institutions within States

It is important to note that in addition to the institutions considered in the preceding part of this Chapter, various institutions have been created by state or provincial governments within federal systems or at local government level and that NGOs have sometimes established institutions with either a national or local focus.

■ *State or provincial institutions*

State, provincial or local governments in various countries – among them Australia, Austria, the Russian Federation and Spain – have established child-specific institutions. The role and impact of the Convention in each of these institutions varies. In the state of Queensland in Australia, a Children's Commission was established as an independent institution to monitor and review entities engaged in the provision of child services and foster a community culture that focuses on a child's rights, needs and responsibilities.²¹² There is no direct reference to the Convention in the legislation to create the Commission, an omission attributed by the Commissioner to the fact that the federal Government of Australia, rather than the Queensland state government, is the party to the Convention and thus bears the legal and social obligations that flow from ratification.²¹³ Nevertheless, the Commission is said to be guided in all its activities by the provisions of the Convention. In the debates leading to the

establishment of the Commission, the Minister for Youth acknowledged the role of the Convention and stated that the Commission's creation recognized the need to give a voice to children.²¹⁴

Another state in Australia, South Australia, established a Children's Interest Bureau as early as 1983. However, this institution was amalgamated into the Office of Families and Children in May 1995.

In India alone, there are state commissions in Assam, Chhattisgarh, Himachal Pradesh, Jammu and Kashmir, Kerala, Madhya Pradesh, Maharashtra, Manipur, Punjab, Rajasthan, Tamil Nadu, Uttar Pradesh, and West Bengal. While some of them have addressed children's rights issues, their overall performance has been criticized by civil liberties groups. Thus the Peoples' Union for Civil Liberties has noted that, "of late, most of the State Commissions have ceased to inspire confidence among the people."²¹⁵

In Madrid, Spain, parliament passed legislation in 1996 to establish an Ombudsman for Children. One of the main aims of this Office is to supervise the actions of child protection entities and situations where children could be at risk. However, it also undertakes activities to monitor the implementation of the Convention and to promote awareness of children's rights under the Convention.

In Austria, an independent Ombudsman for Children and Youth has been established in each of the nine provinces under child welfare legislation. This is in addition to the creation of a Federal Children's Ombudsman. The role of the Ombudsman in each of the provinces is to defend children's interests within the framework of judicial and administrative procedures and to promote public awareness of children's welfare. This kind of mandate falls somewhat short of monitoring the implementation of the Convention and tends to focus more on welfare issues rather than rights.

By way of contrast, the mandate of the child-specific institutions established in five regions of the Russian Federation – Kaluga, St Petersburg, Novgorod, Volgograd, Ekaterinburg – places much greater emphasis on children's rights and the Convention. In each instance the role of the institution is to enhance the protection and promotion of children's rights. To take one example, the resolution to establish the Office of the Ombudsman for Children, states that the Ombudsman is established in order to guarantee state protection of children's rights, compliance with and respect for these rights by the state and local authorities and officials.²¹⁶ It is important to be aware that the prominence given to the Convention and children's rights in the mandate of these new child-specific institutions in the Russian Federation, is a reflection of UNICEF's involvement with the Russian Ministry of Labour and Social Development, to establish this pilot project.

■ *Non-governmental institutions*

NGOs have also played a significant role in creating child-specific institutions. They have consistently been at the forefront of calling for the establishment

of national institutions. In addition, in several states including Israel, Finland and England, they have actually established such institutions themselves. In Israel, the National Council for the Child provides an ombudsman-like service to children. In Finland, the Mannerheim League for Children, which was established by the Mannerheim League in 1981, is one of the oldest bodies specifically created to promote and protect children's rights. While the stimulus for its creation was the International Year of the Child in 1979 rather than the CRC, the Children's Ombudsman indicated that her Office undertakes an active role in monitoring in the implementation of the Convention in Finland.²¹⁷

In the United Kingdom, the creation of the first Children's Rights Commissioner was a joint venture between Save the Children and the county authority for Oxfordshire. The county provides the funding and Save the Children staffs the position. Oxfordshire had committed itself to the Convention in 1993, but acknowledged that it had done little to translate this commitment into practice. It therefore supported the creation of a specific position to monitor the implementation of the Convention. This initiative demonstrates that even in situations where there may be national government resistance to the creation of specific institutions to monitor children's rights, NGOs are able to forge collaborative partnerships at other levels of government, where the resistance may not be as strong. In the long term, this may act as a catalyst for the creation of a national level institution, particularly if the local institutions can be shown to be effective.

This experience also points to an issue to which we shall return later in this study, which is the need for institutions and processes which do not focus solely on the national level, especially in an era when decentralization is systematically reducing the power and reach of national authorities in many areas. The reality is that children's lives are experienced at the local level. Which raises issues about the ability of national institutions to represent children, allow for their participation and ensure their accessibility.

e) The impact of the Convention on the work of general human rights institutions

As already noted, the push towards the creation of child-specific national institutions has been significantly less successful than the movement to establish general purpose human rights institutions at the national level. This trend is all the more important because of the extent to which it has had its greatest impact in the South. While there were occasional calls for the creation of national human rights institutions ever since the drafting of the International Human Rights Covenants began in the 1950s, these efforts were far more pronounced starting in the late 1980s. The World Conference on Human Rights of 1993, in its Vienna Declaration, identified the important and constructive role played by national institutions for the promotion and protection of human rights and encouraged States to establish such institutions in accordance with the Paris

Principles. The remainder of the 1990s and the first few years of the twenty-first century have also seen a strong continuation of the trend towards the establishment of general purpose national human rights institutions.

Indeed, since their number far exceeds the number of child-specific institutions, acceptance of the proposition that only the latter will suffice to promote the CRC would lead to a rather discouraging conclusion. But it is suggested that this call for exclusivity is in fact misplaced and that the equally important challenge facing children's rights advocates is to ensure that wherever only general purpose institutions have been created, they take full account of the CRC in their work. Before developing this theme further, it is useful to consider the extent to which existing national institutions have accorded the CRC a role in their work. It goes without saying that the broad mandate of such institutions means that monitoring the implementation of the Convention can never be their sole purpose and will rarely be their pre-eminent purpose, but this does not preclude giving the Convention a very significant role in their diverse activities.

On the basis of a survey of the mandate or legislative basis for the creation of general human rights institutions, we can conclude that they will usually not make any specific reference to the Convention or to children. Rather, the role of the institution will be stated in general terms relating to the promotion of all human rights and/or to monitoring the implementation of international treaties ratified by the State. The Convention and children's rights obviously fall within the mandate of such institutions. Nevertheless, many commentators would argue that this silence remains problematic and serves to compound the invisibility and marginalization of children within society. In reply, others would argue that according special attention to children and the CRC would lead to the fragmentation of human rights and undermine their universality. This tension will be discussed in further detail below.

An additional observation is that very few general purpose human rights institutions have distinct bodies dedicated to monitoring the implementation of the CRC and children's rights. There are some exceptions, however, one of which is the South African Commission on Human Rights. In addition to its general remit to promote human rights, the Commission has the power to appoint special committees, which are assigned whatever general powers and functions that the Commission sees fit. Several committees have already been established, one of which is dedicated to the rights of the child. Its task is to advise the Commission on all matters pertaining to the rights of children in South Africa, in the context of South Africa's obligations under the Constitution, the African Charter and the Convention. The South African initiative represents an interesting way of resolving the dilemma of how to reconcile the universality of human rights with the need to pay special attention to certain groups, such as children, to prevent their invisibility and marginalization.

There are also a number of Latin American countries which have a separate body within their national institutions for human rights. For example, in Colombia, the Defensoria del Pueblo has a delegate for children, women and seniors. In Costa Rica, the Ombudsman for the Inhabitants of the Republic, which is an amalgamation of several ombudsmen, including the Ombudsman for Children, has a special unit to deal with children. In Honduras, the National Commissioner for Children's Rights has a department which focuses exclusively on children's rights. In Nicaragua, the legislation to create the Human Rights Ombudsman Office also includes provisions for the creation of a Children's Rights Sub Office.²¹⁸

In Ghana, the Commission for Human Rights and Administrative Justice established in 1992, has no specific remit to deal with the Convention or with children. However, it has undertaken action in the defence of children's rights on a number of occasions – especially in relation to the issues of forced labour and traditional cultural practices which violate children's rights. An evaluation of the Commission's work by the International Council on Human Rights held that its legitimacy in the eyes of the public had been enhanced by its intervention on behalf of ordinary people, especially children.²¹⁹

The situation seems to be similar in Malaysia. According to a recent assessment of the Malaysian National Human Rights Commission (known as Suhakam), its mandate was confined to those human rights which were listed in Part II of the Constitution, effectively limiting the scope to civil and political rights. Moreover, the foreign minister indicated at the time of the establishment of the Commission that conventions signed should not be used as a barometer to record the country's human rights practices. On this basis, neither the CRC nor a great many rights of the child would have been expected to be addressed by the Commission despite the fact that Malaysia is a party to the CRC. In practice, however, the Commission has asserted a broader mandate and has apparently investigated a variety of issues in the domain of children's rights. It has also held workshops dealing with the Convention and with the rights of prisoners covered by the CRC.²²⁰

The Australian Human Rights and Equal Opportunity Commission has staff dedicated to children's rights within the Office of the Commissioner for Human Rights, where the work undertaken is clearly rooted in the Convention. Several major reports undertaken by that Commission, including a ground-breaking report on homeless children in the early 1990s and more recent inquiries into mandatory detention of asylum seekers in 2002-03, have made very significant use of the standards contained in the CRC. In Mexico, the Federal Commission has undertaken a significant amount of work with vulnerable groups – especially children. One initiative worth noting is the Tree House, which is a child education centre which aims to educate children about human rights. Already over 140,000 children have attended the programme. The Indonesian Commission for Human Rights, *Komnas*,

has also pursued the area of human rights education by producing pamphlets on children's rights. In a revealing omission, however, it did not provide its contact details on these pamphlets, allegedly because it lacked the resources to respond to any complaints.²²¹ This highlights the lack of resources in many countries, which often impedes the ability of institutions, be they child-specific or general purpose, to effectively monitor the implementation of the Convention and children's rights.

The Irish National Human Rights Commission is, in several respects, reasonably typical of many of the established national institutions in terms of the role it accords to the CRC. Its principal relevant role is to monitor government compliance with the CRC, as it also does in relation to all of the other major international and regional human rights treaties ratified by Ireland. It has had discussions, albeit apparently uncompleted, about children who are homeless, addicted to drugs or vulnerable to peer pressure, are particularly open to exploitation and enter into the world of prostitution. A 2003 report also indicates that "the Commission strives to ensure that children's rights are not regarded as second-class rights in the absence of direct pressure for their protection"²²² But such action does not amount to the adoption of a comprehensive CRC-based mandate. It has also indicated that it will review its CRC monitoring role "when a Children's Ombudsman with appropriate powers has been appointed."²²³

There are, however, case studies of national institutions which, despite limited resources and a general purpose mandate, have made significant contributions to the promotion of the CRC. The National Human Rights Commission (NHRC) of India, created in 1993, is a case in point.²²⁴ Its broad mandate, which requires it to study international treaties and make recommendations on their effective implementation, makes no specific reference to the Convention. However it does have a special responsibility to protect the rights of the vulnerable sections of Indian society, which includes children. The Commission has therefore undertaken work in a number of areas relating to children's rights, such as child labour, the provision of free education and the prevention of child prostitution.²²⁵ A further illustration of the extent to which the Convention has penetrated the work of the Commission, is the allocation of separate issues relating to children's rights, including the implementation of the Convention, to the different members of the Commission.²²⁶ It is also empowered by statute to conduct independent investigations into alleged human rights abuses and can do so either on its own initiative or in response to petitions that are submitted to it.

The Commission has undertaken a range of activities, some of which have focused significantly upon the dimension of children's rights, with specific references on occasion to the CRC. Examples include:

- Issuing a set of guidelines for the media in addressing the issue of child sexual abuse, which conclude with the injunction that, in all reporting, "the media must be guarded by the principle of

best interest of the child as required in the Convention on the Rights of the Child".²²⁷

- Providing financial assistance for research into the 'Impact, Community Response and Acceptance of Non- Formal Education under the National Child Labour Project – A case study of carpet-weaving ...'²²⁸
- Co-sponsoring a Colloquium on 'Population Policy - Development and Human Rights' in January 2003, the conclusions of which noted that "the propagation of a two-child norm and coercion or manipulation of individual fertility decisions through the use of incentives and disincentives, violate the principle of voluntary informed choice and the human rights of the people, particularly the rights of the child."²²⁹
- Issuing a 'Circular on role and duties of Human Rights Cells in the State/City Police Headquarters', in August 1999, which called upon Police Commissioners to, inter alia, "identify specific areas of societal human rights violations in the State and to plan out preventive and rehabilitative schemes in conjunction with the concerned Departments" (for instance in the field of child rights -- child sexual abuse, child-labour, gender justice, juvenile justice, ...)
- Issuing a 1997 instruction on child labour in which it stated that "The Commission feels that employing children (below and up to the age of 14 years) for work by anyone is reprehensible, more so by any government servant. [The Commission recommends] that an appropriate rule be included in the conduct rules of government servants, both Central and State, which, while prohibiting such an employment, would also make it a misconduct inviting a major penalty."²³⁰

Another good illustration of the part that the NHRC has played in relation to children's rights, was its role in response to a landmark 1997 case²³¹ in which the Indian Supreme Court adopted a decision which was highly critical of the inadequate implementation of the Bonded Labour System (Abolition) Act of 1976. One of the key elements in its judgment was its direction to the National Human Rights Commission (NHRC), to supervise the future implementation of the Act and to evaluate the progress made by state governments in light of the Court's orders. One of the techniques used by the Commission was the appointment of a number of special rapporteurs to address the issue. A 2003 report concluded that "By focusing on bonded and child labour, the National Human Rights Commission (NHRC) has changed the environment in the areas where it has investigated". On the other hand, the report noted that while the Commission "can encourage law enforcement, with limited powers and resources it cannot replace it". Commenting on the impact of one of the special rapporteurs dealing with this issue, an NGO representative in Uttar Pradesh noted that it is because of the rapporteur's visits "that the Labour Department is on their toes about this - it creates tensions. The NHRC makes a huge difference They conduct field vis-

its to monitor - they look at education, health and nutrition, the stipends and the resources for rehabilitation. ... The NHRC recognizes the job of good people and goes against people who are not working. If the district magistrate or the committee members take their work too lightly, it will call them to Delhi and scold them".²³²

f) Exclusivity: is it desirable – and feasible?

As noted at the outset of this chapter, it has been argued that "without independent institutions focusing entirely on the rights of children, these rights will rarely receive the priority they deserve."²³³ Various commentators have expressed a preference for exclusivity and there was a time when some children's rights advocates would discourage general purpose institutions from including a CRC focus, because it might undermine their efforts to foster the creation of a separate institution. But the principal finding of this Chapter is that times have changed and there is now a need to abandon such dogmatism and to seek to ensure that whatever approach is feasible within a given State, is made as systematically CRC-conscious as possible. It might even be appropriate to move towards the establishment of minimum criteria in that regard.

A number of arguments have been advanced to justify the creation of a child- specific institution. They have been very well synthesised by the Committee on the Rights of the Child in its General Comment No. 2(2002):

While adults and children alike need independent NHRIs to protect their human rights, additional justifications exist for ensuring that children's human rights are given special attention. These include the fact that children's developmental state makes them particularly vulnerable to human rights violations; that their opinions are still rarely taken into account; that children encounter significant problems in using the judicial system to protect their rights or to seek remedies for violations of their rights; and that children generally have limited access to organizations that may protect their rights.²³⁴

This then was the Committee's rationale for insisting on specialized institutions. But until 2002, its calls for action had paid scant attention to the broader context of resource availability for human rights initiatives and the simultaneous pressures upon States to set up specialized institutions dealing with the rights of groups as diverse as individuals with disability, indigenous peoples, minorities, women, migrant workers and so on.

In addressing this issue, one major report on the CRC concluded that ombudsmen or quasi-governmental agencies for children were not an efficient use of resources in developing countries whose governments would be better advised to devote any available resources to improving existing structures for children.²³⁵ That approach also sought to take account of the risk that the creation of an inadequately resourced, but nevertheless child-specific institution, could easily amount to a Pyrrhic victory, which would eventually serve to undermine the

credibility of the institution and the standing of the Convention and children's rights.

But unless such a policy prescription is elaborated upon, it risks being used by resource-poor States to justify their failure to take any serious measures designed to advocate children's rights and to monitor the implementation of the Convention. It should therefore be accompanied by two caveats. Firstly, States which can legitimately invoke budgetary reasons as an obstacle to the establishment of a national institution for this purpose, should seek the assistance of other States and organizations. One such example is the work of UNICEF in assisting the Russian Ministry for Labour and Social Affairs to establish ombudsmen in five regions. Secondly, the experience of existing child-specific institutions has demonstrated that despite limited resources, these institutions can be relatively effective.²³⁶ While limited resources may present a real impediment to the creation of an ideal child-specific national institution, they need not present an insurmountable obstacle.

But account must also be taken of another common objection to the creation of institutions specifically designed to monitor the Convention. In many countries, resistance to such approaches are rooted in an understandable concern that this would set a precedent for other groups and elevate the rights of one group within the population over those of other deserving groups. The reasoning is that if any institution is to be established, it should have a general human rights mandate to monitor the rights of everyone and not just of children. In support of this approach, it has been argued that "human rights should be approached in an integrated, indivisible manner and given the limited resources in Africa and Asia, it is more practical to establish institutions covering all groups"²³⁷ On the other hand, the very decision to draft a CRC was based on the assumption that existing human rights instruments, despite their comprehensive coverage, did not in fact succeed in responding to the particular needs of children. Based on this reasoning, it can justifiably be argued that a national institution with a general mandate to protect human rights will not of itself be sufficient to protect the rights of children.

But the argument between exclusivity and generality has now been answered by the Committee on the Rights of the Child in its General Comment on this issue. Its position is squarely in favour of recognising the unavoidable realities of limited resources and the reluctance of the vast majority of States to create exclusively child-focused national institutions. It has expressed its position in the following terms:

Where resources are limited, consideration must be given to ensuring that the available resources are used most effectively for the promotion and protection of everyone's human rights, including children's and in this context, development of a broad-based NHRI that includes a specific focus on children, is likely to constitute the best approach. A broad-based NHRI should include within its structure either an identifiable commissioner specifically responsible for children's rights, or a specific section or division responsible for children's rights.²³⁸

The emergence of this compromise position should not, however, come as a surprise -- nor should it be considered a defeat for those who insist on the importance of institutional support for the CRC. The compromise has been a considerable amount of time in the making and owes a great deal to CRC-based advocacy. As the Convention has become better known and as children's rights proponents have become more focused on results than on symbolism, they have come to realize that adaptability and flexibility have much to recommend them in this context. Equally important is the fact that many human rights advocates who had previously sought to downplay the importance and specificity of children's rights have changed their approach.

While a role for national human rights institutions in dealing with children's rights had long been recognized, that recognition became more explicit in the late 1990s than it had ever been. Thus, for example, in 1999, the International Coordinating Committee of national institutions "recognized that the rights of children should be a priority in the work of national institutions ..."²³⁹ Two years later, the Office of the High Commissioner for Human Rights reported that it had been encouraging national institutions "to establish national focal points or specific human rights commissioners dealing with child rights and/or to work closely with other existing national bodies such as children's ombudsmen". The report noted that the Fifth International Workshop for National Institutions held in Rabat in 2000, had "called upon national institutions to continue their activities to promote and protect children's rights in accordance with existing international treaties and conventions and to remain vigilant in the fight against the abuse of children"²⁴⁰ This positive attitude has also been reflected in resolutions regularly adopted by the UN Commission on Human Rights, in which it has affirmed "the important role of national human rights institutions ... in combating racial and related forms of discrimination and in the protection and promotion of the human rights of women and the rights of particularly vulnerable groups, including children and people with disabilities."²⁴¹

As a result of these developments, children's rights have been accorded more prominence in recommendations as to the approach to be taken by general purpose national human rights institutions. To take one example, this change was clearly recognized in a report produced in 2001 by the Commonwealth Secretariat, which called on national institutions to "undertake their mandates with the skills and sensitivity required to appropriately address the special needs of children. When a child is a complainant or has had a complaint filed on his or her behalf, staff should conduct their investigation in an age-appropriate manner. Remedies should be similarly age-appropriate." The report also contained a range of specific recommendations aimed at situations involving children:

- The staff of NHRIs should include specialists in service provision to children and adolescents.
- NHRIs should regularly collect and publicize infor-

mation relating to the number of complainants, types of complaints and results.

- NHRIs should ensure that their services are accessible by children and young people in rural and remote areas.
- NHRIs should specifically direct age-appropriate information towards young people.
- If communication with a child is necessary, that communication should be in person whenever possible. Children should be allowed to have a support person of their choice whenever they are interviewed or requested to produce evidence, by NHRI members or staff.
- NHRIs should not compromise a child's anonymity or safety.
- NHRI staff should refer children who come before it, to other human services agencies if necessary, for assistance or treatment.²⁴²

Lists such as this have proliferated in recent years and the result is the approach adopted in the Committee's General Comment No. 2, which lists twenty activities that NHRIs should carry out in relation to the implementation of children's rights. For the purposes of this report they can be summarized in the following terms:

- Undertake investigations into violation
- Conduct inquiries
- Prepare and publicize opinions, recommendations and reports on any children's rights issue
- Review the adequacy and effectiveness of law and practice concerning children's rights
- Promote harmonization of national legislation, regulations and practices with the CRC and other relevant treaties and promote their effective implementation
- Ensure that national economic policy takes account of children's rights
- Report on the government's implementation and monitoring of children's rights
- Encourage acceptance of relevant international human rights instruments
- Ensure that the 'best interests' principle is reflected in all laws and policies
- Ensure that the views of children are expressed and heard on matters concerning them
- Advocate for and facilitate meaningful participation by children's rights NGOs
- Promote public understanding and awareness of children's rights
- Sensitize the government, public agencies and the general public to the CRC
- Promote teaching of children's rights at both in and out of school
- Undertake child-specific human rights education

- Take or support legal proceedings to vindicate children's rights
- Engage in mediation or conciliation processes, where appropriate
- Provide expertise in children's rights to the courts
- Visit and report on juvenile homes and care institutions and recommend improvements
- Undertake other related activities

g) The participation of children in institutions for the protection of their rights

It is widely accepted that one of the primary justifications for creating an institution to monitor the implementation of children's rights, is the need for children to have an advocate to act on their behalf due to their lack of political power. An evaluation of the work done by the Children's Ombudsman in Sweden expresses this sentiment forcefully when it states that:

... the fundamental task of the Children's Ombudsman is to represent children and young people. That is to say, to be the 'voice' of children and young people in society, to assert their point of view and insist on respect for their human rights.²⁴³

By definition, this implies that such an institution should, where appropriate, effectively seek instructions from its 'constituents' -- children -- rather than act on the assumption that its actions are in their best interests. This invites a discussion about the right of children to participate in the work of institutions designed to monitor the Convention and protect their rights. To date this debate has been overshadowed by other considerations such as the functions and powers of an institution and whether to establish a child-specific institution, or integrate children's rights into a general human rights institution. However, it remains of fundamental importance -- not least because the Convention bestows upon children a right to participation.

Only a handful of general human rights institutions have made any real attempt to tackle this issue. The Australian Human Rights and Equal Opportunity Commission has undertaken a study of the various models of participation and has facilitated the participation of children in its work through focus groups and surveys, but has yet to involve children in issues such as agenda setting.²⁴⁴ Child-specific institutions have made greater efforts to facilitate the participation of children in their work. For example, the Office of the Commissioner for Children in New Zealand established a child and youth advisory group to enable young people to contribute to the work, policies and objectives of the Office.²⁴⁵ A number of other institutions also operate phone lines or internet sites which allow children to express their concerns or obtain advice.

The reality however, is that the issue of child participation remains one of the great unresolved dilemmas, not just for the work of institutions to protect children's rights, but in every area concerning the implementation of the Convention. Much work still

needs to be done by all institutions, child-specific and general human rights alike, to determine how they can effectively facilitate the participation of children, so that they can fulfil their role as advocates acting on behalf of children. The starting point is to emphasize that children's participation does not mean children playing the same roles as adults, by being invited to conferences where they will be unable to make an effective contribution or by being invited to make submissions which require skills that most will not possess. Rather, the challenge is to devise new and appropriate ways to involve children, based on the contexts in which children are comfortable and to ensure that when these views are fed into broader policy processes, they are accorded full weight, rather than being noted as token contributions 'to which every consideration will certainly be given.'

h) Evaluating institutional effectiveness

Another area which institutions need to consider, is whether they are in fact effective in contributing to the implementation of the Convention and the protection of children's rights.²⁴⁶ The importance of evaluation should not be underestimated, even in States which have a child-specific institution. As one commentator has suggested, the existence of a children's Ombudsman may even serve to distract attention from other issues which are of fundamental importance to the condition of children's rights. Evaluations should therefore aim to identify those factors that restrict an institution in monitoring the implementation of the Convention and to make recommendations for improvement.

Such evaluations seem to have been relatively rare to date, although some examples do exist. In Norway, an Evaluative Committee praised the work of the Children's Ombudsman and concluded that the institution had helped put the political spotlight on children and their situation; had been instrumental in developing a greater acceptance of the principle that children's voices should be heard; and suggested that it should be maintained as an independent national body for safeguarding the interests of children and adolescents. The evaluation recommended that the mandate of the Ombudsman be amended, so as to extend its role to monitoring the extent to which all laws complied with the Convention. As mentioned above, this recommendation was subsequently adopted. In Sweden, an evaluation report declared that the office of the Children's Ombudsman had played a significant role in developing issues relating to children, mainly through information and opinion-shaping activities. The report recommended strengthening the role of the Ombudsman as a representative for children and giving greater independence to the office, by confirming the Ombudsman's duties and functions in law, rather than in an administrative instruction.

The significance of these reports is that even though the ombudsmen for Norway and Sweden are often held up as models for other States, the evaluation process revealed that a number of steps still needed to be taken to strengthen their role. The other point

to mention about both reports is that they took the Convention as their point of departure when undertaking the evaluation.

This focus on evaluation is also consistent with the recommendation contained in the report of the Secretary-General of the United Nations, entitled 'We the Children', which was prepared for the 2002 Children's Summit. It proposed that existing independent human rights institutions for children should be assessed, in order to "shed light on the difference they can make to children's lives and to inform the establishment of new ones".

i) The contribution of regional groupings

Two regional groupings have made an important contribution to promoting the role of national institutions *vis-à-vis* children. They are the European Network of Ombudsmen for Children (ENOC) and the Asia Pacific Forum. The former, which was established in 1997, links independent offices for children from 17 countries in Europe. It aims to encourage the full implementation of the Convention and to promote the development of independent institutions for children. In 2002, ENOC adopted a statute and resolved to establish a permanent secretariat, although it has yet to be officially created.

Significantly, ENOC's criteria for membership have evolved over the years to reflect the trends described above. When it was first established, it required member organizations to be:

- National, regional or local offices set up through legislation, to independently promote children's rights and interests
- Bodies established by government or parliament, which are able to advocate independently for children or
- Major national NGOs, generally perceived to be providing a similar office

But by 1999, these criteria had been broadened to admit the following:

National or regional offices set up through legislation specifically to promote children's rights and interests; national human rights institutions set up through legislation, which include a specific focus on children.²⁴⁷

In other words, a preference for exclusivity reflected in the 1997 criteria had been abandoned within two years, so as to permit the participation of general purpose institutions – provided they had a specific focus on children. To counter the potential invisibility of children in a general human rights institution, ENOC recommends that the enabling legislation be linked to the Convention, that the institution has a person with whom children can identify and that separate funding and staff are provided for matters relating to children.

At its annual meeting in 2002, ENOC discussed a range of issues which illustrate the role that such regional groupings might usefully play. Its members expressed their concern at a trend in some

European countries to lower the age of criminal responsibility and emphasized that rehabilitation and reintegration, rather than punishment or retribution, should be the aim of juvenile justice systems. They also expressed concern that it is not easy for children or their representatives to use the European Court of Human Rights in Strasbourg and resolved to encourage discussions on how the court could be made more accessible and effective for the promotion and protection of children's rights.²⁴⁸

In contrast to the child-specific focus of ENOC, the Asia Pacific Forum is a regional body whose membership consists of national human rights institutions. Its aim is not to promote the Convention and independent institutions for children, but to develop a dialogue of cooperation and support between general human rights institutions. In recent years, the Forum has come to pay much greater attention to children rights and the Convention. The discussion on sexual exploitation of children at the Forum's annual meeting in 1998, led to a special focus on the role of national human rights institutions in protecting and promoting children's rights at the Forum's annual meeting in Manila, in 1999. The most significant outcome of this meeting was the adoption by the parties present of 20 separate recommendations for national institutions, with respect to their treatment of children's rights and the Convention.²⁴⁹ They included recommendations to:

- Integrate the Convention into the level and organizational structure of national institutions
- Use the idea of children as rights holders to guide the work of national institutions
- Encourage widespread consultation with children to obtain their perspective
- Encourage awareness of the role of national institutions in promoting the rights of the child
- Ensure all legislation takes account of the impact on children; and
- Promote the development of a culture for the rights of children.

In May 2002, representatives of thirty independent national institutions met in New York to consider the formation of global and regional networks of ombudspersons and commissioners for children and to debate how best to encourage the development of independent institutions in every State.²⁵⁰

Regional workshops have also played a significant role in bringing the various national institutions together over the past decade or so. It is important to note in the present context, however, that while the Committee on the Rights of the Child has reached out to these institutions through its General Comment, this interest has not really been reciprocated at the regional level. The most recent illustration of this is to be found in the 'Conclusions of the Eleventh Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region', held in Islamabad, in February 2003. Although the conclusions highlight a wide range of issues which were considered to be impor-

tant to national institutions throughout the region, the only mention of children came in a call to States to "secure progressively ... the right to development, paying particular attention to the individuals, most often women and children, especially girls, and communities living in extreme poverty and therefore most vulnerable and disadvantaged as well as the issue of human trafficking."²⁵¹ Such an expression of concern is a very long way from a broad-based commitment to the CRC and the rights of children in general and illustrates the fact that there is still a long way to go before general purpose national human rights institutions can be said to have taken the CRC mandate truly to heart.

j) Conclusions

The debate about whether a specialized or an integrated institution is best from the perspective of children's rights, is not one that should be pursued in the abstract. It will, as experience has made clear, be of considerable potential importance in any specific context and especially where it is clear that an institution with an integrated mandate cannot be relied upon by children's rights advocates. But in general, it must be acknowledged that there are as many disadvantages as advantages to compartmentalization and that separation should not be seen as a crucial yardstick of the progress that the CRC has made within the domestic legal order of a given state. A major recent study of national institutions concluded that national institutions themselves "only work effectively as part of an overall framework of domestic institutions."²⁵² The same rationale would seem to hold true for an institution devoted specifically to upholding children's rights: if it is not supported by a framework which is conducive to the protection of human rights in general, it is not likely to last long.

As noted at the beginning of this chapter, there is a risk that some human rights advocates will pay excessive attention to the need to establish judicial recourse mechanisms for redressing violations of children's rights and will downplay the contribution that can be made by a national institution. But the reverse risk also applies. A national children's rights institution, or a human rights institution with a mandate in relation to children, will not necessarily ensure that the need for accountability is met in any particular country. A great many national institutions have been created as 'smokescreens' designed to distract attention from the government's failings and to create a favourable international impression, but with little genuine intention of strengthening the accountability dimension. In the same vein, the creation of a specialist institution dedicated to the promotion of children's rights can be motivated by a preference for dealing with such issues in a 'soft', public relations-friendly context and to avoid the hard legal techniques which might offer a more solid and targeted set of outcomes. The creation of either a specialized institution or one with an integrated mandate which includes children, should never be seen as a substitute for the provision of other mechanisms, including an independent judiciary, a legislature which takes full account of its CRC-based obligations and a bureaucracy which actively promotes

children's rights in its day- to- day activities.²⁵³ In brief, national institutions, no matter how splendid in theory, should never be seen as a panacea.

It follows from this that there should be continuing scrutiny of the achievements and shortcomings of national children's rights institutions. They must be judged on their merits in light of their record and there should be no presumption that their policies and activities are necessarily consistent with the CRC. Domestic civil society, international non-governmental organizations, the UN Committee on the Rights of the Child and other actors should all be prepared to apply an appropriate degree of scrutiny to the activities of these institutions. By the same token, it is appropriate to acknowledge the dilemma that follows from this recommendation. Children's rights groups will tend to see most national institutions as their natural allies and to fear that any criticism of them will be counter-productive in terms of strengthening the hands of actors with different and less child-friendly agendas. It is often argued that any children's rights institution is preferable to none and that, over time, an unsatisfactory performance can be transformed into a more positive one. But this is to miss the point that the such a transformation is more likely to occur if the institution's 'friends' speak openly and honestly, rather than staying silent in the face of consistently negative trends.

It has been suggested that the UN High Commissioner for Human Rights should not be reticent in expressing a "public judgment about negative actions taken by weak or compliant human rights commissions".²⁵⁴ But in fact, the High Commissioner is not well placed either to make such judgments, or to voice them. Special Rapporteurs and thematic mechanisms of the Commission on Human Rights, domestic NGOs, the Committee on the Rights of the Child and those who fund or otherwise support the children's rights institutions, are better placed to carry out this role. They must, however, be prepared to do so and to resist the temptation to legitimize institutions that purport to be defending the rights of children but are in fact doing little more than window-dressing. There is a very real risk at present that the desire to increase the total number of specialized institutions will lead to self-censorship of the critical voices which are indispensable to the effective functioning of any human rights body.

Many of the human rights and children's rights institutions which exist in developing countries have been supported by bilateral funding from external governmental donors or foundations,²⁵⁵ so it is especially important that such donors facilitate sensitive, constructive and domestically-driven, but nonetheless critical, evaluations of the performance of the institutions.

3.4 Civil society

a) Globalization and civil society

Much of the literature on the relationship between globalization and human rights and children's rights

has emphasized the negative consequences said to follow from the principal phenomena associated with globalization. In terms of the issues to be tackled by groups working on children's rights in general and on the Convention in particular, globalization has unquestionably brought a host of new challenges, including global trafficking in children (whether for sexual exploitation, unregulated adoptions, or abuse of their labour), internet-based child pornography, the more rapid spread of diseases, the diminished capacity of many governments to protect children and the abandonment of necessary forms of regulation in the name of competitiveness-driven flexibility. But the globalization balance sheet is by no means all negative and this is especially true of the role of civil society in relation to the CRC. In a variety of ways, globalization has brought new opportunities for civil society at all levels. Enhanced information flows have facilitated a much more rapid and uninterrupted sharing of information, whether about violations, national and international campaigns, or new initiatives. In terms of the work of the Committee on the Rights of the Child, the internet has helped to overcome the tyranny of distance and enabled NGOs in every region of the world to follow the Committee's work, to gain instant access to the emerging national and international jurisprudence on children's rights and to make detailed and timely information and reports available to the Committee. Public awareness of the plight of children and of what is or is not being done to alleviate it, has been greatly heightened by the instant media access which is a feature of life in twenty-first century society.

Some of the developments associated with globalization thus offer the prospect that the already well developed relationship between the CRC and civil society can be further intensified and expanded. The objective of this section of the report is to evaluate the role that civil society and other State actors have played in relation to the Convention and also to explore the impact of the Convention itself on the work of civil society. The latter has occurred in a variety of ways. There are many groups which have opted to alter or extend their mandates in order to reflect the importance of the Convention. There are others in which the CRC has come to be used as a significant point of reference, as an advocacy tool, or even as an overall organizing concept. And there are a great many NGOs which have contributed to, or participated in, different dimensions of what can broadly be termed the CRC process.

b) NGOs' role in developing the legal framework

One of the most important dimensions of the role played by civil society as far as the Convention is concerned, has occurred in relation to the establishment of the international legal framework for children's rights. NGOs played a more significant role in the drafting of the CRC than in relation to any previous international human rights treaty.

NGOs were not, however, major instigators of the drafting process. And indeed there have been many cases in which the decision to draft a treaty, ranging from the 1948 Convention on the Prevention and

Punishment of the Crime of Genocide to the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, was more heavily influenced by the efforts of NGOs. Indeed it was perhaps in large measure because the proposal for a Convention was something of a solo initiative by the Polish Government and its initial draft was so incomplete and unsatisfactory, that such a significant space was opened up for NGO contributions during the drafting phase. The establishment of a 23 member Informal NGO Ad Hoc Group on the Drafting of the Convention and the effective coordination of NGO positions that resulted, not only ensured a significant impact on the substantive provisions of the Convention, but also set a successful precedent for NGO involvement in the continuing process of implementation.²⁵⁶

The most immediate manifestation of this acceptance of the legitimacy of NGO involvement, was the inclusion of a provision in the text of the CRC which empowered the Committee to invite such “competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention ...” Although the formulation is somewhat opaque to those not accustomed to the arcane ways of UN terminology, its principal thrust was clearly to facilitate a role for NGOs. While such a role is now commonplace, in 1989 it was not. Indeed, the direct engagement of NGOs in the work of any United Nations human rights treaty bodies, remained a strongly contested issue at that time.

The results of this potentially very important opening to civil society are considered below, in relation to the work of the Committee.

Since the adoption of the Convention, NGOs have continued to play an important role in catalysing new international legislative initiatives in areas of direct relevance to children’s rights, cajoling governments to support them, pressuring opponents to moderate or drop their resistance and then promoting ratification campaigns.²⁵⁷ Perhaps the most dramatic example is the remarkable success of the campaign to ban landmines. But many other initiatives at both the international and regional levels have also been pursued. In addition to the successful adoption of Optional Protocols to the CRC dealing with child soldiers and with the sexual exploitation of children, there has been ILO Convention No.182 on the Worst Forms of Child Labour and important initiatives within the framework of the Council of Europe and the Organization of American States.

c) Tracing and evaluating the relationship between NGOs and the CRC

In the remainder of the present section of this report, the focus is on the impact which the CRC has had on the mandates of existing NGOs and the extent to which new NGOs or coalitions have emerged in response to the challenges laid down in the Convention.

Any such assessment is inevitably somewhat anecdotal, because of the virtual impossibility of carrying out a scientific study which could evaluate impact with any precision. This is in good measure

due to the difficulty of identifying causes and their effects in relation to such questions. Nevertheless, several steps were taken to enhance the quality and reliability of the evaluation that follows. In particular, a questionnaire was drawn up and circulated to many of the national and international NGOs concerned with children’s rights and a general invitation to provide information was posted on the CRIN (Children’s Rights Information Network) website. A significant number of individuals provided detailed responses²⁵⁸ and every effort has been made to reflect the insights gleaned from these responses

For analytical purposes, this study draws a distinction between three broad categories of NGO: (i) those principally concerned with children; (ii) general human rights NGOs and (iii) development NGOs.

d) Child-focused NGO’s

The Convention has probably had its greatest impact on the mandate and work of international children’s rights NGOs. This is hardly surprising, given their proximity to developments at the international level and the extent to which one of their objectives is usually to make the most of the opportunities offered by the international children’s rights regime and multilateral institutions in general, to promote their agendas.

The relationship between the CRC and such groups is perhaps best illustrated by several examples. Having been heavily involved in the drafting of the treaty, Defence for Children International (DCI) promptly reformulated its mandate on the basis of the Convention.²⁵⁹ For the Fédération Internationale Terre des Hommes, the Convention constitutes the conceptual framework which is said to guide all its activities.²⁶⁰ Terre des Hommes also sees the Convention as providing a new conceptual framework to define its work with children, on the basis that they are not merely recipients, but the holders of rights.²⁶¹ The Save the Children Alliance has also embraced the Convention since it came into force.²⁶² In 1997 it launched a Global Programme Strategy, which requires all activities of whatever kind to be considered in light of the key principles of the CRC and to be integrated within a strategic framework with the object of undertaking children’s rights.²⁶³

But the formal adoption of a CRC-based framework does not guarantee that all the members of the organization concerned will, or will be able, to put such an approach into practice. Thus for example, Woll has suggested that the extent to which Save the Children Fund (SCF) Alliance officers in the field use rights-based approaches, leaves something to be desired. She considers this to be a reflection of the challenge in moving from a needs- based approach to one in which programming is based on the rights of the child.²⁶⁴ This is not, however, a criticism which should be levelled only at the work of SCF. Rather it is an unavoidable challenge for any organization – whether it be an NGO, an intergovernmental organization, or a governmental agency – which seeks to make the transition from a needs- based approach to a child rights approach. It serves to underscore the

fact that considerable work still needs to be done by all NGOs to understand what such an approach means in general and more importantly, what its implications are for the specific focus of the group itself. As noted elsewhere in this report, the same is true for inter-governmental agencies.

In contrast to the impact of the CRC on international NGOs, it has been suggested by some commentators that the closer we get to the local level, the less impact the Convention is likely to have on the formulation of the mandate and activities of an NGO. In her evaluation of the impact of the CRC in six countries, Woll concluded that outside national and international NGOs, civil society had failed to become engaged in the implementation of the CRC.²⁶⁵ This observation is supported by the results of a survey by the Federation for the Protection of Children's Rights in Japan, which found that 90% of NGOs established after the adoption of the CRC, made no reference to it and only 20% of child-focused NGOs had made a place for the Convention in their policies.²⁶⁶

But it is equally possible to identify cases in which local level NGOs in both developed and developing countries, have successfully invoked the CRC. For example, in Guatemala, studies by UNICEF have documented the extent to which the Convention has been used in domestic advocacy and Australian NGOs have persistently relied upon various provisions of the Convention in their efforts to bring about the release of asylum seekers who have been detained pending the resolution of their applications for refugee status.

Moreover, the CRC has actually provided an impetus for the launching of a significant number of new NGO initiatives and even specialized NGOs.

Nevertheless, on balance, it is true that the process of consciousness-raising among local NGOs in relation to the CRC has been a gradual one. In some respects, it is even preferable that the process of 'discovery' of the CRC should be a grassroots one, rather than an initiative orchestrated or even catalysed from above.

But this concern should not be overstated, since effective NGO work on behalf of children's rights will often require significant funding. In fact, the lack of specific CRC-related funding for NGOs would seem to be more of a problem than excess supply creating unsustainable demand. Although it raises difficult issues and would require detailed research that goes well beyond the scope of the present study, a relatively small proportion of funding granted by the major human rights foundations seems to go on CRC-related activities. The same can be said for the funding made available by most of the large bilateral sources of development assistance.

There is clearly considerable scope for a more sustained effort to generate increased funding possibilities, which would facilitate the task of local NGOs wishing to work on the promotion and implementation of the CRC.

It is not suggested that failure to embrace the Convention by local child-focused NGOs is universal. On the contrary, it would be expected that many

local child-focused NGOs would embrace the Convention.²⁶⁷ Moreover, it is not only local NGOs who could be accused of failing to make use of the Convention. Some commentators have observed that many NGOs at the national level also fail to display any detailed knowledge of the Convention.²⁶⁸ This situation reflects the fact that there remains a relative lack of information and awareness about the Convention at the local and national level. This should not come as a surprise, given that the Convention is an international legal document and few countries have so far fulfilled their obligation to make it widely known.²⁶⁹ Accordingly, there remains a need to disseminate information about the Convention to child-focused NGOs that are unaware or do not fully understand how the Convention can assist them in their efforts to improve the lives of children.

It is worth noting that although many NGOs are yet to take full advantage of the Convention, a number of NGOs have been spawned by the very existence of the Convention. This is a significant development, because it means that the Convention has not only provided existing NGOs with a new strategic focus, but has also led to the creation of new NGOs. For example, the mandate of Article 31 Action Network,²⁷⁰ is based on a child's right to play and leisure, under Article 31 of the Convention. Its aim is to increase awareness of children's rights under Article 31 and to encourage projects and partnerships to secure its implementation.²⁷¹ *Espoir pour les Enfants* (Hope for Children) an NGO in Cote d'Ivoire, was created in 2002 to promote the rights of the child under the Convention. *Genuine Empowerment of Mothers in Society* was established in the UK in 1999, to raise awareness about the Convention and to build a harmonious relationship within the family. The *HAQ Centre for Child Rights in India* was established in 1999, to recognise, protect and promote child rights and to report and monitor the implementation of the Convention. Its 2003 report *Children in Globalising India: Challenging Our Conscience*, seeks to provide a wide-ranging status report on the situation of children in India by reference to the CRC.

e) Strategic Coalitions

Another significant area in which the impact of the Convention on the work of NGOs can be demonstrated, is the creation of strategic coalitions in a range of areas which use the Convention to bind the common interests of individual child-focused NGOs.

At the international level, the NGO Group for the Convention on the Rights of the Child is the most obvious example. The 41 members of the Group, which is the successor to the ad hoc NGO group for drafting the Convention, share the common aims of raising awareness and promoting the full implementation of the Convention. At the national level there has been the continued emergence of national coalitions of NGOs for the Convention on the Rights of the Child. There are presently over 70 such coalitions whose aim is to promote the implementation of the Convention within their own jurisdiction. There are obvious benefits that individual NGOs

gain from membership of a national coalition. However, some commentators have suggested that national coalitions often lack visibility. This undermines the potential for such coalitions to be strengthened by the addition of new members and also deprives individual NGOs of the assistance they could receive from a national coalition.

A common feature of the work of national coalitions is the presentation of an alternative report to the Committee on the Rights of the Child. While such reports are welcomed by the Committee and fall squarely within the role envisioned for NGOs under article 45(a) of the Convention, they are often kept confidential, at the request of the authors. This is problematic, given that the role of NGOs should be to elucidate the facts and counter any erroneous claims made by a State Party in its report to the Committee. By requesting confidentiality, NGOs are effectively mitigating the potential impact of their ability to contribute to the implementation of the Convention.

A number of thematic and research coalitions have also been formed, which use the Convention as their point of departure. An example of a thematic coalition is The Global Campaign for the Right to Education, launched in November 1999. This campaign has been formulated to reduce the gap between the reality of children's education and their rights under the Convention and involves the coordination of NGOs working in 180 countries. Similarly, ECPAT, the international campaign to end child prostitution, pornography and trafficking, relies upon the Convention, especially Articles 34 and 35, to inform the activities of its 51 member groups in 44 countries.

Another example (referred to in Chapter 4 above in relation to the role of the CRC within the context of the European Union), is the European Children's Network (Euronet), which describes itself as a coalition of networks and organisations campaigning for the interests and rights of children. The CRC is a central feature of both their analytical framework and their advocacy.²⁷²

Other examples of thematic coalitions that embrace the Convention in support of their cause, include the Coalition to Stop the Use of Child Soldiers, the Global March Against Child Labour and the Focal Point Against the Sexual Exploitation of Children. The emergence of such coalitions represents a significant development in the impact of the Convention on the work of NGOs. Its status as an international instrument with almost universal ratification, represents an opportunity that has been seized upon by many NGOs to coordinate their activities internationally with the force of international law. Eylah Hamouda from TDH has actually suggested that without the Convention, successful campaigns like the Global March against Child Labour and Coalition to Stop the Use of Child Soldiers would have been impossible.²⁷³

It is not only thematic coalitions that have made use of the Convention to coordinate their work. A growing number of research coalitions are also turning to the Convention as their *raison d'être*. The

Childwatch International Research Network is the best illustration of this trend. It was established in 1993. By 2002, forty 'key research institutions' were members of the network. They are committed to using the Convention to define their terms of reference and use it to provide a common agenda for the improvement of the situation of children.²⁷⁴ It is worth noting that unlike the child-focused NGOs discussed above, Childwatch does not consider itself to be an advocacy body. This is significant, because it demonstrates that the impact of the Convention need not be limited to advocacy-based NGOs, but can also be used to enhance the activities of research-based NGOs. To date however, too few research organisations that deal with the condition of children have recognised the linkage that exists between their work and the principles underlying the Convention.

f) The impact of the Convention on general human rights NGOs

While the above discussion about the impact of the Convention on child-focused NGOs reflects a vital part of the overall equation, it is in some respects more interesting to examine the extent to which the Convention has penetrated the mandate and activities of international human rights NGOs. The reason is that these NGOs often have a tremendous capacity to shape and influence the broader human rights agenda. If they have failed to embrace the Convention and the notion of children's rights, this would serve to compound the invisibility and marginalization of children. In doing so, the work of these NGOs would actually serve to undermine the Convention and lead to the isolation, rather than integration, of the activities of child-focused NGOs within the broader human rights struggle.

It is not possible to examine the mandate and activities of every general human rights NGO. So the focus of investigation will be on two NGOs that remain the vanguard of international human rights advocacy: Amnesty International and Human Rights Watch. This reveals that despite some initial delay and resistance, especially on the part of AI, the Convention and children's rights have now been embraced by both NGOs.

■ Human Rights Watch

The Convention has had a significant impact on the work of Human Rights Watch since 1994, when it established its Children's Rights Division. The Director of the Division, Lois Whitman, explains that the impetus for the creation of this division came not so much from the existence of the Convention but from the reality of children's lives.²⁷⁵ In 1993, she published a report on the abuse of children by the police and IRA in Ireland, which led to the government adopting measures to bring about an end to the abuse. Whitman subsequently formed the view that there was merit in establishing a division within HRW focusing exclusively on children, not least because a separate division on women's rights had been established the previous year. She therefore lobbied management, who finally agreed

-- on condition that she generate all the necessary funding herself.

Since the Children's Rights Division was established in 1994, the Convention has provided the normative structure for its activities. The methods used by the Children's Rights Division includes the sending of "fact-finding missions to countries where abuses are occurring, interviewing child victims, parents, human rights activists, lawyers, child care workers, government officials and others, working closely with local human rights groups to identify specific abuses and strategies for change."²⁷⁶

■ *Amnesty International*

Despite the fact that AI was involved in the drafting of the Convention, it was only in the late 1990s that the organization decided to play a focused role in promoting its implementation, once States had ratified it. This slow start has been attributed to two reasons. The first was that the organization's commitment to the universality of human rights was interpreted to mean that it was unnecessary to make any distinctions on the grounds of sex, race, age or disability, when identifying the victim of a human rights abuse. The second was that resource constraints were seen to be an impediment to the role AI could play in the implementation of the Convention.²⁷⁷

In the view of some of those involved, the change in approach was driven by two factors: firstly, an acknowledgement within AI that the unintended consequence of not drawing attention to the distinguishing characteristics of human rights victims meant that certain categories of victim including children, had become less visible than they should have been. Secondly, AI staff in the field were starting to question the relevance of their work in the face of the expanding number of NGOs adopting an explicit focus on children's rights and making use of the Convention. In other words, the child rights community was effectively threatening AI's 'market share'. This forced it to re-evaluate its policy with respect to children's rights, so as to remain competitive and relevant in the NGO marketplace.

The outcome of this process was the formulation of a strategy, adopted in 1999, which aimed to mainstream children's rights into the work of AI. Subsequent initiatives undertaken by the organization include a campaign entitled 'Children in South Asia: Securing their Rights', an action campaign on children under the rubric 'The Future Starts Here' and a 2002 campaign focusing on child soldiers. While there is no child-specific focus among the twelve specific campaign issues given priority by AI in 2003, it has nevertheless given considerable prominence to both children's rights and the CRC, in much of its country-specific work in recent years.²⁷⁸

■ *The Impact of the Convention on Development NGOs*

A nexus between human rights, children's rights and the Convention has gradually come to be accepted by general human rights NGOs. By way of contrast, development NGOs, subject to some exceptions, are

still struggling to make the connection between sustainable human development and human rights, let alone children's rights and the Convention.

The work of development NGOs will inevitably have an impact either directly or indirectly on the situation of children. It is therefore worth examining the impact of the Convention on this type of NGO, to illustrate the extent to which the Convention has penetrated beyond the strictly human rights and child-focused NGOs. What this examination reveals is that while some development NGOs have begun to embrace the Convention, the trend is far from universal. Furthermore, those development NGOs that do make use of the normative framework offered by the Convention, are yet to adopt a rights-based approach in their programming.

Two examples that illustrate the impact of the Convention on development NGOs are Plan International and World Vision. The International Executive Director of Plan recently highlighted the importance of the CRC when he noted: "As we progress into this second decade of the Convention, the global challenge is how we at every level of society - the family, community, organization, government policy - incorporate the views of children through their participation in decisions that affect their lives. It is not as simple as listening to children or, as some childcare experts would advise, giving children 'quality time'. Listening is a start but it also requires an acceptance of responsibility to act on what we learn from listening."²⁷⁹

World Vision's official policy statements indicate that it too 'endorses the widely adopted United Nations Convention on the Rights of the Child.'²⁸⁰ In relation to children in armed conflict, the organization states: "World Vision believes that the Convention on the Rights of the Child (CRC) provides a positive framework for action. The CRC combines a recognition of the responsibility of adults to protect children and adolescents with the right and responsibility of young people to participate in their own development."

g) Conclusion

In summary, the central role played by NGOs in the drafting of the CRC led to a recognition of the importance of their continuing contributions, which has been reflected in the important role that they have assumed in relation to the work of the Committee on the Rights of the Child, in their contributions to the work of international organizations and governments aiming to promote children's rights and most importantly, in their own, continuing struggle to combat policies and practices which are inconsistent with the Convention. They have also promoted greater public awareness of the Convention and deeper public understanding of the very notion of children's rights. In some respects, this can be thought of as a process of mutual legitimation, as the CRC has helped to give legitimacy to the campaigns and programmes of the NGOs and the latter have helped to build public support for the CRC and a better understanding of it.

The Convention has had a significant impact on the work of NGOs. It has provided a major impetus for the creation of new groups working on children's rights issues both at the international and domestic levels. It has acted as a catalyst to changes in the mandates and priorities of a number of NGOs active in the children's rights and related fields and it has prompted the building of new networks and coalitions of NGOs concerned with the human rights of children, be they child-focused, human rights, or development groups.

While it is clear that the NGO community has played a very important role in promoting accountability in relation to the CRC at all levels – be it locally, nationally, or internationally – there is still “considerable room for improvement” (as unimaginative school report cards almost unerringly used to say). Both CRC-related country and thematic reports tend to differ greatly in quality, scope, focus, regularity and reliability. They are all too rarely brought together in any systematic fashion, in order to produce a report which might gain sufficient credence to be considered as a standard reference work for those wanting to know the principal shortcomings in action at the national and international level. While there have been occasional NGO reports produced which seek to provide an overview of progress in a wide range of countries and while there are regular reports produced by UNICEF, such as the State of the World's Children reports, there is no semi-authoritative, highly publicized, annual assessment in relation to the CRC. Instead, the efforts of NGOs have been somewhat fragmented and the need to stamp the authority of each individual NGO on reports seems to have prevented the emergence of a well-funded consortium to produce an annual report which has a significant impact on the way governments, the media and civil society evaluate the adequacy of measures taken to put the fine words and admirable intentions of the CRC into practice.

In this respect, a useful contrast can be drawn between the relatively fragmented NGO assessments of the performance of key actors, especially governments, in relation to their CRC undertakings and those which an NGO-based coalition is now producing as regards the Ottawa Convention against landmines.²⁸¹ The fourth such ‘Landmine Monitor Report’, published in September 2002, was produced under the auspices of a coalition of major NGOs working in the field, with funding support provided by 13 Governments plus the European Commission. It was prepared by a research network consisting of 115 researchers in 90 countries, all of whom are non-governmental and come from a wide variety of backgrounds. The group claims, probably with good justification, that its reports “have been widely hailed as vital documents by treaty signatories and non-signatories alike, as well as by mine action practitioners, journalists and other NGOs.”²⁸²

There would seem to be considerable scope for a similarly comprehensive and authoritative report on children's rights to be produced by a coalition of NGOs working in the field. While there are obvious differences between a field whose focus is relatively clear and circumscribed (landmines) and one which is

broad and open-ended (children's rights), this only means that the modalities and the scope of a CRC-focused report would be different, while the principle remains the same. The first step would be for a small working group of the major CRC-related NGOs to consider the potential scope of such a report, the possible modalities of its preparation and the financial and practical feasibility of such an undertaking.

C - CHALLENGES TO CHILDREN'S RIGHTS ACCOUNTABILITY

3.5 Decentralization

a) The spread of decentralization initiatives

Decentralization has become a key element of early twenty-first century development thinking. The *Human Development Report 2003* identified it, along with the emergence of new social movements, as one of the two trends “giving citizens new ways to take collective action” and providing “the political momentum needed to achieve the Millennium Development Goals.”²⁸³

Historically, there are good reasons why the strategy of diminishing the power of central governments and trying to strengthen local democracy was deeply attractive in an Eastern and Central Europe emerging from totalitarianism, as well as in developing countries such as Indonesia, which had been ruled by an all-powerful central governmental apparatus determined to avoid significant local empowerment lest secessionist tendencies or democratic political demands should flourish. In political terms, a range of compelling reasons have been put forward in favour of decentralization, including arguments that it promotes democracy by enhancing local participation in decision-making, increasing efficiency in the delivery of public services, enhancing the quality of the latter because of increased accountability and sensitivity to local needs, increasing governmental transparency and responsiveness, facilitating the political participation of a more diverse range of actors, increasing political stability by raising citizens' sense of having a stake in the political order and making space for new political ideas to emerge.²⁸⁴

In addition to the changing political environment, many of the phenomena commonly associated with globalization have also conspired to make decentralization more attractive, more feasible and more in line with trends in other areas. Thus, for example, many of the information technology, transportation and other developments of the late twentieth century facilitated a revival of local level efforts which had previously either been made impossible by the tyranny of distance and a lack of vital information, or suffocated by the forces of centralization. Many compelling reasons which had favoured and facilitated centralization virtually evaporated, as func-

tions which previously required access to large quantities of data, access to technical specialists, interaction with other groups and with decision-makers, could suddenly be performed at home. The result has been described as follows:

In recent years a wide variety of countries – transition and developing, solvent and insolvent, authoritarian and democratic, with governments of the left, right and centre – have pursued decentralization. Since the early 1980s such reforms have been introduced in regimes ranging from monarchies to military juntas to single-party systems to multiparty democracies.

... Multipurpose local councils have been created for this purpose in more than 60 countries. And in Latin America, except in a few small countries, nearly all legislative and executive authorities are now elected in 13,000 units of local government.²⁸⁵

b) Drawing the links between children's rights and decentralization

But despite the dramatically enhanced significance of decentralization, there have been very few systematic studies of its impact on the enjoyment of human rights or on the strategies which need to be followed to enable human rights advocates, including those with a focus specifically on children's rights, to adapt their approach to accommodate the new realities. And yet the bottom line is that while decentralization is agreed by many observers to have considerable potential to improve equity, to ensure greater accountability and to promote solutions which are more carefully tailored to meet local needs and circumstances, the fact remains that the trend also has the capacity to reduce very significantly the element of accountability which is central to the human rights regime. Indeed, in various respects, existing approaches to human rights would seem particularly ill-suited to dealing with the new realities that are being brought about by decentralization and remarkably little attention has yet been focused on the need to identify adaptive strategies. Very few major studies have been aimed directly at an in-depth consideration of the human rights dimensions of these issues. One such study canvasses the pros and cons in fairly general but very helpful terms,²⁸⁶ while another examines the specific experience of Africa, especially in the course of the past two decades.²⁸⁷

A number of recent reports on children's rights have focused on some of the implications of decentralization or 'municipalization'. A 2003 report by NCH – which calls itself 'the children's charity' – on the United Kingdom's policies in this respect, observes that devolution of power to the regional or national level in the UK is to be seen as an opportunity which should take policy making closer to children, young people, families and communities and make it more effective.²⁸⁸ The report details a wide range of initiatives, many of which are closely related to the provisions of the CRC, which have been undertaken at the regional level. An earlier report prepared for UNICEF, which studied recent develop-

ments in Brazil, Costa Rica and Venezuela, observed that many of the new laws dealing with children in these countries were based upon a strategy of 'municipalization' especially in terms of service delivery for children and the protection of their rights. It concluded that the "municipalities must therefore assume a leadership role and devise responses to meet local demands."²⁸⁹ While underscoring the challenge thus presented, the report does not give grounds for optimism that the institutions themselves will necessarily be able to rise successfully to the challenge.

Another study, which examined responses to the CRC in six countries in different regions, concluded unsurprisingly that "the level of awareness of child-rights policy, as well as its integration into government structures, is generally lower at local than at national level. Limitations encountered locally ... include insufficient financial and human resources, limited knowledge and awareness of the CRC, lack of data about children, [and] ineffective or non-existent local government structures ..."²⁹⁰

c) Defining 'decentralization'

What exactly is decentralization? It has been defined as 'the process of devolving political, fiscal and administrative powers to subnational units of government'.²⁹¹ And as a process involving "a central government transferring to local entities some of its political authority and crucially, some of its resources and administrative responsibilities."²⁹² Somewhat controversially, the World Bank, on its 'Decentralization Net', defines it as "the transfer of authority and responsibility for public functions from the central government to intermediate and local governments or quasi-independent government organizations and/or the private sector."²⁹³ Most definitions, however, are not willing to encompass privatization as a form of decentralization, as is illustrated by the definition adopted by the United Nations. Decentralization involves the

transfer of authority on a geographic basis whether by deconcentration (i.e. delegation) of administrative authority to field units of the same department or level of government or by the political devolution of authority to local government units or special statutory bodies.²⁹⁴

Other definitions distinguish it from 'deconcentration', on the basis that whereas the latter gives greater autonomy to the regional level but still through the representatives of the central government, full decentralization assumes that the subnational units in question will be locally elected. At the political level, this strategy is occurring in the developed as well as the developing world. In the UK, for example, the devolution of power in respect to a number of areas has occurred in relation to Scotland, Wales and Northern Ireland, as well as through the reintroduction of municipal government in large urban areas such as the City of London. The approach adopted to welfare reform in both the United States and Canada, involving the decentralization of responsibility and funds from the federal

to the state and provincial level, is increasingly being replicated in many developing countries – albeit across a broader range of issues.

In Latin America, decentralization has taken place on a major scale over the past twenty years or so. One survey noted that, “since 1983, all but one of the largest countries in the region have seen a transfer of power, resources and responsibilities to sub-national units of government.”²⁹⁵ Because this process requires political reconfigurations involving a shift from appointed to elected governors and mayors, or the devolution of responsibilities from central to local government, or the introduction of democratic elections in situations where they did not previously apply, the implications for respect for civil and political rights are obvious and one would expect a strongly positive impact. These changes have also involved the devolution of major functional responsibilities in sectors such as health, education, sanitation, water supply and road construction, which in turn have a major potential impact on the enjoyment of economic, social and cultural human rights.

In Asia too, there has been a great deal of experimentation with different forms of decentralization.²⁹⁶ We will return to that region below, in considering the recent experience of Indonesia.

In the African context, Olowu notes that during the 1990s, a number of governments chose to experiment with democratization. He attributes the various initiatives to factors such as the pressures of globalization, the need to respond to economic crises and the demands of structural adjustment, a commitment to democratization and to forces such as rapid urbanization and strengthened ethnic identities. But his survey shows that evaluations of the programmes undertaken in Africa “have generally produced negative findings, with but a few, very limited, exceptions”. His analysis explains these shortcomings by pointing to problems such as the primacy of ideology over consideration of the individual circumstances of each country, the common assumption that democracy, especially in the form of competition among political parties, is incompatible with the needs of decentralization, the failure to redress disparities in infrastructural and institutional capacities between regions and communities and insufficient effort to develop and strengthen both traditional and novel forms of accountability.

Apart from pointing to the need to approach democratic decentralization as a process rather than an event, he emphasizes the need for African states to be more inclusive of the non-governmental organizations, such as religious and community-based groups, which are at present largely sidelined in the process of democratic decentralization.²⁹⁷

It is now widely accepted that decentralization will continue to be a major growth area in the years ahead:

The pressures for decentralization are beyond the control of governments. The emergence of modern economies and an urban, literate middle class has created nearly insurmountable

pressures for a broader distribution of political power. ... Rather than attempting to resist them, governments need to accommodate them in a way that maintains political stability while improving public sector performance.²⁹⁸

It is thus a phenomenon that must be taken fully into account in ensuring the effectiveness of the regime designed to ensure children’s rights accountability in the years ahead. It is of course a process which is not without its potential problems. Some of these have been identified in the World Bank study on Latin America. Three in particular merit attention in the present context. The first is a deterioration in the quality of services offered. The second is the possibility of widening regional disparities in the level of provision of public services, which can be especially problematic in areas such as primary health and primary education. The third set of possible problems arises in relation to macroeconomic policies: “... recurring central government deficits, an over-expanded public sector, or the inability to use fiscal policy to adjust to economic shocks.”²⁹⁹ The report rightly identifies accountability as one of the key ingredients in ensuring that decentralization projects are successful. Unsurprisingly, however, the concern is minimal in respect to the first two possible defects of the process and most of the report is devoted to exploring ways in which macroeconomic accountability can be ensured.

The *Human Development Report 2003* also acknowledges that, despite its considerable attractions and a significant number of highly positive case studies that it details, decentralization can be shown to have its downside. These can best be avoided if it is only undertaken when certain preconditions are in place:

Decentralization tends to be successful when the central government is stable, solvent and committed to transferring both responsibilities and resources, when local authorities are able to assume those responsibilities and when there is effective participation by poor people and by a well organized civil society.³⁰⁰

In addition, the Report notes that “devolving decision-making to local authorities risks being an empty gesture unless backed by sufficient financial resources, administrative capacity and mechanisms for holding those authorities accountable.”³⁰¹ That is then the central issue which needs to be examined in the present report, at least in so far as it affects the CRC.

d) Towards accountability in the context of decentralization

Even within the European Community, the principle of subsidiarity (requiring, *inter alia*, that the Community “shall not go beyond what is necessary to achieve the objectives of the Treaty”) which was enshrined in the basic treaty in 1991 at Maastricht, has given a significant impetus to decentralization of decision-making in certain areas. Central to the argument here, however, it has generally been accompanied by only a limited procedural autonomy being accorded to the Member State which is

responsible for policy implementation. In other words, a significant element of accountability to ensure compliance with Community objectives is ensured through the use of various techniques.

For present purposes the point is not that decentralization is necessarily undesirable in any way. Rather it is that it raises new challenges as to how human rights accountability can best be ensured in the context of a new set of policies and procedures. The problem is potentially acute in circumstances in which the central government, which is the signatory to children's rights treaties and the normal interlocutor with the international community in such matters, has less practical control over what is happening and a diminished ability to provide details of current developments. It is even less well placed to ensure that course corrections that might be proposed by international supervisory bodies are given the consideration demanded by the legal framework of applicable international children's rights treaties.

There are valuable lessons to be learned in terms of accountability from the experiences in Indonesia in recent years. Probably no other country has been as ambitious in its efforts to decentralize, as Indonesia. Its experience is particularly relevant in view of the fact that it is the subject of an in-depth case study undertaken later in this report in relation to the role of children's rights within the work of the international financial institutions. The dimensions of the Indonesian initiative, commonly known as the 'Big Bang', are well captured in the following overview:

Within one year, the Big Bang decentralized much of the responsibility for public services to the local level, almost doubled the regional share in government spending, reassigned two-thirds of the central civil service to the regions and handed over more than 16,000 service facilities to the regions. The country also implemented a new intergovernmental fiscal framework, ... and gave natural resource producing regions a share of the resource revenues. The country switched to a new accountability system at the local level ...³⁰²

While it is not possible within the confines of this report to undertake any detailed or systematic review of the Indonesian experience in this regard, it is instructive to take note of some of the main themes which have emerged from a major World Bank study published in 2003. While the report only mentions children in passing and takes only limited account of the potential relevance of international human or children's rights standards, it nonetheless arrives at several conclusions which are of major importance in the present context. The first is that even after two years of experience with the new system, the assignment of responsibility for different functions between the various levels of government is far from clear, partly because of weaknesses in the decentralization laws themselves. But, as the report notes, clarity on this issue is crucial if there is to be accountability at the local level and sufficient resources for the respective levels of government to carry out their responsibilities.

The second conclusion of particular relevance in the present context is that the Indonesian Government should formulate minimum standards of service in relation to all of the obligatory functions which are to be performed at the regional level. The goal is to clarify what is expected from the regions and to enable citizens to compare how their region is doing compared to the standards. The challenge, as the Bank sees it, is to set realistic and affordable standards:

Minimum standards should strike a balance between a desire to provide a minimum standard of service for all Indonesians, what Indonesia as a nation can afford and the opportunities that regional autonomy offers. If the standards were too specific they would undermine the benefits of decentralization by stifling regional initiative and creativity in service delivery. Moreover, standards that are set too high may not be affordable, or feasible, because of limited capacity in the regions. They risk being widely ignored, or become a fiscal problem for the regions and in the end for the centre.³⁰³

The report recommends that the process of setting priorities should take particular account of those targets "based on international agreements and commitments already made (such as the 9 years of basic, free education for all)", which is presumably a reference to the CRC. It suggests that the process should focus "first on the most important sectors for the people's welfare, such as health and education".

The third conclusion of relevance is that the agreed standards should be subject to monitoring and supervision, and possibly sanctions. It builds upon the report's emphasis on the need to reinforce the accountability of local governments to their constituents. While many of the measures recommended for this purpose focus on financial management and related issues, the report also calls for regulations designed to give citizens access to information from local and national levels of government; the strengthening of administrative courts to enforce the protection of citizen's rights against government abuse; the publication of comparative information on regional governments' performance to allow local constituents comparison of their local government's performance with that of other regions; and increasing citizen's awareness of their rights, through, *inter alia*, the use of techniques such as citizen's charters.³⁰⁴

e) Conclusion

As the Indonesian case study well illustrates, new means need to be devised for ensuring that the consequences of decentralization are not such as to reduce the accountability of governmental or other actors, for achieving the commitments contained in the CRC. This is reinforced by a study from India showing that the effectiveness of political decentralization has been limited because of "the failure to challenge [the] well-entrenched power of the village chiefs." It argues that the finding that decentralization empowers local elites to capture resources from the poor, "is consistent with a stream of recent

research emphasizing that the existence of a strong centre that is able and willing to resist the power of local elites (to earmark funds, support strong local staffing and so on) is a necessary precondition for decentralization'.³⁰⁵

There is another dimension of decentralization which has barely been touched upon in the present analysis, but which also provides complex challenges for children's rights accountability. It concerns the different levels of protection which are accorded to children within federal-state structures. While many of these differences are a legitimate and appropriate reflection of different preferences and priorities of separate units of government, others are difficult or perhaps impossible to reconcile with the basic standards prescribed by the CRC.³⁰⁶

In all of these respects, major challenges will arise in the years ahead for each and every one of the key actors responsible for ensuring accountability for children's rights. They include national governments, regional and local governments, national human rights institutions, civil society, international development agencies, and the Committee on the Rights of the Child. Unless the challenges of decentralization are taken seriously by each of these actors, highly corrosive and growing gaps will emerge in the fabric of accountability which the CRC is designed to promote and ensure.

3.6 Non-state actors

The impact of private actors on the enjoyment of children's rights is growing rapidly in a global economy. Privatization, deregulation and the diminishing regulatory capacities of national governments have all contributed to enhancing the importance of corporations and other private entities in terms of these rights. Although the debate about corporate social responsibility or progressive corporate governance is an old one, it has happily come a long way since the days when Milton Friedman proclaimed that business has "one and only one social responsibility ... - to use its resources and engage in activities designed to increase its profits ...".³⁰⁷ But he added a vital qualification: maximization of profits and of shareholder value are the golden rules for business, "so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud."³⁰⁷ Standards have changed and so too has our understanding of the relationship between corporate good conduct and broader conceptions of governance. Corporations can hardly be expected to operate as paragons of virtue, even within the narrow confines of Friedman's strictures, when they are operating in a context which is closed, corrupt and oppressive (as, for example, in Nigeria, at least until very recently). But consumers and others are increasingly demanding that they should avoid responsibility for, or complicity in, human rights violations and that must clearly be understood to include children's rights.

Ironically, when considering how to approach the issue in an international context, national level efforts to promote or ensure corporate social responsibility

may be a poor guide in various respects and might even be seriously misleading in a number of important ways. Much of the literature talks of social responsibility, corporate good citizenship, social audits, etc., but generally does not talk in terms of human rights, let alone children's rights. The result is a diverse range of standards, varying significantly in scope and focus. They sometimes address issues as wide-ranging as the firm's contribution to employment creation, the amount of revenue it earns per worker, the percentage of its pre-tax profits that is devoted to philanthropic activities, the active disclosure of information to promote transparency, the commissioning of independent corporate audits of performance in relation to social and other non-economic goals, active engagement in or commitment to movements for social change whether in the environmental, arms control or human rights areas -- all admirable dimensions of social accountability. On the other hand, in the domestic debates, many human rights issues are not addressed at all, since it is assumed they are adequately taken care of by domestic regulations by which the corporation is bound.

The point is that many of the national level debates over corporate responsibility take us significantly beyond what is productively thought of as a human rights agenda. The latter agenda is actually closer to Friedman's model of basic compliance with relevant laws, than to these very broad-ranging and potentially open-ended debates over ethics and social responsibility. The principal difference between what might be termed a human rights compliance model and Friedman's model, is that the former supplements clearly and directly applicable national legal regulations with international human rights standards which the business has the responsibility and perhaps also the obligation (but that is to pre-judge a complex issue), to avoid violating. It should also eschew complicity with other actors and particularly governments, in relation to such violations. There is much to be said, therefore, for focusing on a more limited range of issues in relation to which human rights standards are clearly relevant and for having accountable public authorities, rather than corporate officials, to decide what the standards will be.

Globalization is itself highly conducive to the growing power of transnational corporations (TNCs). In some respects, the essence of the phenomenon is to make business across borders easier in a great many ways, as well as more profitable. Improved mobility, economies of scale and a greater ability to communicate and manage across long distances, have all contributed to an enhancement of the role of TNCs. Many of the principal legal and political initiatives associated with globalization have been designed specifically to improve the capacity for TNCs to do business. In the late 1990s, foreign direct investment flows reached record levels. In 1997, they were nearly double what they had been in 1990 and seven times 1980 levels. By 2002, however, they had seen some decline and had fallen to \$651 billion, which was the lowest level since 1998. But this led to only a modest decline in most indicators of the size of the foreign operations of the world's largest transnational corporations.³⁰⁸ In

general, TNCs have been the principal conduit for globalization. This fact alone would be sufficient to warrant a sustained focus on the relationship between the role of TNCs and efforts to ensure the promotion and protection of human rights.

In addition, several other phenomena closely associated with globalization have further increased the importance of TNCs. Privatization, for example, in the case of certain industries, is significantly more likely to create opportunities for TNCs than for local corporations which lack the scale or expertise to bid successfully. The same is often true even for activities such as prison management, some aspects of law enforcement and even aspects of military security. Deregulation reinforces the same trend. At the same time, pressure on the State to reduce its own expenditures will often lead it to downgrade its efforts to enforce those regulatory arrangements that are left in place. Labour inspection is a simple example in this regard. This combination of factors has led many commentators and groups in civil society to focus on the responsibilities of corporations. In addition, a range of widely publicized instances in which major corporations have been implicated in situations involving either significant violations of human rights or of environmental standards, have generated consumer and other pressures upon corporations to demonstrate their responsibility. Shell Oil, Nike, Levi Strauss and many other firms have responded to strong criticism by adopting codes of behaviour designed to insulate themselves from such criticism and to build an image of good corporate citizenship.

Governments have been supportive of such efforts, while at the same time remaining unwilling to take regulatory measures of their own. There has been strong resentment over certain exercises of extra-territorial jurisdiction, including especially some purportedly aimed at upholding human rights. Most notable have been the actions by the US Congress in the Helms-Burton and D'Amato Acts, which seek to punish foreign corporations investing in Cuba, Iran and other countries considered to be *non grata*. The result is that the same governments which successfully insisted upon corporate codes of conduct in relation to South Africa at the time of apartheid³⁰⁹ are not prepared to act in relation to TNCs in general.

There are various reasons for the reluctance to use human rights and children's rights standards, but the most important by far is simply the fact that TNCs, as private or non-state actors, are not bound by human rights standards as such. Human rights obligations are assumed by governments pursuant to international law (either through treaty ratification or by virtue of the application of principles of customary international law) and are thus not formally or directly opposable to TNCs.

Human Rights Watch, while expressing concern about the lack of human rights accountability of TNCs and the strong reluctance of governments to take an interest in corporate responsibility issues, has nevertheless been encouraged by the trend towards the adoption of voluntary codes of conduct

in the footwear, apparel and other sectors. "While governments are unwilling to insist that corporations not profit from repression, a vibrant and burgeoning NGO movement is leading this campaign." However, existing arrangements for monitoring compliance with human rights standards are ill-equipped to respond to these developments. In response to growing corporate awareness and increasing consumer pressure, there has been a significant expansion in the number of voluntary codes of conduct and the like, that have been adopted within different business sectors.

These developments have been warmly welcomed by diverse commentators. Some would argue that the fragmentation of authority within the global system has rendered anachronistic the old ideal of centralized multilateral regulation of TNCs. Others extol the advantages of self-regulation as the only authentic way of ensuring that progressive approaches are entrenched within the corporate mentality. And still others would argue, based particularly on the work of Nicholas Luhman and Gunther Teubner, that there is an emerging global law that is not located in any one place, but instead relies on multiple, often overlapping, norm generators and compliance processes.³¹⁰ The *lex mercatoria* is the classic example of such a set of informal processes. In this view, any attempt at centralization will be ineffectual at best and counter-productive at worst. A further gloss is added by the suggestion by Yves Dezalay and Bryant Garth that the privatization of international commercial justice (primarily through arbitration arrangements designed to obviate the need to rely upon state legal systems) in recent years was driven in large part by the Cold War, welfare state interventionism and 'third worldism'.³¹¹ On this basis, it can be argued that the more concerted formal efforts to regulate TNCs, the greater the likelihood that the target group will devise alternative strategies to circumvent the regulatory attempts. All of these arguments are complex and deserve more careful analysis than they can be given here.

It must suffice for present purposes to argue that while the proliferation of voluntary codes and other initiatives is to be welcomed, such mechanisms are not sufficient in themselves to satisfy the requirement of systematic accountability which is central to the international human rights regime. Such initiatives are very often not based on international human rights standards, their monitoring is uneven, they are mostly overseen by the corporations themselves and they remain entirely, or at best largely, optional. The same criticism applies to the United Nations' Global Compact, launched in 1999 by the Secretary-General of the United Nations, Kofi Annan.³¹² While this initiative should certainly be developed, it must also begin to explore the possible shape of mechanisms to review the conformity of these various codes with human rights standards and to monitor and report on the private sector monitors.

Ultimately, however, such matters cannot be based on voluntary undertakings.³¹³ The standards thus set are excessively flexible and their conformity with international human rights norms is by no means assured. The element of accountability is lacking, in

so far as firms 'police' their own behaviour and international mechanisms, as well as representatives of civil society, are often excluded.

Some examples of the issues that have arisen in relation to children and the activities of TNCs have been given in a recent report prepared for UNICEF. The report argues that there is an urgent need for international regulation of transnational corporations, based on two case studies dealing with the marketing of breast milk substitutes and the regulation of tobacco.³¹⁴ While some of the analysis might have been overtaken in part by the World Health

Organization's adoption in 2003 of the Framework Convention on Tobacco Control, the point made by the study is that there is a need for the proponents of children's rights to pay greater attention to the impact of actions undertaken by non-State actors such as TNCs. There is clearly a need to develop more innovative approaches, by which existing international arrangements designed to achieve children's rights accountability can be adapted, to significantly enhance their capacity to monitor violations attributable to corporations but for which State accountability is altogether lacking or inadequate.

Notes

- 110 DFID, *Realising Human Rights for Poor People: Strategies for Achieving the International Development Targets* (2000).
- 111 International Law Association, Committee on Accountability of International Organizations, 2002 Report, available at www.ila-hq.org
- 112 H. Kovach, C. Neligan & S. Burall, *The Global Accountability Report 2003: Power Without Accountability* (London, One World Trust, 2003)
- 113 <http://www.ichrp.org> (see Working Papers: Accountability of NGO's - Draft Report) (accessed 16 March 2005)
- 114 Mary Robinson, 'Development and Human Rights: the Undeniable Nexus,' Geneva, 26 June 2000. See www.ohchr.org.
- 115 For a book-length study see Jutta Gras, *Monitoring the Convention on the Rights of the Child* (Helsinki, 2001).
- 116 This is not intended to overlook the important standard-setting role of the Commission in relation to the Convention on the Rights of the Child or in the preparation of Optional Protocols on children and armed conflict and on the sexual exploitation of children.
- 117 CHR res. 1990/68
- 118 CHR res. 1992/74.
- 119 CHR res. 1994/90, para. 17.
- 120 CHR res. 1993/83.
- 121 CHR res. 1994/91, para. 13.
- 122 CHR res. 2001/29; 2002/23.
- 123 CHR res. 1998/33.
- 124 CHR res. 1993/81; 1994/93
- 125 CHR res. 1995/25; 1996/24; 1997/19; 1998/30; 1999/40; 2000/44; 2001/48; 2002/51
- 126 CHR res. 1993/80; 1995/41; 1996/32; 1998/39; 2000/39.
- 127 CHR res. 1998/75; 1999/43; 2000/60; 2001/74; 2002/53
- 128 CHR res. 1990/74.
- 129 CHR res. 1990/74
- 130 See for example: CHR res. 1992/75; 1993/78; and 1994/91.
- 131 CHR res. 1995/79. See also: CHR res. 1996/85; 1997/78; 1998/76; 1999/80; 2000/85; 2001/75; 2002/92.
- 132 CHR res. 1999/80, section I, 2(b).
- 133 CHR res. 1999/80, section I, 2(c).
- 134 CHR res. 1999/80, section I, 2(g).
- 135 CHR res. 2001/75 para. 3. See also: CHR res. 2002/92 para. 3.
- 136 CHR res. 1996/85.
- 137 CHR res. 1998/76.
- 138 CHR res. 1999/80.
- 139 The phrase 'and other instruments' was added by CHR res. 2001/75.
- 140 The word 'poverty' was added by CHR res. 2002/92.
- 141 CHR res. 2000/85 para. 15(b).
- 142 CHR res. 1994/91, para. 5.
- 143 CHR Res. 1995/79, para. 13.
- 144 CHR res. 1997/78, preamble (emphasis added).
- 145 CHR res. 1997/78 section I, 2(d)).
- 146 CHR res. 2000/85 para. 13.
- 147 See for example: 'Rights of the Child' resolution 2001/75 (Part I para. 6); 'Rights of the Child' resolution 2002/92 (para. 7); 'Human Rights and Thematic Procedures' resolution 2000/86 especially para. 5(f); 'Human Rights and Thematic Procedures' resolution 2002/84.
- 148 CHR, Summary Record of the 32nd Meeting held at the Palais des Nations, Geneva, 14 April 1999, Rights of the Child, Special Dialogue on Children, E/CN.4/1999/SR.32 10 May 1999.
- 149 Ibid, para. 22.
- 150 Ibid, para. 8.
- 151 Ibid, para. 89.
- 152 For a provocative and challenging critique of the role accorded to children in comparable international undertakings see Antonella Invernizzi and Brian Milne, 'Are Children Entitled to Contribute to International Policy-Making? A Critical View of Children's Participation in the International Campaign for the Elimination of Child Labour', 10 *International Journal of Children's Rights* (2002) 403.
- 153 The reports examined were for: Democratic Republic of Congo E/CN.4/2001/40 (1 February 2001); Iraq E/CN.4/2002/44 (15 March 2002); Sudan E/CN.4/2002/46 (23 January 2002); Afghanistan E/CN.4/2002/43 (6 March 2002); Former Yugoslavia E/CN.4/2001/47 (29 January 2001); Cambodia E/CN.4/2002/118 (28 December 2001); Somalia E/CN.4/2002/119 (14 January 2002); Myanmar E/CN.4/2002/45 (10 January 2002); Burundi E/CN.4/2002/49 (7 March 2002); Haiti E/CN.4/2001/106 (30 January 2001).
- 154 E/CN.4/2002/44 (15 March 2002) paras. 19 and 65. See also: E/CN.4/2001/47 (29 January 2001) Former Yugoslavia (A section dedicated to gender-based violence notes that "the trade in women and children for the purpose of forced prostitution remains one of the most serious human rights violations now being committed in Bosnia and Herzegovina": para. 24. But this observation is not reinforced by a discussion of the Convention or of the Optional Protocol on the Sale and Trafficking of Children).
- 155 E/CN.4/2002/43 (6 March 2002) para. 26.
- 156 E/CN.4/2002/45 (10 January 2002) paras. 61 and 93
- 157 See for example: Sudan E/CN.4/2002/46 (23 January 2002).
- 158 See for example: Cambodia E/CN.4/2002/118 (28 December 2001).
- 159 Democratic Republic of Congo E/CN.4/2002/40 (1 February 2001) paras. 40-42, 130-131, 133-134.
- 160 See for example: Democratic Republic of Congo E/CN.4/2002/40 paras. 117, 133 and 177; Myanmar E/CN.4/2002/45 (10 January 2002) para. 102; Somalia E/CN.4/2002/119 (14 January 2002) paras. 42 and 72; Sudan E/CN.4/2002/46 (23 January 2002) paras. 68-70; Burundi E/CN.4/2002/49 (7 March 2002) especially paras. 91-94, 107, 113-114, 123.
- 161 E/CN.4/2002/32 (6 March 2002)
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4

THE WORLD BANK AND THE IMF: A CASE STUDY

THE CRC AND THE INTERNATIONAL FINANCIAL INSTITUTIONS

Any analysis of the impact of the Convention on the Rights of the Child on international institutions would be incomplete without a careful study of the relationship between the International Monetary Fund and the World Bank on one hand and children's rights and the Convention on the other. While their role is sometimes overstated, especially by those in search of a couple of convenient scapegoats for many of the ills of the world, few commentators today would question the propositions that these two institutions wield significant influence over the policy options open to most countries in the developing world or that they are key players in shaping international thinking about development issues.³¹⁵ These vital roles seem to us to justify an in-depth review of their policies in so far as they are relevant to the promotion of the rights recognized in the CRC. The case for such a study is all the stronger precisely because the institutions themselves have not undertaken such self-assessments. Nor, for the most part, have non-governmental organizations that have scrutinized the policies of the international financial institutions, done so from a CRC perspective.

Although it was UNICEF that pioneered the effort to bring a 'human face' to the structural adjustment and related policies of the international financial institutions as early as the mid-1980s,³¹⁶ relatively little sustained work has been done to examine these issues in the light of the virtually universal ratifica-

tion of the Convention on the Rights of the Child that was achieved in the course of the 1990s.

But rather than exploring these questions in the abstract, as much of the literature on the international financial institutions and human rights has tended to do, this study begins with a detailed case study of the role which was accorded to the Convention and the rights it enshrines in the context of the East Asian financial crises of the late 1990s, with particular reference to the experience of Indonesia. There are a number of reasons for this choice. In the first place, it was arguably the Asian country most dramatically affected by the crisis. Secondly, the impact on children was especially significant and a number of studies have been undertaken which shed important light on this dimension. Thirdly, the Indonesian case represents an important turning point in the evolution of the thinking of the international financial institutions in relation to social issues. An IMF public relations document issued in March 2001 expressed the resulting policy, without making any mention of the Indonesian case or the traumas that it caused for the IMF itself: "The IMF's growing emphasis on social policy issue has emerged from an increased awareness that macro-economic and structural policies have important social implications, which in turn have ramifications for the domestic ownership of economic reform programmes and for promoting sustainable economic growth."³¹⁷ Fourthly, the experience of countries like Indonesia has resulted in far greater importance being attached to the concept of 'country ownership' of policies and programmes designed to respond to financial crises and to address fundamental challenges of poverty. The resulting empha-

sis on Poverty Reduction Strategies, which will be examined in depth below, opens up a major potential opportunity for CRC-based objectives to be given particular prominence in policy-making in such contexts.

This part of the report begins with an examination of the extent to which the rights of children in Indonesia were affected by the financial crisis and considers the extent to which children's rights and the Convention in particular, informed or were included in the policy approaches of the Bank and the Fund. This aspect of the report is based upon a careful study of the relevant legal and economic literature, as well as extensive interviews conducted in Indonesia, Geneva, Washington DC and New York.³¹⁸

This chapter also deals with the questions of whether the Bank and Fund 'can' (from a legal point of view) - and if so - 'should' (having regard to a wider range of factors) include children's rights and the CRC as an explicit element within their activities and policies in future. The report then canvasses some of the main practical and other barriers to the explicit incorporation of the CRC, principally as identified through the interviews conducted in the preparation of the report and concludes with some reflections on future policy directions.

This part of the report does not seek to evaluate the macro-economic arguments about whether the Fund and Bank programmes in some way caused or exacerbated the East Asian crisis. Nor does it explore whether an explicit children's rights approach would have softened the impact of the crisis upon children. The first of these questions has been the subject of an extensive empirical literature which cannot usefully be added to here,³¹⁹ but some elements of which are taken into account in the present analysis. Indeed, a recent IMF review of its experience in relation to Indonesia specifically acknowledges that "differences of view will likely persist for a long time" as to "whether the policy advice given by the IMF to Indonesia during the Asian crisis was correct."³²⁰ The second raises issues of causation which are complex and most probably not susceptible to definitive findings anyway. Apart from the question of whether the correctness of specific Bank and Fund policies can really be empirically validated, there remain two additional problems. The first is the paucity of relative data, despite the number of studies which have been carried out. The second is that attempts to factor values such as human rights into the overall equation by using quantitative methods, are prone to understating or ignoring their essential character and importance. Irrespective of whether access to education, food, or free speech can be empirically shown to help or hinder growth, project performance or prevailing development ideals, one of the basic premises of a CRC-based analysis is that questions of fundamental rights cannot be taken out of the policy equation solely on the grounds that they are thought to be problematic in terms of the realisation of macro-economic or other goals.

Since Indonesia is -- and was from the outset of the

1990s crisis -- a party to both the CRC and the Convention on the Elimination of All Forms of Discrimination against Women, it is appropriate to analyse the crisis and its implications through the lens of a human rights approach, the key characteristics of which can, for present purposes, be taken to be: (1) a non-negotiable normative baseline³²¹ (2) grounding action in obligation, as far as possible, rather than charity (3) mandating a focus on the most excluded (4) a predictable framework for action, with the advantage of objectivity, relative determinacy and the definition of appropriate legal limits (5) a quintessentially empowering strategy for the achievement of human-centred development goals (6) the availability of legal and other means to secure redress for violations and (7) recognition of the principle of accountability, not only in relation to the State Party concerned, but also for a significantly wider range of actors within the context of international development cooperation.

By the same token, there are significant caveats which apply to the usefulness of a human rights approach in any given situation. The first is that while providing an analytical framework for the consideration of the complex issues involved in the development equation, it cannot always be expected to yield definitive answers. The second is that such an approach will often shed only very limited light on the question of which precise mix of policy approaches will be the most appropriate. Thirdly, such an approach must not rely upon overstated assumptions as to the practical value of formal redress through legal processes and institutions. As far as possible, policies to promote human rights need to be open-textured, flexible and capable of application in diverse situations in policy and programmatic contexts, not limited to formal adjudication in courts and tribunals.³²²

4.1 The effects of the crisis in Indonesia on children's rights

a) Some background

The first thing to be said about Indonesia is that it is "a place where no cliché works. ... The place is simply too complex."³²³ At the time of the crisis there were approximately 201 million people in Indonesia, within 17,000 islands. The population consists of "300 ethnically distinct groups who speak a multitude of local languages and practice four major religions (Islam, Christianity, Buddhism and Hinduism). ... Whether in economic, geographic, religious, cultural or ethnic terms, Indonesia has a pronounced diversity." Approximately 35 per cent of Indonesians fall into the category of urban/modern, about 60 per cent traditional, and about 5 per cent live in somewhat isolated conditions.³²⁴

In such a setting, it is evident that effective government regulation and the undertaking of social, demographic and anthropological analyses will constitute complex challenges. The ethnic make-up of Indonesia is famously diverse, as is the character

and variety of 'social capital' and coping mechanisms at community level. Political and ethnic tensions are widespread and the role of the armed forces is complex, controversial and evolving. At the time of the crisis, civil society capacities and activities were limited and fell short of being able to exert an appropriate degree of political and policy influence in the post-Suharto era. The overall political and economic situation was still enormously insecure and the possibility of deterioration, rather than improvement, very real.

The availability of data is a major challenge to undertaking an evaluation of the type attempted here, especially a comparison of the pre- and post-crisis situations for children in Indonesia.³²⁵ Indonesia is by no means unique in this regard since the broader problem of the limitations of quantitative analysis in evaluating structural adjustment programmes have long been identified in the literature.³²⁶ In the interviews on which this report is based, many non-governmental experts (and even some government officials) pointed to continuing serious problems with official data quality and availability since 1997.³²⁷ In 1999, the World Bank Vice-President for the East Asia and Pacific Region expressed unease about the "important gaps in information" that still remained, especially those that reflected the "voices of the silent poor."³²⁸

Many of the observations in this report on the substantive effects of the crisis, do not focus solely or explicitly upon the situation of children. A broader approach is sometimes essential in order to capture the overall context in which the situation of children needs to be considered. Nor should it be assumed that children are in every situation more vulnerable than other members of the population, even though they are our principal concern here because of the CRC-lens through which the issues are being viewed.

b) The impact on children

As to the general effects of the East Asian crisis, it is commonly agreed that Indonesia was the country worst hit by far.³²⁹ As early as 2000, research was beginning to confirm the "drastic toll the Asian economic crisis [had] taken on children."³³⁰ According to one credible local NGO, infant mortality rates nearly doubled as a result of the crisis, growing from 55 deaths per 1,000 in 1995, to 100 per 1,000 in 1998.³³¹ In May 2000, UNICEF had warned of a "lost generation" of youth as a result of the economic crisis,³³² an assessment with which many academic and NGO commentators agreed. It was estimated that 8 million pre-school children were undernourished and a university report found that the number of malnourished children of all ages had risen from 8 million in 1997, before the crisis struck, to 20 million in 2000, a staggering increase of 250 per cent.³³³

Health and education were among the key crisis-affected areas, notwithstanding concerted efforts by the government, with World Bank and Asian Development Bank support, to improve access to primary education.³³⁴ A survey released in 1999, found that overall use of health care facilities by

children dropped significantly after the onset of the crisis in mid-1997. UNICEF reported that maternal health had also been adversely affected.³³⁵ High among the costs of the crisis for many families, is that official and unofficial school fees effectively put education for their children beyond reach.³³⁶ As the World Bank put it, "the combination of reduced public funding for education, higher prices for schooling and lower family incomes, is expected to result in a decline in primary and secondary school enrolment among the poor." And "while it may not be possible to arrive at precise figures, policy-makers, donors, teachers, principals, parents, NGOs and other stakeholders agree that the impact of the crisis on poor children will be severe."³³⁷ Qualitative indicators supported these accounts.³³⁸

It should be acknowledged, however, that these figures and a wide range of other reports with which they are consistent, are difficult to reconcile with the findings contained in a university study which examined the impact of the financial crisis on children in a hundred Indonesian villages. The author found 'little evidence that the crisis had a dramatically negative impact on children. School attendance dropped slightly after the onset of the crisis but then rebounded to higher than pre-crisis levels. Fewer children are now working, although the older children who are working and are not attending school seem to be working longer hours. Children's health status appears to be relatively stable ...'³³⁹

An October 2002 report by the UN Commission on Human Rights' Special Rapporteur on the Right to Education, which dealt exclusively with the situation in Indonesia, referred only in passing to the impact of the financial crisis and went on to recommend the need to elaborate a "rights-based education strategy."³⁴⁰

The number of working children in Indonesia went from 2 million before the 1997 crisis, to some 2.5 million two years later, according to the Government's own statistics.³⁴¹ But the full extent of the problem seems to be far higher, according to a 2002 survey of different estimates:

The State Bureau of Statistics (BPS) stated that 1.9 million children through age fourteen, were working in 1998. The ILO and the NGO World Vision argued that official estimates were too low, citing the fact that between eleven and twelve million school-age children (up to age eighteen) were not attending school and a large number likely were involved in some form of work. The ILO estimated that between 6 and 8 million children worked and over 3.4 million children work 10 hours or more per week. World Vision estimated that there were 6.5 million children working. Of these 6.5 million children, 4.1 million worked in the informal sector and 2.4 million worked in the formal sectors. Other NGOs estimate that more than 10 per cent of children worked more than 4 hours per day and that over thirty five per cent of these children worked over thirty five hours per week. Other NGOs estimate that 8.5 million school-age chil-

children are not enrolled in school and most are employed in the underground economy with no legal protection and poor compensation.³⁴²

There are significant numbers of street children in Indonesia, although as in most situations, statistics are rough and estimates vary considerably. A recent study estimated that there were some 170,000 street children living in urban areas, while another provided a lower estimate of 100,000 in the cities but as many as six million abandoned children in the country as a whole.³⁴³ In 2000, UNICEF reported that about 150,000 street children, with an estimated 40,000 child sex workers.³⁴⁴ In the assessment of some NGOs, it is possible that that figure may have increased by more than sixty per cent as a result of the economic crisis.³⁴⁵ One unofficial UN estimate was that the overall increase in the number of street children in the country as a result of the crisis was five-fold.³⁴⁶

According to some health specialists, malnutrition is the biggest crisis-induced problem. The number of children in hospital is said to be an 'iceberg phenomenon,' reflecting only a fraction of the overall problem. There have also been reports of hospitals refusing treatment to children suffering from malnutrition, due to a lack of resources.³⁴⁷ The estimate of the incidence of malnutrition in Yogyakarta was said to lie between 15-20 per cent of the population.³⁴⁸ Overall, UNICEF estimated that as of 2000, eight million preschool-age children were undernourished, threatening the development of brain function. Official government figures put the incidence of malnutrition in babies born since 1997 at 30 per cent.³⁴⁹ According to government statistics made public in November 2002, more than 25 per cent of the eighteen million children under five are thought to be suffering from some form of malnutrition, up from 9.8 per cent in 1995.³⁵⁰ The Ministry of Health's Community Nutrition Director attributed the 2002 statistics mainly to "the economic crisis, which has plagued the country since 1997..."³⁵¹

4.2 The roles of the IMF and the World Bank in relation to children's rights

In order to illustrate the kinds of presumptive effects on children's rights of macroeconomic policies, including those supported by the IFIs, it is helpful to consider the so-called 'concentric circle' model put forward by de Vylder.³⁵² At the hub of the circle are those policies and legislative instruments which explicitly target children, such as provision of primary health and education and regulations against exploitative child labour. According to de Vylder, "most of the Articles in the [CRC] are to be found in this inner circle." In the middle circle are "policies and institutions which have a strong, but more indirect, impact," such as "redistributive tax and public expenditure policies, traditional social security and welfare policies and in general, policies directly

affecting the situation of the family." Finally, in the outermost circle are "general policies where the impact may still be strong but even more indirect, such as trade and exchange rate policies, WTO rules, monetary policies or environmental policies."³⁵³

a) The CRC in the work of the Bank and the Fund

In general, the CRC appears to have had a very limited direct policy-making relevance within the context of either the Bank's or the Fund's response to the crisis. This was particularly so in the case of the Fund which, for a long time, regarded most 'social issues' and the design of Social Safety Nets (SSNs) as being essentially within the province of the Bank. There were exceptions to this rule in Indonesia, such as when the Fund acted to implement rice subsidies as the crisis worsened. However, the distinctly separate working context of the Bank and Fund and fact that the Bank was sometimes left with a clearly inadequate period of time in which to devise an SSN to be attached to the Fund's Policy Framework Papers, were matters of concern.

Since 1999, the rhetoric has changed, although it remains unclear whether the practice will be very different. A Fund 'Factsheet' on the social dimensions of its policy dialogue with countries, emphasizes that the Fund is concerned about social policies and that programmes which it has supported have sought to promote universal access to basic social services. But before the reader interprets such statements as pre-empting a fundamental change of heart, it is important to read the remainder of the analysis which makes clear that while the Fund will seek to increase public spending in certain contexts for this purpose, its principal focus is upon "improving transparency in governments' decision-making and their capacity to monitor poverty-reducing spending and social developments" and that "in its work in these areas the IMF staff relies heavily on the expertise of other institutions," most notably the Bank.³⁵⁴ Thus attention to social policy will be undertaken by national governments and the World Bank. In the period since the Indonesian crisis, two Social Development Specialists were recruited to advise Fund officials in the implementation of the Poverty Reduction Strategy Paper (PRSP) process and efforts have been made to involve 'governance' experts. Nonetheless, policy change has been slow in coming, as confirmed by the reaction of the media and NGOs to a statement in mid-2003 by the IMF's Managing Director, Horst Köhler, that the reimbursement of Argentina's debt should not be made at the expense of the population's welfare. He was reported as saying that he was convinced that the IMF had the obligation to help [Argentina's government] define an economic policy that is capable of bringing better living conditions and less poverty to most people.³⁵⁵ Press reports at the time noted that "these words contrast deeply with the IMF's previous approach to economic crises, long criticized by NGOs and development campaigners for being too socially harmful."³⁵⁶ Notwithstanding the Fund's new social policy rhetoric, the prospects for getting international human rights instruments such as the CRC onto its radar, still seem somewhat remote, even in 2003.

The position within the Bank is considerably more complex. An increasing number of functional units and thematic teams within the Networks (the advisory parts of the Bank) and Regions seem to be fluttering, albeit cautiously, around the flame of human rights. In cases such as the HIV/AIDS programme, human rights are very clearly at the core of current diagnoses of the problem and at the heart of needed solutions, such as, for example, in relation to rights to confidentiality, rights in the work place, public services, discrimination, stigmatization, and women's rights. The relevance of children's rights has been recognised too, in relation for example to reproductive rights, sexual exploitation, access to condoms and education.

In response to the HIV/AIDS pandemic, the Bank's advocacy and programming accelerated after 2000, commensurate with the mounting global death toll and increasing degree of political support for serious action. The Bank's programmes in a number of countries have begun to incorporate explicit human rights components, particularly in so far as prevention strategies are concerned, with strongly principled stands evident in particular cases on the requirement for appropriate legislative measures. However, as at 2003, these elements are still not prominently mainstreamed.

The same thing might be said of the CRC in relation to the Bank's approaches to issues such as child labour, health and education. The CRC is occasionally acknowledged explicitly as being part of the overarching international legal framework within which the Bank's responses are situated³⁵⁷ and more frequently, as a source of inspiration for the Bank's approaches, or benchmarks of international community concern or consensus on issues within the Bank's mandate. In exceptional cases the Bank has explicitly – albeit without reliance upon specific legal formulations – suggested that a client country had violated its obligations under the CRC, for example in connection with the Bank's criticisms of orphanages in Bulgaria in April 2001.³⁵⁸ There is also some evidence that the CRC has been used to assist the Bank in defining certain legal issues. For example, the International Finance Corporation and the Multilateral Investment Guarantee Agency have child labour policies that have made use of the CRC definition of child labour.³⁵⁹

Finally there are anecdotal claims that international human rights treaties, even where the country concerned has not ratified them, sometimes serve as reference points for Bank appraisals of national laws and international obligations in the social and environmental assessment processes. Indeed, quite a striking example is to be found in the work of the Bank's Gender and Law Thematic Group, posting a ratification chart of major international human rights instruments (including the CRC) bearing on equality of access to the labour market in the Middle East and Northern Africa Region.³⁶⁰ However, on the basis of publicly available information, this would appear to be an isolated case. Certainly, written internal guidance or policy material encouraging more systematic

exploration of such normative and functional linkages – in the gender, HIV/AIDS, child labour, judicial reform or other areas – do not currently appear to exist.

On the basis of the research and interviews conducted for this report, it seems safe to conclude that international human rights standards and instruments in general and the CRC in particular, while known to a reasonable number of Bank officials, especially those working directly in areas such as education, gender issues, HIV/AIDS issues, child labour and to some extent judicial reform, have:

- arisen only selectively in a practical programmatic context
- been of little practical relevance in the discharge of the Bank's social safeguard functions and assessment procedures and
- been of rather marginal and at best 'inspirational', relevance to the Bank's research agenda and substantive policy development.

b) The place of children in the Bank's Indonesia programme

It is not possible within the limits of the present study to review systematically all of the Bank's programmes within Indonesia in recent years. It must therefore suffice to review the most significant publicly available project and programme information. Many of the Bank-supported projects ongoing in 2000 had either been conceived or had already commenced prior to, or around the onset of, the crisis in 1997, although a total of US\$2 billion in new lending commitments to the social sectors was said to have been mobilized over the two year period until July 1999.³⁶¹ A perusal of available project documentation reveals that although the crisis undoubtedly galvanized the Bank to focus on the worst social manifestations of the crisis and generated a range of new initiatives and resource flows, many of the programmes in existence as at 1997, were mainly sought to be adapted or broadened in an attempt to cope with perceived crisis exigencies.³⁶² This factor alone makes a clear delineation and discussion of pre- and post-crisis responses difficult, in contrast to the approach taken here.

The Bank's activities in the social sectors in general are said to address short-term as well as long-term issues and to have various direct and indirect impacts on children. Examples include "school feeding programmes, supplemental feeding in clinics, vaccination campaigns and subsidies for essential drugs and school tuition that aim to curtail hunger, malnutrition, diseases, and schools dropouts."³⁶³ The Bank's Vice-President has noted that it supported "broad sectoral programmes, public expenditure reviews ... and [helped] to build key institutions." Furthermore SSN programmes were said to be 'aimed directly at the poor' and included "support for community programmes, social funds, policy measures like regional targeting and work with NGOs."³⁶⁴

A few specific remarks are warranted on the Bank's Indonesian lending activities.³⁶⁵ In terms of quantum,

the largest lending activity relating to the crisis was the 'Policy Reform Support Loan,' in the sum of US\$1 billion with the overall purpose of supporting Indonesia's efforts to rebuild confidence and restore rapid poverty-reducing growth as quickly as possible. Principal elements were said to include: increasing the "efficiency and transparency of public sector operations; rebuilding an efficient, competitive and properly supervised banking sector; improve governance, increase productivity, and ensure environmental sustainability and shield poor and vulnerable groups."³⁶⁶ Other key elements included: the West Java Basic Education Project; an Early Childhood Development Project (directed at the nutritional and educational well-being of children in three provinces up to the age of six, including an emergency nutrition component designed to protect infants to two years old from malnutrition);³⁶⁷ Junior Secondary and Basic Education projects in several provinces;³⁶⁸ a District Health project; the Kecamatan Development Project; Village Infrastructure Projects; the Nusa Tenggara and Sulawesi Regional Development Projects; and Urban Development Projects.³⁶⁹

From this overview and based upon interviews, children's interests and needs were directly addressed during the crisis within the framework of health, nutrition (including safe motherhood) and education programmes during the East Asian crisis. However, the lack of any child labour projects or programmes seems curious, in view of the scale of the problem and its obvious connection with the education and health sectors. It is unclear when the Bank began a separate focus on children or whether children have been a 'cross-cutting element' – as gender and the environment have – in other Bank-supported initiatives. Neither is it clear what, if any, overarching analytical strategy was employed in order to guide the Bank's responses and whether necessary inter-sectoral linkages are adequately captured thereby. There was in general, however, a failure adequately to link social and children's issues to the overall macro-economic programme design. Many of the projects are expressed to have important civil society participation and empowerment linkages, but on the basis of available information it appears that none had express human rights components, or were human rights-based.

This conclusion is underscored by the fact that while the Bank has published a major study to review its performance in relation to the macroeconomic aspects of the crisis,³⁷⁰ it does not appear to have undertaken a comparable review to assess how its response to the social dimensions of the crisis might have been improved. Although it was instrumental in forming a consortium that created a Social Monitoring and Early Response Unit which analyzes socio-economic and poverty issues in Indonesia, studies produced by the latter have no necessary impact within the Bank. Similarly the Bank's July 2002 Country Assistance Strategy Progress Report, which brings together in one place an overall evaluation of the Bank's programme in Indonesia, makes not a single reference to the words 'child' or 'children' (except in the statistical appendix on p. 40), let alone to the CRC or children's rights.³⁷¹

c) The place of children in the Fund's Indonesia programme

Between 1997 and early 2003, the IMF sent over seventy Technical Assistance missions to Indonesia to advise on virtually every aspect of the country's economic policy. While a recent study lists 'social expenditure and safety net' as the first item on which advice was provided,³⁷² it would be difficult to make the case that the Fund devoted a lot of its own energies to those issues, except in relation to the need for cuts in the relevant expenditures. Nonetheless, the Fund itself claims to have "paid increasing attention to the social and distributional dimensions of fiscal adjustment", with evidence to support this proposition resting on "the fact that social spending has been largely protected in countries like Turkey in 2001 and Brazil in 1998 and for Asia the social safety nets were strengthened in the aftermath of the crisis".³⁷³

In July 2003, the Indonesian Government announced that it had decided not to enter into a new financial arrangement with the Fund when the current programme expires at the end of the 2003.³⁷⁴ That means that while Indonesia might wish to continue to consult the Fund, it will no longer have to submit policy proposals in the form of letters of intent designed to win the Fund's formal approval for its policies.

During the period of heavy reliance upon the Fund and throughout the crisis, the consideration of the place of children within the Fund's programme design in Indonesia, appears to have been minimal. There is no clear evidence that at any time during the crisis, children's needs or rights significantly influenced the design of the macro-economic matrix considered appropriate for Indonesia.

This assessment is strongly reinforced by the recently published review of the experience in Indonesia and other crisis states, which was prepared by the IMF's Independent Evaluation Office. In a lengthy Evaluation Report entitled *IMF and Recent Capital Account Crises: Indonesia, Korea, Brazil*, which was published in July 2003,³⁷⁵ neither the word 'children' nor the word 'rights' appears at all in the ninety page main report. In the very detailed annex on Indonesia, the word 'children' appears twice, but on each occasion the reference is to the influence exerted by the children of President Suharto.

A review of the policy documents adopted during this period, confirms this conclusion. This may be illustrated by reference to the facility entered into by the government of Indonesia on 4 February 2000, when the Fund approved a three-year SDR ('Special Drawing Right') 3.638 billion (worth about US\$4.7 billion as of mid-2002) Extended Fund Facility ('EFF') to support Indonesia's economic and structural reform programme. Of the total, SDR 260 million was said to be available immediately, with further disbursements being made available on the basis of 'performance targets and programme reviews in the period ahead.'³⁷⁶ The Memorandum of Economic and Financial Policies for Indonesia for 1999 and 2000

(‘MEFP’ or ‘Letter of Intent’), was published in January 2000. Official statements indicated that the Fund and the World Bank “collaborated closely in the discussions with the authorities on all the key elements of the programme.”³⁷⁷ All of the available evidence would seem to indicate that the extent of the Fund’s influence over the content of the programme’s terms is somewhat understated in such official accounts.

The medium-term economic strategy for Indonesia was said to have four main planks: “First, to make the macroeconomic policy mix fully supportive of recovery while entrenching basic price stability. Second, to reinvigorate bank, corporate and other restructuring policies, which are crucial to sustaining an economic recovery accompanied by lasting poverty reduction. Third, to rebuild key institutions, thereby strengthening Indonesia’s capacity to implement economic and social policies with popular support, transparency and good governance. Fourth, to improve greatly natural resource management ...”³⁷⁸ The medium term macro-economic strategy reflects the Fund’s standard matrix, with some noteworthy variations to take account of particular challenges in the areas of fiscal and administrative decentralization, anti-corruption measures and judicial and legal reform.³⁷⁹ The core areas covered could be summarized as bank restructuring, corporate restructuring and privatization, rebuilding key economic institutions, rule of law programmes, corporate governance including oversight issues, capital market regulation and improved natural resource management.³⁸⁰

The Letter of Intent contains a section entitled ‘Fiscal Policy and the Social Safety Net,’ which provides for budget deficit financing of approximately 5 per cent of GDP, expected to be “fully met by privatization receipts, asset recovery and foreign financing.”³⁸¹ The principles for the Fiscal Year 2000 budget were said to include: “to start the process of gradually reducing untargeted subsidies, while protecting small household users from their impact and strengthening targeted poverty-alleviation programmes; and “to begin to restore public sector wages, especially for the most senior officials, concurrently with administrative reform and stringent penalties on corruption.” Further details of proposed wage rises for public officials, including the judiciary, were provided. The near-term macro-economic policies relied upon, related principally to: fiscal policy and the SSN, monetary and exchange rate policies, and balance of payments and external policies. Structural reforms were divided into fiscal and trade policy reforms, fiscal decentralization, banking system reforms,³⁸² corporate restructuring, legal reform and governance, reform and privatization of state-owned enterprises, the energy sector and other structural reforms.³⁸³

The three main elements of Indonesia’s social spending were said to be: the SSN, poverty alleviation programmes, and targeted fuel and energy subsidies. The SSN occupied about one third of total public spending for the FY 2000 and includes the following principal components: (i) the rice distribu-

tion programme, (ii) a health component, (iii) specific employment programmes, including to enhance women’s employment, (iv) a programme to provide funds directly to communities, (v) scholarships to needy students and block grants to targeted schools, and (vi) poverty alleviation.³⁸⁴

Some six subsequent Letters of Intent have confirmed and developed this strategy and the IMF’s Executive Board has conducted eight performance reviews of the arrangements.³⁸⁵

The Fund-approved programme therefore is broadly consistent with the general premise that social issues (and children’s rights) are best addressed by the Fund indirectly, through improvements assumed to flow from a stabilized, privatized and liberalized economic base, considered appropriate for promoting investor confidence and ensuring economic growth. The division of labour between the Bank (in charge of longer-term development and social issues, into which category children’s needs or rights fall) and the Fund (in charge of macro-economic design) is the principal reason why children have not made it onto the Fund’s radar screen. Thus, in its July 2002 Country Report on Indonesia, the Fund makes no mention of children and the only reference to social dimensions comes in an unelaborated observation on the medium-term outlook, that if a more balanced budget could be achieved in the years ahead “there would be room to boost the priority social and development spending needed to maintain the basic infrastructure, sustain growth, and reduce poverty.”³⁸⁶

The suggested compartmentalization of responsibilities is far from completely watertight, however. As noted above, early in the crisis the Fund addressed an important social issue by taking the initiative to reintroduce subsidies on rice, following food riots and popular protests against Fund-sponsored fiscal tightening measures. There were also various other instances in which the IMF decided to take responsibility for non-‘core’ macro-economic issues. Similarly, in its July 2002 overview report on Indonesia, the Fund observes that Indonesia’s ratification of certain ILO labour standards conventions is “particularly welcome.”³⁸⁷ A senior IMF official subsequently called for Indonesia to adopt “a sensible labour market policy that strikes a balance between protecting workers’ rights and preserving a flexible labour market.”³⁸⁸

A recent paper suggested that the reason for less emphasis on social spending during the crisis lay primarily with the Government, even if the IMF might perhaps have done something more itself:

[During the crisis] fiscal policy was far less expansionary than [IMF targets] allowed under the programme. This reflected in part the Ministry of Finance’s fiscal conservatism ... but also the absence of institutional mechanisms to increase the targeted spending increases under the social safety net. With hindsight, the IMF could have been more proactive in pushing for a looser fiscal stance from the start.³⁸⁹

As will be seen in more detail later, to a large extent the question of whether and the extent to which, the Fund can and ought to take more direct responsibility for social (including children's) issues and rights is a strategic one, limited more by institutional factors than by the legal constraints which are often invoked to argue against such proposals. This assessment is confirmed by the July 2003 statement, already noted earlier, by the Fund's Managing Director in relation to Argentina, when he acknowledged the IMF's responsibility to help define "an economic policy that is capable of bringing better living conditions and less poverty to most people":

d) Some relevant general critiques of IFI programmes during the East Asian crisis

■ Preliminary remarks

The first point to be made as far as macro-economic design is concerned, is that despite occasional acknowledgements that some things might have been done differently, the Fund in general appears to remain convinced of the appropriateness of the basic ingredients of its economic prescriptions in East Asia. Fund officials often observe that the problem is that client countries have failed to implement the Fund's prescriptions sufficiently. To the extent that some Fund responsibility for erroneous programme design is admitted, the concessions generally go to issues of timing and sequencing, rather than content, although admissions of general failure to predict the severity of the East Asian crisis are fairly self-evident and given freely.³⁹⁰

The second point concerns the limited availability of the data which might make it possible to compare the pre- and post-crisis situation of children in Indonesia. Although a number of detailed micro studies have been done, focusing on issues such as school enrolments and attendance in a small number of villages, the sort of detailed country-wide social data which would provide the foundation for an in-depth study, is lacking. Discussions of the impact of the policies pursued by the IFIs thus remain inevitably at a level of some generality.³⁹¹

A related issue is that this discussion would be much less relevant if it were the case, as is sometimes claimed, that the policy influence of the Bank and Fund in East Asia was, at all material times during the crisis, rather limited. The extent of the IFIs' policy influence obviously varies according to the specific context, but there is little doubt that in the East Asian crisis and in Indonesia in particular, the IFI's policy influence was considerable. The following elements support this proposition:

- A survey of opinions, both within and outside the IFIs, undertaken in the course of interviews conducted for this study³⁹²
- A survey of media reports and evaluations from 1997 until the present³⁹³
- A proper appreciation of the significance of the phenomenon of cross-conditionality and the Fund's role (in particular) as 'gatekeeper' for international and bilateral aid and private capital flows and³⁹⁴

- An objective appraisal of the timing and degree of correspondence between the government of Indonesia's publicly stated policy positions, including on such matters as pursuing resolution of the 'Bali Gate' scandal³⁹⁵ and other high level corruption prosecutions and perhaps most tellingly of all, the handling of the East Timor referendum's aftermath and those of the IFIs.

One important consequence that flows from this linkage is that a greater degree of influence ought to go hand in hand with a greater degree of responsibility. This is also consistent with the question of the human rights obligations of the IFIs as a matter of international law. While detailed consideration of the international legal foundations for human rights responsibility lies beyond the scope of this report, one can proceed confidently from the basic proposition that the IFIs as subjects of international law, have a baseline duty to respect, or at the very least to observe a duty of vigilance, not to violate or collaborate in the violation of, human rights standards in force at the national level.

A final preliminary comment concerns the history and nature of the relationship between the Bank and the government of Indonesia at country level. A series of quite fundamental critiques of the Bank's policy approaches in Indonesia were revealed in the Operation Evaluation Department's (OED) Country Assistance Note, in February 1999. This Evaluation is worthy of particular mention here, inasmuch as it illustrates the constraints upon the Bank's dealings with the government in Indonesia before and at the beginning of the crisis and the reaction to such systemic issues as corruption.

As the Evaluation indicated, the Bank has had an unusually close and long-standing relationship with the government in Indonesia³⁹⁶ and "willingly and for many years on a large scale funded projects linked to [former President] Suharto."³⁹⁷ In the view of many, the Bank's leverage and capacity for independent and principled action (in accordance with its own policies on corruption, for example), was diminished as a consequence of the nature of its relationship with the government.³⁹⁸ The account in the OED Country Note suggests that senior Bank management were compromised in their dealings with the Government of Indonesia, playing down Board concerns about the Bank's strategy and ignoring staff warnings, in an effort to preserve the Bank/government relationship and placing undue reliance upon proffered official indicators of Indonesia's economic performance.³⁹⁹ Staffing changes within the Bank appear to have affected its institutional memory and in other respects further impaired the Bank's capacity to respond.⁴⁰⁰ The OED particularly questioned the decision of the Bank to avoid financial sector conditionality that would have accompanied a structural adjustment loan, instead (in July 1998) implementing a fast-disbursing 'PRSL' to address Indonesia's systemic problems.⁴⁰¹ As a consequence of choosing this quick-disbursing instrument, the Bank's ability to track disbursements and to remedy systemic shortcomings was significantly curtailed.

Some of the criticisms within the OED Note are especially blunt and suggest that evidence of a failed financial sector strategy (essentially involving the liberalization of interest rates and financial sector deregulation without adequate legal or accounting structures or the capacity to supervise) was played down, in deference to the need to preserve the Bank/government relationship and that ‘unjustified penalties’ were visited upon the career prospects of some Bank staff who had brought the issues to light.⁴⁰³

Many staff within the Bank take issue with the OED’s views and assumptions on certain points, including on the latter point regarding disciplinary action being visited upon whistle-blowing staff. General criticisms were also levelled by some staff that the OED:

- Is disconnected from national level realities
- Exaggerated the extent to which Bank officials ignored corruption,⁴⁰⁴ discounted the problems presented by the lack of political space in Indonesia
- Overstated the degree of the Bank’s influence on the Indonesian government and
- Failed to appreciate or properly weigh the delicate political balance upon which rested the Bank’s continued presence and ability to operate in Indonesia at all material times

A further criticism of the OED report was that it failed to recognize that increased use of conditionality against Indonesia in the past, may have pushed the government over the precipice, by dint of private sector reaction and capital flight, following the World Bank’s lead. However in various respects this explanation seems difficult to reconcile with disclaimers concerning the minimal extent of the Bank’s leverage and policy influence.

While the present analysis cannot purport to resolve these disputed accounts, it is important to bear the objections to the OED evaluation in mind when weighing up the criticisms and recommendations contained therein. Moreover, these criticisms must be kept in context, since it is clear that the Bank’s approach to corruption and similar matters have taken a relatively principled and generally more constructive turn in light of crisis events, as shown by:

- The principled and strenuous conditionalities attached to both Bank and Fund lending, relating to the resolution of the ‘Bank Bali’ scandal and prosecution of other high-level corruption cases,⁴⁰⁵
- Highly effective ‘backdoor’ initiatives on human rights in East Timor and
- Increasing dealings with civil society partners.⁴⁰⁶

By the same token, if we assume that the general thrust of the OED critique of excessive Bank proximity and deference to the government is warranted, it is not difficult to appreciate why human rights issues in general, including concerns relating specifically to children, would not have been raised or pursued with any vigour by Bank officials, vis-à-vis the Government of Indonesia.

In the aftermath of the crisis, various programmatic improvements were introduced, involving participatory and empowering community-driven implementation strategies on particular projects⁴⁰⁷ and general ‘civil society outreach’ initiatives by both Bank and Fund, driven by a combination of public pressure, instrumentalist developmental rationales and the practical necessity to explore new partnerships and modes of cooperation in the post-Suharto political vacuum.

The IMF had quite a different history with Indonesia and established an in-country office only at a relatively late stage in the crisis. Accordingly, lessons to be drawn from the OED’s qualitative observations are obviously of less direct relevance to the Fund, save to the extent that they describe the general political climate in which the IFIs operated.

The IMF has acknowledged that it may have erred in East Asia in imposing unduly strict fiscal discipline at the outset, thereby worsening the crisis. In the circumstances of pre-crisis Indonesia, many economists now accept that a slight fiscal expansion, rather than a contraction, would have been a more appropriate response.⁴⁰⁸ In the view of OXFAM: “The flawed prescription follows a misdiagnosis of the disease: Fund staff have discovered budget deficit problems where no such problems existed.” That report concluded that “the resulting austerity measures have increased poverty and undermined human welfare. Some of the effects will be felt by the next generation as public health deteriorates and large numbers of children are withdrawn from school.”⁴⁰⁹

■ *Social measures*

Most commentators agree that social issues were factored into the Indonesian macro-economic matrix ‘too little, too late.’ It took widespread rioting to bring to the Fund’s attention, the need for re-introduction of subsidies for basic food items. Within the terms of the Fund’s stand-by credit, approved under the ‘Emergency Financing Mechanism’ (EFM) in November 1997, a ‘social safety net’ paragraph was included.⁴¹⁰ However, it merely preserved expenditure on basic health and education and other social services at pre-crisis levels, which independent commentators agree were inadequate. A further measure was to increase ‘special assistance programmes’ for poor villages, ignoring the serious inadequacies of these anti-poverty programmes from targeting and effectiveness perspectives.

While the Fund has occasionally acknowledged shortcomings in its policy response, it is difficult not to conclude that its experience in Indonesia had a significant impact upon its subsequent appreciation of the need to be more conscious of social factors, even if the emphasis has been on prompting others to take the necessary measures, rather than ensuring that they are a truly integral part of its own concerns and policies.

■ *Situation analysis*

As a matter of logic, as the Swedish economist Gunnar Myrdal famously observed, “the isolation of one part of social reality by demarcating it as ‘eco-

conomic' is not feasible, in reality, there are no economic, sociological or psychological problems, but just problems, and they are complex."⁴¹¹ Early in the Indonesian crisis, the World Bank's Katherine Marshall warned that '[a] common danger is to over-segregate macroeconomic and sector policy. The debates around IMF Letters of Intent, rescue packages, World Bank financial sector and structural adjustment loans tend to be led by macroeconomic teams.' After citing the relatively positive case of Korea, where social policy issues (especially those relating to labour policy, because of the strength of the labour movement) were squarely on the table at the outset, she lamented: "Still, policy debates have tended once again to take place largely in separate domains. The paramount importance of macroeconomic outcomes and policies for social welfare is much more starkly appreciated in the Asian case than it was before."⁴¹²

Other commentators such as Kevin Watkins of OXFAM, have long criticized the 'bolt-on' approach of the IFIs, defined as the attachment of SSN's, often hastily conceived, onto a macro-economic template pre-conceived by the Fund.⁴¹³ Criticisms such as these, resonate quite strongly from a human rights perspective, with the CRC in particular providing a clear and applicable basis for inter-sectoral analysis, premised upon the indivisibility and functional inter-relatedness of all human rights. The inadequacy of this division of labour has been portrayed in the East Asian context in the following way:

The IMF itself has pointed to the introduction of social-welfare mechanisms aimed at mitigating the effects of the crisis on poor households as evidence of institutional concern with poverty. In fact, the World Bank assumed responsibility for mobilizing donor support in this area, much as the IMF has assumed responsibility for managing support for macroeconomic management. As a result, social policy considerations were conspicuous by their absence from the initial stabilisation plans. They were subsequently introduced as an appendage to these plans in a policy environment which, because of the impact of deflation on household poverty, was not conducive to an effective social-welfare response. In effect, the World Bank was used to fight a forest fire, the flames of which were being fanned by the IMF.⁴¹⁴

Such criticisms appear not to have fallen entirely on deaf ears at the IFIs, adding to momentum for reforms along the lines that have been seen flowing from the ESAF External Review and potentially more significantly, the Poverty Reduction Strategy Process (PRSP) initiative. The inherently flawed 'compartmentalization' assumption has been laid bare by the apparently new premises of conceptual coherence and functional symbiosis between macro-economic and social issues within the PRSP framework. Within and independently of that framework, it should be standard practice that macroeconomic, social and indeed human rights and other kinds of issues be dealt with simultaneously within the same conceptual framework at the outset. Recent joint Bank/Fund cooperation in the implementation of the PRSP

process is of interest in this context, potentially providing a bridge for the reconciliation of conceptual, disciplinary and institutional differences.

■ *Social safety nets (SSNs)*

Social safety net programmes were put in place by the Indonesian Government, with significant donor support, in the aftermath of the 1997 crisis. Their aim was to provide targeted assistance to the poor, new and old, by giving access to subsidised rice, providing student scholarships to ensure continued access to education, offering health care subsidies, giving block grants to at-risk communities and promoting labour-intensive employment projects to enhance incomes. A monitoring capacity, based on community inputs, was also gradually developed.

One of major reasons for which the SSN approach in Indonesia was criticized, was the lack of coherence among its various programme components.⁴¹⁵ Firstly, it was alleged that there was little apparent distinction between programmes with shorter and longer-term objectives. Secondly, a number of SSN elements were simply 'piggybacked' onto existing programmes. These criticisms emerge clearly from a report on the crisis by the United Nations Support Facility for Indonesian Recovery.⁴¹⁶

Targeting under the SSN proved to be a problem and in the view of some observers, did too little to promote equity.⁴¹⁸ An evaluation of the SSN programmes published in October 2002, also concluded that the results were mixed. The most effective aspects seem to have been the employment creation programmes, "which relied on self-selection targeting, [and] were much more likely to reach those households experiencing large shocks to their expenditure than programmes based on administrative targeting such as subsidised rice sales, scholarships, and health subsidies."⁴¹⁸

One of the apparent justifications of the Fund in allocating sole responsibility to the Bank for design and implementation of the SSN, is that "welfare payments can be targeted at those households most at risk."⁴¹⁹ However, as OXFAM noted, "Experience has shown that targeting during periods of economic crisis is a hazardous affair. In Indonesia, World Bank efforts to provide educational assistance to poor households have been hampered by corruption and weak administrative systems. Scholarship schemes intended to protect vulnerable households have frequently missed their target, including children who have dropped out of the school system."⁴²⁰ Interviews undertaken for this report very much supported these observations,⁴²¹ as did the OED evaluation, the criticisms of which included: (a) failure to target the 'near poor' (b) the need for the Bank to deepen its understanding of how well-targeted and effective the government's poverty programmes were and (c) the need to institute 'subjective' poverty lines based upon people's own assessments of the adequacy of their consumption, rather than adhering solely to 'traditional survey methods.'⁴²²

Among the other major flaws in the SSN scheme as a whole, in the opinion of one respected Indonesian social scientist, is the systemic problem that it tends

to make people 'dependent.' This can be viewed as a component of the 'social capital erosion' argument, addressed below. Other problems include: (a) the fact that in comparison with the income losses sustained by poor households and the overall decline in social-sector provision, the resources available (under the World Bank and Asian Development Bank sponsored 'Stay in School' programme) are grossly inadequate' (b) an inherent regional inequity and bias towards Java in the national welfare system which donors work through (c) failure to capture children who weren't formally enrolled in the school system and (d) the scale of the loss of SSN funds through corruption.⁴²³

■ The 'social capital' debate

One issue which was prominent in the Indonesia crisis and has significant ramifications in terms of human rights, is that of 'social capital'. Definitions of the term vary widely, but the following excerpt captures the essence:

Unlike physical capital that is wholly tangible and human capital that is embodied in the skills and knowledge of an individual, social capital exists in relations among persons. Most simply, it may be defined as voluntary forms of social regulation. ... It places not just the human being at the centre, but above all, the relation among human beings. They are important because they constitute the basis on which moral communities are built. Human capital seeks to improve the ability of an individual to make decisions; social capital seeks to improve the ability of a collectivity to make decisions. Naturally, however, the two are not mutually exclusive; a more skilled individual will also enrich collectivities, while more harmonious collectivities will make individual skills more meaningful and effective.⁴²⁴

Another commentator has taken this analysis further:

If we broaden the definition of social capital somewhat, we may also include formal and informal processes and structures, that is, how different institutions relate to each other, power structures, norms and networks within and between different organizations, issues related to accountability and transparency, the degree of democratic participation and control and other issues. The cultural setting, including the family and gender structure, extent of ethnic diversity, the role of customary law and traditions, define the broader context in which social capital is being accumulated (or depreciated).⁴²⁵

With reference to the Bank's research, some independent commentators have spoken of the danger of seeing 'social capital' as a convenient answer to objections concerning the reduced role of the State within the neo-liberal paradigm and queried the motives for the Bank's enthusiasm about social capital. The alternative view is that there should be a role for the state in helping to nurture the conditions for the development of 'social capital,' seeing it as a 'complement' rather than an alternative, to an active governmental role.

Erosion of social capital has been identified as one of the key impacts of the crisis for Indonesia.⁴²⁶ Many commentators have warned that the Bank can destroy 'social capital' with too much social lending, in contrast to the possibility of acting as a catalyst or stimulant for families and communities, empowering them to do the work themselves.⁴²⁷ According to one critic, the Bank failed to accord sufficient recognition to three sources of strength in Indonesian society: family, religious organizations and community self-help:

Promises of large amounts of money for Indonesia's [SSN] to be provided with no *quid pro quo*, may damage the willingness of poor people to reciprocate the support they traditionally receive. ... Top-down giving of free goods will not promote a sustainable answer to Indonesia's crisis. The rapidly escalating problems of maternal and infant malnutrition, reduced access to quality health care on the part of poor families and school drop-out levels, can best be solved by strengthening Indonesia's existing social capital, not by imposing an alien social safety net.⁴²⁸

A different commentator complained of the "seriously flawed assumption" at the macro level of evaluation (by the Bank and government) that "local coping capacity is zero." A senior economist interviewed for this report concurred, describing social capital as "community-based." He noted that "it's not appropriate to throw around large amounts of financial resources in all situations" and effectively "co-opt indigenous organizations."⁴²⁹

Other interviewees, however, were not persuaded by the claim that the massive dose of SSN funds had the effect of eroding 'social capital' in Indonesia, citing three main arguments. The first was that because the biggest issue in Indonesia was seen to be corruption, donors were reluctant to maintain high levels of financial support to most potential recipients. A second argument was that in the time between the crises of the 1960s and that of the 1990s, the urban population grew dramatically and this migration from the countryside had itself contributed to an erosion or changing of the situation of 'social capital' within Indonesia. In this sense, social capital is not static. Thirdly, some of the SSN funds are targeted to education, which would not be expected to undermine social capital.

But these objections are not necessarily dispositive of the matter. The first argument goes only to the question of degree. The second is valid to the extent that it reflects a concern about the capacity to capture and measure a concept as fluid, elusive and context-bound as 'social capital,' but it understates the importance of the 65 per cent of Indonesians who still live in traditional social systems where the characteristics of social capital are relatively strong. And the third factor is marginal, in terms of its capacity to refute the underlying critique.

Perhaps the principal relevance of this debate for present purposes is to highlight the importance of the sort of consultative and participatory models which are implicit in human rights-based approaches. Even in a crisis setting such as that in Indonesia in the late 1990s,

efforts to protect the social base of the community need to be undertaken in ways which respect the rights of individuals and of the communities in which they live, to control their own destinies and to realize a right to self-determination to the greatest extent possible.

■ *The trade-off issue*

One commentator has warned that: “From a purely economic viewpoint, structural adjustment policies and economic reform policies are viewed as short-term austerities that lead to long-term growth and development. These inter-temporal trade-offs, however, are not always acceptable in health.”⁴³⁰ In this view, “the quantitative data available on the impact of structural adjustment programmes, provides a restricted view of the situation. In many developing countries, there are no reliable data and available data do not assess the impact on people’s lives or the despair that the programmes bring with them.”⁴³¹ Lack of comprehensive or reliable official data in Indonesia was a problem identified time and again by independent commentators, NGOs and academics in Indonesia.⁴³² And the Bank’s own ‘Voices of the Poor’ research demonstrates the many profound and enduring ways in which poverty is manifested and felt by poor people themselves, including on a psychological level.⁴³³

Early in the crisis in Indonesia, UNICEF’s Executive Director, Carol Bellamy, warned of a lost generation of Indonesian children, forced out of education and into a vicious cycle of lost opportunity and potentially hazardous or exploitative labour, with increased vulnerability to a wide range of human rights abuses – an assessment with which many independent commentators agreed.⁴³⁴ In an environment where: (a) either ‘social capital’ stocks are being eroded or, at best, where the risk of erosion of social capital is apparent but the quantifiable extent of it unknown (b) where the scale of a crisis critically thwarts the impact of the standard range of SSN measures (c) where official and other available data are unavailable, incomplete or unreliable and (d) where the social, economic and political dynamics of a crisis situation are fluid and the future course unpredictable, policy-makers should do everything possible to avoid underestimating the enduring human rights costs that ‘temporary’ austerity measures in health and education policy can generate.

e) Drawing conclusions

This attempt to evaluate the roles of the World Bank and the IMF in Indonesia in terms of the CRC and children’s rights more generally, has revealed that it is unwise to make many generalizations that purport to apply equally to both institutions. It is apparent, for example, that while the Bank spends much of its energies on trying to promote particular social policy objectives, the Fund continues to have a rather ambivalent attitude towards the social dimensions of the issues which it considers to be at the top of its agenda. Moreover, much of the analysis above, points to the relative marginality of a lot of the social analysis that is undertaken. In many respects, the limited success of some of the Bank’s efforts to

address poverty concerns in its work, is suggestive of the problems which it faces in promoting any such agenda effectively. Thus, for example, an internal Bank review produced in 1999 was reported to have criticized the limited extent to which environmental and poverty impacts have been factored in to loan decisions.⁴³⁵ The study, which reviewed structural adjustment and sectoral loans made between July 1997 and December 1998, concluded that the Bank had failed to consider sufficiently the impact of some of its largest loans on both the poor and the environment, thus demonstrating a disconnect between Bank policy and practice. Of 54 project reports reviewed, only nine made any substantial mention of environmental consequences. The analysis was reported to have found that “the majority of loans do not address poverty directly, the likely economic impact of proposed operations on the poor or ways to mitigate negative effects of reform.”

While the Fund has changed some of its policies and certainly its rhetoric in recent years and the Bank has made a major effort to give priority to poverty and social development issues, there has been all too little change in relation to some of the shortcomings documented in the present study. Perhaps the major development relates to the potential role that might come to be played by the PRSPs, but that process is still very much one in the making, rather than the great breakthrough which has already been heralded in some of the publicity surrounding the initiative. We will examine that potential in more detail below.⁴³⁶

Overall, we cannot conclude in relation to either institution that the CRC has a significant place within the policy matrix which is applied. Although the Bank makes occasional reference to it in the context of broad statements identifying the international legal framework which might be taken into account in a particular context, it has not reached the same level of familiarity as treaty provisions dealing with gender equality, to take but one example. Overall, neither institution has been able or prepared to incorporate the legal framework of human rights treaty obligations in any meaningful way into its daily work.

The questions that then remain to be answered are, first: how can we explain this continuing marginality and second: what might be done about it in the future? In addressing the first of these questions, we turn now to consider whether there are legal obstacles present in the mandates given to each of these institutions, which would prevent them from taking a more active role in relation to the CRC.

4.3 Legal mandate aspects of the IFIs involvement with the CRC

In the aftermath of the crisis, Amnesty International argued that human rights should be “the cornerstone of rebuilding Indonesia,” on the basis that “weak institutions and a lack of transparency and

accountability in government structures have been at the root of human rights violations ... and contributed to the nation's economic and political crisis."⁴³⁷ But for the IFIs, that raises the question of whether they can and if so, whether that should, include human rights directly within their mandated activities. These questions are not confined to the Indonesian context, although their exploration here will draw upon many factors and events specific to that country's experience.

Detailed discussions of the legal dimensions of the Bank's and the Fund's mandates have already been undertaken elsewhere and will not be repeated here.⁴³⁸ In the following analysis, consideration is given to a range of policy initiatives taken by the IFIs in recent years which have a distinct human rights dimension to them, even if that dimension has been either denied or downplayed by the institutions themselves. The theme which emerges is that the institutions already have a human rights policy of sorts, or, more accurately, a range of human rights policies. Rather than more arcane debates among lawyers over the legal mandate and its interpretation, what is needed now is an effort to maximize the coherence and consistency of the resulting patchwork.

a) Questions of interpretation

Those who advocate the adoption of human rights-conscious policies by the IFIs, are sometimes accused of ignoring the restrictions which are explicitly contained in the respective founding documents of the two institutions and of seeking to substitute a highly speculative and politically-contested interpretation, for a straightforward one. But such stark characterizations are unhelpful, as even the Bank's former General Counsel, Ibrahim Shihata, acknowledged, despite his ambivalence about the role of human rights in the work of the organization. Shihata noted the importance of a purposive or teleological interpretation for charters of international organisations in general, based on the rationale that "by nature of their respective mandates, [they] must be able to respond to the world's changing needs." To make sure that this approach was not taken so far, he also insisted that, consistent with the Vienna Convention on the Law of Treaties, care must be taken not to arrive at a result which would "conflict with the ordinary meaning of the words as used in their context (unless it is clear that a special meaning was intended or that the ordinary meaning leads to absurd or contradictory results)." Shihata cautioned that "flexibility in the interpretation process cannot ... reasonably substitute this process for the amendment of the Articles, which goes beyond the powers of the EDs (Executive Directors) or, for that matter, the Board of Governors."⁴³⁹

b) How vital an issue is the 'legal mandate' question?

On the basis of interviews conducted in preparing this analysis, it seems that World Bank staff consider the 'legal mandate' question to be important (at the

Bank), partly because of Board reticence about certain issues and partly because "everything at regional level is done with a lawyer." Furthermore the 'legal people' are a core part of assuring internal accountability and hence are part of the policy development process too. However, opinions do differ on this quite markedly. The Bank's record overall tends to show incremental and opportunistic expansion and some levels of internal resistance to the Bank's move into areas such as criminal law reform and prior to that, corruption. Such developments have been hastily followed up by *ex-post-facto*, if not always compelling, efforts to show that they fall within the 'economic effects' category of justification.

Overall, the Bank's complex institutional structure and its greater decentralization, are likely to present increasing human rights-related challenges to those charged with keeping operations and policies within centrally-defined and coherent legal parameters. The challenge of reconciling legal considerations with the demands of a policy which reflects the real world within which the Bank operates, will be high on the Bank's agenda in the years ahead. In addition, growing recognition of the instrumentalist advantages of human rights-friendly policies will increase the pressures on the Bank to move towards embracing such approaches.

Similarly, the International Monetary Fund's embrace of the 'rule of law' in various dimensions of its work and its acknowledgement of the role to be played by appropriately designed legal and other institutions, seem likely to help create a context of greater openness to human rights-sensitive policies. Moreover, a rigid official legal interpretation of the Fund's Articles of Association will become ever more difficult to reconcile with the increasingly wide and complex range of activities and issues which are engaging the attention and involvement of Fund staff, especially within the PRSP context.⁴⁴⁰

c) Issues specific to the World Bank's mandate

■ Copenhagen follow-up and human rights

Early in 1999, World Bank President, James Wolfensohn, signalled his intention to "draw together the Bank's experience of alleviating poverty with the conclusions arrived at during the 1995 Copenhagen World Summit on Social Development, to define a new social code," which would "look at controversial issues related to labour rights, human rights, the eradication of poverty, as well as greater equality between men and women."⁴⁴¹ This reflected the fact that the Copenhagen Summit had clearly recognized human rights as an important element in the overall social development equations. In a press conference at the 1999 Spring Meetings of the Bank and Fund, Wolfensohn described the Copenhagen accords, including the human rights elements, as "the agenda of the Bank."⁴⁴² Notwithstanding this commitment, the resulting 'Principles and Good Practices in Social Policy' can hardly be said to have achieved that objective, at least from a human rights or children's rights perspective.⁴⁴³

■ *Environmental assessments and international obligations*

The Bank's Operational Policy on environmental assessments states that the Bank 'does not finance project activities that would contravene the obligations arising for the relevant State under applicable international environmental treaties and agreements as identified during the environmental assessment.'⁴⁴⁴ In a 1994 Bank review of projects involving involuntary resettlement, the Bank offers a rationale for the adoption of a similar policy in relation to children's rights: "The potential for violating individual and group rights under domestic and international law makes compulsory resettlement unlike any other project activity."⁴⁴⁵ The same applies to certain specified core labour standards. Thus a Bank statement on the latter issue begins by observing that "The Bank is obliged by its legal framework to base lending considerations on the basis of their demonstrable economic impact"; thus satisfying Shihata's development effects criterion. But the policy goes on to note that "Under such criteria, Bank research supports the standards related to harmful child labour, forced labour, and gender equality in the labour market."⁴⁴⁶

It would seem to follow logically that if the Bank feels that none of its activities should knowingly assist a government to violate environmental or labour obligations undertaken by virtue of treaty ratification, the same reasoning would apply in relation to human rights. And that logic would be even more compelling in relation to children's rights, because of the virtually universal nature of their acceptance. Not a single country to which the World Bank would ever make a loan or a grant is not a party to the CRC. There is, in principle, no reason why the environmental precedent could not be extended to the human rights field, in a manner which would in each case be readily compatible with the Bank's mandate.

■ *Breadth of mandate on issues affecting children*

In 1996, the Bank's then Vice-President and General Counsel, Ibrahim Shihata, wrote in relatively favourable terms about a potentially broad agenda for the Bank in child rights-related issues.⁴⁴⁷ The matters he thought to be within the Bank's legitimate domain ranged from health and education, to HIV/AIDS and land-mine removal, subject to a rather vaguely-stated requirement that the issues in question should have legitimate 'developmental effects'. A subsequent Bank publication entitled *Child Labour: Issues and Directions for the World Bank* (1998), effectively countenanced children's rights conditionality in loan agreements in response to exploitative child labour practices.

More specifically in relation to Indonesia, the Bank's Vice-President for Asia and the Pacific at the time of the crisis, Jean-Michel Severino, was quoted in press reports as having stated at the Consultative Group meeting for Indonesia that future Bank support would be dependent upon the country's human rights performance. The Bank, however, downplayed the significance of the remarks and one Bank official observed that the statement needed to be seen in the context of

a particular set of questions being discussed at the Consultative Group news conference, rather than foreshadowing a more active and explicit Bank approach on human rights issues, or human rights conditionality, in Indonesia. According to public statements by Indonesia's then Attorney-General, Marzuki Darusman, there were three key issues that needed to be resolved for the sake of Indonesia's international credibility: (1) 'prosecuting Suharto'(2) resolving the Bank Bali scandal and (3) prosecuting human rights abuses by the military. Severino's overall message was reportedly intended to be that "the Bank is here to support you in those objectives."⁴⁴⁸ His remarks at least served to undercut the view that there was some a *priori* legal impediment to the Bank expressly addressing human rights issues within its strategies and programmes, when it is consistent with the client country's wishes that it do so.

■ *Inter-agency comparisons: the Inter-American Development Bank (IADB) and the International Finance Corporation (IFC)*

THE IADB

In evaluating the policy approach of the Bank and the Fund, it is useful to take account of the policy approaches of other institutions which might act as comparators, even while recognizing that no two institutions are alike and that there are clear limits to the comparisons that might be drawn. In this respect, the Inter-American Development Bank (IADB) presents an important case study. In contrast to the European Bank for Reconstruction and Development (EBRD) whose mandate expressly includes human rights objectives, the purposes and functions of the IADB as expressed in the Agreement Establishing the Inter-American Development Bank, are in many respects identical to the Bank's. The general purpose of the IADB is set out in Article 1, Section 1: "To contribute to the acceleration of the process of economic development of the member countries, individually and collectively." The functions prescribed to implement that purpose include:

- To promote the investment of public and private capital for development purposes;
- To utilize its own capital, funds raised by it in the financial markets and other available resources, for financing the development of the member countries, giving priority to those loans and guarantees that will contribute most effectively to their economic growth;
- To encourage private investment in projects, enterprises and activities contributing to economic development and to supplement private investment when private capital is not available on reasonable terms and conditions;
- To cooperate with the member countries to orient their development policies toward a better utilization of their resources, in a manner consistent with the objectives of making their economies more complementary and of fostering the orderly growth of their foreign trade and

- To provide technical assistance for the preparation, financing and implementation of development plans and projects, including the study of priorities and the formulation of specific project proposals.⁴⁴⁹

A 'political prohibition' is included in almost identical terms to the World Bank's equivalent prohibition:

The Bank, its officers and employees shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions and these considerations shall be weighed impartially in order to achieve the purpose and functions stated in Article I.⁴⁵⁰

The practice of the IADB, which in many respects is consistent with the World Bank's own increasing expansiveness, indicates that a relatively narrow interpretation of this provision has been adopted, one which would principally exclude only partisan political activities. IADB member States have, in terms of the principles involved, expressly recognised the importance of human rights for development.⁴⁵¹ But, as is also the case with the World Bank, the preparedness to acknowledge the clear transboundary impact of environmental policies and thus the relevance of international standards and treaty obligations, has not been matched by a similar recognition in relation to human rights.⁴⁵² Nevertheless, a sampling of project documents indicates that human rights components (including specifically the direct relevance of the CRC, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and other UN treaties) have penetrated into the IADB's programme design in particular areas.⁴⁵³ For the purposes of the present study, it is significant that juvenile justice is one of the most prominent examples in this respect. Although this may be due in part to the fact that in certain IADB member states (notably El Salvador and Guatemala) UN-brokered post-conflict institutional and constitutional arrangements have been founded upon the bedrock of international human rights law,⁴⁵⁴ the general principles involved nevertheless serve to underscore the ultimate unsustainability of broad-ranging interpretations of the prohibition on political activities which seek to exclude all concerns relating to human rights.

THE IFC

The International Finance Corporation has an Operational Policy on child labour,⁴⁵⁵ as does the Multilateral Investment Guarantee Agency. In 2002, the IFC also published a 'Good Practice Note on Addressing Child Labour in the Workplace and Supply Chain,' explicitly anchored in relevant provisions of the CRC.⁴⁵⁶ Institutional factors were cited as a partial explanation for the fact that these agencies moved on this issue before the World Bank itself did, with one observer commenting that "things move quicker at the IFC." Another suggested reason is the possibility of the exposure of the IFC's clients to the real and immediate commercial consequences of any involvement with child labour. Many of the corporations with which the agency deals,

have now had to adopt their own human rights-related codes of conduct and are no longer in a position to take the view that these matters are extraneous to their activities. It has been reported that work was underway within the IFC in 2003, with a view to developing a more coherent human rights policy, although the successful conclusion of such an effort would presumably lead to pressure on the World Bank itself to follow suit.

d) Issues specific to the IMF's mandate

The official legal position at the Fund continues to be that, despite the agency's foray into poverty reduction strategies and its more recent acknowledgement of the social dimensions of its activities, the IMF remains essentially in the business of balance of payments financing. The correct legal view is said to be that concerns with growth and poverty do not fall within Article 1 of the Fund's Articles of Agreement. The Fund's official position regarding its legal competence to take responsibility for human rights issues, is well captured in the following statement by the Fund to the Commission on Human Rights in 2000:

The International Monetary Fund ... stated that it was established to promote international monetary cooperation, exchange stability and orderly exchange arrangements, to foster economic growth and high levels of employment and to provide temporary financial assistance to countries under adequate safeguards to help ease balance of payments adjustments. In implementing this mandate, the focus is on macro issues and not on the right to food, or any other human right. However, the Fund is available to work with individual member governments to establish a stable macroeconomic and financial framework conducive to the implementation of a government's approach to the right to food, other human rights, or other appropriate policy goals of the authorities.⁴⁵⁷

It is noteworthy, however, that the Fund is not constrained by a 'political prohibition' such as that found in the Bank's Articles. As a result, a straightforward reading of the terms of the Fund's Articles would seem to permit a higher degree of flexibility and to make the task of arguing against an appropriately dynamic interpretation of the Fund's remit, considerably more difficult. Officially, the point is generally made that the Fund's activities in relation to corruption, governance and so on, all need to be justified by reference to its mandated roles. A restrictive view, on grounds of legal interpretation, seems to be advocated by some officials even in relation to poverty-related activities, especially in response to fears that they might become the 'dominant' objective of the Fund, rather than merely a subsidiary one or a 'co-objective'. Such expressions of concern do not sit easily with the marked expansion of the Fund's activities from its inception and especially after the collapse of the 'par value' system in the 1970s. The resulting involvement in structural adjustment and the provision of longer-term facilities, has broadened the Fund's effective mandate very considerably, without requiring any formal amendment of

the type that is often suggested is necessary before the Fund could take human rights matters into account.⁴⁵⁸ It has also been argued that the Fund's involvement in governance type issues at this level, calls into question the adequacy and even the legitimacy of its internal governance structures.⁴⁵⁹

These questions have obviously been brought closer to the surface in recent years since the launch of the Fund's joint anti-poverty drive with the Bank. The political factors driving this development include the need for the Fund to be seen to be helping the poor, responding to the sustained criticisms it faced following the East Asian crisis and the political imperatives relating to international debt relief. As one observer put it, helping the poor certainly paints a much more positive public image than bailing out the bankers. But for some Fund officials, these political imperatives do not invalidate the legal position which holds that the Fund was created and remains in business, for the specific purpose of helping countries with their balance of payments problems. At the end of the day, however, it seems that the real limits of the Fund's mandate as it relates to poverty reduction or even children's rights-related issues, are more likely to be determined by policy and political considerations, institutional capacity⁴⁶⁰ and budgetary concerns, than by the victory of one school of legal interpretation over another in relation to the 'proper' interpretation of the Articles.

Of those factors, it is probably policy considerations that weigh most heavily. This is well captured by an assessment of the role of labour standards in the context of globalization, which was proffered by the Fund's second most senior official, Anne Krueger, in September 2002. Her analysis is worth citing at length:

What about the impact of growth and globalization on labour and social conditions in the developing world? Conditions in so-called sweatshop factories in developing countries should be compared to the other choices available to people in those countries. For instance, the growth of the footwear industry in Vietnam has translated into a five-fold increase in wages in a short period of time. While still a pittance by our standards, the higher wages have completely transformed for the better the lives of those workers and their families. Insisting that such workers be given a decent wage, by our standards would completely erode any competitive advantage of businesses using unskilled labour on the international market. Likewise, child labour is sometimes prevalent in developing countries because the alternatives are so much worse: starvation or malnutrition, forced early marriages (for girls) or prostitution, or life on the streets as a beggar. There is ample evidence that parents in developing countries, like parents everywhere, choose schooling for their young when they can afford to do so and the quickest path to that outcome is through more rapid economic growth.⁴⁶¹

In effect, this analysis endorses what might be termed a trickle-down theory in relation to children's rights as well as labour rights, in the sense that the best – or maybe the only – way to achieve their realization is to

enhance economic growth. Specific targeting of abuses, governmental identification of priorities, or other interventions designed to accelerate and prioritize measures to ensure respect for children's rights are at worst counter-productive and at best highly unlikely to make a difference. Other Fund spokespersons have expressed the view that foreign direct investment and the involvement of transnational corporations might be the most effective way forward:

Despite occasional unfortunate instances of unethical behaviour, multinationals seem increasingly willing to respect internationally agreed principles regarding environmental protection and the abolition of child labour. And they generally pay higher wages than local employers do.⁴⁶²

e) The road ahead

The picture that emerges is of two institutions which have each made major inroads into long-established but increasingly unsustainable and anachronistic policies against open or explicit engagement with children's rights norms and issues. They now stand at a crossroads and a great deal will depend on the extent to which the proponents of children's rights promotion can succeed in engaging the two institutions, both in their own terms and in the broader battles to influence governmental attitudes and more importantly, public opinion. In those endeavours, the proponents of children's rights will need to understand as clearly as possible the reasons why the Bank and the Fund have shown such reluctance in the past, in order to be able to engage with those objections and to tailor proposed future policy options in such a way as to assuage the doubts and fears of those who stand in the way of progress in this respect.

4.4 Explaining the reluctance to take the CRC fully on board

a) The evolution of the general debate

Until the late 1980s, the norm, not only within the international financial institutions but in the UN development framework in general, was to avoid, at almost any cost, the use of human rights terminology in debates over development policy and especially in the context of the formulation of United Nations development goals. Part of this reluctance was driven by factors which were external to the development debate. For present purposes, the two most important were the relatively underdeveloped state of human rights law and the extent to which the conflict between East and West tended to turn any human rights debate into a forum in which one side or the other could score points in the context of the Cold War. But by the late 1980s and certainly by the time that the Berlin Wall collapsed, these factors were no longer compelling and human rights became much more a part of societal discourse both within the many societies undergoing reform ('in transition', as the optimistic phrase put it) and within the international community at large. The high-water mark of

efforts to bring the human rights and development agendas constructively together, came in the *Human Development Report 2000*. But, despite the sophistication of the report's analysis and the strength of the case that it marshals, three years later, the debate remains very far from being won.

In general, development specialists and particularly the economists who tend to dominate the framing of the main policy agendas, have continued to be wary of the use of rights terminology. Some of the motivations for this avoidance of human rights language have been noted elsewhere. Many of them extend well beyond the range of issues which can usefully be examined in the present report with its limited focus on the CRC and the work of the international financial institutions. Nevertheless, it is appropriate to at least note that they include the following: (1) a desire, through the use of distinctive but open-ended formulations such as 'basic needs', 'sustainable development', 'redistribution with growth' etc, to avoid having to work with, or adapt to, externally formulated analytical frameworks which they cannot readily amend or reinterpret to suit their own needs or preferences (2) a desire not to be pinned down to a specific normative framework such as that offered by human rights, but instead to maintain as much policy flexibility as possible (3) a resistance to what are seen as development fads, amongst which human rights is included by some and doubtless children's rights would be included by others (4) a perception that the human rights framework and that dealing with children's rights are excessively abstract and inherently legalistic and (5) a functionalist view which depicts human rights as "an essentially political and thus inherently politicized, concern, to be contrasted with mainstream development activities which, it is thought, can be pursued within a largely neutral, or apolitical framework."⁴⁶³

These arguments are not addressed further in this report, partly because they have been considered elsewhere⁴⁶⁴ and more importantly because – despite their unquestioned pertinence – they are not the key factors cited by officials of the Bank and Fund and by other experts during the interviews for the preparation of the present report in seeking to explain why a children's rights or human rights approach is best avoided. What follows is a selection of arguments, most of which are equally applicable to human rights in general as to children's rights in particular, but all of which need to be acknowledged if the debate over the integration of children's rights into the activities of the major development agencies is going to make significant progress. For the most part, they are rarely 'on the table' in the sense of being articulated in formal debates or systematically acknowledged in any of the written analyses of the issues.

b) The Molière defence

One of the most common reasons for not adopting the CRC or some other human rights treaty as a basis upon which an international organization might operate, is that the organization is, in fact,

despite any appearances to the contrary, already doing so. This is what might be called the Molière defence in recognition of the French playwright, Jean-Baptiste Poquelin, better known as Molière, whose character in *Le Bourgeois Gentilhomme*, Monsieur Jourdain, discovered that he had "been speaking prose all my life and didn't even know it!"

In the present context, this defence takes the 'institution-speak' form of a curious fallback position which follows rapidly upon an explanation of why a human rights approach would, for various reasons, be inappropriate, ill-advised, counter-productive, or prohibited by legal constraints. Having rehearsed those arguments, the analysis then continues by saying, in effect: even though we cannot be seen to be adopting a human rights approach, we are in reality following a directly comparable recipe anyway, so there is not really a problem. The current President of the World Bank, who has been more favourably disposed to human rights than any of his predecessors would have ever contemplated, has adopted a variation of this time-honoured form of argumentation. Thus, in answer to a question about the Bank's human rights policy at a 'town hall meeting' in 2002, he began by affirming that "everything that we're doing at the Bank in relation to poverty is an attempt to protect human rights. The issue of poverty is an issue of human rights. The issue of women is an issue of human rights." He then went on to explain, however, that "I don't want to move to a rights-based approach because I think I'm stronger in what I'm doing." This straightforward rejection of not only the discourse of human rights, but far more importantly, its normative and institutional framework, was followed immediately by an attempt to soften the rejection and downplay its consequences by adding that "... I really believe that, while we don't call it a rights-based approach, ... on each issue we are, in fact, addressing [those very] questions ..."⁴⁶⁵ This approach clearly reflects a genuine belief that human rights norms are important but that they can be promoted in ways that avoid both the language and substantive normative content of international human rights law. It is thus essential for children's rights proponents to come to grips with the reasons why this approach is insufficient, if the CRC agenda is to be effectively promoted.

The Molière defence attempts to have it both ways, but it is in fact premised upon a rejection of the particularities of a human rights approach. Because of the particularities of the human rights framework, it is not possible to have what might be termed an 'accidental human rights approach', or in other words a strategy which although not presented by reference to human rights standards, nonetheless fortuitously satisfies all of the requirements of the latter. Without repeating what has been analyzed in detail elsewhere,⁴⁶⁶ such a human rights approach requires, at a minimum, that the normative language of human rights be used (i.e. it makes a fundamental difference to say that a child has a human right to education, rather than that the World Bank or the government concerned is doing whatever it feels it can under the circumstances to improve educational access and standards within a country); that the communities concerned are able to

participate effectively in the choice of policy priorities (i.e. through the effective exercise of their civil and political rights); that governments set benchmarks which facilitate a process of accountability to domestic political actors in the event of the non-fulfilment of the agreed goals and that there is effective international accountability in cases in which the minimum core content of the right in question has not been met.

c) The 'double standards' critique

Another objection which is often raised by Bank and Fund officials when asked about the greater use of children's rights discourse, is that double standards apply dramatically in discussions of all human rights issues. This means that smaller or less powerful countries are discriminated against by being singled out for human rights violations which would go unremarked if committed by more powerful countries. This critique is sometimes used in order to call into question the legitimacy of much of the international community's endeavours to promote respect for human rights. While the Government of China has raised objections of this type in the context of the Commission on Human Rights, China itself is often cited by other observers as a country which, because of its size and importance, is said not to have been pressed by the Bank to implement measures to ensure rights relating to free expression, the press, freedom of association and so forth, and is thus in a very different situation to that of most developing countries. Opponents of Bank policies on human or children's rights thus argue that when the Bank seeks selectively to encourage some states but not others to conform to international rights norms, it exhibits double standards, undermining the objectivity, credibility and acceptability of the approach.

In responding to this critique, it must be acknowledged that the fact that international efforts to promote human rights are rarely consistent across countries, is certainly a problem. It is, however, an issue in relation to almost all areas within the international arena in which different *de facto* standards are applied depending on the political, economic, or even religious status of the country concerned. But, in the face of such unevenness, it is not clear that abandonment of the objective itself is the appropriate response. Striving for consistency is not impossible and occasional failure to achieve the optimum standard is no reason to abandon all efforts.

An alternative approach in the case of the international financial institutions is to redistribute decision-making power within the IFIs on more equitable lines, on the assumption that double standards will be less likely to prevail, if power is more evenly distributed. Such an approach was advocated in the *Human Development Report 2002*, entitled 'Deepening Democracy in a Fragmented World'. It seems unlikely, however, that any such set of institutional reforms seeking to promote transparency, democratization of decision-making and accountability, will of itself succeed in negating concern that a double standard will sometimes apply in the

human rights area, as it does also in a great many other policy arenas in which the IFIs operate.

The most effective response to double standards in the human rights area is to make the debate more open and transparent, to insist on reliance upon agreed international standards, rather than the self-serving interpretations which are sometimes put forward by individual countries, to root the discussion and the process in the legal obligations which the country concerned has undertaken and to insist on objective and strongly-grounded factual analyses, as the bases for decision-making in this area. This all points to the need to professionalize the process, rather than jettisoning it. It also underscores the importance of taking a treaty such as the CRC seriously, thus avoiding at least some of the pitfalls that have occurred in the context of the more open-ended and unanchored human rights debate within certain international contexts and most dramatically, in bilateral settings.

d) The demand that any children's rights-based policy needs to be empirically justified

To a significant extent, economists and others working within the international financial institutions pride themselves upon the extent to which the policies they endorse can be empirically demonstrated to be superior to any alternatives. The implication in the present context is that the incorporation of a children's rights dimension to their policies and programmes would only be warranted if it could be shown that, in relation to the economic and social outcomes produced, it would be superior to any other policy approach. Taken to its logical extreme, which of course most officials would not do, such an approach implies the rejection of children's rights and the embrace of repressive or discriminatory policies if they can be shown to have a greater utilitarian benefit, in other words if they make more people better off than the alternatives do, regardless of the negative impact upon groups and individuals who do not benefit from the preferred policy approach. But even where the extreme variation of the argument is rejected, there are still many contexts in which this utilitarian approach can be highly problematic from a children's rights perspective.

Two examples must suffice. The first concerns child labour, in relation to which there can be endless permutations to the arguments about how to balance, on the one side, the human rights imperative that children should never be forced to work in jobs that are harmful, whether physically, morally, or in terms of depriving them of the enjoyment of rights such as the right to primary education, with, on the other side, the need to adopt rational economic policies which provide incentives over time for communities and families to opt for other alternatives. While an insistence that the respect for children's rights be factored in as an important part of the overall equation cannot magically determine the optimal economic and social policy to be followed, it does make a significant difference to the weight to be accorded to different considerations and also

excludes certain policy options which might otherwise be defensible in purely economic terms.

A second example concerns the use of user fees for primary education. Although human rights instruments require that primary education “shall be compulsory and available free to all”; to use the terms of Article 13(2) of the International Covenant on Economic, Social and Cultural Rights, it may well be possible to demonstrate that in a particular situation the imposition of fees is necessary or desirable whether to ensure that only truly dedicated students attend, that sufficient resources are available, or as a means of raising revenue for other priority objectives of government policy. But, however powerful such instrumentalist arguments may be – and it must be conceded that there will be some circumstances in which there is no other option in the short term – the fact remains that a value which is universally recognized as a human right is being traded off without any possibility of the children affected being consulted and with little if any likelihood that appropriate remedial measures will be taken at any stage.

By the same token, however, a move towards a greater recognition of instrumentalist justifications for human rights is by no means a bad thing. Human rights are a reflection of ethical or moral values which can be grounded in different philosophical or religious traditions, in natural law or natural rights theory, or in positive law (an option that has only become fully convincing in recent years). They cannot systematically be justified through the application of economic or efficiency criteria and instrumentalist approaches will have major shortcomings. Nevertheless, for pragmatic and operational reasons, it is important to develop instrumentalist reasoning as far as possible, as a complement to the basic ethical and normative grounding of human rights. This is, in a number of respects, the path followed in relation to gender-in-development endeavours, many of which relied far more heavily upon arguments based on the beneficial economic consequences of inclusion, than the ethical imperative to end discrimination and exclusion.⁴⁶⁷

United Nations Secretary-General, Kofi Annan, has often observed that human rights are part of human security. This is partly an ethical statement, but its principal significance is instrumentalist. In other words, the assertion is being made that those who care about human security (whether defined in traditional or in more enlightened twenty-first century terms)⁴⁶⁸ have practical, or authentically ‘strategic’, reasons to seek to factor human rights considerations into their analyses.

The quest for empirical or instrumentalist justifications for the pursuit of human rights policies, such as the efforts made by economists to show that democracy, or the rule of law, or judicial independence, are vindicated by virtue of the superior economic results that they yield, is thus a valid and important one. Thus, for example, Amartya Sen, having reviewed the literature on the relationship between authoritarianism and economic performance, concluded that

“the selective anecdotal evidence goes in contrary directions and the general statistical picture does not yield any clear relationship at all.”⁴⁶⁹ But this sort of empirical work must not be confused with the proposition that human rights are only valid to the extent that they can be demonstrated to be economically beneficial. The protection of human dignity, respect for freedom of speech and the right to a fair trial, are all values which the international community has endorsed unqualifiedly and they are not open to rebuttal in particular situations on the grounds that an alternative approach might yield better economic outcomes. So too must children’s rights be seen as non-negotiable.

e) The imposition of children’s rights amounts to economic or cultural imperialism

This argument has many different formulations, but the most frequently invoked relate to the reluctance of particular governments to endorse human rights objectives for economic or cultural reasons.

The first of these problems has been cited by the President of the World Bank to explain why the Bank cannot embrace a human rights approach to certain issues. Thus, when challenged at a meeting on January 17, 2002, as to why the Bank did not take a stronger stand in defending labour rights, the (edited) transcript of a recent discussion contains the following analysis:

With the trade unions, we have come a tremendous way closer. We now meet with trade unions everywhere. There are four issues of trade unions, in terms of slavery, child labour, [equal opportunity/anti-discrimination] and collective bargaining. (Note:⁴⁷⁰ At a February 4 meeting with forty international labour leaders in New York, Mr. Wolfensohn clarified that at the January 17 meeting with NGOs he had misstated the ILO’s position on the issue of collective bargaining; he affirmed to the labour leaders that the ILO unambiguously endorses the right to collective bargaining. He also stated that the Bank supports the promotion of all four core labour standards, but the institution does not apply conditionality on these standards in its lending, due to lack of consensus among the Bank’s shareholders.) We are pushing, wherever we can, within the framework of the collective bargaining issue, but many of the poorest member countries are concerned – within their own government frameworks, ... – and are not prepared to make that go full hog or to push that to the end.⁴⁷¹

But at least in the cases of child labour, slavery and non-discrimination, the growing corpus of international legal standards and the paucity of governments which have not firmly committed themselves to those standards, will make it increasingly difficult to argue that governments with which the Bank is working are not prepared to abide by the applicable human rights standards.

The second and more intensely debated objection of this type, concerns the cultural rejection of the rele-

vant standards by certain countries. Among the most important of the human rights-related debates that were unleashed by the end of the Cold War and the resulting more vigorous participation of developing nations in those discussions, were those that reflected different variants of the cultural relativism debate. In essence, the argument is that while any given group of individuals might have its own moral standards, it cannot be assumed that those same standards are shared by others elsewhere in the same community, let alone living in very different societies. The claim of human rights to be universal is thus impugned and the critique applies with equal force to children's rights. Indeed, this field provides fertile ground for the so-called cultural relativists. Prominent issues include the minimum age for marriage of girls and boys, traditional practices such as female genital mutilation, child labour which is performed at the expense of educational opportunities, the right to express opinions on matters of concern to the child and to participate in decision-making and corporal punishment in the home and at school.

This debate has been pursued at both the political and the scholarly level and came to a head within the international community in the lead-up to the 1993 Vienna World Conference on Human Rights. In essence, the Conference clearly affirmed the universal applicability of international human rights law and at least in relation to children's rights, this position has been reinforced and given additional substance by the fact that virtually every country in the world has ratified the CRC.

This is not, however, to suggest that the debate is closed in relation to any of the cultural issues that might arise at the national or local level. Quite the contrary. Within the perspective of international human rights law, many dimensions remain open to debate. That applies, for example, to the challenges of: interpreting the flexibility which is built into many norms; introducing the appropriate and permissible degree of sensitivity and adaptation which is necessary for the successful promotion of human rights standards within a given context; and tailoring implementation mechanisms to reflect national and local ways of doing things in so far as that is compatible with the essential obligations of the state concerned.

These issues have been debated at great length both in the relevant scholarly literature⁴⁷² and in discussions in inter-governmental fora such as the UN Commission on Human Rights, the Human Rights Sub-Commission and UNICEF. While the complexity of the issues cannot be denied, it is also clear that a pragmatic consensus has emerged which upholds the integrity of the corpus of human rights norms, especially in relation to children. But despite this fact, a significant number of officials interviewed in connection with this report raised such issues as though they constituted a fundamental barrier to the pursuit of a child rights-based approach to development issues. Many of these officials seemed largely if not entirely unaware of the debate which has been going on for many years, or the ways in which the United Nations human rights framework has responded to these critiques. Similarly, few of

those who raised relativist arguments as an impediment to the pursuit of a children's rights perspective, seemed to feel that other types of broad-brush policy prescriptions being pursued by the international agencies for which they worked, fell foul of comparable objections. As a result, relatively detailed economic and fiscal policy prescriptions were seen to enjoy a universalism which stood in marked contrast to the culturally justified hesitance in relation to the rights of the child.

The conclusion to be drawn is that there is a need for officials in the major agencies to be informed of the nature of the debates that have taken place and of the ways in which the issues have been resolved. It is not sufficient in this context to rely entirely upon the formalist riposte that every single government in the world, bar one, has officially and solemnly signed on to the following set of obligations contained in the CRC. While that argument is compelling, it has clearly not been sufficient to overcome the resistance which our surveys show continue to characterize the understandings of many of the officials whose responsibilities have a major impact on the potential success or failure of children's rights strategies.

f) The current state of play in the Bank: a case study of Roma children

This report has argued that the World Bank, unlike the IMF, is gradually coming to terms with the importance of incorporating both children's rights and human rights perspectives into at least some aspects of its work. Gradually and almost imperceptibly, the CRC is also starting to be used as a reference point in this regard.

Perhaps the best illustration of the current state of play, revealing both the strengths and the limitations of the approach, is to be found in the Bank's recent work on the situation of Europe's largest minority group, the Roma of Central and Eastern Europe. The number of Roma is estimated to be between 7 and 9 million people, a great many of whom live in extreme poverty and whose members have long been the object of widespread human rights violations. The centrality of the children's rights dimensions of the situation is underscored by the fact that between a quarter and a third of the Roma are under fifteen years of age. This compares with only 10 percent of the majority population in the same age bracket.

The World Bank was an active participant in a major conference held in Budapest in June-July 2003, entitled 'Roma in an Expanding Europe: Challenges for the Future'. In an editorial opinion piece published in the lead-up to the conference and co-authored with George Soros, World Bank President, James Wofensohn called attention to the plight of the Roma and focused in part on the situation of children:

An estimated 600,000 Roma children of primary school age living in the EU accession countries are not attending schools at all. Of those that go, most do not complete primary school and less than 1 percent across Central and Eastern Europe go on to higher/further education. Many

students who are in class are stuck in inferior segregated schools. Others are wrongly placed in schools for the mentally and physically disabled, merely because they had no access to preschool, or because they do not speak the majority language.⁴⁷³

But although this analysis ended by calling for an integrated policy approach designed to ensure that the basic rights of Roma are truly realized, neither human rights nor children's rights were explicitly mentioned. This is consistent with Wolfensohn's contention that it is neither necessary nor productive for the Bank to endorse a rights-based approach. Nevertheless, it is significant to note that the Bank's work on these issues has not been entirely rights-blind and that there has been at least one major project with a significant CRC dimension.

In a detailed report prepared for the 2003 conference,⁴⁷⁴ the Bank acknowledges both the historical legacy of rights violations⁴⁷⁵ and the need, 'for human rights and social justice' reasons, to address the problems associated with the marginalization of the Roma. But while rights issues are mentioned in several places, the strong emphasis of the report is on the instrumentalist reasons for addressing those issues, what the report refers to as the "reasons of growth and competitiveness". The increasing marginalization of the Roma is characterized as a problem which threatens economic stability and social cohesion. It is for that reason that it is important for European policy-makers to give priority to this issue.

While the report acknowledges the growing concern of a range of "international organizations such as the UNDP, the Council of Europe, and the OSCE, as well as NGOs including the Open Society Institute, Save the Children, and UNICEF", it indicates that the most important reason why Roma issues have gained attention is that they are "now an integral part of the European Union accession process". But despite the emphasis on the need to tackle social exclusion and to promote participation, human rights dimensions (defined and approached as such) remain largely invisible in the report itself.

Children's rights are, however, more prominent in two specific 'child welfare' projects in which the Bank has been involved in recent years, which are identified in a recent inventory of 'World Bank involvement in Roma issues'. The first of the projects was carried out in Romania between 1998 and 2002 and was designed to "test and promote community-based child welfare approaches as sustainable and cost-effective alternatives to institutionalized child care and to test approaches to reintegrate street children in Bucharest more fully into society."⁴⁷⁶ While the approach is not rights-based, the almost \$30 million project (of which the Bank was to contribute only \$5 million) provides that the local level implementing agency would be the Specialized Public Services for the Protection of Children's Rights.

The second operational project is the Bulgarian Child Welfare Reform Project (running from 2001 to 2004), the principal objective of which is said to be:

To improve child welfare and protect children's rights in Bulgaria through promoting community-based child welfare approaches such as de-institutionalization, abandonment prevention and street children services, as cost-effective alternatives to institutionalized child care. Thereby, the project will promote human capital development amongst disadvantaged children and will facilitate meeting some of the human rights elements of European Union accession and the fulfillment of Bulgaria's commitment to the United Nations Convention on the Rights of the Child (CRC).⁴⁷⁷

The report is premised on the need to ensure CRC standards in a variety of respects and indicates for example that "Training will be provided to all police officers to make them more aware of children's rights and their role in promoting them under the UN CRC" and that the project "will support the development of unified standards and requirements for care and services for children and families in line with the UN CRC and EU standards".

This case study of recent World Bank initiatives in relation to Roma and children in Eastern and Central Europe, demonstrates that issues of human rights and children's rights cannot easily be overlooked either in diagnosing the reasons for existing problems, or in prescribing effective responses to them. The Bulgarian example indicates that it is entirely feasible for the Bank to take full account of the CRC and to incorporate its standards as an integral part of project design, if and when it so wishes. It is true of course that there is probably greater sensitivity to such issues in these contexts because of the involvement of the EU, both in insisting that candidates for membership of the Union comply with human rights standards and in providing project funding linked to respect for human rights. But this caveat only serves to highlight the role that other actors can play in urging governments to take greater account of children's rights and the CRC and in facilitating a CRC-sensitive approach on the part of the Bank.

4.5 Recommendations of general relevance that emerge from the Indonesian case study

The case study of Indonesia which has been undertaken for the purposes of this report was designed to illustrate some of the issues that arise more generally in such situations and to highlight some of the strategies that should be considered in the future, in connection with the work of the international financial institutions, both in responding to financial crises and more generally in the course of their work. Although the comments that follow are sometimes Indonesia-specific, the primary purpose is to provide a concrete illustration of the issues being raised, rather than to focus specifically on what should have been done, or even what might in the future be done, in relation to Indonesia.

a) General principles

■ *Distinguishing children's rights empowerment from anti-poverty strategies*

There is considerable evidence that in the aftermath of the financial crisis, the Government of Indonesia tended to seek to deal with children's problems principally within a 'poverty' framework, on the assumption that the rights of children, as reflected in the CRC - including diverse problems faced as a result of discrimination and various forms of abuse and exploitation - could effectively be addressed as a by-product of an overarching anti-poverty approach. One NGO commentator suggested that government officials thought that children's problems are their families' problems and that specific targeting of children was not a central part of the strategy required.

In many respects, the quintessential challenge facing proponents of the CRC is to convince governments and other actors, including the international financial institutions, that a commitment to children's rights requires that they be treated as a separate issue on the agenda and that specific focused strategies are necessary if those rights are to be protected in times of crisis.

■ *Taking economic, social and cultural rights seriously*

According to one senior economist who was interviewed, it is essential that consideration not only be given to economic and social rights after a crisis has erupted. According to this view, Indonesia had been under-investing in basic social services (such as health and education) for a considerable period prior to the crisis and this partly explains why it was hit so hard by the 'tremor' that occurred.⁴⁷⁸ In support of this view, the 1995 child malnutrition figure of 35 per cent was cited, which was "hardly the norm for a 'miracle economy'".

The faithful implementation⁴⁷⁹ of the 'core content' of economic and social rights for children (under the CRC) and women (under CEDAW), in the context of international cooperation, presents an important vehicle for the grounding of the 'basic and universal social services' policy objective within the international legal framework, importing *inter alia* a sense of legal accountability for results. The ratification of the International Covenant on Economic, Social and Cultural Rights by the government of Indonesia, would help considerably in promoting this objective, eliminating the incoherence that has resulted from only children and women being entitled as a matter of law to the enjoyment of economic, social and cultural rights.

b) The national level

■ *The legal status of the Convention on the Rights of the Child*

Ratification of the CRC is only the first step in any country towards its implementation. Indonesia was one of the first group of countries to become a party to the CRC when it ratified the Convention in 1990. But, as noted earlier in this report, ratification needs

to be followed by appropriate measures to give full effect to the Convention within the context of national law. But even twelve years after ratification, the government informed the Committee that while some work had been done already, it "must be appreciated that a comprehensive review of national legislation will take quite a considerable amount of time and effort."⁴⁸⁰ In other words, there is still a long way to go before it can confidently be said that the basic legislative framework of the country is fully consistent with the requirements of the CRC.

In Indonesia, the CRC was reflected in a Presidential Decree, but this does not give it the force of law and thus does not enable the courts to play their role in making children's rights part of the legal culture of Indonesia.⁴⁸¹ Thus, for example, one interviewee remarked in relation to the Child Protection Law that the CRC "can't be used as an explicit reference point". Instead, due to its lower status as a decree, only the 'spirit' of the Convention can be invoked. In its First Periodic Report under the CRC, submitted in February 2002 and examined by the Committee in January 2004, Indonesia reported no change in this regard but gave the assurance that it was "earnestly considering and exploring ways of raising the [status of the] instrument of ratification from a Presidential Decree to an Act."⁴⁸² The Committee in its concluding observations strongly supported the latter alternative.⁴⁸³

A comparable situation continues to exist in many of the countries that have ratified the Convention and in the great majority of them the result is to significantly limit the treaty's real impact, especially within the legal system but also more broadly in terms of its policy impact. It is time for the Committee on the Rights of the Child to attach greater importance to its inquiries as to the formal and *de facto* legal status of the Convention when it is reviewing reports by States Parties and to make more consistent recommendations for an improved status in all situations where the legal status is not sufficient to enable the government concerned to demonstrate that it is honouring its legal obligation under Article 4 of the Convention to "undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention".

■ *The role of national institutions for the promotion of human and children's rights*

As noted earlier in this report, national institutions for the promotion of human rights can play a vital part in achieving greater respect for the CRC. In Indonesia, the principal institution established for this purpose is the National Human Rights Commission, Komnas-HAM. It was established in 1993 and has played an important, although uneven and often contested, role in the course of the subsequent decade. It has consistently drawn mixed reviews.⁴⁸⁴ For example, in 2000, a public opinion survey in the magazine Kompas found that 45 per cent of those surveyed, believed Komnas-HAM to be the most credible institution in Indonesia for defending human rights.⁴⁸⁵ But by March 2002, Human Rights Watch claimed that 'Komnas-HAM [had] gone from being the most credi-

ble institution in the country to being a real hindrance to human rights progress'.⁴⁸⁶

Research undertaken at the time of the financial crisis in Indonesia focused on the following shortcomings of the Commission. First, it needed to be established by law, or entrenched in the constitution and not exist solely on the basis of a presidential decree.⁴⁸⁷ Secondly, the quality of the staff of the Commission was said to be lacking in some respects, especially in terms of their overall expertise and the diversity of their backgrounds. Thirdly, it had only very limited complaints and investigatory powers and could only make recommendations to the government, on which the latter did not need to take any action if it so chose.⁴⁸⁸ Finally, it was not seen as being sufficiently independent from the executive, including in relation to the appointment process.⁴⁸⁹

These criticisms were also echoed by the UN Committee against Torture after its examination of a report by Indonesia in 2001. The Committee's conclusions and recommendations included reference to "the insufficient level of guarantees of the independence and impartiality of the National Commission on Human Rights (Komnas-HAM) which hinders it from fully carrying out its mandate..." Because only the Attorney General and not Komnas-HAM, has the authority to decide whether or not to initiate proceedings, the Committee is further concerned that reports of Komnas-HAM on preliminary investigations are not fully published, and that Komnas-HAM does not have the right to challenge a decision by the Attorney General not to prosecute a case.⁴⁹⁰

Komnas- HAM does not appear to have done a great deal of work specifically focused on children, although as noted earlier in this report, it did produce a series of pamphlets on children's rights. Similarly, the legal basis of Child Protection Bodies (CPBs) needs to be strengthened. The membership of CPBs consists mostly of NGOs, and one representative from the Ministry for Social Affairs. Their general role is to monitor, provide advocacy, receive complaints⁴⁹¹ and educate. Their broader potential was said by one member to relate to their ability to 'synergise and synchronise' various institutions in Indonesia relevant to child protection (e.g. church institutions, NGOs) and act as a 'coordinating body.' However at the time of the financial crisis their relationship with Komnas- HAM and other relevant human rights bodies⁴⁹² was unclear.

As emphasized in Chapter 8 of this report, national institutions can play a vital role in ensuring promotion of children's rights and of the CRC. The Indonesian example demonstrates that, despite the existence of an important national institution, much remains to be done to ensure that adequate attention is paid to the CRC. In appropriate situations, the IFIs could consider reaching out to these fledgling institutions as part of their institution-building programmes, as has been done in isolated cases so far under the PRSP process.⁴⁹³ Mutually-reinforcing legal and institutional reforms and NGO and civil society capacity-building initiatives would be required to secure the foundations for the robust

and independent operation of institutions designed to promote and protect children's rights.

c) The need for a broad-based children's rights constituency

One of the paradoxes of work to promote children's rights is that much of it reflects a top-down approach by international agencies or NGOs, working with national level agencies, while at the same time proclaiming the importance of grassroots support and the need for participatory structures. This combination sometimes leads to a neglect of the vital importance of ensuring that there is a broad-based constituency in favour of children's rights and one which is in a position to both demand and support initiatives designed to give effect to the CRC.⁴⁹⁴

In Indonesia at the time of the financial crisis, a local human rights movement had certainly existed for a considerable period of time, rising to prominence with popular resistance to the authoritarian excesses of the Suharto regime and flourishing with the opening of political space after 1997. However, as the country sought to come to grips with the consequences of the crisis, 'human rights consciousness' was considered to be limited, especially to younger people, of whatever class. Education and advocacy thus needed to be at the core of strategies to expand local understanding of the relevance of human rights, including the CRC, in order to reinforce the fact that human rights are, as one Indonesian observer put it, "not just Western."

d) The importance of data as a foundation for monitoring

One of the biggest obstacles to the effective application of a CRC-based approach in the context of development planning, relates to the lack of focused data on the basis of which targeted action can be adopted with a view to ensuring that the situation of each individual child is maximized. The study undertaken for the purpose of the present report in Indonesia serves to illustrate this problem in concrete terms.

In particular, in Indonesia, the need to rely on official data was a serious problem. Thus, for example, the Badan Pusat Statistik (BPS), (Dept of Statistics) figures in 1999 reported that there were 1.8 million workers in Indonesia aged 10-14; however, the Ministry of Education says the school drop-out rate figure for 10-14 year-olds was approximately five million,⁴⁹⁵ almost all of whom, according to independent commentators, would have gone to the informal labour sector.⁴⁹⁶ This largely accounts for the gap between BPS and ILO estimates of the dimensions of the child labour problem in Indonesia for 10-14 year-olds. The BPS relies on traditional survey data (which excludes education), whereas the ILO's statistics take into account data from education records too, premised upon the likelihood that children not enrolled in school are most probably engaged in labour.

To take a further example, according to one NGO dealing with street children the principal reason that

street children do not have SSN access (apart from the identity card issue mentioned earlier) is that the government uses official BPS data, which misses street children. Other children's rights and development NGOs agreed, one commenting that the reason that street children were 'missed' was that most official government planning was based almost exclusively upon 'household statistics'. There is a need for the IFIs and other aid agencies to take account of NGO data concerning street children. Exclusive reliance on BPS data means that street children are "all but ignored in planning."

One independent commentator alleged that government figures were often deliberately manipulated, leading to mistargeting and poor evaluation.⁴⁹⁷ Existing official statistics on children in Indonesia were described by this commentator as completely unreliable and a bad basis for planning. The attentions of the IFIs must be directed at securing an appropriate statistical basis for development policy and programming, including through capacity-building efforts at the levels of government and civil society (including academia and NGO), and increased reliance upon data from non-official sources.

The type of data relied upon is another issue. The CRC frame of reference is relatively broad, demanding the consideration of equality of access issues and the policy and programmatic integration of qualitative dimensions of deprivation and process-oriented implementation methodology and evaluation criteria. However, in 1999, the quality of education in Indonesia was still far below standard. For example, according to one education specialist, while not part of official government policy, there is nonetheless a cultural bias in favour of boys regarding tertiary education.

Another problem is the preponderance of quantitative measures, such as net enrolment ratio, to the exclusion of qualitative data. One former official in the Ministry of Education confided that even 10 years ago he knew that the situation was bad. However he said the Bank only evaluated on superficial criteria, rather than quality of education.⁴⁹⁸ NGO observers agreed, adding that monitoring and evaluation of programmes designed to benefit children, must go beyond the traditional government comfort zone of 'survival,' beyond indicators such as infant mortality rates, breastfeeding and so forth. But according to these commentators, the CRC needs to be brought in, along with a much broader range of qualitative as well as traditional quantitative indicators, allowing an appreciation of the full normative dimensions of applicable human rights.⁴⁹⁹ Social indicators must be adapted to the realization of children's rights within the terms of the CRC and must be developed and implemented in a way which facilitates participatory assessment and evaluation, including children's participation.

But this level of sophistication goes far beyond the basic problems that confront those who would wish to evaluate the extent to which specific provisions of the CRC are being met by a given government. This is dramatically illustrated by the problems

encountered in measuring the extent of compliance with a set of goals or indicators elevated by the international community to a place of particular prominence, in the form of the Millennium Development Goals (MDGs). A recent report by the World Bank which seeks to assess the progress which is being made by developing countries in their efforts to reach the various goals, some of which are focused on the year 2015, concludes not only that a significant number of countries are unlikely to meet the goals but, perhaps even more worryingly, that for a great many countries there is no data on the basis of which a reasonable assessment could be made. Thus an examination of the extent to which the sixty-five low income countries are likely to meet the goal of eliminating child malnutrition – defined as the prevalence of malnutrition among children under age five, measured by weight for age – the Bank concludes that for 55 per cent of the countries, there is no pertinent data available.⁵⁰⁰

Many other such examples could be cited of the extent to which data is not collected in ways or in relation to issues which are crucial for any effective evaluation of the extent to which countries are complying with many of their obligations under the Convention on the Rights of the Child. The Bank recommends that a greater effort be made to develop and monitor appropriate indicators.⁵⁰¹ But neither in this context, nor in any other Bank setting, is consideration given to the possibilities of linking the MDG monitoring process with the monitoring and evaluation activities that are required under the CRC. It is urgent that systematic consideration be given to the benefits to be derived from linking these two parallel processes in ways that eliminate duplication and emphasize synergies.

e) Reporting to the Committee on the Rights of the Child

The present report is focused on the need to lay the foundations for children's rights accountability, in part through the ratification of the CRC. But it is equally important to ensure that this is just the starting point, rather than being seen as an end in itself. In the case of Indonesia, two reports have now been submitted and the second of those will be examined by the Committee in 2004. But in response to the examination of the first report, there is little evidence that the government complied with its commitments to disseminate the Committee's concluding observations from the initial reporting round.⁵⁰² Moreover, the Second Periodic Report, which had been due in 1997, was submitted only five years later. These delays raise issues for the Committee itself, in terms of how to deal with delinquent reporting States, especially in situations in which there is a particular need to review progress or the lack thereof, both in responding to the recommendations made by the Committee in 1994 and on the basis of Indonesia's first report.⁵⁰³

In the present context such a record also raises questions as to how the World Bank and the IMF should relate to the Committee and indeed to the

Convention itself. As noted elsewhere in this report, it would be entirely feasible for the two institutions to factor the CRC into their situation analyses and to require that it be an element in the adoption of a PRSP, given that any country (apart from Somalia) preparing such a strategy will be a party to the Convention. Similarly it is appropriate for these institutions to use the CRC framework and the obligations which have been undertaken by their client states, as a way of ensuring that their prescriptions are not in any way incompatible with respect for the rights of children within the country concerned.

f) The IFIs

■ *The importance of an official policy statement on children's rights on the part of the international financial institutions*

While the present report is not the appropriate place in which to seek to resolve the contested issue of how the IFIs ought best to engage with the overall human rights framework, it is clear from the foregoing analysis that the absence of any official statement committing the Bank and the Fund to uphold, as far as possible, the principles contained in the CRC, is a significant obstacle to efforts designed to ensure adequate attention is paid to children's rights. Such a commitment could take any one of a variety of different formats. It might be useful as a starting point for UNICEF to seek to encourage the IFIs to agree to a joint statement along similar lines to that which was issued in March 2003, in relation to women's rights. On that occasion, an official joint statement was issued in the names of Omar Kabbaj of the African Development Bank, Tadao Chino of the Asian Development Bank, Jean Lemierre of the European Bank for Reconstruction and Development, Host Köhler of the International Monetary Fund, Enrique Iglesias of the Inter-American Development Bank, and James Wolfensohn of the World Bank. Because of its importance as a precedent, its text is worth recalling in full:

We, the Heads of the Multilateral Development Banks/International Monetary Fund, affirm the importance of promoting gender equality and empowering women for achieving the Millennium Development Goals.

Gender equality is not only a goal in its own right, but is important for reducing poverty and hunger, ensuring education for all, reducing child mortality, promoting maternal health, combating HIV/AIDS, malaria and other diseases and ensuring environmental sustainability. Research and on-the-ground experience show that providing females and males with equal access to capacity, resources, opportunities and voice increases productivity, accelerates economic growth, makes poverty reduction more achievable and improves the well-being of children, women and men. It also supports international conventions and treaties, including the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

Gender equality in our organizations is not only an issue of fairness; it strengthens our work. Organizational research and experience show that a more balanced workplace contributes to a diversity of approaches to the complex problems of development. In light of this, we affirm our continued commitment to promoting gender equality in our organizations and in the work of our organizations to assist member countries.⁵⁰⁴

■ *The training of international officials*

A frequent complaint voiced by Bank staff is that they don't have time to think about anything beyond the confines of the immediate task at hand, and have no time to undertake professional development activities in fields such as human rights. Existing bureaucratic workloads are such that the burden is said to be on the proponents of children's rights training for professional staff, to convince middle management of the value of such activities. Others pointed to the practical problem of what they called the endless restructuring at the Bank, with consequent confusion about what the priorities are. Another problem cited was the 'short-termism' of many of the discrete and concentrated agendas which individual Bank officials pursue, which are at best difficult to reconcile with rights-based strategies and approaches.⁵⁰⁵ Finally, noting the proliferation of development slogans and philosophies over the last few decades, the resistance within the Bank to perceived fads – into which category children's rights and human rights are often assumed to fall – is particularly high.

It is true of course that the introduction of even basic professional development training for IFI staff in relation to children's rights and human rights would not be without cost, in terms of staff time and the acquisition of the necessary expertise. But if children's rights are accepted by the entire international community and if every country in which the IFIs are working has undertaken binding legal obligations to respect the rights in question, it would seem to be an odd economy to avoid such basic training. Moreover, if human rights are seen in instrumental terms – as the work of Amartya Sen, in particular, has sought to underscore – then the required investment becomes merely a prudent way of proceeding. Once again, the analogy with women's rights, although by no means perfect, is of major relevance in this regard.

g) The future: children's rights and the CRC in the context of the PRSP and MDG processes

Two of the most significant processes with which the IFIs in particular and the international community in general, are currently involved, are the Poverty Reduction Strategy Papers (PRSP) process and the Millennium Development Goals process. In important respects the two processes are beginning to converge and each of them presents a major opportunity for the inclusion of children's rights dimensions in national level planning by governments. It is thus crucial that consideration be given to the

ways in which the IFIs can ensure that the CRC and the rights of the child are given the greatest possible prominence in the various contexts within which policies are being formulated.

Until recently, the only mention of PRSPs in the context of policies relating to children, dealt with Penicillin-Resistant Streptococcus Pneumoniae. Today, however, at least outside medical circles, the acronym has come to stand for something very different.

The PRSP process arose from the evaluation of the experience with the Enhanced Structural Adjustment Facility, the debate over the Fund's role in the Asian crisis, the HIPC and the Jubilee 2000 debt relief campaign, as well as pressure from the G7 on the IFIs to improve on their perceived shortcomings.⁵⁰⁶ The IFIs sought to assuage concerns about excessive conditionality and the imposition of Washington-designed policies and programmes on unwilling governments, by focusing on the notion of country-ownership and seeking ways in which poor countries could be seen to be taking control of their own destinies by formulating their own policy priorities.

Both the IFIs, bilateral donors and most other international development agencies have now come to invest a great deal of effort, resources and prestige into the process and despite relatively harsh critiques put forward by many NGOs and other actors, it seems certain that the PRSP process will continue to be a mainstay of the international scene for the next few years at least. It is thus essential that CRC proponents understand these strategies' role and how they can be reformed, so as to make a stronger contribution to the realization of children's rights.

- In contrast to previous Bank and Fund practices, the process has had a number of highly innovative characteristics. These are generally summarized as requiring that poverty reduction strategies should be: country-driven, promoting national ownership of strategies by involving broad-based participation by civil society
- Result-oriented and focused on outcomes that would benefit the poor
- Comprehensive in recognizing the multidimensional nature of poverty
- Partnership-oriented, involving coordinated participation of development partners (government, domestic stakeholders and external donors); and
- Based on a long-term perspective for poverty reduction.

It is clear that, unlike any approach which preceded it, the PRSP process is premised upon notions of transparency and participation. Thus, in the preparation of the strategies, the Fund and Bank are supposed to work closely with civil society, key donors and regional banks. In principle, if the PRSP process works as intended at the country level, health and education ministers and government and non-government constituencies sympathetic to, or with a direct responsibility for, children's rights, could play an active role in the formulation of the national

poverty reduction strategy upon which the national governments in cooperation with the IFIs' and (ideally) the international donor community in general, will base their development policy frameworks.

The potential importance of PRSPs in relation to children has been underlined by various reports. For example, in 2001, Save the Children UK noted in a submission to the Bank that in many of the world's poorest countries children under the age of fifteen, make up over 40 per cent of the population:

...in Burkina Faso and Uganda (49 per cent), Malawi (46 percent) and Ethiopia and Tanzania (45 percent). Children and young people are also more likely to be affected by poverty than other groups. In Honduras, for example, 60 per cent of couples with children live in poverty compared to 43 per cent of those without children, while in Vietnam in 1993, while 50 per cent of the population as a whole lived in poverty, 63 per cent of under fives did. In Uganda, 59 per cent of people living below the poverty line are children.⁵⁰⁷

In 2003, Swedish Save the Children commissioned a special report to review the experience with PRSPs in one particular region. The report began by noting that the considerable significance of the process "in low-income, developing countries where children form both the bulk of the population and the majority of those that live below the poverty line." As a consequence, children should be seen as "the locus of poverty, and strategies that prioritize children's rights and target child poverty reduction ensure a bias towards pro-poor growth and development policies."⁵⁰⁸

Given this importance, the central question then becomes whether the PRSP process has lived up to its potential, both in general terms and in relation to children. The Bank and the Fund have conducted a number of internal reviews of their experience over recent years. In March 2002, the staffs of the Bank and the Fund produced a joint review of the approach. It indicated that since 1999, only ten countries had completed a full PRSP while forty-two countries had completed interim PRSPs and seven others had prepared status reports. The review sought to convey a sense of optimism by indicating that "there has been widespread acceptance of the PRSP approach" and that "there is broad agreement" among those involved "that the objectives of the PRSP approach remain valid". But the report seems to use bureaucratic code words to convey a sense of much greater tentativeness. Thus it speaks of "the need to have realistic expectations"; "substantial scope for countries to improve the process" and the need to strike a balance "between pushing for more rapid achievement of the full potential of the PRSP approach and ensuring realism in light of country capacity constraints".

By May 2004, thirty-nine countries had undertaken a full PRSP and another sixteen had completed an interim PRSP. Thirty of the fifty-five were in Sub-Saharan Africa, eleven in Europe and Central Asia, and eight in the Asia/Pacific region.⁵⁰⁹ In 2003, the IMF's Independent Evaluation Office (IEO) announced that it would undertake an in-depth eval-

uation of the experience to date. By mid-2004, the evaluation had not yet been completed. The IEO's statement of intent recounted a variety of positive internal findings, including "broad agreement among all stakeholders involved on the validity of the objectives of the PRSP approach and its usefulness in tackling poverty" and "widespread agreement that the four key achievements of the PRSP approach to date are: (i) a stronger sense of ownership among most governments (ii) a more open dialogue (iii) a prominent place for poverty reduction in policy debates and (iv) an acceptance by the donor community of the principles of the PRSP approach".

From the perspective of the present report, two findings from the 2002 staff report are especially important. The first is that various concerns have been expressed about the lack of involvement of specific groups in the participatory process and specific reference is made to community groups which are out of favour with the government, local government officials, private sector representatives, trade unions, women's groups and direct representatives of the poor. In other words, a great many groups feel that they have been excluded, which does not augur well for the eventual inclusion of a human rights or children's rights perspective. We will return to this issue below. The second is the recommendation that the 'focus should now shift beyond process to content and implementation, which could usefully be interpreted to mean that the human rights dimension needs to be addressed, although it is not clear that this is the intention.⁵¹⁰

For all of the hopes invested in the process, there have been many criticisms levelled at it, especially concerning the extent to which genuine national level participation has vindicated the notion of country 'ownership' of the process. At one extreme, it has been claimed that "the IMF told Mozambique and Mauritania that they could obtain rapid approval for debt relief under HIPC, only if they did not put the PRSP out for public consultation."⁵¹¹ Reports from the consultation process underway in Bolivia, are similarly discouraging.⁵¹² Some interviewees pointed sceptically to the concept of 'PRSP Missions' which seem to go hand in hand with short-termism and excessive reliance upon external experts. The challenge was said to be whether the PRSP will be accepted as a new lens rather than a new dimension of bureaucratic activity. And from a human rights perspective in particular, one Bank official commented that 'country ownership' of poverty strategies under the PRSP might in many cases diminish – rather than promote – the scope for inclusion of human rights standards and assessment procedures, depending upon the space open for civil society and NGOs, the country's sensitivity to human rights scrutiny and the willingness and ability of the Bank and Fund to exert leverage on the question of participation.

A number of the experts interviewed for this report also expressed concern that the prevailing view at the working level within the Fund was that the prospects for genuine local or popular 'ownership' of the country poverty strategies under the PRSP should not be overstated and some seem to think

such prospects would also be undesirable.⁵¹³ There is also a perception among some within the Fund that there is little difference between the Fund's role in the PRSP process and the way in which Letters of Intent have traditionally been seen to be prepared, i.e. "the work should be done largely by the IMF in Washington prior to the country mission." This is consistent with the view held by some that governments must rely on the technicians at the IMF, if they are to identify the appropriate solutions to their problems. On this view, the value of the 'ownership' idea within the PRSP is that it can help countries to understand better the macro-economic issues and the work that the Fund does.⁵¹⁴

These criticisms all highlight the importance of the participatory dimension of the process, without which its aspirations to country-ownership, empowerment, mobilization, etc, are unlikely to amount to very much. Indeed, the debate over the consultative process by which PRSPs are ideally to be adopted, serves to focus attention on another aspect of the practice of many of the international development agencies and not only the Bank and the Fund, in relation to the promotion of participatory development. The terms 'participation' and 'empowerment' are very often invoked by such agencies, even if actual programmatic implementation remains uneven at best.

The United Kingdom's Department for International Development, DFID, has identified 'participation' as one of three "underlying principles, integral to the realization of all human rights" and the achievement of the Copenhagen and OECD international development targets.⁵¹⁵ It has elsewhere been described as "in many ways the key to release the power of fusion between development and human rights", thus representing "an opportunity for a holistic fusion of the operational and normative aspects of development and human rights approaches."⁵¹⁶ According to DFID's analysis, "Effective participation requires that the voices and interests of the poor are taken into account when decisions are made and that poor people are empowered to hold policy makers accountable. Accountability is therefore essential to participation."⁵¹⁷ DFID therefore places emphasis upon essential civil and political rights and guarantees as the appropriate legal underpinning for the instrumental value of participation, relying in particular upon the freedom of expression, free press and access to information and freedom of association.⁵¹⁸ Indeed, the approach is rooted in human rights instruments, in particular Articles 19-21 and 23 of the Universal Declaration of Human Rights.⁵¹⁹ The concept of 'empowerment'⁵²⁰ is closely linked to participation both in a normative and functional sense. Some of the World Bank's projects in South Asia and elsewhere already expressly rely on the concept of 'empowerment'. The experience of other development agencies also underscores the potential value of international human rights standards in that context.⁵²¹

The Bank has offered the following definition of participation:

The process by which stakeholders influence and share control over priority setting, policy-making, resource allocations, and/or programme implementation⁵²²

Unlike some of the early approaches to participation which were often limited to small groups directly affected by particular projects and whose involvement or cooption demonstrably had the capacity to enhance project outcomes in an instrumentalist sense, this definition is a strong one and its import is further enhanced by the listing of groups which are to be involved in any such participatory exercises. They include: (1) the general public, particularly the poor and vulnerable groups (2) the government, including parliament, local government, line and central ministries (3) civil society organisations such as NGOs, community-based organisations, trade unions and guilds, academic institutions (4) private sector actors such as professional associations and (5) donors, both bilateral and multilateral.

But virtually all of the reviews that have to date been undertaken of the element of participation within the PRSP process, have identified significant shortcomings. In a valuable synthesis of the available data, Frances Stewart and Michael Wang have identified various categories of people who have been more or less excluded from the process across a significant number of countries. They include (a) parliamentarians, particularly in Africa but also in Latin America (b) trade unions, whose very low profile in the process has been criticized by the International Labour Organization as well as the International Confederation of Free Trade Unions (c) women, whose participation is said to have been generally, although not always, weak and (d) 'marginalised groups', such as indigenous groups and peasants.⁵²³

The widespread criticism of the participatory dimensions of the process were reflected in the terms of reference for the proposed IMF Independent Evaluation Office study of the PRSPs. They highlight some of the criticisms that have been made. First, despite the consultation of stakeholders that has occurred, "their influence on the choice, design, and implementation of policies has not increased markedly". This is attributed both to "the limited technical capacities of civil society and other groups" representing the poor, and to "an underestimation of the time and resources required to build the capacity to enable civil society to contribute effectively to policy formulation". Second, the amount of civil society participation "tends to decline or break down altogether as the PRSP process approaches key final stages". Third, a participatory process of this type is ill-equipped to address the policy trade-offs and conflicts of interest which lie at the heart of many of the choices to be made. Fourth, insufficient weight has been given to the views of parliamentarians, the private sector and within civil society, those of rural dwellers. Fifth, the PRSP's participatory aspirations "are unrealistic and vague, especially in the area of macroeconomic policies". Sixth, the PRSP process is 'often not well integrated with the framework for domestic macro-

policy formulation'. In this respect the process is seen to be operating in a sphere which is distinct from established political institutions, including local governments.⁵²⁴

But this analysis put forward by the IMF is essentially designed to recite criticisms coming from outside the IFI system and it does not, at this stage, seek to evaluate the consequences of whatever shortcomings might be confirmed. In this respect, the evaluation by Stewart and Wang gives more cause for concern. They conclude that experience so far suggests that "PRSPs have achieved little in the way of increasing national ownership/empowerment over programme design by national governments or civil society". In some very limited respects, civil society participants have been empowered compared to their earlier position by being formally included in the policy-making process. But, because of the shallow, consultative, nature of the participation, this has not made much difference. And equally concerning, is their conclusion that "where civil society has been empowered, it is often an assortment of NGOs (including foreign ones), not necessarily representative of society as a whole, or of the poor, in particular."

While national governments are seen to be increasingly engaged in the PRSP process, the authors question whether this has had much of an impact in practice. This is borne out by the fact that the policy proposals coming out of the PRSP processes have been remarkably similar to the programmes that are already a part of the international agenda.

Of particular interest are the observations that Stewart and Wang make on the relationship between the PRSP process and democracy in the countries concerned. In general terms, they raise the possibility that the whole exercise has resulted in diminishing the legitimacy of national governments as a result of the IFIs bypassing them in order to engage with various other societal actors in order to design policy. In relation to democratically elected governments, this bypassing of existing institutions has the potential to weaken elected governments. They note that the situation is different in relation to non-democratic regimes, where "broadening participation may be particularly beneficial, contributing to the democratization of decision-making".

Contrary to some of the empowerment and ownership rhetoric, they conclude that the power of the IFIs has probably not been diminished by the process. This is because the PRSPs ultimately have to be approved by the Boards of the Bank and the Fund and this 'conditions the dynamics of the process from the start'. Moreover, the IFIs continue to 'exert a considerable indirect influence', manifested in part through self-censorship on the part of governments who propose programmes they assume to be favoured by the IFIs.

The overall conclusion reached by Stewart and Wang is that:

The PRSP process to date has not empowered developing countries and disempowered the World Bank. It may have changed perceptions

and consequently national ownership from this perspective. If so it would appear to have actually helped empower the World Bank, by increasing the effectiveness of programmes through raising national enthusiasm for them.⁵²⁵

It is of particular relevance in the context of the present study that none of these critiques has focused on the role accorded within the PRSP process to children or to the extent to which the process contributes to the realization of their rights. The neglect of this dimension is in some ways a confirmation of the oft-voiced criticism that the process is largely business as usual for the IFIs. The case study of Indonesia is not of great help in this respect, since a PRSP has yet to be adopted, as of early 2003. Moreover, the absence of one was not the subject of much comment in the concluding remarks adopted by the Chairman of the World Bank's Executive Board after its September 2002 consideration of the situation in that country. The statement rather blandly notes that the "Directors welcomed the early signs of a renewed commitment to poverty reduction and the progress made towards preparing a comprehensive poverty reduction strategy. They urged the government to continue and deepen consultations with all segments of society. Directors saw progress in this area as one key step in restoring public trust in government."⁵²⁶

In addition to examining the extent to which PRSPs have focused on the rights of children, the CRC itself highlights another much-neglected dimension of this issue. It concerns the right of children, recognized in Article 12 of the CRC, to participate in decisions concerning them, to the extent of their evolving capacities. This is a dimension which was noted by Save the Children UK in its 2001 submission to the IMF/World Bank review of PRSPs. On the basis of a review of the practice up until that time, the group concluded that "children and young people are being left out of discussions in the development of the PRSPs, despite the insights they have into their own situation." The submission urged the World Bank, the IMF and governments to take the views of children and young people seriously in PRSPs, by creating spaces to allow them to participate in formulating and monitoring PRSPs, on issues that affect them. This can be time-consuming, but it is worthwhile.

That report also found that "analysis of and action to tackle childhood poverty is not given enough attention in existing Interim Poverty Strategy Reduction Papers (I-PRSPs) and PRSPs." The existing level of attention to that crucial issue was described as limited and piecemeal. A later analysis of this issue concluded that PRSPs "do not, as yet, amount to a comprehensive or strategic approach to reducing childhood poverty or securing the wellbeing of future generations." The same authors expressed concern that the "policy emphases on liberalization [contained in many PRSPs] may undermine the livelihoods and wellbeing of the poorest groups" and that the overall policy mix "may deliver little for children's health and education among the poorest groups."⁵²⁷

A more detailed subsequent review of specific

PRSPs prepared by countries in Southern Africa, agreed that, in general, the PRSPs studied did "not undertake a comprehensive review of child poverty. Neither do they consider the implications of child poverty for systemic poverty entrenchment, noting how specific interventions to reduce child poverty and address children's rights, such as education, can assist in breaking the poverty cycle in low-income countries." On the other hand, the review concluded that although children are not specifically given priority in the strategies, some of them "do discuss a limited range of interventions that are directed towards reducing child poverty and improving children's future opportunities. These include measures to promote school attendance, improve access to basic health services and better nutrition and raise family incomes or livelihoods."

The overall conclusion of this geographically-limited review was that "the PRSPs reviewed do present some recognition and support for particularly vulnerable groups of children. This is welcome, but interventions are few and far between, indicating a limited and fragmented recognition of the needs and rights of discriminated girls and boys."⁵²⁸ While the greater child consciousness found in these Southern African PRSPs could possibly be sub-regionally specific, it is also possible that there is a growing awareness of the desirability of addressing children's issues in greater detail in the strategies. By the same token, however, that does not necessarily translate into any role for children's rights as such, or for the Convention.

The most recent study of the PRSPs to have focused on children's rights was published in 2004. It observed that thirty-four, or almost two-thirds of the PRSPs so far undertaken, make no mention at all of children's rights, despite the prominence of this group among the poorest and most disadvantaged.⁵²⁹ Of those that did mention the rights of the child, only three address specific rights such as the right to education. The report states that:

Without exception the perception of children's and youth's social reality is fragmented throughout the I-PRSPs and ignores the fact that children are holders of rights and not simply objects of social measures. Children (and young people less so) appear in the I-PRSPs as objects threatened by malnutrition, disease and poverty who need to be protected.⁵³⁰

In focusing specifically on child labour, a problem which is common to virtually all of the relevant countries, the report noted that twenty-eight out of fifty-three I-PRSPs evaluated, made not one single reference to child labour.⁵³¹

Another detailed review of the PRS processes examined the extent to which gender considerations have been taken into account. Again the findings indicate that there is a considerable distance to go before this dimension is adequately reflected. The study examined all thirteen of the PRSPs produced during 2002. According to the authors, only two deal directly with women's rights and do so in a reasonably comprehensive way (those dealing with Malawi and

Rwanda). Another report (on Zambia) addresses gender issues 'commendably'. But eight PRSPs adopt a very limited conception characterized as the "outdated Women in Development approach" and define gender issues as being limited to "reproductive health, girls' education and a few other issues that vary by country". "The remaining two PRSPs almost neglect gender". In terms of process considerations, the report concludes that while women are said to have been included in the consultations undertaken in almost all cases, none of the reports "break down the numbers of men and women consulted or indicate whether their surveys included gender-related questions. Few PRSP data are sex-disaggregated."⁵³²

What conclusions and perhaps more importantly, what recommendations might be drawn from this survey of the literature on PRSPs?

The first is that there needs to be a meaningful evaluation of what is meant by 'participation' and it should be done from within a human rights framework. This would be entirely consistent with the spirit and rationale of the Bank's highly publicized 'Voices of the Poor' participatory poverty assessment initiative. At present, the Bank Task Managers and Fund staff involved in the process do not evaluate participation, but only describe the process. The Board itself must make decisions as to adequacy. This situation could be improved significantly

From the CRC perspective, there are two dimensions of this process. The first is to explore how children's voices might best be heard. And the second is to ensure that children's rights are an integral part of the substantive focus of the strategies. In relation to the first, a report by the UK Save the Children Fund has rightly emphasized that "encouraging children and young people to participate does not mean inviting them to meetings where they will be unable to contribute. Instead it means creating spaces for consultations to take place, usually where the children are and allowing their views to be fed into the development of PRSPs." Where this approach is not pursued by those involved with the process, an alternative identified in the same report is to "use the rich variety of already existing pieces of research done with and by children and young people on poverty issues" in formulating the strategies.⁵³³

Another important reform of the PRSP process involves a more open examination of the macroeconomic and structural policy options which might be considered by States, rather than assuming that a fixed set of parameters govern the process from the outset and that nothing that is said or done within the process could lead to the attraction of more substantial resources for clearly identified needs such as ensuring the realization of children's rights.

If the PRSP process is to become more CRC-friendly, it needs to remedy the deficiency noted above in relation to gender concerns and ensure that poverty data is disaggregated not only by gender but also by age. Where that data is not available and this is a problem highlighted very effectively in the *Human Development Report 2003*, plans for developing a

more systematic approach to the collection and analysis of data which can be used to develop a CRC-conscious approach, should be set in motion.

Given that every country which will prepare a PRSP is bound by the obligations contained in the CRC, it should be assumed that each strategy will contain detailed plans for reducing childhood poverty and for facilitating the meeting of at least minimum targets set, in the light of the CRC. The review of PRSP in Southern Africa described above, concluded by emphasizing that child advocacy organizations should, among other things, seek to:

- Build local capacity on economic and development literacy to raise awareness and participation, particularly child participation, in PRSP processes
- Undertake research and analysis on the implementation, monitoring and review of PRSP processes
- Undertake research on the prioritization of child policies and resource-allocation to child-focused interventions in the PRSP processes. This may evolve into a Child-focused Shadow or Alternative PRSP - that is, a civil society version of a national PRSP.⁵³⁴

The PRSP process should also be seen as an important opportunity for educating various national and local constituencies in terms of the CRC and children's rights. One way to promote this objective is to seek to link the process in creative ways to the monitoring which is required to be undertaken at least every five years, in order to fulfil the State's reporting obligations under the CRC. Thus the terms of reference formulated for the IMF's review of PRSPs notes objections made by some civil society representatives to the methods used to evaluate and monitor the impact of the process. It is claimed that these are "often based on hastily-collected and inadequate data, especially about poverty and using methods on which there is little consensus". This emphasis on the need for independent and credible monitoring mechanisms serves to highlight an important link to the children's rights framework. In the broader human rights domain, these links are beginning to be explored. Thus for example the Irish Human Rights Commission has announced that it plans to press for the full integration of a human rights approach into the National Anti-Poverty Strategy and that one way in which this could be achieved would be through the use of poverty indicators to monitor outcomes.⁵³⁵ Similar linkages need to be developed in relation to the CRC.

If carried out properly, within an appropriate time frame, the children's rights gains overall from planning approaches modelled upon the PRSP could be significant, in terms of direct empowerment in children's rights terms, contribution to a general awareness and culture of children's rights and instrumental gains from the higher priority accorded to those rights in development planning.

Notes

- 315 A report prepared by the Save the Children Fund to assess the impact of the CRC in its first decade has called upon NGOs in the North to lobby those of their governments which are represented by individual Executive Directors with the governing structure of the World Bank to 'ensure that a children's rights approach is adopted in all the decision-making processes of the Bank'. Save the Children, *Children's Rights: Reality or Rhetoric?: The UN Convention on the Rights of the Child: The First Ten Years*, (2000) p. 292.
- 316 For a symposium evaluating the program several years after its launch see Richard Jolly and Roph van der Hoeven (eds.), 'Adjustment with a Human Face – Record and Relevance', 19 *World Development* (1991) 1801.
- 317 IMF, 'Social Dimensions of the IMF's Policy Dialogue: A Factsheet', March 2001.
- 318 For details of the interviews conducted etc see Annex A to this report.
- 319 See, for a controversial but eminently readable example, J. Stiglitz, *Globalization and Its Discontents* (2002).
- 320 Jack Boorman and Andrea Richter Hume, 'Life with the IMF: Indonesia's Choices for the Future', paper presented at the 15th Congress of the Indonesian Economists Association, Malang, Indonesia, July 15, 2003, available at http://www.imf.org/external/np/speeches/2003/071503.htm#P282_72752
- 321 One interviewee for this study reported that the 'fact of ratification of the CRC was persuasive with African Finance Ministers' when they agreed upon principles which would discourage charging for access to essential health and educational facilities. In this context the CRC was said to have 'added a powerful additional argument' for the proposition that recognition of the child's rights to health and education meant that such measures were required rather than optional. See *Implementing the 20/20 Initiative: Achieving Universal Access to Basic Social Services*, A joint publication of UNDP, UNESCO, UNFPA, UNICEF, WHO and the World Bank (September 1998) at 22-25.
- 322 The appropriate legal framework and mechanisms must be in place at national level if human rights are to be protected. But this is not enough on its own. In practice, legal services tend to reflect the preferences and needs of their most common users - mainly propertied and salaried classes. Poor people are rarely able to use formal legal systems to pursue their claims. The actual costs of engaging a lawyer, the opportunity cost of time spent in court and the general level of skill and education required to litigate effectively, all serve as deterrents. However, reliance on alternative structures and mechanisms may likewise have its limitations: "Poor people may prefer, or have no choice but, to use traditional and customary systems. While such informal systems are often closer to the lives and concerns of poor people, they may be based on authority structures, practices and values which do not comply with human rights norms." UK Department for International Development, *Realising Human Rights for Poor People: Strategies for Achieving the International Development Targets*, October 2000, p.17, available at http://www.dfid.gov.uk/Pubs/files/tsp_human.pdf.
- 323 Solan, M., Jones, S., Dicker, R. and Waller, S., 'Indonesia: Intersection of Human Rights, Financial Markets and Competition Policy (Panel Discussion)', 25(1) *Brooklyn Journal of International Law* 161-82, 162 (1999). The remark was made in the context of a discussion on the effects of 'globalization' in Indonesia.
- 324 UNICEF (Jakarta) Situation Analysis (1999).
- 325 For one such study, although with a very limited scope, see Kittiprapas, S., Sanderatne, N., and Abeysekera, G., 'Financial Instability and Child Well-being: A Comparative Analysis of Social Policy Responses in Four Crisis-affected Asian Countries: Thailand, Indonesia, the Republic of Korea and Malaysia', in Cornia, G.A. (ed.), *Harnessing Globalisation for Children: A Report to UNICEF* (Florence, UNICEF Innocenti Research Centre, 2002).
- 326 Curtis, E., 'Child Health and the International Monetary Fund', Vol 352, Issue 9140 *Lancet* 1622-24 (1998).
- 327 See e.g. United Nations Support Facility for Indonesian Recovery (UNSFIR), *The Social Implications of the Indonesian Economic Crisis: Perceptions and Policy* (1999) at 6-7, and 11-26 on the limitations of small-scale assessments. The authors conclude (at 25): "Given the weaknesses of the data currently (as at April 1999) available, the difficulty of comparing surveys' results, and the technically inaccurate exercise of generalizing at the national level, care should be taken in using available data for programmatic purposes, in particular targeting."
- 328 Speech by Jean-Michel Severino, Vice President, East Asia and Pacific Region, World Bank, at the Third Asia-Pacific Economic Cooperation Human Resources Development Ministerial Meeting, Washington D.C., 28 July 1999.
- 329 Solan, M., Jones, S., Dicker, R. and Waller, S. (1999) at 162. Useful references concerning the social effects of the crisis include: (1) Caroline Robb, 'Social Aspects of the East Asian Financial Crisis: Perceptions of the Poor Communities' (World Bank 1998), highlighting the disproportionate impact of poverty, lack of medication and health care, and increase in child prostitution; (2) Mboi, N., 'Child labour and economic crisis', *Jakarta Post*, 15 October 1998; (3) 'UNICEF: Fate of millions of Indonesian Children at Stake', *Antara- the Indonesian National News Agency*, 8 Sept 1998, reporting a UNICEF statement that "multiple threats to the health, well being and basic education of Indonesia's children constitute nothing short of an international emergency." In the same report Carol Bellamy "expressed concern that over \$50 billion in emergency loans to Indonesia by the IMF and World Bank and other lending agencies may not be enough to turn things around;" (4) 'UNICEF: Indonesia faces long-term emergency', *M2 Communications*, 19 August 1998; (5) Okol, P., 'Crisis hits hard for child workers; street children', *Jakarta Post*, 23 July 1998; (6) OXFAM International Briefing, 'The Real Crisis in Asia' (April 1998); and (7) OXFAM International Policy Paper, *East Asian 'Recovery' Leaves the Poor Sinking* (October 1998), covering impacts on education, access to health services, and child prostitution.
- 330 U.S. Department of State, *1999 Country Reports on Human Rights Practices*, Feb. 25, 2000. And for an earlier accounts see Soemardjan, S. et al, "*Prihatin Lajhir Batin: The Impact of Current Monetary Crisis and Natural Disasters on the Situation of Indonesian Communities, Families, Women and Children* (1998), covering issues such as education, employment, and women's and children's health and nutrition; and Atinc, T. and Walton, M., *Social Consequences of the East Asian Financial Crisis* (1998) at 14-23.
- 331 U.S. State Department Report, *Country Reports on Human Rights Practices 2001* (March 2002). However during the same period the mortality rate for children under age 5 was reported to have slightly decreased.
- 332 Dursin, R., 'Malnutrition Saps a Generation's Future', *Inter Press Service*, 31 May 2000.
- 333 U.S. State Department Report 2001 (March 2002).
- 334 On crisis effects on education, albeit focusing upon official drop-out and enrolment rates and gender disparity figures rather than qualitative assessments, see UNICEF (Jakarta) Situation Analysis (1999) at 27. Details of the Social Safety Net (SSN) 'stay in school' programme launched in June 1998 and the Bank's response more generally, can be found at: The World Bank Group, *Social Crisis in East Asia: Education in Indonesia – The Response*, <http://www.world-bank.org/poverty/eacrisis/countries/indon/educ3.htm>. For some official evaluations, albeit limited in scope, see World Bank, *'Back-to-School' Indonesia 1998/9: What Worked Well? What Didn't? A Report on the Scholarships and Grants Program* (SGP) (July 1999); Ministry of Education and Culture, *The Impact of Indonesia's Economic Crisis on Education: Findings from a Survey of Schools* (1999).
- 335 UNICEF (Jakarta) Situation Analysis (1999) at 26.
- 336 "A 1994 law raised compulsory education from 6 to 9 years, but the law has not been implemented fully due to inadequate school facilities and the lack of family financial resources to support children to stay in school. Official and unofficial fees for public education, including payments for registration, books, meals, transport, and uniforms have become prohibitively high for many families. According to a 1999 Rand Corporation survey, the percentage of 7 to 12 year olds who have dropped out of school tripled from about 1.0 percent in 1997 to 3.5 percent in 1998. According to ILO statistics, 6 million children between the ages of 7 and 15 dropped out of school since the economy plummeted in 1997." *U.S. State Department Report 1999* (Feb. 2000).
- 337 The World Bank Group, 'Social Crisis in East Asia: Education in Indonesia – Impact of the Crisis',

- <http://www.worldbank.org/poverty/eacrisis/countries/indon/educ2.htm>.
- 338 See generally UNICEF (Jakarta) Situation Analysis (1999) at 117-34. Interviewees in October 1999 identified lack of books and other infrastructure and teacher education, as issues. According to some sources primary school teachers mostly were no more than high school graduates and there was a need to increase existing teacher numbers. As at 1999 there was a 9-year compulsory education programme, with about 70% attendance now. About 30% of 13-15 year-olds could not attend junior secondary school because of poverty, and also 'infrastructure limitations' (i.e. no schools or teachers). A World Bank-supported programme reportedly aimed to maintain the 70% rate during the crisis, and increase gradually until 100% by the year 2004.
- 339 Cameron, L., *The Impact of the Indonesian Financial Crisis on Children: Data from 100 Villages Survey*, World Bank Policy Research Working Paper No. WPS 2799 (2002); for an earlier version of this study see Cameron, L., 'The impact of the Indonesian Financial Crisis on Children: An Analysis Using the 100 Villages Data', *Innocenti Working Paper No. 81*, UNICEF Innocenti Research Centre (2000).
- 340 K. Toma_evski, Report on a Mission to Indonesia, 1-7 July 2002, UN Doc. E/CN.4/2003/9/Add.1.
- 341 U.S. State Department Report 2001 (March 2002).
- 342 *Ibid.*
- 343 *Ibid.*
- 344 Carriere, R., 'The First Years Last a Lifetime', statement to Indonesia Consultative Group Meeting, Tokyo, Oct. 17-18, 2000, available on World Bank website.
- 345 U.S. State Department Report 2000. See also Knowles, J., Pernia, E. and Racelis, M., 'Social Consequences of the Financial Crisis in Asia: the Deeper Crisis', paper prepared for Manila Social Forum: New Social Agenda for East and South-east Asia, 8-12 November 1999 at 7, reporting also an increase in the number of reported child abuse cases.
- 346 Interviews in Jakarta, October 1999.
- 347 US State Department Report 1999 (Feb. 2000).
- 348 Interviews in Yogyakarta, October 1999. And as the US State Department Report 1999 notes: "On an anecdotal level, the media frequently reported on instances of children dying from malnutrition or those in need of treatment for the condition."
- 349 'Over 1 million babies born malnourished', *The Jakarta Post*, 18 April 2000. State Minister of Women's Empowerment Khofifah Indah Parawansa revealed on 17 April 2000 that 30 percent of 3.5 million babies born in Indonesia during the two year period since the onset of the crisis had serious malnutrition. "Many of these babies were born weighing less than two kilograms because of their mothers' poor health," Khofifah was reported to have said. The article stated that: malnutrition had been prevalent among newborns and infants in rural and urban areas following the economic crisis that hit the country in 1997. "Many babies were born underweight because their mothers, especially those from young families, suffered malnutrition," the minister said. Their growth would be retarded, both physically and mentally, she said, adding that unless help came quickly, they would become "the lost generation."
- 350 For the 2002 figure see 'Malnutrition Among Children Hits Alarming Level', *Jakarta Post*, Nov. 12, 2002. For the 1995 figures see U.S. State Department Report 1999 (Feb. 2000).
- 351 *Jakarta Post*, Nov. 12, 2002.
- 352 See de Vylder, S., *Development Strategies, Macro-economic Policies and the Rights of the Child*, Discussion Paper for Radda Barnen (1996) at 9.
- 353 *Ibid.*, 10. For an illustration of ways in which these 'third circle' policies affected poverty in the East Asian crisis see Atinc, T. and Walton, M., *Social Consequences of the East Asian Financial Crisis* (1998) at 26-7.
- 354 IMF, 'Social Dimensions of the IMF's Policy Dialogue: A Factsheet', March 2001, p.2.
- 355 *La Tribune* (France), 23 June 2003, reported in *World Bank Press Review: Headlines for Monday, June 23, 2003*.
- 356 *Ibid.*
See e.g. World Bank, *Child Labour: Issues and Directions for the World Bank* (1998). As of 2003 this was not a formal policy document.
- 357 *World Bank Development News*, 2 April 2001.
- 358 Indeed the IFC's work on child labour is significantly more advanced in its recognition of relevant international standards than is the comparable work of the IDA/IBRD.
- 359 See 'Gender – Work in Progress' links at <http://lnweb18.worldbank.org/mna/mena.nsf/>.
- 360 Speech by Jean-Michel Severino, Vice President, East Asia and Pacific Region, World Bank, at the Third Asia-Pacific Economic Cooperation Human Resources Development Ministerial Meeting, Washington D.C., 28 July 1999.
- 361 See e.g. The World Bank Group, 'Social Crisis in East Asia: Activities in Indonesia – Improving the Quality of Junior Secondary Education (East Java and East Nusa Tenggara Junior Secondary Education; Central Indonesia Junior Secondary Education; Sumatra Junior Secondary Education)', <http://www.worldbank.org/poverty/eacrisis/countries/indon/INDPRO~1p5.htm>, a joint project involving the ADB, with World Bank funding initially being US\$296 million of the US\$382 million total. The Bank agreed to expand the geographic coverage for and increase the amount of, scholarship and special assistance funds beyond the above three provinces to all 27 provinces of the country, as a result of the crisis.
- 362 Speech by Jean-Michel Severino, Vice President, East Asia and Pacific Region, World Bank, at the Third Asia-Pacific Economic Cooperation Human Resources Development Ministerial Meeting, Washington D.C., 28 July 1999.
- 363 *Ibid.*
- 364 As to the non-lending activities see 'World Bank Non-lending Activities in Indonesia,' <<http://www.worldbank.org/poverty/eacrisis/countries/indon/indonmatrix2.htm>>.
- 365 The World Bank Group, 'Social Crisis in East Asia: Activities in Indonesia – Policy Reform Support Loan,' <http://www.worldbank.org/poverty/eacrisis/countries/indon/INDPRO~1p6.htm>.
- 366 But for a cautionary note see OXFAM International Policy Paper, *East Asian 'Recovery' Leaves the Poor Sinking* (October 1998): The World Bank's Early Childhood Development Program will provide support to 1.2 million infants. Crucial as such support is, in eastern Indonesia over 50 per cent of children under the age of five [were as at October 1998] estimated to be suffering from malnutrition.
- 367 However OXFAM has criticised such safety net measures as being "not even remotely adequate given the scale of the social crisis they are seeking to address. For instance, the World Bank's five year program of grants aimed at keeping children in school will cover, in a best case scenario, less than a third of the children who are expected to drop out. There is also evidence that the programme is failing to target the poorest and most vulnerable." OXFAM International Policy Paper, *East Asian 'Recovery' Leaves the Poor Sinking* (October 1998).
- 368 For a summary see: The World Bank Group, 'Social Crisis in East Asia: World Bank Lending Activities in Indonesia,' <http://www.worldbank.org/poverty/eacrisis/countries/indon/indonmatrix.htm>.
- 369 Scott, D., A Practical Guide to Managing Systemic Financial Crises : A Review of Approaches Taken in Indonesia, the Republic of Korea, and Thailand, World Bank Policy Research Working Paper Series No. WPS 2843 (2002).
- 370 Country Assistance Strategy Progress Report for Republic of Indonesia, July 25, 2002. World Bank Report No. 24608-IND.
- 371 Jack Boorman and Andrea Richter Hume, 'Life with the IMF: Indonesia's Choices for the Future', paper presented at the 15th Congress of the Indonesian Economists Association, Malang, Indonesia, July 15, 2003, available at http://www.imf.org/external/np/speeches/2003/071503.htm#P282_72752, Box 2.
- 372 Remarks by Sanjeev Gupta, Assistant Director, Fiscal Affairs Department, IMF, Transcript of an IMF Economic Forum, Does IMF Fiscal Policy Advice End up Hurting the Poor?, Washington DC, April 29, 2003, at <http://www.imf.org/external/np/tr/2003/tr030429.htm>
- 373 IMF Press Release No. 03/129, July 29, 2003.
- 374 <http://www.imf.org/external/np/teo/2003/cac/index.htm>
- 375 IMF, Press Release No. 00/4, February 4, 2000, 'IMF Approves US\$5B Extended Arrangement for Indonesia.'
- 376 Statement of IMF Deputy-Managing Director Stanley Fischer in Press Release No. 00/4, 4 February 2000.
- 377 MEFP, para 4.
- 378 MEFP, paras 12-15.
- 379 MEFP, paras 11-19.
- 380 MEFP, para 21.
- 381 Including: improved governance in banking (including at para 36, credible prosecution of the Bank Bali investigations); loan collection and asset recovery; State and BTO

- Bank restructuring; private bank restructuring; and legal, regulatory and supervisory framework (elements specific to bank system reforms).
- 382 Namely, in connection with competition and investment policy; agricultural policy; forestry; environment, and small and medium enterprise policy.
- 383 MEFP, paras 21-24. The programmes are also said to have 'enhanced monitoring provisions and other safeguards to prevent abuse and protect implementation, including frequent reporting on key performance indicators, independent verification and close involvement by NGOs and civil society.'
- 384 The letters have been dated December 13, 2001, April 9, 2002, June 11, 2002, November 20, 2002, March 18, 2003, and June 11, 2003.
- 385 'Indonesia: Selected Issues', IMF Country Report No. 02/154 (July 2002), p. 10.
- 386 *Ibid.*, p. 92.
- 387 'Consultative Group Meeting for Indonesia, Remarks by Mr. Daniel Citrin, Senior Advisor, Asia & Pacific Department, IMF', January 21, 2003, <http://www.imf.org/external/np/dm/2003/012103.htm>
- 388 Jack Boorman and Andrea Richter Hume, 'Life with the IMF: Indonesia's Choices for the Future', paper presented at the 15th Congress of the Indonesian Economists Association, Malang, Indonesia, July 15, 2003, available at http://www.imf.org/external/np/speeches/2003/071503.htm#P282_72752.
- 389 See the various assessments cited in the preceding footnotes.
- 390 One such observer, OXFAM, has summarized the Fund's culpability in the following way: "The IMF was not responsible for East Asia's crisis, but it was responsible for deepening and prolonging the recession. The economic costs have been enormous. Less visible, and less easy to estimate, are the human welfare costs. Poverty and vulnerability have increased across the region; some of the consequences may be irreversible." OXFAM (1999) at 31. And see also OXFAM, *Education Now: Break the Cycle of Poverty* (1999) at 190-92; and OXFAM, October 1998 report on human cost of IMF programmes: 'IMF policies based on the imposition of high interest rates, supposedly to "restore investor confidence," have exacerbated the situation and contributed to poverty. The most dramatic effects have been in Indonesia where gross domestic product is expected to contract by 20 per cent.'
- 391 For example, in the case of the IMF, one senior Indonesian government official stated that it was the IMF which determined the percentage allocation in the budget for education and health and so forth, albeit "in conjunction with the government." However the Fund has its own "international (macroeconomic) formula," and needs to be "convinced why the standard model is inapplicable in a given situation, or needs to be varied."
- 392 See for example O'Sullivan, D., 'IMF spurs Indonesian reform,' *Financial Times*, 9 April 2000; and the book by Joseph Stiglitz cited above.
- 393 For a discussion of this phenomenon see OXFAM (1999) at 12-14.
- 394 The 'Bali Gate' scandal began in July 1999, when investigators discovered that one of Indonesia's leading private banks, Bank Bali, had diverted about US\$70 million in public funds to a top Golkar official, apparently in order to help gain support for a plan to keep Bank Bali afloat. See *New York Times*, 8 September 1999.
- 395 For a more comprehensive account of that relationship see Kapur, Lewis and Webb, *The World Bank in its First Half Century* (1997); and also paras 3.8-3.10 at 15-16 of the Indonesia - OED (World Bank) Country Assistance Note, 4 February 1999.
- 396 Page 3, para 1.14 of the OED Note refers to the corruption problem. See also Standing, G., (ILO), EUI European Forum conference paper, Global Trajectories: Ideas, Transnational Policy Transfer and 'Models' of Welfare Reform, Florence, 25-26 March 1999, 'New Development Paradigm or Third Wayism? A Critique of the World Bank Rethink,' at 12; and OED Country Assistance Note (February 1999) at para 3.10, reporting former Bank President MacNamara's warnings on corruption even during the 1970s.
- 397 See e.g. Standing, G. (1999) at 12: The Bank's VP for East Asia in late 1997 said that the Bank knew 'exactly where our money is going' in Indonesia (*Wall Street Journal*, 19 August 1998). However the Bank's memorandum in September 1998 and subsequent early 1999 evaluation estimated that 20% of the funds allocated to Bank projects in Indonesia had been 'diverted' to politicians and bureaucrats.' Estimates offered by experts interviewed for the present study suggested an even higher figure.
- 398 OED Country Assistance Note (February 1999) at paras 2.11-2.20 and 3.8-3.10 and 3.29 and p.26. One respected independent Indonesian commentator remarked that the Bank was unduly concerned with preserving good relations between the US and the Indonesian government, in the (US) interests of preserving 'democracy' and combating communism.
- 399 OED Country Assistance Note (February 1999) at para 2.17.
- 400 See OED Note, paras 9-10.
- 401 OED Note, para 2.20. There appears to have been a belated formal acknowledgement of the deficiencies of this approach. See *World Bank Development News*, 18 April 2000: "Le Figaro (p.v) notes that Wolfensohn acknowledged that in 1999, the major part of Bank lending was in fast-disbursing structural adjustment credits for the countries hit by the Asian crisis. This would change in future, he promised, adding that there would be a better division of labour with the IMF"
- 402 OED Country Assistance Note (February 1999) at paras 3.27-3.29.
- 403 According to some accounts, the Bank's concerns regarding corruption were raised from time to time with the government of Indonesia, although almost always behind closed doors.
- 404 See description above.
- 405 The sea change in this respect was evident soon after the Habibie Government took office in 1998.
- 406 On 5 Oct 1999, Development News reported, quoting Reuters and AFP: "The IMF said yesterday it plans technical talks with Indonesia, but reiterated that no new lending would take place until significant progress was made on the Bank Bali investigation, Reuters reports. The Fund said in a statement it would talk with the government, major political parties, universities and other economic institutions with a view to reaching a consensus on a suitable macroeconomic policy for the country. The Fund said the consultations would be held in response to requests from government and non-government sources in Indonesia and that it would undertake technical discussions aimed at forging a consensus "on the macroeconomic framework that should guide policy in the period ahead," quotes AFP.
- 407 The 'Village Infrastructure Projects' are said to be an example of this. See Deepa Narayan (ed), *Empowerment and Poverty Reduction: A Sourcebook* 131-35 (2002).
- 408 The Bank's former chief economist Joseph Stiglitz was making this point frequently in public addresses in 1999. See also Atinc, T. and Walton, M., *Social Consequences of the East Asia Financial Crisis* (1998) at 26: "To help reduce poverty there is a strong case to err on the side of [macroeconomic policy] expansion," although investor confidence and inflationary and economic growth risks need to be weighed. "Moderating economic contraction is important for the poor, and may be distributionally favourable. How the fiscal expansion is financed is equally important."
- 409 OXFAM (1999) at 29. Furthermore, according to one commentator, in Korea the vernacular was/is 'IMF crisis,' rather than 'fiscal crisis,' as the IMF's reforms were not seen as being appropriate to ensure the inflow of capital. Furthermore in Malaysia it was shown that capital controls (contrary to IMF dogma) can be applied in certain circumstances and that 'indigenous plans' do have a place.
- 410 See IMF Press Release No. 97/50, 5 November 1997, 'IMF Approves Stand-by Credit for Indonesia.'
- 411 Myrdal, G., *Against the Stream: Critical Essays on Economics* (1975) at 142. Recent research by Jeffrey Sachs and others into the cumulative economic costs of the malaria epidemic in Africa, graphically exposes the compartmentalization fallacy: Barber, B., 'Malaria Cripples African Economy,' *The Washington Times*, 25 April 2000; 'Africa Confronts Malaria,' *BBC News Online*, 25 April 2000.
- 412 Marshall, K., 'Social Dimensions of the East Asia Crisis: Some Reflections Based on Experience from the Adjustment Eras in Africa and Latin America,' Paper for IDS East Asia Crisis Meeting, 13-14 July, 1998.
- 413 See e.g. OXFAM International Policy Paper, *East Asian 'Recovery' Leaves the Poor Sinking* (October 1998): "Treating poverty reduction as an appendage to economic reform is inconsistent with the policy commitment of both [the Bank and Fund], as well as being inimical to the inter-

- ests of the poor in East Asia." And more recently, OXFAM International Policy Paper, *Outcome of the IMF/World Bank September 1999 Annual Meetings: Implications for Poverty Reduction and Debt Relief* (October 1999) at 5: "For too long the approach [to programme design] has actually been backwards, with poverty reduction coming as an afterthought to harsh structural adjustment programming by the IMF and World Bank. The Bank has often attached 'social funds' to adjustment programmes, claiming that these often politicized and disconnected programmes are successfully addressing poverty even while the overall adjustment policies do not. Senior staff of both institutions now acknowledge the failures of this approach and the pressure is on them to get this right."
- 414 OXFAM, *Education Now: Break the Cycle of Poverty* (1999) at 190. Or as the same organization has put the matter more simply: SSNs are "ineffective in an environment where poorly designed economic reforms are destroying livelihoods." *Jakarta Post*, 27 September 1999.
- 415 United Nations Support Facility for Indonesian Recovery (UNSFIR), *The Social Implications of the Indonesian Economic Crisis: Perceptions and Policy* (1999) at 98.
- 416 UNSFIR (1999) at 98. See 98-101 for a discussion of a range of SSN implementation issues, including other aspects of programme design, targeting of beneficiaries, delivery mechanisms, capacity of local authorities and sustainability.
- 417 As one senior independent economist saw it, the question is how to identify where the targets are and how to design and execute the programme in a sustainable way. In her view SSNs are needed, but the focus must be on 'identification, targeting, and design.' Indonesia is characterized by great diversity in social arrangements, economic activity and basic service delivery (e.g. farmers within and outside of Java are different, and fishermen within Java will be different). A 'cushion' is needed, but what sort? In this respect there is a very real tension from the Bank's point of view between 'recognition of diversity' v. 'efficient management of programmes', the latter factor tending towards inappropriate homogeneity in approaches.
- 418 Pritchett, L., Sumarto, S., and Suryahadi, A., 'Targeted Programs in an Economic Crisis: Empirical Findings from the Experience of Indonesia' (Jakarta, SMERU Working Paper, Oct. 2002). <http://www.smeru.or.id/report/workpaper/targetedprogram/targetedprog.pdf>
- 419 OXFAM (1999) at 35.
- 420 OXFAM (1999) at 35. See also Knowles, J., Pernia, E. and Racelis, M., 'Social Consequences of the Financial Crisis in Asia: the Deeper Crisis,' paper prepared for Manila Social Forum: New Social Agenda for East and South-east Asia, 8-12 November 1999 at 10: "Targeting is more difficult during a crisis because there is much 'churning' into and out of the ranks of the poor. A lot of experimentation and careful evaluation are therefore required to develop effective targeting mechanisms for social safety nets." And the findings of the Social Monitoring and Early Response Unit (SMERU) see Suryahadi, A., Suharso, Y. and Sumarto, S., 'Coverage and Targeting in the Indonesian Social Safety Net Programs,' paper prepared for Manila Social Forum: New Social Agenda for East and South-east Asia, 8-12 November 1999 at 19-20: While discounting for some regional variation, the authors conclude: "The findings of this study, unfortunately, point out that in many cases the target groups have been largely missed by the programs – both in terms of low coverage and being only loosely targeted in practice. ... The general picture ... points to the need for a large improvement in program implementations, in particular in targeting the beneficiaries of a particular program and raising coverage within the target groups." However see United Nations Support Facility for Indonesian Recovery (UNSFIR), *The Social Implications of the Indonesian Economic Crisis: Perceptions and Policy* (1999) at 6-7, and 11-26 on the methodological limitations of small-scale assessments, including the above '100 villages study.'
- 421 However for a more upbeat assessment from the Bank's perspective see the speech of Jean-Michel Severino, 'Is Asia Rising? An Update: Report Prepared for a Presentation to the World Bank Board of Executive Directors,' Washington D.C., 13 July 1999.
- 422 OED Note (1999) at paras 3.30, 3.32 and 3.35.
- 423 OXFAM, *Education Now: Break the Cycle of Poverty* (1999) at 187-88. On a more general level, against the growing political unrest and social tension in Indonesia in 1998, one observer has claimed that that Bank then "had no choice but to shore up the dwindling legitimacy of the Indonesian state with ample loans." See Breman, J., 'Politics of Poverty and a Leaking Safety Net,' 34(20) *Economic and Political Weekly* 1177-78, 1177 (1999). However on the basis of personal research and observations Breman (at 1177-78) criticized the lack of effectiveness of the SSN, in particular: (i) failure of distribution systems for subsidised rice (ii) failure of public works programmes and lack of any apparent 'serious attempt' (in Breman's view) to combat unemployment and (iii) inadequacies in the system of granting small-scale credit. Corruption was obviously a major factor in these failures. In Breman's view (at 1178) as important as 'charitable' acts to relieve the suffering of the poorest are (through SSN's or otherwise) in Indonesia, on the whole they "remain far from any structural combating of poverty," which "requires a redistribution of economic and political power." According to Breman (at 1178) as at 1999 'the fight for social equality [had] hardly begun.'
- 424 Banuri, T., Hyden, G., Juma, C. and Rivera, M., *Sustainable Human Development from Concept to Operation: A Guide for the Practitioner*, A UNDP Discussion Paper (1994) at 18-19.
- 425 De Vylder, S., *Sustainable Human Development and Macroeconomics: Strategic Links and Implications*, A UNDP Discussion Paper (1996) at 13. The term 'trust, reciprocity and networks of support' has also been used as a definition: Robb, C., 'Social Aspects of the East Asian Financial Crisis: Perceptions of Poor Communities,' Paper prepared for DFID's seminar on Implications of the East Asian Crisis for Poverty Elimination, 15 July 1998.
- 426 Knowles, J., Pernia, E. and Racelis, M., 'Social Consequences of the Financial Crisis in Asia: the Deeper Crisis,' paper prepared for Manila Social Forum: New Social Agenda for East and South-east Asia, 8-12 November 1999 at 6: "In Indonesia, traditional practices to help the poorest members of the community prospered in the early part of the crisis, but faltered, along with religious gatherings, as the crisis deepened." See also Robb, C. (1998), dealing with the issue in terms of 'conflict' and 'vulnerability and insecurity.'
- 427 Indeed one UNICEF official remarked that the Bank's money effectively "puts UNICEF out of business," destroying local capacities and social capital. Social Safety Net (SSN, or JSP) funds are "given away free."
- 428 Woodhouse, S., 'Tradition of Mutual Help Damping the Crisis,' *The Jakarta Post*, 26 October 1998. The strengths as elaborated are: "First, there is the power of the extended family to look after the interests of all members, with a particular focus on protecting the poorest, most-vulnerable members first. Extended family gatherings are commonplace and often involve specific plans for helping family members in the short and long term. However, reciprocity is also important. ... The second strength is the power of religious leaders. All the major religions here share a common commitment to help the poor. ... The third strength is *gotong royong* (community self-help) with its numerous manifestations that vary from area to area. ... Indonesia's excellent system of community health and nutrition posts (*Posyandu*) is also rooted in *gotong-royong*. There are about 250,000 such posts throughout the country. ... In most parts of Indonesia, community work such as clearing drains, maintaining public thoroughfares and independence day celebrations is done based on the spirit of mutual self-help. As with everywhere, there is no such thing as a free lunch and everyone contributes what they can."
- 429 One commentator has referred to this phenomenon as the 'commodification [sic] of social relationships.' See Breman, J., 'Politics of Poverty and a Leaking Safety Net,' 34(20) *Economic and Political Weekly* 1177-78, 1177 (1999). Yash Ghai uses the term 'commodification' in Ghai, Y., 'Rights, Markets and Globalisation: East Asian Experience,' in UNDP, *Oslo Symposium Report* 1998 126-32, 128: "Commodification thus sets in motion a process in which, instead of social relationships subsisting economic ones, economic relationships and considerations become dominant over social relationships, even close kinship relations. In the end we see the dependence on the markets of individuals, families and communities."
- 430 Peabody, J., 'Economic Reform and Health Sector Policy: Lessons from Structural Adjustment Programs,' 43 *Soc Sci Med* 823, 835 (1996), cited in Curtis, E., 'Child Health and the International Monetary Fund,' Vol 352, Issue 9140 *Lancet* 1622 (1998), at 1624.
- 431 Curtis, E. (1998) at 1624.
- 432 See generally Lundy, P., 'Limitations of Quantative [sic]

- Research in the Study of Structural Adjustment,' 42 *Soc Sci Med* 313, 324 (1996), cited in Curtis, E. (1998) at 1624.
- 433 See *World Bank Development News* 15 March, and 30 March 2000: "Poverty is multi-dimensional: being poor means not only being hungry but also difficulties in finding shelter, getting health care, and providing education for one's children. It is often linked with injustice and a lack of protection of any kind. The psychological effects are important. In their relationship with the state and other sources of power, the poor often experience dependency, shame, and humiliation. Their alienation is first and foremost economic, and the state, seen by the poor, is often absent or inefficient. Nor have NGOs managed to step into the state's role. The World Bank urges the international community to adapt its approaches to poverty reduction and put in place 'innovative strategies' that empower the poor." See Narayan, D. and Petes, P. (eds.), *Voices of the Poor: From Many Lands* (2000); Narayan, D., Chambers, R., Shah, M. and Petes, P. (eds.) *Voices of the Poor: Crying Out for Change* (2002); and Patel, R., Schafft, K., Rademacher, A. and Koch-Schulte, S. (eds.), *Voices of the Poor: Can Anyone Hear Us?* (2002).
- 434 See e.g. OXFAM, *The IMF: Wrong Diagnosis, Wrong Medicine* (1999) at 31: "Many of the children [in East Asia] who have been removed from school will lose out permanently on opportunities for education, increasing the risk of poverty. Increased malnutrition will have long-term consequences."
- 435 Dunne, N., 'Projects fail the poor?', *Financial Times*, 24 September 1999.
- 436 See Chapter 16 below.
- 437 'Amnesty International - Indonesia - Human rights - The cornerstone of rebuilding Indonesia,' *M2 Presswire*, 27 July 1999.
- 438 See Darrow, M., *Between Light and Shadow: The World Bank, The International Monetary Fund and International Human Rights Law* (2003); and M., Skogly, S. *The Human Rights Obligations of the World Bank and the International Monetary Fund* (2001); Bradlow, D. (1996); and Bradlow, D. and Grossman, C., 'Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF,' 17 *Human Rights Quarterly* 411-42 (1995).
- 439 Shihata, I. (1999) at 1049.
- 440 Although this is not to say that the expansion began with the PRSP. See e.g. Bradlow, D., 'The World Bank, the IMF and Human Rights,' 6(1) *Transnational Law and Contemporary Problems* 47-90, 69-72 (1996).
- 441 Kohli, S., 'World Bank Chief Promotes Proposals for Social Code Binding Nations to Policies,' *South China Morning Post*, p.14.
- 442 News Conference by James Wolfensohn, President of the World Bank, IMF Spring Meeting, IMF Headquarters, Washington D.C., *Federal Information Systems Corporation, Federal News Service*, 22 April 1999: "We were asked by the [Bank] board to talk about issues of social policy and the experience of the Bank and what it is that we can do. And we took the – essentially we took our experience and we took the Copenhagen accords, which is the last reflection of the world's commitment to some form of social code, and tried to put down what it was that we're doing in relation to the implementation of the elements of Copenhagen and of our experience in social programs. And essentially what we can do at the Bank is, first of all, try and raise these issues, which we do, in our approaches to our lending; issues that relate to education, to human rights. I got [sic] the Copenhagen thing here, is [sic] really the agenda of the Bank. They want to have an environment to achieve social development, eradicate poverty, [achieve] full employment, sustainable livelihood, social integration, achieving equity between men and women, universal access to education and health, protection of culture and the environment, special focus on Africa and the least-developed countries, [and] ensuring that structural adjustment does not impede social development goals[.]. So what we're doing in our daily work is, in fact, trying to implement this."
- 443 See World Bank, *Principles and Good Practice in Social Policy: Issues and Areas for Public Action*, Prepared by the World Bank for the World Bank/IMF Development Committee (April 1999); and World Bank, *Managing the Social Dimensions of Crises: Good Practices in Social Policy* (14 September 1999).
- 444 Revised Operational Policy, OP 4.01 (January 1999), para. 3.
- 445 LCHR/ELSAM (1995) at 19, n. 23 and accompanying text.
- 446 Core Labor Standards and the World Bank (July 2000), at <http://wbln0018.worldbank.org/HDNet/HDdocs.nsf/0/65510796ed04ac1685256961004c6e7c?OpenDocument>
- 447 Shihata, I.F.I., 'The World Bank's Protection and Promotion of Children's Rights', 4 *International Journal of Children's Rights* (1996) 383.
- 448 *Development News*, 2 February 2000.
- 449 Article I, Section 2, IADB Articles.
- 450 Article VIII, Section 5(f), IADB Articles.
- 451 Specifically, it was recognised that 'democracy and respect for human rights have helped create appropriate conditions for development.' See IADB, 'The Bank's Lending Program for the Period of the Eighth General Increase in Resources,' Chapter II (1994), para 2.36, <<http://www.iadb.org/exr/eight/ch2e.htm>>.
- 452 See e.g. IADB, 'The Bank's Lending Program for the Period of the Eighth General Increase in Resources,' Chapter II (1994), para 2.41: [S]olutions to environmental problems, especially global problems, must take imaginative approaches and must envision the availability of financing on concessional terms for environmental projects and components with distinctly global benefits including, for example, projects related to the implementation of the Biodiversity and Climate Change Conventions.'
- 453 Internal IADB project documents on justice system reform. Currently the influence of international human rights law seemed strongest in the juvenile justice and judicial education and reform areas.
- 454 See Aspen Institute, *Honoring Human Rights: From Peace to Justice – Recommendations to the International Community* (1998).
- 455 IFC Policy Statement on Harmful Child and Forced Labor (1998), at <http://www.ifc.org/enviro/EnvSoc/childlabor/child-safeguard.htm>
- 456 See http://www2.ifc.org/enviro/Publications/Child/Good_Practice_Note_Child_Labor.pdf
- 457 E/CN.4/2000/48 at para 13 (emphasis added).
- 458 For a fuller discussion of this evolution see Bradlow, D. (1996) at 69-72. For a strong critique of the IMF's expanding mandate, with particular emphasis upon its policies in Indonesia see Riesenhuber, E., *The IMF Under Constraint: Legitimacy of its Crisis Management* (2001).
- 459 White, B., 'The IMF, Good Governance and Middle-income Countries', Paper for the EADI 12th Annual Conference, Ljubljana, 21-22 September, 2002, at <http://www.eadi.org/pubs/pdf/white.pdf>
- 460 Although by 2000 the Fund had recruited social development and governance specialists, in what amounted to a significant break with previous reluctance to employing such 'exotic' expertise in-house.
- 461 Anne O. Krueger, 'Supporting Globalization', Remarks at the 2002 Eisenhower National Security Conference on National Security for the 21st Century: Anticipating Challenges, Seizing Opportunities, Building Capabilities, September 26, 2002.
- 462 Flemming Larsen, 'The IMF's Dialogue with Nongovernmental Organizations', *Finance and Development*, March 2001, <http://www.imf.org/external/pubs/ft/fandd/2001/03/larsen.htm>.
- 463 Alston, P., 'What's in a Name: Does it Really Matter if Development Policies Refer to Goals, Ideals or Human Rights?', in Helmich, H. and Borghese, E. (eds), *Human Rights in Development Cooperation* (1998) 103.
- 464 *Ibid.* at 98-105.
- 465 Townhall Meeting, IMF Managing Director Horst Köhler and World Bank President James Wolfensohn, with Civil Society Representatives Participating in the International Conference on Poverty Reduction Strategies, January 17, 2002, Washington, D.C <http://www.imf.org/external/np/tr/2002/tr020117a.htm>
- 466 See, for example, Mary Robinson, 'Development and Human Rights: the Undeniable Nexus,' Speech of the United Nations High Commissioner for Human Rights, Geneva, 26 June 2000. The then High Commissioner listed the comparative advantages of a rights-based approach as: (a) "higher levels of ... ownership and free, meaningful and active participation; (b) easier consensus and increased transparency in national development processes; (c) integrated safeguards against unintentional harm by development projects (d) more effective and complete analysis and (e) a more authoritative basis for advocacy." In emphasizing the element of accountability the High Commissioner concluded that "all partners in the develop-

- ment process – local, national, regional and international – must accept higher levels of accountability” and explicitly included “every donor, aid agency and international financial institution”.
- 467 For an insightful analysis of the strengths and weaknesses of this approach see Kerry Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform* (2002)
- 468 For a fascinating analysis of such developments in more traditional security thinking, see M. Alagappa (ed.), *Asian Security Practice: Material and Ideational Influences* (Stanford, Stanford University Press, 1998).
- 469 Sen, A., ‘Human Rights and Economic Achievements,’ in Bauer, J. and Bell, D. (eds), *The East Asian Challenge for Human Rights* (1999) 88-99 at 91
- 470 This note was inserted by the World Bank when posting this dialogue on its website.
- 471 Townhall Meeting, IMF Managing Director Horst Köhler and World Bank President James Wolfensohn, with Civil Society Representatives Participating in the International Conference on Poverty Reduction Strategies, January 17, 2002, Washington, D.C
<http://www.imf.org/external/np/tr/2002/tr020117a.htm>
- 472 For general discussions see Alston, P. *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994); Steiner, H. and Alston, P., *International Human Rights in Context: Law, Politics, Morals* (2nd. Ed., 2000) chap. 5; Bauer, J. and Bell, D. (eds), *The East Asian Challenge for Human Rights* (1999); Ghai, Y. (1998); Freeman, M., ‘Fifty Years of Development of the Concept and Contents of Human Rights,’ in Baehr, P., Flinterman, C. and Senders, M. (eds) (1999) at 38-9.
- 473 J. Wolfensohn and G. Soros, ‘Why Roma Matter in Europe’, at <http://lnweb18.worldbank.org/eca/ecshd.nsf/romadocbyunid/461420c6d373be74c1256d640054865e?opendocument&start=1&count=5>
- 474 Ringold, D., Orenstein, M., and Wilkens, E., *Roma in an Expanding Europe: Breaking the Poverty Cycle* (World Bank, 2003), at <http://lnweb18.worldbank.org/eca/ecshd.nsf/romadocbyunid/edf5ec59184222f8c1256d4f0053da41?opendocument&start=1&count=5>
- 475 *Ibid.*, “Political liberalization following the collapse of the Iron Curtain in 1989 allowed for increased international and domestic awareness of the situation of Roma, including emerging human rights violations and humanitarian concerns related to deteriorating socioeconomic conditions.”
- 476 Report No. PID6669 Project Name Romania-Child Welfare Reform, at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1998/07/17/000009265_3980929173315/Rendered/PDF/multi0page.pdf
- 477 See Project Appraisal Document on Report No. 21012 – BUL (2001), at http://www.wds.worldbank.org/servlet/WDServlet?pcont=details&eid=000094946_01021705363340
- 478 For support for this view, on the particular issue of disparities, see Abraham, G., ‘Giannella Lecture: The Cry of the Children,’ 41 *Villanova Law Review* 1345, 1353 (1996), citing Himes, J. and Saltarelli, D., to the effect that in Indonesia (circa 1996) “the government spends three times more on health for the richest 10% of the population than on the poorest 10%.”
- 479 The adjective ‘faithful’ is chosen deliberately. Article 26 of the Vienna Convention on the Law of Treaties provides that: ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’
- 480 CRC/C/65/Add.23, p. 4.
- 481 Indonesia has ratified ILO Convention 138 (by Law No. 20 (1999)), and in March 2000 ratified ILO Convention No. 182 on the Worst Forms of Child Labour.
- 482 CRC/C/65/Add.23, p. 4.
- 483 CRC/C/15/Add.223 (30 Jan. 2004).
- 484 See generally Sonia Cardenas, ‘Adaptive States: The Proliferation of National Human Rights Institutions’, *Carr Center for Human Rights Policy Working Paper T-01-04* (Cambridge, Mass., 2001); and International Council on Human Rights Policy, *Performance and Legitimacy: National Human Rights Institutions* (Geneva, 2000).
- 485 *Ibid.*, p.34.
- 486 Accountability for Human Rights Violations in Aceh (New York, Human Rights Watch, 2002).
- 487 In response to this criticism, a new law was proposed in 1999-2000 which sought to rectify certain structural inadequacies, including providing Komnas- HAM with a budget of its own, and giving it power to refer cases to the courts, including the proposed Human Rights Court, whose jurisdiction would include issues relating to children’s rights.
- 488 However in the past, largely at the initiative of particular members, it is true that Komnas- HAM has provided reasonably effective mediation services, for example in the context of land disputes and has carried out a limited number of investigations into human rights abuses by the military, with a degree of independence beyond the expectations of most observers.
- 489 Many of these criticisms were amplified in the report by the Asia-Pacific Human Rights Network’s Human Rights Documentation Center, *Indonesia’s National Human Rights Commission (Komnas HAM): The Formative Years* (2000).
- 490 CAT/C/XXVII/Concl.3 (Nov. 2001), para. 8 (c).
- 491 In relation to the complaints role, according to a member of one of the CPBs, the CPBs’ functions include assisting complainants and representing children in court, even without the consent of the parents, for example in child abuse cases. The Supreme Court has reportedly issued an advisory opinion to the effect that the CPB has these powers on a ‘general level.’ However in the view of this commentator the law still has a gap, and needs to be clarified. There have been few cases in which the CPB had asked PRAGUWANA (a ‘pre-juvenile institution’ with a staff of lawyers, assisting children in conflict with the law) to assist children in court proceedings.
- 492 E.g. KOMNASPRAMUN (the Indonesian Commission for Violence Against Women), and KOMNASANA (the children’s equivalent, which is said to have been ‘inspired’ by the CRC).
- 493 The PRSPs in Rwanda and Nicaragua are good, albeit rare, examples.
- 494 For scholarly analyses of the importance of such constituencies see for example Martha Minow, ‘What Ever Happened to Children’s Rights?’, 80 *Minnesota Law Review* (1995) 267; and Angelina Snodgrass Godoy, ‘Our Right is the Right to be Killed – Making Rights Real on the Streets of Guatemala City’, 6 *Childhood* (1999).
- 495 According to ILO statistics as at 1999, approximately 16 million children in Indonesia between 10-15 years old were not in school.
- 496 Interviews in Indonesia in October 1999.
- 497 For a discussion on the unreliability of official pre-crisis data - although overstating rather than understating estimates of poverty - see Asra, A., ‘Poverty and Inequality in Indonesia - Estimates, Decomposition and Key Issues,’ 5(1) *Journal of the Asia Pacific Economy* 91-111, 98-100 (2000).
- 498 According to one education specialist, the Bank and UN (notably, UNESCO’s award to Indonesia for education) ‘praised’ the government for their progress notwithstanding the superficial evaluation criteria, ritualistic and uncritical disbursement practices and questionable accounting practices attending these award processes.
- 499 For example, in relation to education: ‘To what degree is the voice of children heard in designing education curricula?’ The plain answer given by one NGO was ‘none.’
- 500 World Bank, Operations Evaluation Department, 2002 *Annual Review of Development Effectiveness: Achieving Developing Outcomes: The Millennium Challenge* (2002), Annex IV, p. 61.
- 501 *Ibid.*, pp.6-7.
- 502 For a useful critical evaluation of Indonesia’s response see Littlewood, P., ‘Domestic Child Abuse under the UN Convention on the Rights of the Child: Implications for Children’s Rights in Four Asian Countries,’ 6 *Pacific Rim Law and Policy* 411 (1997) at nn 192-241 and accompanying text. Interviews in October 1999 bore out those criticisms.
- 503 CRC/C/15/Add.25 (1994).
- 504 Statement from MDB/IMF Heads on International Women’s Day (March 8).
- 505 A different observer, drawing a point of contrast with the IFC, said that the many-faceted (IDA) projects run through several ministries, often over a period of several years, making it difficult to establish criteria or causality’ in human rights terms.
- 506 Assessment drawn from several Fund and Bank interviews.
- 507 Save the Children UK submission to the IMF/WB review of PRSPs, at <http://www.worldbank.org/poverty/strategies/review/scuk1.pdf>
- 508 Robinson, S., *Children First in the Poverty Battle: A Review of Poverty Reduction Strategy Papers in the Southern*

African Region - from a Child Rights Perspective (Save the Children, Sweden, March 2003), available at <http://www.reliefweb.int/library/documents/2003/stc-sa-31mar.pdf>.

- 509 For a detailed analysis see Staffs of the World Bank and IMF, 'Poverty Reduction Strategy Papers – Detailed Analysis of Progress in Implementation' (2003), p. 58, Annex 1.
- 510 Staffs of the World Bank and IMF, 'Review of the Poverty Reduction Strategy Paper (PRSP) Approach: Main Findings', March 15, 2002. See also Review of the Poverty Reduction Strategy Paper (PRSP) Approach: Early Experience with Interim PRSPs and Full PRSPs, Feb. 15, 2002.
- 511 Elliott, L., 'Poor Nations' Rights are Wronged,' *The Guardian*, 3 April 2000, p.25.
- 512 Bolivia was the first country to have produced an Interim Poverty Reduction Strategy Paper (PRSP), which has qualified it for the enhanced HIPC Initiative debt relief..
- 513 Indeed many independent commentators interviewed soon after the introduction of the PRSP process predicted somewhat pessimistically that the IMF's standard macro-economic liberalization agenda will not be up for negotiation within the scope of the PRSP process or otherwise. Marcus, R., Wilkinson, J., and Marshall, J., 'Poverty Reduction Strategy Papers (PRSPs) – Fulfilling their Potential for Children in Poverty?', 14 *Journal of International Development* (2002) 1117
- 514 As one study puts it, many of the PRSP processes are "accurately characterized as 'business as usual', and institutional and political pressures reduce the extent to which they represent a real opportunity for changes in the way development is planned and carried out".
- 515 *DFID Human Rights Paper* (2000) at 3. The other two principles are 'inclusion' and 'obligation.' Participation is said to involve "enabling people to claim their human rights through the promotion of the rights of all citizens to participation in, and information relating to, the decision-making processes which affect their lives."
- 516 Jones, T., 'The Right to Participation' in UNDP (ed), *Human Development and Human Rights: Report of the Oslo Symposium* (2-3 October 1998) ('*Oslo Symposium Report 1998*') at 213-21, emphasizing the instrumental links to the concept of empowerment.
- 517 *DFID Human Rights Paper* (2000) at 19.
- 518 *Ibid.*, at 19-22.
- 519 *Ibid.*, at 6. Those articles of the UDHR concern the right to take part in formal political processes; freedom of opinion, expression and association; and the right to form and join trade unions.
- 520 See e.g. Deepa Narayan (ed), *Empowerment and Poverty Reduction: A Sourcebook* (2002).
- 521 An example is provided in *ibid.*, at 13: "Poor and powerless people may be excluded from popular human rights movements and focused effort is required to protect and promote their rights. Lessons from Bangladesh show that there are possibilities to do this. Nari Pokkho, a women's human rights organisation, has been working within the framework of the [CEDAW] to support those women most vulnerable to discrimination and abuse. These include women divorced as a result of reproductive health problems, women disfigured from acid attacks and sex workers. A three-stage strategy helps women create a voice that counts, then demand answers from state institutions such as the police and health services and, finally, be empowered to demand change."
- 522 World Bank, *Source Book for Poverty Reduction Strategies* (2002) at 237.
- 523 Stewart, F., and Wang, M., 'Do PRSPs Empower Poor Countries and Disempower the World Bank, or is it the Other Way Round?', Queen Elizabeth House, Working Paper Number 108, May 2003, pp. 11-12.
- 524 IMF, IEO, 'Evaluation of Poverty Reduction Strategy Papers and the Poverty Reduction and Growth Facility: Issues Paper/Terms of Reference January 31, 2003', at <http://www.imf.org/external/np/ieo/2002/prsp/index.htm#1>
- 525 Stewart, F., and Wang, M., 'Do PRSPs Empower Poor Countries and Disempower the World Bank, or is it the Other Way Round?', Queen Elizabeth House, Working Paper Number 108, May 2003, p. 23.
- 526 Chairman's Concluding Remarks, Indonesia: Country Assistance Strategy Progress Report, September 3, 2002.
- 527 Marcus, R., Wilkinson, J., and Marshall, J., 'Poverty Reduction Strategy Papers (PRSPs) – Fulfilling their Potential for Children in Poverty?', 14 *Journal of International Development* (2002) 1117.
- 528 Robinson, S., *Children First in the Poverty Battle: A Review of Poverty Reduction Strategy Papers in the Southern African Region - from a Child Rights Perspective* (Save the Children, Sweden, March 2003), available at <http://www.reliefweb.int/library/documents/2003/stc-sa-31mar.pdf>.
- 529 Klaus Heidel, Poverty Reduction Strategy Papers – Blind to the Rights of the (Working) Child? (Heidelberg, Kindernothilfe e.V., March 2004), p. 16.
- 530 *Ibid.*, p. 14.
- 531 *Ibid.*
- 532 Elaine Zuckerman and Ashley Garrett, 'Do Poverty Reduction Strategy Papers (PRSPs) Address Gender?: A Gender Audit of 2002 PRSPs', (Gender Action, 2003) available at www.genderaction.org
- 533 Save the Children UK submission to the IMF/WB review of PRSPs, at <http://www.worldbank.org/poverty/strategies/review/scuk1.pdf>
- 534 Robinson, S., *Children First in the Poverty Battle*.
- 535 Human Rights Commission, *Promoting and Protecting Human Rights in Irish Society: A Plan for 2003-2006* (Dublin, 2003), p. 20.

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