

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 1

2022

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Violence against Children: The State Obligations under the Convention on the Rights of the Child to Protect in alternative Care Institutions

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ABSTRACT

The UN Convention on the Rights of the Child (CRC) recognizes children as rights holders and provides them with individual rights. In 1989, world leaders made a historic commitment to the world's children by adopting the United Nations Convention on the Rights of the Child – an international agreement on childhood. It's become the most widely ratified human rights treaty in history and has helped transform children's lives around the world. But still not every child gets to enjoy a full childhood. Still, too many childhoods are cut short. It is up to our generation to demand that leaders from government, business and communities fulfil their commitments and take action for child rights now, once and for all. They must commit to making sure every child, has every right.

Children's rights under the CRC are commonly divided into three categories, and protection rights are one of those, beside provision rights and participation rights. However, children's rights are indivisible and holistic and should not be seen separately or in isolation from each other. This paper is about child protection, but children cannot be properly protected without being provided with food, housing, care, health services and education or the opportunity to participate in decision-making regarding their own lives and in society. In protecting children, the interplay between the different types of rights is important.

This paper provides the reader with a legal understanding of children's right to protection against maltreatment in their homes and the obligations of states parties in implementing this right in practice. The rights and obligations form the framework within which to exercise professional judgment in this area, and specifying their content is a prerequisite for rights to be realized. The focus is on the obligations to prevent and respond to maltreatment as well as on the best interests of the child.

Keywords: *Child protection, Article 19, CRC, Rehabilitation, Reporting, Best interests, Views of the child, Prevention*

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I. INTRODUCTION

Usually, the primary protection and care of children is vested in their family. In the absence of family this duty shifts upon the state and the state becomes responsible to address the issues of proper care and protection of children. Under international law it is an obligation of states to ensure protection against violence for children. Before analyzing the extent of the obligations of the state in protecting children against violence it is important to throw light upon the obligation of states to protect children against violence under international law.

In this chapter the state obligations under the UN Convention on the Rights of the Child (CRC) to protect children against violence in alternative care institutions are discussed. Firstly, the core obligation of a state will be discussed. Then the international obligations of the state regarding children in alternative care will be discussed. Then, the UN Guidelines for alternative care.

II. THE CORE OBLIGATION OF STATE TO IMPLEMENT THE CRC

A member state to the CRC is obliged to implement the rights provided in the Convention as set out in article 4 CRC. According to this provision a state should undertake all appropriate measures, including legislative and administrative, for the implementation of the rights recognized in the CRC. Implementation of the CRC means that states should find ways to give effect to the CRC in practice.

The CRC has no direct effect in the national system of countries. This means that when national laws conflict with the CRC, it does not get priority. In addition, direct effect has the advantage that it can lead to the creation of rights that are not available in national law. States can give effect to the CRC either by placing it alongside their respective national constitutions or it can be used as guiding force for enacting legislations. Irrespective of the different attitudes of states towards the enforceability of the CRC, it has been a source of valuable interpretative guidance for the national courts.³

Compliance of States is monitored by the Committee on Convention on the rights of the Child (hereinafter: the Committee) is the body which monitors states compliance with the CRC by examining the children's rights situation in different countries by means of reports submitted by state parties.⁴ In order to determine the obligation of states to protect children from violence in alternative care institution, it is necessary to refer to relevant General Comments

³ Patrick Geary, 'CRC in Court: The Case Law of the Convention on the Rights of the Child' (CRIN 2012)

⁴ CRIN, 'Committee on the Rights of the Child' (CRIN, 2018) <<https://archive.crin.org/en/guides/un-international-system/committee-rights-child.html>> accessed on 15 March 2021

(hereinafter: GC) developed by the Committee. Though GCs are not legally binding, they contain authoritative interpretations developed by the Committee. They furthermore guide state parties in fulfilling their obligations under CRC. The relevant GCs for the purpose of our study are GC No. 8,⁵ GC No. 9⁶ and GC No. 11.⁷

III. INTERNATIONAL OBLIGATIONS REGARDING CHILDREN IN ALTERNATIVE CARE

According to article 25 CRC, the treatment and care of children living in alternative care should always be governed by what is in the best interests of the child (article 3 CRC) and state must ensure that other rights such as the right to be protected from violence (article 19 CRC), the right to education (article 28 and 29 CRC), the right to food,⁸ the right to play and leisure⁹ are also complied with it. Article 25 CRC further requires that states shall have proper mechanisms to ensure periodic reviews and assessment of the suitability of care provided to the child.¹⁰

IV. UN GUIDELINES FOR THE ALTERNATIVE CARE

Since the Committee¹¹ articulated a need for alternative care for children, the United Nations General Assembly¹² adopted the Guidelines which aims to enhance the implementation of the CRC in the area of alternative care for children. While these Guidelines are non-binding, they do include specific indications of the level of care and basic requirements for alternative care. According to the Guidelines alternative care involves the “*protection and well-being of children who are deprived of parental care or who are at the risk of being so*”¹³ Alternative care is also a part of child protection system which includes both preventive and responsive measures to protect children and families.¹⁴ According to the Guidelines preventive measures should include preventing family breakdown, addressing the issue of poverty, discrimination,

⁵ UNCRC ‘General Comment 8’ in ‘The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)’ (2 March 2007) UN Doc CRC/C/GC/8

⁶ UNCRC ‘General Comment 9’ in ‘The rights of children with disabilities’ (27 February 2007) UN Doc CRC/C/GC/9

⁷ UNCRC ‘General Comment 13’ in ‘The right of the child to freedom from all forms of violence’ (18 April 2011) UN Doc CRC/C/GC/13

⁸ Nigel Cantwell and others, *Moving Forward: Implementing The Guidelines for the Alternative Care of Children* (Centre for Excellence for Looked After Children in Scotland 2012)

⁹ Nigel Cantwell and others, *Moving Forward: Implementing The Guidelines for the Alternative Care of Children* (Centre for Excellence for Looked After Children in Scotland 2012)

¹⁰ Kristen Sandberg, *Children’s Right to Protection under the CRC* (Palgrave Macmillan 2018) 15-38

¹¹ Nigel Cantwell and others, *Moving Forward: Implementing The Guidelines for the Alternative Care of Children* (Centre for Excellence for Looked After Children in Scotland 2012)

¹² UNGA ‘Guidelines for the Alternative Care of Children’ (18 December 2009) UN Doc A/RES/64/142

¹³ Article 1 of UNGA ‘Guidelines for the Alternative Care of Children’ (18 December 2009) UN Doc A/RES/64/142

¹⁴ Rebecca Dobson and others, ‘From a Whisper to a Shout: A Call to End Violence Against Children in Alternative Care’ (SOS Children’s Villages International, University of Bedfordshire 2014)

marginalization and effective preventive services to assist children. Responsive Measures include effective process for reporting and receiving complaints,¹⁵ mechanism for follow up of complaints,¹⁶ monitoring by competent authorities. For example, states are required to have (a) a variety of alternative care options, (b) the period spent in alternative care should be suitable, (c) accommodation and monitoring should provide adequate safeguards against violence, (d) corrective actions and behavior modification that constitute some types of violence are forbidden.¹⁷ Whether alternative care institutions are controlled and regulated by the state or not, states have a duty to shield children from abuse.¹⁸

V. INTERNATIONAL OBLIGATION UNDER ARTICLE 19 CRC TO PROTECT CHILDREN FROM VIOLENCE

Though the foremost important provision of the CRC which provides “*the right to protection against all forms of violence*” is article 19 CRC, it should not be read in isolation. Due to the indivisibility of human rights article 19 CRC is linked to many other substantive rights such as articles 28 and 32–38 CRC which assert children’s right to be “free from all forms of harm in all settings” and articles 20 and 25 CRC which assert children’s right to be “free from harm while in alternative care”.¹⁹ Article 19 CRC deserves special attention because it deals specifically with violence against children. It is divided into two parts the first para of article 19 CRC states that states have a mandatory obligation to take appropriate educational, social, legislative and administrative measures that are necessary to protect children from violence and second para explains that the appropriate measures to protect children should include preventive and responsive measures. States enjoy a certain level of discretion in determining which measures will be ‘appropriate’ for protecting children from violence.

(A) Legal analysis of article 19 para 1

- **Appropriate Measures**

According to the Committee ‘appropriate’ refers to a broad range of measures cutting across all sectors of government. These measures should be effective and consistent in order to protect

¹⁵ Article 98 UNGA ‘Guidelines for the Alternative Care of Children’ (18 December 2009) UN Doc A/RES/64/142

¹⁶ Article 99 UNGA ‘Guidelines for the Alternative Care of Children’ (18 December 2009) UN Doc A/RES/64/142

¹⁷ Kristen Sandberg, *Children’s Right to Protection under the CRC* (Palgrave Macmillan 2018) 1-29

¹⁸ Nigel Cantwell and others, *Moving Forward: Implementing The Guidelines for the Alternative Care of Children* (Centre for Excellence for Looked After Children in Scotland 2012)

¹⁹ Yvon Dandurand, ‘Article 19 of the CRC and the Criminal Justice System’s Duty to Protect Children Against Violence’, (2014) *The Canadian Journal of Children’s Right* 1(1), 46-84 <<https://ojs.library.carleton.ca/index.php/cjcr/article/view/31>> accessed 15 March 2021

children from all forms of violence.²⁰ Effective prohibition of corporal punishment will be used as an example to illustrate how to interpret these terms in relation to the measures. Firstly, a measure that prohibits corporal punishment should be appropriate. Reference can be made to efforts of those states which have recently enacted laws prohibiting the use of corporal punishment as a form of child discipline in all settings, as well as states which are considering such legislation as in terms of law any measure will be appropriate when it is assigned for the particular purpose to be achieved by that law.²¹ Secondly, a measure that prohibits corporal punishment should be effective. Measures are effective when they can be actually implemented in practice. For example, Canada has laws to protect children from violence. However, in practice the Canadian law and policy still fail to protect children from violence. Article 43 of the Criminal Code (Canadian law) provides protection to children from corporal punishment. Despite the fact that the CRC denounces the use of corporal punishment, social and cultural attitudes in Canada condone violence against children in the form of corporal punishment and prevent adequate enforcement of applicable laws.²² If these measures are not supplemented by improvements in human behavior and social values, they may prove to be ineffective.

Thirdly, a measure that prohibits corporal punishment should be consistent with the provisions of the CRC. Countries like Maldives, Malaysia, Bangladesh, Bhutan and many others though have ratified the CRC to protect children from all forms of violence but have no laws to prohibit corporal punishment in alternative care settings. This indicates that there are inconsistencies between CRC and the domestic laws.²³ In this regard, the Committee specifically stated that “any measures which affects the right to be free from violence is contrary to international law and must be eliminated and that the persistence of harmful practices like corporal punishment cannot be safeguarded due to approval of custom, tradition or culture.”²⁴ It means that the CRC prohibits provisions in national which allow usage of some violence against children either as corrective measure or chastisement in all settings including alternative care. According to the

²⁰ UNCRC ‘General Comment 13’ in ‘The right of the child to freedom from all forms of violence’ (18 April 2011) UN Doc CRC/C/GC/13

²¹ End Corporal Punishment, ‘ACERWC calls for prohibition of all corporal punishment of children in General Comment No. 5’ (*End Corporal Punishment*, 9 November 2018) <<https://endcorporalpunishment.org/acerwc-calls-for-prohibition-of-all-corporal-punishment-of-children-in-general-comment-no-5/>> accessed 15 March 2021

²² UNCRC ‘General Comment 8’ in ‘The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)’ (2 March 2007) UN Doc CRC/C/GC/8

²³ End Corporal Punishment, ‘Global Report 2021: Prohibiting all corporal punishment of children: laying the foundations for non-violent childhoods’, (Global Partnership to End Violence Against Children 2021) accessed <<https://endcorporalpunishment.org/resources/global-report-2021/>> 22 May 2021

²⁴ End Corporal Punishment, ‘ACERWC calls for prohibition of all corporal punishment of children in General Comment No. 5’ (*End Corporal Punishment*, 9 November 2018) <<https://endcorporalpunishment.org/acerwc-calls-for-prohibition-of-all-corporal-punishment-of-children-in-general-comment-no-5/>> accessed 15 March 2021

Committee due to traditional acceptance of corporal punishment, it is necessary that “all branches of law relating to all forms of alternative care and justice systems should clearly prohibit the use of corporal punishment in all settings”.²⁵

- **Legislative, administrative, social and educational measures**

(i) Legislative Measures

The legislative measures apply to all aspects of policy including implementation, budgeting, and enforcement. It is difficult and, in some way, impossible to give a full and detailed picture of the impact of the CRC at the national level of all 195 states. The reports submitted to the Committee however show a wide variety of legislative, social and other measures with different degrees of challenges to implement all of these measures. According to the Committee in GC No. 5²⁶ on General Measures of Implementation of the CRC ‘incorporation’ of the provisions of the CRC into the domestic legislations is amongst the legislative measure required under article 19.²⁷ When states ‘incorporate’ provision of the CRC in their national legal system, it means that these provisions can be directly invoked before the courts. ‘Incorporation’ also means that provisions of the CRC get priority over domestic legislation in case of inconsistency between the CRC and national legislation. In this regards the Committee emphasize that it is necessary that provisions of the CRC should be applied and enforced appropriately and encourage states to give priority to ‘incorporation’ amongst other measures. Most of states which have ratified the CRC have directly or indirectly incorporated the whole of the CRC into their domestic legislation and some states have incorporated different aspects of the CRC according to their requirements. Two-thirds of the countries have explicitly integrated the CRC into their national laws (mostly civil law countries).²⁸ This ensures that the CRC is enforceable in court and is binding on state bodies. Since 1989, one-third of the countries examined have adopted new constitutions which includes provisions on the rights of the child. Africa arguably leads the way here with provisions of new constitutional instruments in Burkina Faso, Ethiopia, Rwanda and South Africa (which has the most extensive provisions) all containing express protection for children's rights.²⁹

²⁵ UNCRC ‘General Comment 8’ in ‘The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)’ (2 March 2007) UN Doc CRC/C/GC/8

²⁶ UNCRC ‘General Comment 5’ in ‘General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)’ (27 November 2003) UN Doc CRC/GC/2003/5

²⁷ UNCRC ‘General Comment 5’ in ‘General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)’ (27 November 2003) UN Doc CRC/GC/2003/5

²⁸ Simon Hoffman and Rebecca Thorburn Stern, ‘Incorporation of the UN Convention on the Rights of the Child in National Law’ (2020) *The International Journal of Children’s Rights* 28(1), 133-156 <<https://doi.org/10.1163/15718182-02801001>> accessed 12 May 2021

²⁹ Examples of cases where the CRC has been directly applied²⁹ within the domestic legal system enabling

As noted above direct incorporation means that provisions of the CRC can be applied directly and enforced in a state. An alternative to this is indirect incorporation.³⁰ Through indirect incorporation some effect can also be given to treaties in domestic law by using a different legal mechanism. This can be done by referencing to human rights treaties which have been ratified by states in their constitutions. Its effect will have to be determined whether or not the provisions have ‘direct effect’ in the domestic law or not.³¹ Example of Wales can be used to explain indirect incorporation of the CRC. Wales in 2011 adopted the ‘*Rights of Children and Young Persons (Wales) Measure*’³² and it requires the Ministers of the Wales Assembly to give due regard to the provisions of the CRC while formulating or reviewing any legislation or policy. This result in indirect incorporation of the CRC by taking into account the provisions of the CRC while making decision on rights of children.³³ Thus, indirect incorporation will not have any potential enforcement until there is comprehensive implementation of it into national law as considering the treaty as a part of national law is not enough.³⁴

In the past thirty years human rights have been a prime focus in almost every constitutional restructuring. States like Chile and Morocco indirectly incorporated the CRC by means of a constitutional reference.³⁵ Even though the CRC is the only treaty that support the rights of children to be free from violence,³⁶ the reality is that just a small number of states have incorporated the provisions of the CRC in their domestic law.

The aspirational goal of incorporation of the CRC alone is as demonstrated not sufficient for protecting the rights of children rather it is the duty of each state to facilitate necessary legal,

individuals to seek enforcement of their rights, are the case of *Bencosme v Devers*,²⁹ *Kerezov v Minister of Justice*²⁹, *Maja Dreo et al. v Slovenia*,²⁹ *Touwota Molu v John Molou*²⁹ and *S.R., V.R. v Lithuania*²⁹. Examples of cases in which the CRC has been used as interpretive are *Government v Grootboom*,²⁹ *In re Lorna Gleeson*,²⁹ *Ndlovu v Macheme*,²⁹ *Police v Vailopa*²⁹ and *Smith v Smith and Another*.²⁹

³⁰ Simon Hoffman, ‘Incorporation of the UN Convention on the Rights of the Child in National Law’ (2020) *International Journal of Children’s Rights*

³¹ Kasay McCall-Smith, ‘To incorporate the CRC or not – is this really the question?’ (2018) *The International Journal of Human Rights* 23(3), 425-441 <<https://doi.org/10.1080/13642987.2018.1558990>> accessed 12 May 2021

³² <https://www.legislation.gov.uk/mwa/2011/2/contents>

³³ Lundy L., Kilkelly U., And Byrne B, ‘Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review’ (2013) *International Journal of Children’s rights*, 21(3) pg 442-463

³⁴ Kasay McCall-Smith, ‘To incorporate the CRC or not – is this really the question?’ (2018) *The International Journal of Human Rights* 23(3), 425-441 <<https://doi.org/10.1080/13642987.2018.1558990>> accessed 12 May 2021

³⁵ Kasay McCall-Smith, ‘To incorporate the CRC or not – is this really the question?’ (2018) *The International Journal of Human Rights* 23(3), 425-441 <<https://doi.org/10.1080/13642987.2018.1558990>> accessed 12 May 2021

³⁶ Kasay McCall-Smith, ‘To incorporate the CRC or not – is this really the question?’ (2018) *The International Journal of Human Rights* 23(3), 425-441 <<https://doi.org/10.1080/13642987.2018.1558990>> accessed 12 May 2021

social and institutional changes to give effect to provisions of the CRC.³⁷

(ii) Administrative Measures

The administrative measures should include the government's obligations to implement legislation and services to monitor accountability mechanisms to protect children from all forms of violence. In Central and Eastern Europe, Asia and sub Saharan Africa, despite the existence of child protection laws and policies the laws are poorly enforced due to inadequate governance, a lack of transparency and monitoring processes, insufficient financial capital, and corruption.³⁸ Regulation and supervision of child protection programs are lacking due to factors such as (1) government actors limited resources, (2) requirements for child care services being decentralized among various state and NSAs in many countries, and (3) responsibilities or functions that overlaps with other protection departments. These characteristics lead to ineffective vertical and horizontal coordination between institutions, resulting in overlap, waste of scarce capital, and a lack of adequate oversight and transparency within the system.³⁹

(iii) Social Measures

The social measures demonstrate the government's commitment to ensure that children's rights are protected, and that basic and targeted services are available which may be introduced and enforced by both the state and NGOs. Social policy interventions to minimize harm and avoid abuse against children are examples of such measures.⁴⁰ Child poverty is identified as a major problem for child rights in the Council of Europe's Strategy for the Rights of the Child (2016-21), which stresses the urgency of ensuring children's social rights as outlined in the CRC. The framework of the CRC don't recognize the characteristics and experiences of children who live in alternative care institutions from the perspective of poverty. The approach of the CRC is that the issue of child poverty can be addressed by family and household-oriented measures (article 26 and 27 CRC). But when parents cannot afford to look after their children, many children end up in alternative care around the world. As a consequence, paragraph 15 of the Guidelines states that: "*Financial and material poverty, or conditions directly and uniquely imputable to*

³⁷ Kasay McCall-Smith, 'To incorporate the CRC or not – is this really the question?' (2018) The International Journal of Human Rights 23(3), 425-441 <<https://doi.org/10.1080/13642987.2018.1558990>> accessed 12 May 2021

³⁸ Ghazal Keshavarzian, 'Protect my future: The links between child protection and good governance' (*Save the Children*, 2013) <<https://resourcecentre.savethechildren.net/sites/default/files/documents/7257.pdf>> accessed 15 March 2021

³⁹ Ghazal Keshavarzian, 'Protect my future: The links between child protection and good governance' (*Save the Children*, 2013) <<https://resourcecentre.savethechildren.net/sites/default/files/documents/7257.pdf>> accessed 15 March 2021

⁴⁰ UNCRC 'General Comment 13' in 'The right of the child to freedom from all forms of violence' (18 April 2011) UN Doc CRC/C/GC/13

*such poverty, should never be the only justification for the removal of a child from parental care, for receiving a child into alternative care, or for preventing his/her reintegration, but should be seen as a signal for the need to provide appropriate support to the family”.*⁴¹ This statement is reflected in para. 62 of GC No. 14.

The Committee's Concluding Observations to States, such as those to Sierra Leone⁴² and Suriname,⁴³ often reiterate that financial issues or other circumstances should not be a reason to place children into alternative care institutions. This is intertwined with states' responsibilities to provide social security under article 27 CRC. Government initiatives, according to the Guidelines, should solve the main causes of why children are being placed in alternative care institutions and should focus on poverty-reduction steps.⁴⁴ Such assistance can be used to supplement or replace salaries in situations where work is scarce or where wages are insufficient to sustain a family.⁴⁵

(iv) Educational Measures

The educational measures should be implemented to make sure that professionals dealing with children have the tools for preventing violence in alternative care for example promoting constrictive dialogue around violence and facilitate children's expertise, both by state and other actors, as long as the state is in charge.⁴⁶ The Committee has elaborated the educational measures in GC No. 13 where the committee recognizes that how knowledge is created, taught, and applied by professionals is extremely important in ensuring that children's rights are protected and implemented. For example, while Norway provides training programs for care takers, such as a bachelor's degree in social work for children, this does not suggest that Norway has a professional education curriculum oriented toward or applicable to child protection services. In the opposite, in Norway there are no education systems that train personnel explicitly for the area of child protection practice, and there is no system of authorization in effect for child protection caseworkers, as is common for other careers.⁴⁷

⁴¹ UNGA 'Guidelines for the Alternative Care of Children' (18 December 2009) UN Doc A/RES/64/142

⁴² UNCRC 'Concluding observations on the combined third to fifth periodic reports of Sierra Leone' (1 November 2016) UN Doc CRC/C/SLE/CO/3-5, para 25

⁴³ UNCRC 'Concluding observations on the combined third and fourth periodic reports of Suriname' (9 November 2016) UN Doc CRC/C/SUR/CO/3-4, para 24

⁴⁴ UNCRC 'General Comment 13' in 'The right of the child to freedom from all forms of violence' (18 April 2011) UN Doc CRC/C/GC/13, para 32

⁴⁵ Kirsten Sandberg, 'Alternative Care and Children's Rights' in Ursula Kilkelly and Ton Liefwaard (eds), *International Human Rights of Children. International Human Rights* (Springer Singapore 2018) 1-29

⁴⁶ UNCRC 'General Comment 13' in 'The right of the child to freedom from all forms of violence' (18 April 2011) UN Doc CRC/C/GC/13

⁴⁷ Harald Grimen and Anders Molander. 'Profesjon og skjønn. I A. Molander & A. Terum' (2008) Profesjonsstudier, 179–197

(B) Legal analysis of article 19 para 2

Article 19 para 2 provides that the appropriate protective measures provided under Article 19 para 1 should also include the measures to prevent violence from happening and responding effectively if an incident of violence takes place. Article 19 para 2 CRC highlights the specific areas where measures should be taken to fulfill the general obligation to protect children from violence. The word ‘effective procedures’ can include coordination among different sectors directed by protocols, developing and implementing systematic mechanism for data collection and its analysis and developing measurable objectives, policies and outcomes indicators in reference to the policies for children living in alternative care settings.⁴⁸ For example, outcome indicators can be formulated which focuses on a child’s positive development, his/her wellbeing and its rights instead of narrowly focusing on various forms of violence. Also, worth considering are the reviews of child death and critical injury as these can identify the reason why violence occurs while making recommendations for corrective measures.⁴⁹

The word ‘include’ in article 19 para 2 CRC indicates that the measures are illustrative and not exhaustive and includes both ‘preventive’ and ‘responsive’ measures.⁵⁰

(i) Preventive measures under article 19 (2)

Preventing violence from occurring is the basic step for protecting children against violence one of which is prohibiting violence in all forms. The Committee has “*emphasized that child protection must begin with proactive prevention of all forms of violence*”.⁵¹ It is necessary that effective preventive measures must tackle the ‘root causes of violence’.⁵² Preventive measures include empowering families so that they can provide the necessary care and protection to their children. Preventive measures require government to address the issues of poverty and the societal behavior towards violence. Prevention will be possible only with ‘*effective coordination at central, regional and local levels between different sectors and with civil society including empirical research community*’.⁵³ Apart from the social policy measures to ensure that the children live with their parents and enabling them to take care of the child and

⁴⁸ UNCRC ‘General Comment 13’ in ‘The right of the child to freedom from all forms of violence’ (18 April 2011) UN Doc CRC/C/GC/13

⁴⁹ UNCRC ‘General Comment 13’ in ‘The right of the child to freedom from all forms of violence’ (18 April 2011) UN Doc CRC/C/GC/13

⁵⁰ John Tobin, *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 1-22

⁵¹ UNCRC ‘General Comment 13’ in ‘The right of the child to freedom from all forms of violence’ (18 April 2011) UN Doc CRC/C/GC/13, para 46

⁵² UNCRC ‘General Comment 13’ in ‘The right of the child to freedom from all forms of violence’ (18 April 2011) UN Doc CRC/C/GC/13, para 46

⁵³ Para 72(i) General Comment 13

changing the attitude of society towards violence targeted prevention is also required which includes identification of children at the risk of violence and appropriate intervention by the authorities.⁵⁴ The list of preventive measures available to states is vast and states enjoy a level of discretion⁵⁵ in identifying which measures they determine to be appropriate within their jurisdiction following consultation with all relevant actors.⁵⁶

The committee suggested that a state's preventive strategy must have some if not all of the following characteristics: clear policy, protocols, and programmes; data collection, monitoring, and evaluation; comprehensive services and equity; working with children; working with families, parents, caretakers, community involvement, interdisciplinary and multi-sectoral approaches, involving policy makers, international collaboration and partnership.⁵⁷

The challenges faced in implementing preventive measures by a state have already been mentioned in paragraph 2.4 and some of them will be briefly discussed here including; lack of monitoring system, overcrowding and lack of efficient complaint system.

Lack of monitoring system

For the purpose of assessing and monitoring the alternative care institutions it is first necessary to ensure that all alternative care institutions are registered. Apart from registration it is also necessary that these alternative care institutions should be regularly monitored by states irrespective of the fact whether they are state run or private. Insufficient control of government over the alternative care institutions affects the ability of states to protect children from violence. In this context, the state of Chile may be seen as an example, where the state only has authority over institutions that accept government subsidies, implying that the government does not oversee privately financed alternative care institutions.⁵⁸

⁵⁴ K Sandberg, 'Children's Right to Protection under the CRC' in Falch Erikson A., Bache-Hansen E. (eds) *Human Rights in Child Protection* (2018 Palgrave Macmillan)

⁵⁵ Despite this discretion, it is suggested that a state's preventive strategy must have some if not all of the following characteristics: clear policy, protocols, and programs; data collection, monitoring, and evaluation; comprehensive services and equity; working with children; working with caretakers, community involvement, interdisciplinary and multi-sectoral approaches, involving policy makers, international collaboration and partnership. (UNCRC 'General Comment 13' in 'The right of the child to freedom from all forms of violence' (18 April 2011) UN Doc CRC/C/GC/13, para 27-29)

⁵⁶ UNICEF, UNHCR, Save the Children and World Vision, 'A Better way to Protect all Children: The Theory and Practice of Child Protection Systems' (*A Better Way to Protect all Children Conference*, 2013) <https://resourcecentre.savethechildren.net/sites/default/files/documents/c956_cps_interior_5_130620web_0.pdf> accessed on 15 March 2021

⁵⁷ UNCRC 'General Comment 13' in 'The right of the child to freedom from all forms of violence' (18 April 2011) UN Doc CRC/C/GC/13, para 27-29

⁵⁸ Nicolás Espejo Yaksic, 'Report of the Investigation in Chile under Article 13 of the Optional Protocol to the Convention on the Rights of the Child on a communication Procedure, CRC/C/HL/NQ/1' (2018) 2018/2 (note)

Overcrowding in alternative care institutions

Some of the countries with the highest estimates of number of children living in alternative care institutions are Pakistan, India, Russia, Indonesia, France. High number of children in alternative care institutions result in overcrowding.⁵⁹ Overcrowding in alternative care institution is a big hindrance in giving effect to state obligation to protect children against violence as overcrowding leads to receiving impersonal care of poor quality, easy exploitation and a larger risk of physical and emotional abuse.⁶⁰ Insufficient number of alternative care institutions in relation to the number of children to be placed in them will affect the resources for the care and protection of children in such institutions and lack of personal attention to such children being in excess than required number will give scope for unattended cases of violence against them.⁶¹

Lack of complaint system

Thirdly, there is also often a lack of a complaint system. The first step for ensuring quality care is to effectively manage complaints. Even though, reporting procedures or complaint mechanisms are standard under national law⁶², the processes and structures in place to facilitate reporting and complaints are often inadequate.⁶³ Collaboration between the police and child welfare authorities is frequently intermittent, if not problematic, in practice.⁶⁴ For example, in Armenia all residential care facilities have formal complaint mechanisms in the form of complaint boxes and child helplines but most of these boxes remain empty and no cases of violence are recorded in alternative care institutions.⁶⁵ In Kosovo, despite the existence of complaint raising procedures for children living in alternative care it has been observed that

⁵⁹ Chris Desmond and others, 'Prevalence and Number of Children Living in Institutional Care: Global, Regional and Country Estimates', (2019) *The Lancet Child & Adolescent Health* 4(5), 370-377 <[https://www.thelancet.com/journals/lanchi/article/PIIS2352-4642\(20\)30022-5/fulltext](https://www.thelancet.com/journals/lanchi/article/PIIS2352-4642(20)30022-5/fulltext)> accessed 22 May 2021

⁶⁰ Mary Dozier and others, 'Institutional Care for Young Children: Review of Literature and Policy Implications' (2012) *Social Issues and Policy Review* 6(1), 1-25

⁶¹ Mary Dozier and others, 'Institutional Care for Young Children: Review of Literature and Policy Implications' (2012) *Social Issues and Policy Review* 6(1), 1-25

⁶² For example, in Denmark, Estonia, Lithuania, Poland, and Sweden, the reporting obligations afforded under the national laws apply to all professionals who are directly involved and in contact with children in their work. In Finland and Latvia, on the other side, the reporting obligations concern only specific professional groups such as social workers or teachers. In Denmark, Estonia, Finland, Latvia, Lithuania and Sweden, reporting obligations extend by law to any person to the effect that civilians are obliged to report cases of violence against children to the competent authorities. https://childrenatrisk.cbss.org/wp-content/uploads/2020/12/Family_Support_and_Alternative_Care_Report.pdf. Family Support and Alternative Care The Baltic Sea States Regional Report 2015

⁶³ Lizette Berry and others, *Children's right to be protected from violence: A review of South Africa's laws and policies* (Save the Children South Africa 2014)

⁶⁴ Yvon Dandurand, 'Article 19 of the CRC and the Criminal Justice System's Duty to Protect Children Against Violence', (2014) *The Canadian Journal of Children's Right* 1(1), 46-84 <<https://ojs.library.carleton.ca/index.php/cjcr/article/view/31>> accessed 15 March 2021

⁶⁵ Rebecca Dobson and others, 'From a Whisper to a Shout: A Call to End Violence Against Children in Alternative Care' (SOS Children's Villages International, University of Bedfordshire 2014)

the children are unable to raise complaints or their concerns due to lack of knowledge about the right to file complaints. Moreover, children living in alternative care are fearful in raising complaint against the people under whose care they are. This emphasizes the need for improved communication enabling children to raise their complaints against violence without any fear. The CRC Committee recommended that states should provide child accessible complaint mechanism in every alternative care institution.⁶⁶

Until 2014 children were not allowed to bring complaints directly to the CRC Committee. It was only in 2014 when third optional protocol to CRC was adopted which allows children to bring complaints directly to CRC Committee which then can investigate the complaint of children.⁶⁷ It was a very welcoming step by the CRC Committee to strengthen the position of children under CRC as now they could bring complaints of violence in alternative care institutions to the notice of CRC Committee. But this strengthening of position of children seems illusory as the protocol is optional which means states have discretion to choose whether they want to be bound by the protocol or not.

(ii) Responsive measures under article 19 (2)

The responsive measures include identification and reporting of cases of violence against children in alternative care institutions, referral and investigation by competent authorities, treatment and follow up of children who faced violence and the judicial intervention. Institutional responses to children exposed to violence can be placed into three categories; protective, therapeutic and juridical. The protective responses include statutory child welfare responses, which aim to protect children from any further harm from violence. The means as well as the criteria for protective measures vary between countries due to the different child welfare legislation. Therapeutic responses aim to help children to cope with and overcome the abuse experiences. They may overlap protective responses. Juridical responses, on the other hand, focus on investigating and sanctioning violent acts. Like the other responses, juridical responses involve a variety of professionals. The next sub paragraph will focus on juridical responses zooming in on investigation and sanctioning violent acts when violence occurs in alternative care settings.

The process of investigation includes collection of evidence, identification of the accused, arresting the accused and forming charges against the accused. Investigation plays a very vital

⁶⁶ https://eurochild.org/uploads/2021/01/Eurochild_Publication_-_Children_in_Alternative_Care_-_2nd_Edition_January2010.pdf

⁶⁷ Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure adopted on 19 December 2011, A/RES/66/186 available at <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>

role in any criminal justice system as the conviction of any guilty person will be dependent on the investigation. The aim of investigation is to ensure justice by fair trials in courts as the efficiency and fairness of the investigation will determine the justice to victim and punishment to accused. If the investigation is not efficient, proper or fair then there is less probability of accused being punished. Hence, it plays a vital role in any system. Whether the aggressor committing acts of violence against children in alternative care institutions, will be stopped depends on the investigation process to a large extent. Therefore, the researcher has focused on investigation as part of responsive measures. After that the sanctioning of acts of violence will be discussed.

Investigation

The Committee has reported that when violence against children occurs inquiries must be carried out by adequately trained staff with adequate resources to ensure a comprehensive and impartial inquiry. This can be hard in practice because there is usually too little specialized staff. In result people with no special training research the cases. Thus, the quality of the investigations varied, and the children's experiences of violence are treated differently.⁶⁸ For example, in Canada, even though there is a strong social understanding of the issue and a very high degree of trust in the police, in several cases, the plaintiffs took a long time to record the incident. In certain cases, finding the suspect is a comparatively easy process, but collecting adequate information to continue with charges is a difficult and time-consuming task.⁶⁹

Sanctioning violent acts

The conviction of perpetrators of violence against children is referred to as sufficient judicial intervention. It includes cases in which courts play a part in deciding which forms of action or intervention should be taken by relevant authorities to shield a child from abuse when in the custody of an alternative care arrangement.⁷⁰ Article 19 CRC does not prescribe the type of judicial interference that must be used for the purposes of this clause, because states enjoy a discretion. But whichever mechanism is used, it must be successful and compliant with the other clauses of the CRC.⁷¹ Wherever possible, sentencing decisions must aim to denounce and deter violence against children. However, a wide range of perpetrators commit violence against

⁶⁸ Diana Roberts, 'Child Protection in the 21st Century' (1991) *Child Abuse and Neglect* 15(1) 25-30

⁶⁹ Adam Cotter and Pascale Beaupré, 'Police-reported sexual offences against children and youth in Canada, 2012' (2014) Component of Statistics Canada catalogue no. 85-002-X <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2014001/article/14008-eng.pdf?st=E1xzbOiX>> accessed on 15 March 2021

⁷⁰ John Tobin, *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 25-26

⁷¹ John Tobin, *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 25

children includes children themselves. The principle of the best interests of the child means in this case that a child can be either a “*perpetrator of violence*” or a “*survivor*”. When the best interest of child applied and the child is a perpetrator, minimum sentences should be applied to certain types of offences to prevent detrimental impact on their social and psychological development.⁷²

Another point to be noticed is that incidents of violence in alternative care settings originates from caretakers which often results lack of evidence in such cases as they are not reported. As a result of lack of evidence the culprits escape punishment. The criminal justice system recognizes the principle “*better that ten guilty persons escape, than that one innocent person suffers*”.⁷³ This means that evidence of a crime should be considered carefully and a person will only be found guilty once this can be proven according to the laws of that member state. These principles shift the entire burden of proof upon the prosecution to prove the guilt of the accused beyond reasonable doubt and the benefit of every doubt is given to the accused which often results in acquittal of the guilty due to lack of evidence.⁷⁴

VI. CONCLUSION

In this chapter the existing legal framework for protection of children from violence under the CRC and the Guidelines was discussed. The Guidelines assist the governments in fulfilling their obligations under the CRC. CRC and the Guidelines are strong in their approach to protect children from all forms of violence. Though the Guidelines are not binding upon states they guide states in developing their policy and programmes to fulfil the obligation to protect children from violence in alternative care as they are in conformity with the right to protection from violence under the CRC.

A state has the obligation to implements the rights as codified in article 4 CRC. For this appropriate legislative administrative social and educational measures (as described in article 19 CRC) need to be applied. At times the obligations may be legally binding in the form of provisions of the treaty which are to be mandatorily given effect by states and sometimes they may be in the form of recommendation to states explained in the reports and GCs by the Committee which guide the course of action of states in effecting the provision of the treaty.

⁷² Yvon Dandurand, ‘Article 19 of the CRC and the Criminal Justice System’s Duty to Protect Children Against Violence’, (2014) *The Canadian Journal of Children’s Right* 1(1), 46-84 <<https://ojs.library.carleton.ca/index.php/cjcr/article/view/31>> accessed 15 March 2021

⁷³ Jeffrey Reiman and Ernest Van Den Haag, *On the Common Saying that it is Better that Ten Guilty Persons Escape than that One Innocent Suffer: Pro and Con* (Cambridge University Press 2009)

⁷⁴ Better that ten guilty persons escape: punishment costs explain the standard of evidence Matteo Rizzolli · Margherita Saraceno

Although the GCs of the Committee are not legally binding, they can be seen as an authoritative legal interpretation of what the obligations of states based on the CRC imply.

Based on the CRC, there can be no denial of the fact that states have the primary obligation to protect children from all forms of violence, which includes protection in alternative care institutions. Relevant articles of the CRC and the GCs provide an approach which is proactive, holistic and inclusive and focus on an environment free of violence against children.⁷⁵ However, laws and policies will be of no use if there is no mechanism for effective enforcement and implementation in place.

⁷⁵ John Tobin, *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019) 1-22