

course inevitable. They do not impugn the need for some boundary markers. Disputes over what might be presumed in our understanding of childhood are also inevitable. They too, if properly understood and evaluated, do not obviate the need for recognition of the distinctiveness of childhood and thus for some definition of its boundaries.

Moreover, we can acknowledge that childhood does differ from adulthood *and*, as the preceding section emphasized, acknowledge that the age of majority need not be fixed at the same point for all legal entitlements across all cultures and without acknowledgment of the possibility of making case by case determinations of such entitlements in some contexts. A child is not, for the law's purposes, an adult. Yet the law, even whilst marking that difference, need not characterize all children as alike in all respects.

Finally, the deference given to states under article 1 to adopt a legal definition of majority other than 18 years of age, demonstrates a culturally sensitive approach to this issue that is often overlooked in criticisms of the Convention that it seeks to impose a Western conception of childhood. This flexibility remains problematic given that a state could use it to lower the age of majority simply to minimize its obligations under the Convention. However, the CRC Committee's routine insistence that an age of majority other than 18 is incompatible with the Convention is without justification and serves to fuel allegations of a Western bias in the interpretation of the Convention. In contrast, the CRC Committee's suggestion that increased dialogue with cultural and religious leaders about the importance of conceptualizing persons under 18 as children with special rights, is not only justified but likely to be more conducive to extending the protections afforded under the Convention.

Select Bibliography

- Alston P, 'The Unborn Child and Abortion under the Draft Convention on the Rights of the Child' (1990) 12 Human Rights Quarterly 156
- Archard D and Macleod C (eds), *The Moral and Political Status of Children* (OUP 2002)
- Archard D, *Children, Rights and Childhood* (3rd edn, Routledge 2014)
- Aries E, *L'Enfant et la Vie Familiale Sous l'Ancien Regime* (Librairie Plon 1960)
- Cassidy C, 'Children's Status, Children's Rights and "Dealing with" Children' (2012) 20 International Journal of Children's Rights 57
- Cornock M and Montgomery H, 'Children's Rights in and out of the Womb' (2011) 19 International Journal of Children's Rights 3
- de Mause L (ed), *The History of Childhood* (Souvenir Press 1976)
- Freeman M, *The Rights and Wrongs of Children* (Frances Pinter 1983)
- Schapiro T, 'What is a Child?' (1999) 109 Ethics 715
- Tobin J, 'Justifying Children's Rights' (2013) 21 International Journal of Children's Rights 395
- Tobin J, 'Understanding Children's Rights: A Vision Beyond Vulnerability' (2015) Nordic Journal of Human Rights 155
- Turner S and Matthews GB, *The Philosopher's Child: Critical Perspectives in the Western Tradition* (University of Rochester 1998)
- Vann RT, 'The Youth of Centuries of Childhood' (1982) 21 History and Theory 279
- Warren MA, 'On the Moral and Legal Status of Abortion' (1973) 57 Monist 43
- Wilson W, 'The Infancy of the History of Childhood' (1982) 21 History and Theory 132
- Wringe C, *Children's Rights* (Routledge and Kegan Paul 1981)

DAVID ARCHARD JOHN TOBIN

Article 2. The Right to Non-Discrimination

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or her or his parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

I. Introduction	42
A. Background	42
B. Context	43
1. Non-Discrimination in International and Regional Human Rights Law	43
2. Extension to Children	47
C. Specificity	48
II. Analysis	49
A. Function	49
B. Duties: 'Shall Respect and Ensure' and 'Shall Take All Appropriate Measures'	50
C. Scope: 'The Rights Set Forth in the Present Convention to Each Child within Their Jurisdiction'	52
1. Material Scope	53
2. Personal Scope	53
3. Territorial Scope	55
D. Content: 'Without Discrimination of Any Kind'	56
1. Concept of Non-Discrimination	56
2. Conception of Discrimination	58
3. Constitutive Elements of Discrimination	59
4. Special Measures	64
E. Monitoring	66
1. Domestic Monitoring	66
2. International Monitoring	67
3. Budgetary Exception	68
F. Special Provisions Relating to Child Discrimination	69
1. <i>Leges Speciales</i> in the ICCPR and the ICESCR	69
2. <i>Lex Specialis</i> in the CRPD	69
III. Evaluation	70
Select Bibliography	71

I. Introduction

A. Background

To date, every human rights treaty, whether international or regional, obligates States Parties to guarantee that the rights enshrined in the treaty are recognized and exercised without discrimination of any kind. As an international human rights treaty, the 1989 Convention on the Rights of the Child ('CRC', 'the Convention') sets such an obligation for its States Parties in its article 2.

The non-discrimination principle actually bears a specific role in the context of children's rights. Historically, indeed, the struggle against child discrimination has been a central driving force in the development of the rights of the child and one understands the latter better through the lens of three kinds of child discrimination.

First of all, the discrimination between *children and adults*. The principle of non-discrimination has clearly been at work in the gradual recognition of children's rights as such.¹ For a long time indeed, children were not deemed as capable of holding human rights, and were hence discriminated against by comparison to adults. Slowly, but surely, children's rights have been recognized. This recognition culminated in the adoption of the Convention in 1989. Children's interests are now deemed as fundamentally equal to those of adults, even though they are deemed as more vulnerable and hence in need of special protection. Second, the discrimination between *children and young adults*. A second step in the protection of children against discrimination has been the definition of the 'child', and the delineation of childhood from adulthood as a result. This is still a very controversial question given CRC article 1's incomplete definition of the 'child' and the potential discrimination of 'children' depending on their qualification as children from one state to the next.² Finally, the discrimination between *children and children*. Children are being discriminated against all the time. Little girls are not treated like little boys,³ children with a disability are not treated like children without a disability,⁴ rural children do not get the same opportunities as those living in cities, migrant children do not benefit from the same rights as local children,⁵ and so on.⁶ Moreover, children are often discriminated against on account of the status of

¹ Anne McGillivray, 'Why Children Do Have Equal Rights (Reply to Laura Purdy)' (1994) 1 *International Journal of Children's Rights* 243; David Archard, 'Children's Rights' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2016 edn) <https://plato.stanford.edu/archives/sum2016/entries/rights-children/> accessed 4 March 2018; James Griffin, 'Do Children Have Rights?' in David Archard and Colin Macleod (eds), *The Moral and Political Status of Children: New Essays* (OUP 2002); John Tobin, 'Justifying Children's Rights' (2013) 21 *International Journal of Children's Rights* 395.

² See Chapter 1 in this Commentary. See also Sonja Grover, 'On Recognizing Children's Universal Rights: What Needs to Change in the Convention on the Rights of the Child' (2004) 12 *International Journal of Children's Rights* 259.

³ Nura Taefi, 'The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and Marginalisation of the Girl-Child' (2009) 17 *International Journal of Children's Rights* 345.

⁴ Gerison Lansdown, 'It is our World Too! A Report on the Lives of Disabled Children for the UN General Assembly Special Session on Children, New York 2001' (Disability Awareness in Action 2001) <http://www.daa.org.uk/uploads/pdf/It%20is%20Our%20World%20Too!.pdf> accessed 4 March 2018.

⁵ Claire Breen, 'Refugee Law in Ireland: Disregarding the Rights of the Child-Citizen, Discriminating against the Rights of the Child' (2003) 15 *International Journal of Refugee Law* 750.

⁶ See examples mentioned in: Rachel Hodgkin and Peter Newell, *The Implementation Handbook for the Convention on the Rights of the Child* (3rd edn, UNICEF 2007) 24–25; Sarah Muscroft, *Children's Rights:*

their parents or guardians. The adoption of a general clause prohibiting discrimination among children based not only on their status, but also on the status of their parents was therefore an important step in the struggle against child discrimination. This was done with the insertion of paragraph 2 in article 2 of the CRC.⁷ It guarantees children the equal benefit of all Convention rights without discrimination.

B. Context

Non-discrimination clauses, whether general or specific, are among the most standard provisions in international human rights treaties. To assess the comparative potential and limits of article 2, it is worth taking a brief look at major international and regional guarantees of the principle of non-discrimination and their applicability to children. It is only by replacing the principle in its general context that one is able to grasp the full measure of the progress made with the adoption of article 2 of the CRC, but also some of its current limitations.

1. Non-Discrimination in International and Regional Human Rights Law

Equality and non-discrimination are fundamental moral principles.⁸ They are also key constitutional principles in a modern democracy where human rights are protected. As a matter of fact, it is the egalitarian dimension of both human rights and democracy that explains why they are usually regarded as interrelated. Human rights are situated in a constitutive relationship to equal moral status and democracy is the only political regime able to protect that equal moral status and the corresponding political equality.⁹

No wonder then that, nowadays, equality and non-discrimination occupy pride of place in most written constitutions and that numerous countries have non-discrimination legislation either against all forms of discrimination or against some specific forms of discrimination only, such as racial or sex discrimination.

Whereas traditional international law used not to concern itself with the principles of equality and non-discrimination, except in relation to states and state sovereignty, the Second World War triggered an unprecedented concern for human rights protection, including guaranteeing them for all without discrimination. The 1945 Charter of the

Equal Rights? Diversity, Difference and the Issue of Discrimination (The International Save the Children Alliance 2000) 32–40.

⁷ See on art 2 CRC: Lisa Hitch, 'Non-discrimination and the Rights of the Child, Article 2' (1989) 7 *New York University Law School Journal of Human Rights* 47; Philip Alston, 'Cadre juridique de la Convention relative aux droits de l'enfant' (1992) 91(2) *Bulletin des droits de l'homme* 1; Geraldine Van Bueren, *The International Law on the Rights of the Child* (Kluwer 1995) ch 2; Lawrence J LeBlanc, *The Convention on the Rights of the Child. United Nations Lawmaking on Human Rights* (University of Nebraska Press 1995) 94–107; Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 1999) art 2; Muscroft (n 6) Part I; Samantha Besson, 'The Non-discrimination Principle in the Convention on the Rights of the Child' (2005) 13 *The International Journal of Children's Rights* 433; Hodgkin and Newell (n 6) art 2; Bruce Abramson, *A Commentary on the United Nations Convention on the Rights of the Child, Article 2: The Right of Non-discrimination* (Martinus Nijhoff 2008); Nevena Vuckovic Sahovic, Jaap Doek, and Jean Zermatten, *The Rights of the Child in International Law* (Stämpfli 2012) part 2, chapter 3.

⁸ On the relationship between equality and non-discrimination, see Samantha Besson, 'The Egalitarian Dimension of Human Rights' (2013) 136 *Archiv für Sozial- und Rechtsphilosophie Beiheft* 19.

⁹ On the egalitarian dimension of human rights and the relationship between human rights and democracy, see *ibid.*

United Nations itself includes the principle of equal rights of peoples and the promotion and encouragement of respect for human rights and fundamental freedoms as two of its major goals.¹⁰

From the 1950s onwards, conventional guarantees of the non-discrimination principle multiplied. The principle of non-discrimination is now one of the most frequently protected norms of international human rights law.¹¹ The generality and regularity of these international legal recognitions of the principle of non-discrimination is actually often taken as evidence of its customary nature.¹² It is even sometimes invoked as proof of its imperative or pre-emptive force.¹³ According to the Inter-American Court of Human Rights (Inter-Am. CtHR),¹⁴ for instance, the prohibition of discrimination belongs to *jus cogens* norms.

In a nutshell, one may identify three kinds of guarantees of the principle of non-discrimination in international human rights law: general, ground-specific, and context-specific prohibitions of discrimination.

First of all, *general* prohibitions of discrimination. These clauses prohibit discrimination on all grounds in the protection of the human rights guaranteed by the relevant international instrument.

The three major international human rights instruments, that is, the 1948 Universal Declaration of Human Rights ('UDHR'),¹⁵ the 1966 International Covenant on Civil and Political Rights ('ICCPR') and the 1966 International Covenant on Economic, Social and Cultural Rights ('ICESCR')¹⁶ protect the principle of non-discrimination in a general clause, placed prominently at the beginning of the treaties. Article 2 of the UDHR

¹⁰ Arts 1(2) and 1(3) UN Charter (adopted 24 October 1945) 1 UNTS XVI. See also art 55(c).

¹¹ See on non-discrimination in international human rights law: Wilhelm Kewenig, *Der Grundsatz der Nichtdiskriminierung im Völkerrecht der internationalen Beziehungen, Vol I: Der Begriff der Diskriminierung* (Athenäum 1972); Egbert W Vierdag, *The Concept of Discrimination in International Law, with Special Reference to Human Rights* (Martinus Nijhoff 1973); Christian Tomuschat, 'Equality and Non-discrimination under the International Covenant on Civil and Political Rights' in Ingo von Münch (ed), *Staatsrecht, Völkerrecht, Europarecht: Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag am 28. März 1981* (W de Gruyter 1981); Warwick McKean, *Equality and Discrimination under International Law* (OUP 1983); Bertrand Ramcharan, 'Equality and Non-discrimination' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1983); Yoram Dinstein, 'Discrimination and International Human Rights' (1985) 15 *Israel Yearbook of Human Rights* 11; Anne Bayefsky, 'The Principle of Equality and Non-discrimination in International Law' (1990) 11 *Human Rights Law Journal* 1; Karl J Partsch, 'Discrimination' in Ronald St J Macdonald, Franz Matscher, and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993) 571-92; Wouter Vandenhoele, *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia-Hart 2005); Dinah Shelton, 'Prohibited Discrimination in International Human Rights Law' in Aristotle Constantinides and Nikos Zaikos (eds), *The Diversity of International Law* (Martinus Nijhoff 2009) 261-92; Olivier de Schutter, *International Human Rights Law* (2nd edn, Cambridge 2014) 632-757; Daniel Moeckli, 'Equality and Non-discrimination' in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, OUP 2018) 148-64.

¹² See: *South West Africa* (Second Phase, Judgment) [1966] ICJ Rep 3, 293 (Tanaka J); ICJ, *Barcelona Traction* (Second Phase, Judgment) [1970] ICJ Rep 3, 32.

¹³ McKean (n 11) 277-83; Hitch (n 7) 50; Ramcharan (n 11) 249; Van Bueren (n 7) 55.

¹⁴ Inter-Am CtHR, *Juridical Condition of the Undocumented Migrants*, Advisory Opinion OC-18/03 (2003) Series A No 18, paras 97 ff, 101.

¹⁵ Universal Declaration of Human Rights UNGA Res 217 A(III).

¹⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 July 1976) 993 UNTS 3.

prohibits discrimination in the enjoyment of the rights recognized in the Declaration, but the principle of non-discrimination is also specified further in the legal context with a guarantee of equality before the law and in the law (UDHR art 7).¹⁷ Article 2(1) of the ICCPR prohibits discrimination in the enjoyment of the rights recognized in the Convention while article 26 of the ICCPR provides an autonomous guarantee of equality in and before the law and hence against discrimination.¹⁸ Article 2(2) of the ICESCR contains a general non-discrimination clause that prohibits discrimination in the enjoyment of the rights in the ICESCR. There is, however, no equivalent to article 26 of the ICCPR in the ICESCR.¹⁹

General prohibitions of discrimination may also be found in all regional human rights treaties. The principle of non-discrimination appears in the first article of the American Convention on Human Rights ('ACHR') which lays down the obligations of States Parties²⁰ and in the second article of the African Charter on Human and Peoples' Rights ('ACHPR').²¹ Article 14 of the European Convention on Human Rights ('ECHR')²² prohibits discrimination in the enjoyment of the rights and freedoms set forth in the Convention, whereas article 1 of Protocol No 12 to the ECHR contains an autonomous

¹⁷ Universal Declaration of Human Rights UNGA Res 217 A(III). Art 2 UDHR reads as follows: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Arts 10, 16, 21, and 26(2) also refer to components of equality.

¹⁸ Art 2(1) ICCPR reads as follows: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' According to art 26 ICCPR: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

¹⁹ Art 2(2) ICESCR reads as follows: 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

²⁰ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) (1969) 9 ILM 99. Art 1 reads as follows: 'The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition'. See also art 3 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988, entered into force 16 November 1999) (1989) 28 ILM 156.

²¹ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58. Art 2 reads as follows: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'. Art 3 guarantees that every individual shall be equal before the law and shall be entitled to equal protection of the law.

²² Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) CETS 5. Art 14 reads as follows: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. See also Art E of the 1996 European Social Charter (European Social Charter revised, adopted 3 May 1996, entered into force 1 July 1999) CETS 163 and the Preamble to the 1961 European Social Charter.

prohibition of discrimination which extends the prohibition laid down in article 14 of the ECHR to 'any right set forth by law' and to any action taken by a public authority.²³ Finally, mention should be made of the Charter of Fundamental Rights of the European Union.²⁴ An entire chapter of the Charter is dedicated to equality (Chapter III). It starts with a general prohibition of discrimination (art 21), but also contains a specific article on children's rights (art 24).

These general international and regional guarantees of the non-discrimination principle share common features. First of all, most of them are *subordinate* and non-autonomous clauses, which qualify other guaranteed rights in commending their respect free of any discrimination rather than prohibiting discrimination in itself.²⁵ This is the case, for instance, of article 2(1) of the ICCPR, article 2(2) of the ICESCR, article 2 of the UDHR, article 1 of the ACHR, article 2 of the ACHPR, and article 14 of the ECHR. Exceptions to this may be found in article 7 of the UDHR, article 26 of the ICCPR, article 1 Protocol No 12 of the ECHR and article 24 of the ACHR. These autonomous clauses guarantee equality in and before the law not merely in the context of a threat to another Covenant or Convention right or freedom, but in general. Second, most of these provisions have an *open-ended* scope. In this sense, the list of prohibited discrimination grounds is purely indicative and can be extended to other similar grounds.²⁶ This is what is meant by terms like 'other status' or 'such as' used in the non-discrimination clauses. As to the list of exemplary discrimination grounds prohibited in all the clauses mentioned, it is more or less the same. Finally, most of these guarantees are *not directly justiciable* norms. In this sense, they cannot be invoked directly by individuals against the state. Exceptions to this may be found in article 26 of the ICCPR, article 14 of the ECHR, article 1 Protocol No 12 of the ECHR, and article 24 of the ACHR.

Second, *ground-specific* prohibitions of discrimination. These clauses prohibit discrimination on specific grounds only, in the context of the protection of the human rights guaranteed by the relevant international instrument—which is itself often drafted as a non-discrimination treaty.

The two most prominent ground-specific prohibitions of discrimination are to be found in the 1965 International Convention on the Elimination of all Forms of Racial Discrimination ('ICERD') and in the 1979 Convention on the Elimination of all Forms of Discrimination against Women ('CEDAW').²⁷ The two conventions aim at combating various forms of ground-specific discrimination by granting non-discrimination rights.²⁸ They also include a ground-specific non-discrimination clause applicable to the exercise of these other ground-specific non-discrimination rights in the Convention (ICERD art

²³ Protocol No 12 to the ECHR (adopted 4 November 2000, entered into force 1 April 2005) CETS 177. The Protocol is open for signature by all the members States of the Council of Europe, but as of November 2018 only twenty of the forty-seven members States have ratified it.

²⁴ Charter of Fundamental Rights of the European Union [2010] OJ C83/02.

²⁵ Bayefsky (n 11) 3–4. See also UN Human Rights Committee ('HR Committee'), 'General Comment No 18: Non-discrimination' (1989) ('HRC GC 18') in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* (2008) HRI/GEN/1/Rev.9 (Vol I) 195 para 12.

²⁶ Bayefsky (n 11) 5–8.

²⁷ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195; Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

²⁸ On the distinction between non-discrimination *rights* and the *principle* of non-discrimination in international human rights law, see Besson, 'The Egalitarian Dimension' (n 8).

5; and CEDAW art 3). A distinct example is the 2006 Convention on the Rights of Persons with Disabilities ('CRPD').²⁹ The Convention includes various disability-specific rights, and not only non-discrimination rights like the other two, but it also includes a disability-specific non-discrimination clause (CRPD art 5). It further entails non-discrimination clauses addressing cases of multiple discrimination of disabled women (CRPD art 6) and, as we will see, disabled children (CRPD art 7).

Finally, *context-specific* prohibitions of discrimination. These clauses prohibit discrimination in the protection of the human rights guaranteed by the relevant international instrument, albeit in a specific context only: that is, that of the instrument itself, which is often drafted as a context-specific non-discrimination treaty. One may mention the 1958 ILO Convention no 111 concerning Discrimination in Respect of Employment and Occupation and the 1960 UNESCO Convention against Discrimination in Education.³⁰

2. Extension to Children

In principle, children are protected by the general non-discrimination clauses entailed in international and regional human rights instruments, whether general, ground-specific, or context-specific, just as adults would in the same situation.³¹ After all, human rights treaties are supposed to apply to 'every human being', and hence independently of age. As a matter of fact, age discrimination is directly or at least indirectly prohibited by most non-discrimination clauses in international and regional human rights instruments and should apply *a fortiori* to other international and regional human rights instruments.³²

All the same, the principle of non-discrimination as we know it from international and regional human rights law has been largely unable to effectively counter child discrimination.³³ This is due partly to these instruments' general misapplication and reservations, but also to their inadequacy to protect children against all kinds of child-specific discrimination.

There are various types of child-specific discrimination one may mention. First, children often require special measures of protection that take into account their particular

²⁹ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

³⁰ UNESCO Convention against Discrimination in Education (adopted 14 December 1960, entered into force 29 May 1962) 429 UNTS 93; ILO Convention (no 111) concerning Discrimination in Respect of Employment and Occupation (adopted 25 June 1958, entered into force 15 June 1960) 362 UNTS 31. As regards work, one should also mention the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3. Art 7 ICPMW prohibits discrimination in the enjoyment of the rights guaranteed by the Convention 'in accordance with the international instruments concerning human rights'.

³¹ Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (OUP 2005) 26; See HR Committee, 'General Comment no 17: Article 24. Rights of the Child' (1989) reproduced in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* (2008) HRI/GEN/1/Rev.9 (Vol I) 193 para 2.

³² Age is an explicit prohibited ground in the ICPMW (art 7), the Charter of Fundamental Rights of the European Union (art 21) and the Inter-American Convention against all Forms of Discrimination and Intolerance (adopted 5 June 2013, not yet entered into force) OEA/Ser.P AG/RES. 2804 article 1). It has been recognized as a prohibited ground of discrimination by the HR C (HR Committee, *Love et al. v Australia* (Comm no 983/2001) (final views adopted on 25 March 2003) [para 8.2) and the Committee on Economic, Social and Cultural Rights ('ESCR Committee') ('General Comment No 6: The economic, social and cultural rights of older persons' (1995) in 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) HRI/GEN/1/Rev.9 (Vol I) 27 paras 11–12). As this last example shows, discrimination based on age often refers to discrimination against *elderly people*, however.

³³ Van Bueren (n 7) 39.

vulnerability vis-à-vis the state, but also vis-à-vis their families and other individuals. Children may indeed be discriminated against because of actions that their parents or family members have engaged in, and hence in a way that is mediated through their parents. Second, children are often not only discriminated against when compared to other children, but also by comparison to *adults*. Thus, children are excluded from actively taking part in judicial procedures through which they could claim their rights not to be discriminated against. Finally, children are often doubly discriminated against: first, as children and, second, as members of a *specific group*. These discriminations are often invisible, partly because the difference of treatment based on age may appear, at first sight, necessary to protect the child. This is the case, for instance, of certain differentiations based on age for sexual consent between homosexual and heterosexual acts, which have been thought to protect young adults and hence deemed justified, but which have turned out quite detrimental to homosexual young adults.³⁴ This 'double jeopardy' weighing on children is difficult to handle merely through general guarantees of the principle of non-discrimination and needs to be addressed specifically.

Hence the need for a special international instrument guaranteeing children the respect of their human rights without discrimination.

C. Specificity

The Convention on the Rights of the Child includes a guarantee of the principle of non-discrimination in article 2.³⁵ It is a general discrimination clause that is neither ground-specific nor context-specific. It is unique to the extent that it is a general non-discrimination clause in a ground-specific human rights instrument. Unlike the other non-discrimination clauses in ground-specific instruments, it is not restricted to one discrimination ground only. Nor, however, is it so general that it is oblivious to the child-specific nature of the discrimination at stake and it cannot therefore be conflated with a general non-discrimination clause in a general human rights instrument.

At first sight, the wording of article 2 of the CRC is very similar to that of several other general non-discrimination clauses in general human rights instruments, such as article 2(1) of the ICCPR or article 2(2) of the ICESCR. It may be compared to those clauses as follows.

First, article 2 uses the term '*discrimination*' like article 2(2) of the ICESCR and article 14 of the ECHR, by contrast to article 2(1) of the ICCPR and article 2 of the UDHR which refer to '*distinction*'.³⁶ It is generally accepted nowadays that both refer to the same kind of differentiation without reason. Second, the *list of prohibited grounds* of discrimination in article 2(1) is the same as those of major non-discrimination clauses with the additional grounds of *disability* and *ethnic origin*. Third, it is important to emphasize that article 2(1) is a *subordinate* rather than an autonomous clause of non-discrimination. As such, it applies only to those rights guaranteed in the Convention, by contrast to

³⁴ *ibid* 39–40. See ECtHR, *Dudgeon v United Kingdom* (1981) Series A no 45.

³⁵ One of the regional counterparts of the CRC, the African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49, also contains a general provision on non-discrimination (art 3), which reads as follows: 'Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status'.

³⁶ Hitch (n 7) 54–58.

article 26 of the ICCPR, for instance. In this sense, it is very similar to article 2(1) of the ICCPR, article 2(2) of the ICESCR, and article 14 of the ECHR. This is not the case, however, of article 2(2) of the CRC which applies to cases of discrimination of a child on the basis of her or his parents' activities or status only. Fourth, the scope of application of article 2 is *open* and cannot be limited to some areas only. It applies to education as much as to private ownership. Finally, article 2 is a *directly justiciable clause* that may be invoked by victims of discrimination directly before domestic institutions. This mirrors the solution chosen by article 2(1) of the ICCPR.

A careful reading of the international provisions discussed before shows, however, that article 2 of the CRC is also unique in several ways. On the one hand, it protects the child in all her or his specificities and not only as any other human being (art 2(1)). On the other, it protects children not only against discrimination directly targeted at them, but also against discrimination based on attributes of their parents, legal guardians or family members (art 2(1) and (2)). Indeed, very often, children are easy targets for discrimination through their parents.

Thus, like other children's rights in the Convention, article 2 of the CRC recognizes both the special status and needs of children, due to their very dependency, through a child-specific non-discrimination clause, and, at the same time, the same basic human rights and fundamental freedoms already recognized to adults through a non-discrimination clause that is at least as inclusive as general non-discrimination clauses in other international and regional human rights instruments.

II. Analysis

Article 2 is a short but complex provision that requires a careful analysis. The following section presents its function, the duties implied by this provision, and its scope and content, before turning to its implementation and the monitoring thereof. A final section considers the relationship between article 2 CRC and specific measures protecting particularly vulnerable children against discrimination.

A. Function

Article 2 is the general non-discrimination clause in the Convention on the Rights of the Child. Together with articles 3, 6, and 12 of the CRC, it forms part of the so-called *general principles of the CRC*.³⁷ As such, it applies to the interpretation and application of the whole treaty and to the many ways in which children rights may be applied in a discriminatory fashion.³⁸

³⁷ CRC Committee, 'Overview of the reporting procedures' (1994) CRC/C/33; CRC Committee, 'General guidelines regarding the form and content of initial reports to be submitted by States Parties under article 44, paragraph 1 (a), of the Convention on the Rights of the Child' (1991) CRC/C/5 ('CRC Committee, General guidelines'), para 9; CRC Committee, 'General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42, and 44, para 6)' (2003) ('CRC GC 5') reproduced in 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) HRI/GEN/1/Rev.9 (Vol II) 421, para 12. See on the general principles of the CRC, Laura Lundy and Bronagh Byrne, 'The Four General Principles of the United Nations Convention on the Rights of the Child: the Potential Value of the Approach in Other Areas of Human Rights Law' in Eva Brems, Ellen Desmet, and Wouter Vandenhoele (eds), *Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration?* (Routledge 2017) 52–70.

³⁸ Muscroft (n 6) 27–28.

Article 2 amounts to more than a non-discrimination clause, however. It also has another, albeit related, function in the determination of the content of States Parties' obligations. Besides the obligations not to discriminate in the protection of all the rights set forth in the Convention, article 2 also identifies the general obligations of States Parties with respect to those rights.³⁹ This general function of article 2 comes very close to that of article 4 of the CRC which deals with the implementation of Convention rights. Thus, one may say, following Philip Alston, that article 2(1) states the *objectives* of the Convention, while article 4 indicates the *means* to implement them.⁴⁰

This dual function of article 2 of the CRC is essential to understanding the duties of States Parties entailed in this provision. First, States Parties shall *respect* and *ensure* all the rights set forth in the Convention. The means for doing so are described in article 4 of the CRC⁴¹—not in article 2 as it is the case in the ICCPR. Second, States Parties shall *respect* and *ensure* all the rights set forth in the Convention *without discrimination*. In what follows, we will focus on the specific duties related to the prohibition of discrimination.

B. Duties: 'Shall Respect and Ensure' and 'Shall Take All Appropriate Measures'

Like article 2(1) of the ICCPR, article 2(1) of the CRC foresees two kinds of duties (or obligations) which complement each other.⁴²

First of all, duties to *respect*. These duties are passive or negative. In general, duties to respect require States Parties to refrain from violating any of the rights enshrined in the Convention.⁴³ In relation to the prohibition of discrimination, they imply that the State may not actively discriminate in any way against children in their protected rights. Second, duties to *ensure*. In his commentary on the ICCPR, Nowak has explained that '[i]n contrast to the obligation to respect ... the obligation to *ensure* is a positive duty'.⁴⁴ He has further explained that:

The obligation to ensure consists of the obligation to *protect* individuals against interference by third parties (horizontal effect) and the obligation to *fulfil* which in turn incorporates and obligation to facilitate the enjoyment of human rights and provide services.⁴⁵

This model aligns with what is typically referred to as the typology of tripartite obligations under international human rights law which consists of an obligation to respect, protect, and fulfil (promote).⁴⁶

³⁹ See HR Committee, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) ('HRC GC 31') reproduced in 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) HRI/GEN/1/Rev.9 (Vol I) 243, paras 6, 8, 10.

⁴⁰ Alston (n 7) 4. ⁴¹ See chapter 4 of this Commentary. ⁴² Detrick (n 7) 68–69.

⁴³ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd NP Engel 2005) 37; Human Rights Committee General Comment No 31: 'The Nature of the General Legal Obligation imposed on State Parties to the Covenant' CCPR/C/21/Rev.1/Add.13 (26 May 2004) ('HRC GC 31') para 6; Robin Geib, 'The Obligation to Respect and to Ensure Respect for the Conventions' in Andrew Clapham, Paola Gaeta, and Marco Sassoli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 111, 117 (noting that this obligation 'simply amounts to a reaffirmation of the rule expressed with the Latin tag *pacta sunt servanda* and codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties').

⁴⁴ Nowak (n 43) 37. See also: HRC GC 31 (n 43) para 6; Geib (n 43) 117–19; Hodgkin and Newell (n 6) 22.

⁴⁵ Nowak (n 43) 38.

⁴⁶ For a discussion of the development and features of this model see: Olivier de Schutter (n 11) chapter 3; Walter Kalin and Jorg Kunzli, *The Law of International Human Rights Protection* (OUP 2009) 96–120. The

In general, therefore, the duty 'to respect and ensure' under article 2 requires States Parties to take whatever measures are necessary to give effect to the rights enshrined in the Convention.⁴⁷ It is a broad and onerous obligation that applies *to all rights quite independent* of the obligation to protect children against discrimination in their enjoyment of these rights. With respect to the prohibition of discrimination, however, there is both a negative duty to refrain from discrimination and a positive duty to prevent discrimination irrespective of whether the threat arises from a government or private actor.⁴⁸ This protection can take place *legally* through the adoption of non-discrimination laws.⁴⁹ Often, however, non-discrimination laws exist, but are not effectively implemented.⁵⁰ As a result, *practical* measures should also be taken to prevent and combat discrimination that cannot only be eradicated through laws, as in the context of social, economic, and cultural rights, for instance. Socially internalized forms of discrimination and the media are indeed at the origins of many forms of discrimination and should be targeted directly.⁵¹ This is confirmed by article 4 of the CRC which emphasizes that legislative measures are not the only ones the state should take to combat discrimination. It is important to emphasize that positive duties of protection apply to all areas of political control, whether official or private, thus also calling for *mainstreaming* measures in all these areas.

These positive duties under article 2(1) are complemented by the duties to take all appropriate measures set by article 2(2) in relationship to grounds of discrimination related to the child's parents' or guardians' person or status.

The Committee on the Rights of the Child ('CRC Committee', 'the Committee') has summarized these two kinds of non-discrimination duties in its general comment on the best interest of the child:

The right to non-discrimination is not a passive obligation, prohibiting all forms of discrimination in the enjoyment of rights under the Convention, but also requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to enjoy the rights

tripartite typology is not an explicit feature of the CRC or indeed other international human rights instruments. Its emergence and gradual acceptance however can be traced to the efforts of scholars and Committee bodies in the 80s and 90s who sought to generate an understanding and acceptance of economic and social rights relative to civil and political rights. See especially the work of: Asbjorn Aide, *The Right to Adequate Food as a Human Right* E/CN.4/Sub.2/1983/25 (1983); Henry Shue, *Basic Rights, Subsistence, Affluence and US Foreign Policy* (Princeton University, Princeton 1980) 52; The Maastricht Guidelines on Violations of Economic Social and Cultural Rights (1997) (adopted by a group of academic experts in Maastricht 22–26 January 1997) para 6 ('Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil'); ESCR Committee, General Comment No 12: The Right to Adequate Food (art 11) E/C.12/1999/5 (12 May 1999) para 15; African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* Comm No 155/96 (2001) AHRLR 60 (ACHPR) (15th Annual Activity Report) paras 44–48; Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (2005) paras 47–48.

⁴⁷ Thomas Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations' in Louis Henkin (ed), *The International Bill of Rights* (Columbia University Press 1981) 77; see the comment made by the United Nations Children's Fund (UN Doc E/CN.4/1989/WG.1/CRP.1) during the drafting process, reproduced in Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child* (United Nations 2007) 329–30 ('*Legislative History*').

⁴⁸ Alston (n 7) 4–5.

⁴⁹ Hodgkin and Newell (n 6) 23.

⁵⁰ Muscroft (n 6) 34.

⁵¹ CRC Committee, CO Bosnia and Herzegovina, CRC/C/BIH/CO/2-4 paras 29–30; Hodgkin and Newell (n 6) 24.

under the Convention. This may require positive measures aimed at redressing a situation of real inequality.⁵²

More generally, the States Parties' obligations under article 2 have been specified further by the Committee in various general comments and concluding observations.

In its 'General Comments', on the one hand, the CRC Committee considers that article 2 imposes the following duties: to ensure that the principle of non-discrimination is reflected in all domestic legislation and can be directly applied and appropriately monitored and enforced through judicial and administrative bodies; to identify individual children and groups of children the recognition and realization of whose rights may demand special measures; to collect data and disaggregate them in order to identify discrimination; to amend legislation, administration, and resource allocation, as well as educational measures when needed to change attitudes; and to take special measures.⁵³ Specific obligations to vulnerable children have also been identified by the Committee. To combat discrimination against children with disabilities, for example, states should: include disability as a forbidden ground in their constitution or legislation; provide effective remedies in case of violations of the rights of children with disabilities; conduct awareness-raising and educational campaigns; and pay particular attention to girls with disabilities.⁵⁴

Specific duties relating to the non-discrimination principle may also be identified from the CRC Committee's *concluding observations* on States Parties' reports, on the other hand. The Committee regularly requests, for instance, that states provide 'specific information on the measures and programmes relevant to the Convention on the rights of the child undertaken by the State party to follow up on the Durban Declaration and Programme of Action adopted at the 2001 World conference against racism, racial discrimination, xenophobia and related intolerance'.⁵⁵

C. Scope: 'The Rights Set Forth in the Present Convention to Each Child within Their Jurisdiction'

To get a full grasp of the scope of article 2, its specific material, personal, and territorial scopes need to be examined in turn.

⁵² CRC Committee, 'General Comment No 14 on the right of the child to have her or his best interests taken as a primary consideration (art 3, para 1)' (2013) CRC/C/GC/14 ('CRC GC 14') paras 40, 48.

⁵³ CRC Committee, 'General Comment No 11: Indigenous children and their rights under the Convention' (2009) CRC/C/GC/11 ('CRC GC 11') paras 23–24; CRC GC 5 (n 37) para 12.

⁵⁴ CRC Committee, 'General Comment No 9: The rights of children with disabilities' (2006) reproduced in 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) HRI/GEN/1/Rev.9 (Vol II) 497 ('CRC GC 9') para 9. With respect to migrant children see: 'Joint General Comment No 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No 22 of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration' (2017) CMW/C/GC/3-CRC/C/GC/22 paras 21–26; CRC Committee, 'General Comment No 21 on children in street situations' (2017) CRC/C/GC/21 paras 25–27; CRC Committee, 'General Comment No 20 on the Implementation of the Rights of the Child During Adolescence' (2016) CRC/C/GC/20 ('CRC GC 20') para 21; CRC GC 11 (n 53) paras 23–29.

⁵⁵ CRC Committee, CO Albania, CRC/C/ALB/CO/2-4 para 28; CO Malta, CRC/C/MLT/CO/2 para 29; CO Guyana, CRC/C/GUY/CO/2-4 para 25; CO Andorra, CRC/C/15/Add.176 para 30; CO Bahrain, CRC/C/15/Add.175 para 30; CO Bangladesh, CRC/C/15/Add.221 para 30; CO Belarus, CRC/C/15/Add.180 para 30; CO Brunei Darussalam, CRC/C/15/Add.219 para 28; CO New Zealand, CRC/C/15/Add.216 para 24. See also CRC GC 11 (n 53) para 28.

1. Material Scope

The material scope of article 2 may be approached from the perspective of the rights protected, but also from that of the areas covered and that of the prohibited grounds of discrimination.

(a) Rights Protected

The phrase 'the rights set forth in the present Convention' in article 2(1) indicates that the obligation of non-discrimination applies only with respect to the rights set forth in the Convention, and not beyond. The rights in the Convention may indeed be respected in ways that exclude or discriminate children.

The CRC's principle of non-discrimination is not an independent and autonomous principle of non-discrimination, therefore, but a dependent or derivative one. In that respect, it comes close to the one captured by most other non-discrimination clauses in international human rights instruments.

There is an *exception* to this restriction, however, in article 2(2). That provision extends the prohibition of discrimination to any rights and areas where discrimination may take place, even if they fall outside the ambit of the Convention. This has very broad implications, although these remain still largely unexplored to date.⁵⁶

(b) Areas Covered

Depending on the duties at stake, the non-discrimination obligations of the state have a different material scope.

When the obligation is one of negative 'respect' of the prohibition of discrimination according to article 2(1), the obligation applies only to any governmental measure of state action by an official or authority at any level of government. When the obligation is one of positive 'protection' according to article 2(1) and 2(2), however, the obligation extends also to removing private obstacles to the enjoyment of the designated rights.

For the rest, however, there are no context-specific restrictions to the material scope of article 2 of the CRC.

(c) Grounds of Discrimination

The insertion of an exhaustive list of prohibited discrimination grounds can restrict the material scope of a prohibition of discrimination. This is the case in the CEDAW, which only refers to discrimination against women, and in the CERD, which only refer to discrimination on the grounds of race, colour, or ethnic or national origin.

By contrast, article 2(1) of the CRC contains a long list of suspect grounds. This list is purely exemplary, however, and can be extended to other grounds as is apparent from the wording 'other status' at the end of the list. The interpretation of the notion of 'other status' is addressed in further detail below. Article 2(2) only applies, on the contrary, to the discrimination of children that is based on the status of their parents.

Of course, article 2 of the CRC protects children against discrimination and, as result, focuses on the child-specific dimensions of those discriminations whatever the grounds.

2. Personal Scope

The personal scope of article 2 can be apprehended from the perspective of the right-holders and from that of its duty-bearers. Duties stemming from article 2 can indeed be

⁵⁶ Hodgkin and Newell (n 6) 30.

directly invoked by children against the institutions of States Parties. To that extent, it amounts to more than an interpretative principle.

(a) Right-Holders

Those protected against discrimination by article 2 are *all children*. As such, the application of article 2 depends on article 1 of the CRC's definition of 'child'.⁵⁷ This definition regards any person under 18 as a child, except when national law determines a different age for the children's majority. This flexibility has been heavily criticized for allowing discrimination among children of different States Parties. One may argue, however, that the age-based definition in the Convention has already become quite authoritative since 1989 and this may be seen as a sign of progress when compared to the multitude of definitions that used to prevail.

The only *exceptions* to the general scope of right-holders of article 2 are identified in article 22, 23 and 30 of the CRC. Those three provisions provide for special protection against discrimination of children in particularly vulnerable situations, and respectively to refugee, disabled and indigenous children. Only children falling into these three groups may therefore benefit from the special protection measures foreseen by the respective provision, thus giving rise to interesting questions of inequality before non-discrimination clauses and hence of discrimination in non-discrimination rights.

Of course, the children protected against discrimination are only those children situated 'within the jurisdiction' of the relevant State party (art 2(1)). As explained below, jurisdiction should not be conflated with nationality, however. The children protected may not be discriminated against because they are *non-nationals* of the State in which they are discriminated. This applies even if they are in irregular situation.

(b) Duty-Bearers

From a purely practical point of view, discrimination, like any other violation of human rights, may have many perpetrators.

First of all, *public institutions*. They are indeed the source of power and coercion that can most discriminate or omit to prevent discrimination from occurring. Second, *parents* or *guardians*. They constitute another important source of discrimination, as they dispose legally and materially of important power over children. Third, *other individuals*. Other individuals in the society may also contribute to causing discrimination against children. This is the case of the media or of other social groups such as religious lobbies which may contribute to entrenching biases against children in social attitudes.⁵⁸ Finally, other *children*. Children are also often at the origin of discrimination against other children.

Identifying the actual bearers of the corresponding non-discrimination duties is more complicated, however. The scope of duty-bearers of the prohibition of non-discrimination is indeed more restricted than the scope of potential discriminators.

First of all, *States* are clearly the sole negative and positive duty-bearers of article 2(1) and 2(2), provided they have ratified the Convention. Of course, their duties also extend, as explained before, to preventing individuals from discriminating against children. Indeed, States Parties have a positive duty to prevent legally or practically individuals from discriminating against children.⁵⁹

⁵⁷ See in this Commentary, Chapter 1. ⁵⁸ Muscroft (n 6) 35.

⁵⁹ See CRC Committee, 'General Comment No 16: State obligations regarding the impact of the business sector on children's rights' (2013) CRC/C/GC/16 ('CRC GC 16') para 14: 'States are required to prevent discrimination in the private sphere in general and provide remedy if it occurs'.

The second question to arise is whether non-discrimination clauses may also have horizontal effect and generate non-discrimination duties for *individuals* themselves. One may distinguish between two types of potential horizontal effect of article 2 of the CRC: direct horizontal effect and indirect horizontal effect.

Granting article 2 *direct* horizontal effect would mean that the non-discrimination principle binds individuals directly in their relations to children. This is controversial domestically. It is even more so in international law. States are by and large still the only parties to international treaties and hence the only direct bearers of the duties they give rise to. They are also the only ones responsible before international monitoring bodies. As a result, direct horizontal effect has never been granted to the non-discrimination principle in international law. It could be recognized, however, through domestic law provided domestic law grants the prohibition of non-discrimination direct horizontal effect in some or all circumstances, on the one hand, and the latter extends to international law within the domestic legal order, on the other.

In the absence of direct horizontal effect, international guarantees of the principle of non-discrimination are generally regarded as having *indirect* horizontal effect. What this means is that domestic judges and other institutions ought to refer to the principle of non-discrimination to interpret domestic private law and the law regulating inter-individual relationships in a way that prohibits discrimination among private parties. Article 2 of the CRC clearly is meant to have such an indirect horizontal effect and binds domestic authorities in the interpretation of the Convention's rights.⁶⁰

3. Territorial Scope

Article 2(1) applies to all children *under the State's jurisdiction*. This is a broad clause that was thoroughly debated in the *travaux préparatoires*.⁶¹ Such jurisdiction clauses have now become common practice in international and regional human rights law and their interpretation by courts or quasi-judicial bodies⁶² has generated substantial debates.⁶³ Curiously, article 2 of the CRC's jurisdiction clause replaces a general jurisdiction clause

⁶⁰ CRC Committee, CO Cambodia, CRC/C/15/Add.128 para 26 ('The Committee recommends that the general principles of the Convention (art. 2, 3, 6, and 12) be included in all relevant legislation affecting children and taken into account in all administrative and judicial decisions, as well as in all policies and programmes related to children' (emphasis added)); CO Niger, CRC/C/15/Add.179 para 26.

⁶¹ The revised draft (UN Doc E/CN.4/1349), which was the basic working document for the working group, mentioned that the rights extended to all children 'in the territories' of the States Parties. The formulation remained the same after the first reading (UN Doc E/CN.4/1988/WG.1/WP.1/Rev.1). UNICEF made the suggestion to complete the formulation by adding 'in their territories or subject to their jurisdiction'. During the second reading, some states proposed amending the 'or' with 'and' but it was finally agreed that reference to territories would be deleted and only the reference to jurisdiction would be kept (see UN Doc E/CN.4/1989/48 paras 146–69). All extracts are reproduced in OHCHR, *Legislative History* (n 47) 74–75, 83, 331–33. See ICCPR art 2: 'to all individuals within its territory and subject to its jurisdiction'.

⁶² See eg: ICJ, *Legal Consequences of the Construction of the Wall* (Advisory Opinion) [2004] ICJ Rep. 136 para 107 ff; HR Committee, *Lopez Burgos v Uruguay* Communication no 52/1979 (final views adopted on 29 July 1981); in the regional context: ECtHR, *Al-Skeini v United Kingdom* App no 55721/07 (Judgment of 7 July 2011).

⁶³ See Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 *Leiden Journal of International Law* 857; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford 2011); Malcolm Langford, Wouter Vandenhole, Martin Scheinin, and Willem Van Genugten (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2012); Olivier De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' (2006) 6 *Baltic Yearbook of International Law* 183.

in the Convention. This combination of a general and non-discrimination jurisdiction clause may actually also be found in other international human rights instruments (eg art 2, ICCPR).

As is clear from the *travaux préparatoires*, the notion of 'jurisdiction' is not equivalent to those of 'territory' or 'nationality'. In a nutshell, the Convention's non-discrimination principle's jurisdiction clause excludes limiting the prohibition of discrimination only to those children situated on the territory of the State party or only to children who hold the nationality of the State party as opposed to foreign children.⁶⁴ The jurisdiction of a State party extends to national and foreign children inside and outside its territory when that territory is occupied or protected by the State or when the State exercises a form of effective control over those children outside its territory.⁶⁵

This applies whether the discriminated child is under the state's jurisdiction regularly or not.⁶⁶ During the drafting process, the United States tried to limit the scope of the protection to those children who were 'lawfully' in a territory. This proposal was harshly criticized and finally abandoned.⁶⁷ As such, the Convention specifically addresses the rights of certain groups of vulnerable children, such as refugee children, children in trouble with the law, children in situations of armed conflict, and children from minority groups.

Finally, article 2 of the CRC applies to children under a State party's jurisdiction whether or not the state from which this child is a national has ratified the Convention. The only exceptions to this general rule are those foreseen in article 22 of the CRC which deals with refugee children.⁶⁸

D. Content: 'Without Discrimination of Any Kind'

States shall respect and ensure the rights set forth in the CRC 'without discrimination of any kind'. To capture the exact content of the prohibition of discrimination, it is important to start by presenting some distinctions pertaining to the concept of non-discrimination, before looking more closely at the relevant conception of discrimination and at its constitutive elements. Finally, special measures, that is, measures aiming at achieving material equality and that amount to a special kind of positive non-discrimination duties, are also considered.

1. Concept of Non-Discrimination

There are different distinctions necessary to the identification of the concept of non-discrimination in practice. The following distinctions are of particular relevance: the

⁶⁴ HRC GC 31 (n 39) para 10.

⁶⁵ *ibid* para 10; ICJ, *Legal Consequences of the Construction of the Wall* (Advisory Opinion) [2004] ICJ Rep 136, para 107 ff. See for an interesting application of territorial jurisdiction to the father of a child to benefit the child: Appellant's Submissions in *DWN027 v The Republic of Nauru* in the High Court of Australia on Appeal from the Supreme Court of Nauru No M145 of 2017 paras 55–64 available on line: http://www.hcourt.gov.au/cases/case_m145-2017 (accessed 20 April 2018) (discussing and using this notion of jurisdiction to argue that when considering an application by a father located within the territory of a state for refugee status, the state must take into account the best interests of a child of that father (consistent with art 3 of the Convention) even though the child is in another state and not under the power or control of the state).

⁶⁶ LeBlanc (n 7) 95–96.

⁶⁷ UN Doc E/CN.4/L.1575 paras 39–56 reproduced in Office of the United Nations High Commissioner for Human Rights, *Legislative History* (n 47) 321–23.

⁶⁸ Detrick (n 7) 69–70.

distinction between equality and non-discrimination, the distinction between formal and material equality, and the distinction between equality before and in the law.

(a) Equality and Non-Discrimination

Article 2 CRC does not guarantee 'equality'. All it does is prohibit 'discrimination'. In this respect, it is unlike other general or ground-specific non-discrimination clause one finds in international human rights instruments that usually associate the principles of equality and non-discrimination.⁶⁹ Equality and non-discrimination are indeed often understood as positive and negative statements of the same principle.⁷⁰ According to this common view, one is treated equally when one is not discriminated against, and one is discriminated against when one is not treated equally.⁷¹

The lack of mention of the principle of equality in the Convention does not have significant consequences for the interpretation of article 2 CRC, however. The CRC Committee also refers to equality when interpreting the non-discrimination principle. It actually sometimes uses both principles interchangeably.⁷²

(b) Formal and Material Equality

Article 2 CRC aims at realizing not only formal, but also material equality. The CRC Committee has stressed many times that the non-discrimination principle does not mean identical treatment in every instance.⁷³

Equality may be deemed *formal* when what matters is the different treatment of similar situations or the similar treatment of different situations seen in strict terms. By contrast, what matters for *material* equality is whether someone is treated differently in practice or *de facto*.⁷⁴ Someone may be treated equally from a formal perspective, but be treated differently materially when her or his position is assessed from a practical standpoint.

Two further distinctions help clarifying the notion of material equality.

First, one usually opposes equality of opportunities to equality of results. Whereas the former is an equality of starting gates, as when men and women are given equal education, the latter looks at results, as when men and women have not fared equally well overall in the labour market, although they have been given equal chances. Measures of protection of equality may focus on the former or the latter, depending on the overall policy one follows. Promoting equality of opportunities is usually regarded as less damaging for formal equality than targeting inequalities of result.⁷⁵

Second, one may contrast symmetrical with asymmetrical equality. When equality calls for the equal treatment of similar situations and the differentiated treatment of different situations, it is referred to as symmetrical equality. Equal treatment does not necessarily mean identical treatment in every instance, however.⁷⁶ Some persons or situations may call for special measures of protection and favourable treatment. When equality justifies special protection of people with special needs or favourable treatment to correct past or

⁶⁹ On the relationship between equality and non-discrimination, see Besson, 'The Egalitarian Dimension' (n 8).

⁷⁰ Bayefsky (n 11) 1. Contra: Elisa Holmes, 'Anti-discrimination Rights without Equality' (2005) 68 *Modern Law Review* 175.

⁷¹ McKean (n 11) 285. ⁷² eg CRC GC 14 (n 52) para 41.

⁷³ CRC GC 5 (n 37) para 12. See also HRC GC 18 (n 25) para 8.

⁷⁴ See PCIJ, *Minority Schools in Albania* [1935] PCIJ Rep Series A/B No 64, 19. See also HRC GC 18 (n 25) para 8.

⁷⁵ See eg ECJ, Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.

⁷⁶ Bayefsky (n 11) 11; ECtHR, *Belgian Linguistic Cases* (1986) Series A no 6, para 10.

present discrimination, one speaks of asymmetrical equality. This opposition between symmetrical and asymmetrical equality actually corresponds to two successive trends in the history of the development of non-discrimination law: first of all, the idea that equality implies similarity and, second, the idea that equality protects, on the contrary, diversity.

Whereas duties to protect formal equality are necessarily symmetrical, this is not the case in respect of duties to promote material equality. The latter may indeed be undifferentiated and target all groups indifferently, as with general education programmes or other active promotions of equality which benefit everybody. But they may also—and this is more controversial—favour groups over others, thus discriminating some of them formally in order to redress material discrimination.

(c) Equality before and in the Law

The major case of formal equality is legal equality or equality *de jure*. This includes equality before the law, but also equality in the law.

Equality before the law pertains to the status of a person when the law applies to her. For instance, equality before the law is in question when the legal subjecthood is unequally distributed. *Equality in the law* by contrast is the equality the law guarantees in effect. Equality in the law thus addresses the lawmaker. For instance, gender equality in the law can be exemplified by the equal treatment of the duties of men and women in family law.

Unlike article 26 of the ICCPR, article 2 of the CRC does not expressly guarantee the concept of *equality before the law*. Of course, such an express recognition of the child's legal personality may have been useful. It may be derived indirectly, however, from article 12(2) of the CRC's guarantee of the right of the child to participate in procedures and be heard.⁷⁷

By contrast, article 2 of the CRC protects *equality in the law*. This has been confirmed by the Committee in its guidelines and its monitoring of States Parties' legislation for violations of equality.⁷⁸ One finds another confirmation in article 4 of the CRC's duties of implementation of equality that mention legislative duties of implementation.

2. Conception of Discrimination

Article 2 of the CRC does not define the concept of 'discrimination' and the CRC Committee has never defined it clearly. All it said on the subject in its first general comment issued in 2001 was that:

discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities.⁷⁹

The absence of a clear definition is not surprising. Although non-discrimination is a dominant and recurring principle of international human rights law, its content has not been specified in a detailed fashion in the different sources of international law.⁸⁰ As Judge Tanaka noted in the *South West Africa Case*, 'although the existence of this principle [of non-discrimination] is universally recognised ... its precise content is not very clear'.⁸¹

⁷⁷ Van Bueren (n 7) 45. ⁷⁸ Hodgkin and Newell (n 6) 22.

⁷⁹ CRC Committee, 'General Comment No 1: Article 29 (1): The Aims of Education' (2001) ('CRC GC 1') reproduced in 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) HRI/GEN/1/Rev.9 (Vol II) 384.

⁸⁰ Bayefsky (n 11) 34.

⁸¹ ICJ, *South West Africa* (Second Phase, Judgment) [1966] ICJ Rep 3, 6.

A widely used definition of discrimination is the one given by the UN Human Rights Committee ('HR Committee') in its general comment on non-discrimination. According to this definition, discrimination should be understood as:

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.⁸²

This understanding combines the key elements of the various definitions of discrimination one finds in international human rights law. On the one hand, it corresponds to those one finds in the ILO Convention no 111 and the UNESCO Convention about education.⁸³ It also corresponds to the definition of discrimination against women (art 1, CEDAW) and the definition of racial discrimination (art 1, ICERD), both of them being expressly cited by the HR Committee as a source of inspiration. On the other hand, later definitions of discrimination adopted by other UN human rights treaty bodies after the HR Committee's general comment on non-discrimination and in international and regional Conventions⁸⁴ were actually modelled on it. For example, the Committee on Economic, Social and Cultural Rights ('ESCR Committee') has chosen a similar, albeit not identical, definition in its 2009 general comment on the notion of discrimination.⁸⁵

This common understanding of discrimination in the international human rights context applies to article 2 of the CRC. Indeed, the fact that article 2 features a similar structure and wording as other existing non-discrimination clauses in international law shows a clear intention to keep in line with what applies more generally in international non-discrimination law. Moreover, the CRC Committee often refers to other international instruments in its interpretations, and usually follows the approach adopted by other UN human rights treaty bodies.⁸⁶

3. Constitutive Elements of Discrimination

The general definition of discrimination entails various constitutive elements. Those elements have been specified over time by the UN human rights treaty bodies⁸⁷ and regional human rights courts.⁸⁸ In a nutshell, the principle of non-discrimination is understood as

⁸² HRC GC 18 (n 25) para 7.

⁸³ See: art 1 ILO Convention No 111 (n 30); art 1 UNESCO Convention Against Discrimination in Education (n 30).

⁸⁴ See CRPD art 2: 'Discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'. See also the definition of discrimination in the Inter-American Convention against all Forms of Discrimination and Intolerance (n 32).

⁸⁵ ESCR Committee, 'General Comment No 20: Non-discrimination in economic, social and cultural rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)' (2009) E/C.12/GC/20 ('ESCR GC 20') para 7.

⁸⁶ See eg: CRC GC 5 (n 37) para 12 (making special reference to the HRC's general comment 18 on non-discrimination); CRC GC 11 (n 53) para 18.

⁸⁷ HR Committee, *Canessa et al v Uruguay* Communications nos 1637/2011, 1757/2008, and 1765/2008 (final views adopted on 24 October 2011) paras 9–10; HR Committee, *Broeks v Netherlands* Communication no 172/984 (final views adopted on 9 April 1987); HRC GC 18 (n 25), para 13; ESCR GC 20 (n 85) para 13.

⁸⁸ See: ECtHR, *Belgian Linguistic Cases* (1968) Series A no 6, para 10; ECtHR, *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) Series A no 94, para 72; Inter-Am. CtHR, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 (1984) Series A no 4, paras 56–57 (making reference to the case law of the ECtHR).

the prohibition of treating similar situations differently without an objective justification. Although the CRC Committee does not usually specify the elements of discrimination, it has already invoked this definition in the past.⁸⁹

There are three elements in the definition:⁹⁰ an *unfavourable treatment* based on a *prohibited ground* that cannot be *justified*. Each of these elements has to be interpreted further to adapt to the child-specific context.

(a) An Unfavourable Treatment

To start with, discrimination implies a difference of treatment of similar situations or a similar treatment of different situations.⁹¹ What makes situations different or alike is a matter of evaluation of which substantial factual differences should count and of how they should count. This is clearly a very controversial evaluation to perform, particularly in the context of child discrimination. It should not, however, be confused with the judgment of discrimination itself which relies on the pre-existence of a similar situation being treated differently.

When one assesses whether situations are alike and should therefore be treated alike, it is important to determine what should be the criterion of comparison. The general case is a *comparison between children*. For instance, girls should not be treated differently from boys at school. A special case one should mention, however, is that of a *comparison between children and adults*. This is probably the most difficult assessment to perform. On the one hand, the Convention itself recognizes the specificity of the child's situation and thus points out the difference between children and adults. Consequently, children must be treated differently. As the Inter-Am. CtHR noted in its advisory opinion on children rights, 'differentiated treatment granted to adults and to minors is not discriminatory per se'.⁹² On the other hand, a great achievement of the Convention is the recognition that children are right-holders. Thus the Convention itself does not endorse the view that children are always in a different position just because they are children and cannot be treated as adults. One may think of many differences of treatment between children and adults that are not justified.⁹³

The difference of treatment or distinction at stake may cover any kind of treatment one may think of. Legislation, measures, and practices that have the purpose or the effect of nullifying or impairing the guaranteed rights are prohibited. It is thus not necessary to show intent to discriminate. This is also what follows from most international guarantees of the principle of non-discrimination.⁹⁴

⁸⁹ CRC Committee, CO Belgium, CRC/C/15/Add.178 para 6: 'With respect to article 2, the Committee, noting that the general principle of non-discrimination in the Convention prohibits differences in treatment on grounds that are arbitrary and objectively unjustifiable, including nationality, is concerned that the declaration on article 2 may restrict the enjoyment of non-Belgian children in Belgium of rights contained in the Convention'. See also eg CRC GC No 20 (n 54) para 21.

⁹⁰ Bayefsky (n 11) 11–24.

⁹¹ Alston (n 7) 6. See ECtHR, *Thlimmenos v Greece* ECHR 2000-IV 263.

⁹² Inter-Am. CtHR, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 (2002) Series A no 17, para 55. See also ECtHR, *D G v Ireland* ECHR 2002-III 361, para 115.

⁹³ See the examples in Child Rights Information Network, *Guide to Non-discrimination and the CRC* (CRIN 2009) 4; see also Claire Breen, *Age Discrimination and Children's Rights* (Martinus Nijhoff 2006), 20–33 (discussing in detail which criteria should be taken into account to assess differences of treatment between children and adults).

⁹⁴ McKean (n 11) 287; Bayefsky (n 11) 8–10.

This means that both *direct* and *indirect* discrimination are prohibited by article 2 of the CRC. In fact, the CRC Committee urges states to combat both forms of discrimination, but does not define the terms explicitly.⁹⁵ Direct discrimination occurs when a difference of treatment is based on a protected characteristic. Indirect discrimination takes place when a law or a measure is based on a seemingly innocuous ground, but disadvantages certain children in fact. For instance, a disabled child may be indirectly discriminated against by a rule which requires written work as an admission test to a school. True, formally speaking, this ground of discrimination is perfectly innocuous and admissible in an educational context. However, seen from the perspective of a disabled child, it might constitute an insurmountable obstacle in the access to further education and integration.⁹⁶

Article 2(2) of the CRC mentions a special form of discrimination: that is, any form of *punishment* related to the child's parents' or guardians' status. This is an additional child-specific dimension of the principle of non-discrimination in the CRC that focuses on the fact that children are often discriminated in ways that match their specific position in human society. And punishment constitutes one of those established social practises that apply to children specifically. Children have indeed become the victims of human rights violations, including imprisonment or torture because of actions that their parents or family members have engaged in.⁹⁷

(b) Based on a Prohibited Ground

A differential treatment of comparable cases may only be deemed discriminatory if the ground on which the differential treatment is based constitutes a prohibited ground of discrimination or if the consequence of the differential treatment is the imposition of a particular disadvantage to persons belonging to a protected group.

Article 2(1) of the CRC provides a long list of suspect classification and discriminatory grounds. This list is only exemplary and can be extended to other criteria. As we will see, the CRC Committee has made extensive use of the non-exhaustive character of this list.

Interestingly, article 2(1)'s list of grounds indicates that the prohibition against discrimination applies both to the 'child's *and* her or his parents' or legal guardian's' race, colour, gender, language, and the like. Article 2(1) is the only international guarantee of the principle of non-discrimination that expressly states that a person can be discriminated against not only because of her or his status, but also because of the status of a person close to her or him. Article 2(2) only applies, by contrast, to the discrimination of children that is based on the status, activities, expressed opinions, or beliefs of their parents, legal guardians, or family members.

Article 2(1) lists the suspect classifications foreseen in most international and regional human rights instruments, such as the UDHR, the ICCPR, the ICSCR, and the UNESCO Convention against Discrimination in Education, but adds an important one: *disability*. Discrimination against persons with disabilities was largely ignored at the time of the adoption of the UNDRH, ICCPR, ICESCR, and ICERD. It was still the case in 1979 when the CEDAW was adopted, although the first steps towards the recognition of the rights of persons with disabilities date back to the 1970s. The CRC is more recent,

⁹⁵ See: CRC Committee, CO Austria, CRC/C/AUT/CO/3-4 para 25; CO Viet Nam, CRC/C/VNM/CO/3-4 para 29; CO Thailand, CRC/C/THA/CO/3-4 para 33. See, however, CRC GC 1 (n 79), for the opposition between 'overt' and 'hidden' discrimination.

⁹⁶ Lansdown, 'It is our World Too!' (n 4) 24.

⁹⁷ LeBlanc (n 7) 97.

however, and this explains why it was the first international convention to contain a specific reference to this ground of discrimination. As a matter of fact, discrimination against children with disabilities was (and still is) one of the most common case of discrimination against children (see also article 7, CRPD).

Article 2 does not mention birth out of wedlock as a ground of discrimination even if this ground is often used in practice to differentiate between children.⁹⁸ It was a sensitive topic at the time of the drafting of the Convention and although there was mention at some stage in the *travaux préparatoires* of the need to protect non-marital children expressly against discrimination when compared to marital children, this was not done in the end for lack of consensus.⁹⁹ It was also argued that the term 'birth' already covered children born out of wedlock.¹⁰⁰ Furthermore, it became clear that this ground of discrimination could not only be derived from others in article 2 CRC, but also from other international and regional guarantees against discrimination.¹⁰¹ In fact, article 41 of the CRC encourages the most liberal interpretation of the Convention's provisions by giving priority to more favourable international clauses over less protective norms in the CRC.

The debate on the inclusion of this or that ground of discrimination loses its significance as soon as one looks at how the CRC Committee has made extensive use of the non-exhaustive character of article 2 of the CRC. The Committee has interpreted the notion of 'other status' to extend the protection against discrimination to grounds not even discussed during the drafting process. So far, the Committee has identified no less than fifty-three grounds of discrimination based on the child's status or her or his parents' status,¹⁰² including sexual orientation and HIV/Aids.¹⁰³ The Committee has furthermore condemned discrimination based on sexual orientation in various concluding observations.¹⁰⁴

There are no differences between the grounds explicitly covered by article 2 and grounds recognized later on by the Committee. The only difference one may think of is related to implementation. According to the Committee, all grounds for discrimination expressly spelled out in article 2 CRC should be reflected in States Parties' domestic constitution or legislation, and this is arguably not the case for other grounds.¹⁰⁵ This is only a

⁹⁸ CRC Committee, CO Japan, CRC/C/JPN/CO/3 para 33; CO Mozambique, CRC/C/MOZ/CO/2 para 30; CO Philippines, CRC/C/PHL/CO/3-4 paras 10, 29-30; CO Maldives, CRC/C/MDV/CO/3 para 33.

⁹⁹ See: E/CN.4/1324 (suggestion to include 'born out of wedlock' among the grounds of discrimination); E/CN.4/1986/39 paras 13-21 (discussion in the working group 1986 of the proposal submitted by China and the proposal submitted by Austria to include a specific provision regarding children born out of wedlock—no consensus reached); E/CN.4/1988/28 paras 226-30 (discussion in the working group 1988 of the proposal submitted by Germany to include a specific provision regarding children born out of wedlock—withdrawal of the proposal). All extracts are reproduced in *Legislative History* (n 47) 315-28, 887-90.

¹⁰⁰ E/CN.4/1988/28 para 228; *Legislative History* (n 47) 889-90.

¹⁰¹ LeBlanc (n 7) 100-01; Van Bueren (n 7) 41-45; Detrick (n 7) 75-77. The ECtHR dealt with numerous cases of discrimination between marital and non-marital children during the 1980s. According to the ECtHR, 'only very weighty reasons' can justify a difference of treatment between children born in or out of wedlock: ECtHR, *Marckx v Belgium* (1979) Series A No 31; *Inze v Austria* (1988) Series A No 126, para 41.

¹⁰² See: the list provided by Hodgkin and Newell (n 6) 24-25; Child Rights Information Network (n 93).

¹⁰³ CRC Committee, 'General Comment No 3: HIV/AIDS and the Rights of the Child' (2003) reproduced in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* (2008) HRI/GEN/1/Rev.9 (Vol II) 398 para 9.

¹⁰⁴ See eg: CO Romania, CRC/C/ROU/CO5 paras 16 and 17; CO Mongolia, CRC/C/MNG/CO/5 paras 15-16; CO United Kingdom and Great Britain, CRC/C/GBR/CO/5 paras 21-22 (all expressing concern with respect to discrimination against lesbian, gay, bisexual, transgender, and intersex children).

¹⁰⁵ CRC Committee, 'General guidelines regarding the form and content of periodic reports to be submitted by States Parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child' (1996) CRC/C/58 para 25. Note, however, that the actual guidelines are less clear in this regard. See 'Harmonized

slight difference, however. Moreover, the Committee has already requested States Parties to adopt legislation against discrimination based on sexual orientation, for example.¹⁰⁶

Not only has the CRC Committee expanded the list of the protected grounds. It has also emphasized that discrimination is often based on more than one ground and that specific attention should be paid to these forms of *multiple* discrimination.¹⁰⁷

In a nutshell, one may distinguish three types of multiple discrimination of the child. First, many differences of treatment target specific groups of children, such as girls, for instance. Adults of the same group, women in this example, are not subject to the same detrimental treatment. In this case, age discrimination is combined with sex discrimination. One may think of female genital mutilation in girls as a case in point.¹⁰⁸ Second, many children are discriminated against on multiple grounds, but age is not necessarily a factor in that discrimination. One may think of girls from rural areas who are deprived of their right to education. Third, a child may be discriminated against because of her or his status *and* the status of her or his parents. One may think of discrimination against coloured children whose parents have a same-sex relationship.

These distinctions between multiple discrimination based on age and one or more grounds, on the one hand, and multiple discrimination based on other grounds than age, on the other, may seem artificial. It is difficult indeed to neatly separate the grounds that lead to discrimination in practice. However, these distinctions are useful to highlight the especially vulnerable position of children in society, and the Convention's lack of explicit protection against discrimination based on age *together with* other grounds.

(c) In the Absence of Justification

As the CRC Committee has explained, 'not every differentiation in treatment will constitute discrimination'.¹⁰⁹ It is only when these differences of treatment are unreasonable and lack an objective justification that they may be deemed discriminatory.¹¹⁰

The notion of a reasonable and objective justification entails two elements. First, the difference of treatment must pursue a legitimate aim (or pressing social need). Second, the measures to achieve the aim must be proportionate.¹¹¹ Within the context

guidelines on reporting under the international human rights treaties, including guidelines on a core document and treaty-specific documents' (2006) HRI/MC/2006/3 in 'Compilation of guidelines on the form and content of reports to be submitted by States Parties to the International human rights treaties' (2009) HRI/GEN/2/Rev.6 and CRC Committee, 'Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child' (2015) CRC/C/58/Rev.3.

¹⁰⁶ CO Australia, CRC/C/AUS/CO/4 para 30; CO Korea, CRC/C/KOR/CO/3-4 para 28.

¹⁰⁷ CRC GC 9 (n 54) para 5; 'General Comment No 7: Implementing child rights in early childhood' (2006) reproduced in 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) HRI/GEN/1/Rev.9 (Vol II) 466, para 11; CO Seychelles, CRC/C/SYC/CO/2-4 para 35; CO Philippines, CRC/C/PHL/CO/3-4 para 30; CO Poland, CRC/C/POL/CO/3-4 paras 16-17. See, on multiple discrimination against children, Camilla Ida Ravnboel, *Intersectional Discrimination against Children: Discrimination against Romani Children and Anti-Discrimination Measures to Address Child Trafficking*, Innocenti working paper (UNICEF 2009).

¹⁰⁸ See CO Guinea-Bissau, CRC/C/GNB/CO/2-4 para 24.

¹⁰⁹ CRC GC 20 (n 54) para 21. Discrimination is used here to refer to *unjustified*, unlawful and particularly damaging differences of treatment. As a result, 'discrimination' itself cannot be justified *stricto sensu*. This reading is compatible with the text of art 2 CRC. Contra: Abramson (n 7) 22.

¹¹⁰ See: CRC GC 20 (n 54); ECtHR, *Belgian Linguistic Cases* (1968) Series A no 6, para 10; HRC GC 18 (n 25) para 13; Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights E/CN.4/1985/4 (28 September 1984) Annex paras 10-11.

¹¹¹ This is what follows from the practice of various UN human rights treaty bodies and from the practice of regional courts, prominently the ECtHR (see eg ECtHR, *Glor v Switzerland* (App no 13444/04) (Judgement

of discrimination law, there are some general conditions for this proportionality test, although they are not always clearly articulated or strictly applied by courts or in practice:¹¹² the means must be apt to attain the end, be necessary means to do so, and amount to the least restrictive means to reach that end.¹¹³ This approach may be regarded as consistent with the broader commentary in international law as to when an interference with a human right will be justified.¹¹⁴ Importantly, it is the state which carries the burden of providing evidence which establishes a nexus between the differential treatment and the legitimate aim being pursued¹¹⁵—what is sometimes referred to as the rational connection test.

One may distinguish two hypotheses of differential treatment justifiable in the context of article 2 of the CRC. First, differences of treatment may be required when the situations are different. This may be the case for certain distinctions made between children and adults, albeit not all of them. Second, even when situations are similar, a difference of treatment may be justified in order to achieve material equality. This would be the case for certain positive measures drawing formal distinctions between equally situated children, albeit to enhance their material equality. Those 'special measures' are discussed in the next section.

Importantly, in the context of child protection, article 3 of the CRC and its principle of the best interest of the child constitute an additional test in the justification of differential treatments between children and adults or between children only.¹¹⁶

4. Special Measures

To achieve material equality, it is sometimes necessary to adopt special measures,¹¹⁷ that is, measures aimed at redressing material inequalities or improving *de facto* equality.

of 30 April 2009) paras 72, 81 ff). See: ESCR GC 20 (n 85) para 13; UN Committee on the Elimination of Racial Discrimination, 'General recommendation no 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination' (2009) CERD/C/GC/32 para 8. The practice of the HR Committee is less clear, but the HR Committee sometimes refers explicitly to a proportionality test: HR Committee, *Jacobs v Belgium* Comm no 943/2000 (final views adopted on 17 August 2004) para 9.5; *Gillot v France* Comm no 932/2000 (final views adopted 27 July 2002) paras 13.2, 13.17. See also: HRC GC 18 (n 25) para 13; CRC GC No 20 (n 54) para 21.

¹¹² See Samantha Besson, 'Evolutions in Anti-Discrimination Law within the ECHR and the ESC Systems' (2012) 60 *American Journal of Comparative Law* 147.

¹¹³ Although the CRC Committee does not generally make reference to proportionality, it has already emphasized that special measures should be taken when they appear to be *necessary*: CO Australia, CRC/C/AUS/CO/4 para 30; CO United Kingdom and Northern Ireland, (2008) CRC/C/GBR/CO/4 para 25.

¹¹⁴ Siracusa Principles (n 110) paras 10–11; John Tobin, *The Right to Health in International Law* (OUP 2012) 180–84.

¹¹⁵ Siracusa Principles (n 110) paras 10 and 12.

¹¹⁶ Muscroft (n 6) 30.

¹¹⁷ Note on the terminology: special measures are often equated with 'affirmative action', 'positive measures' and 'positive action'. However, the term 'special measures' is the most adequate term in the international context because it is compatible with various international human rights instruments (see art 4(1) CEDAW; art 1(4) ICERD). Affirmative action is most commonly used in the USA while the term 'positive action' or 'positive measures' is the term most often adopted in Europe. One should note, however, that the terms 'positive action' and 'positive measures' can add to the confusion because positive action may be conflated with positive duties, whereas positive duties do not necessarily amount to duties to adopt special measures. Finally, the term 'positive discrimination' should be avoided as it entails a contradiction in terms. See on these questions: UN Commission on Human Rights, 'The concept and practice of affirmative action. Preliminary report submitted by Mr Marc Bossuyt, Special rapporteur, in accordance with Sub-Commission resolution 1998/5' (2000) UN DocE/CN.4/Sub.2/2000/11; UN Committee on the Elimination of Discrimination against Women, 'General Recommendation No 25: Article 4, paragraph 1, of the Convention (temporary special measures) (2004)' reproduced in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* (2008) HRI/GEN/1/Rev.9 (Vol II) 365.

These measures should not be confused with positive (action) measures in general.¹¹⁸ Positive action involves a wide range of measures and special measures only constitute a subset of those.

Article 2 of the CRC does not expressly foresee the duty to adopt special measures or, at least, the justification for doing so, by contrast to what non-discrimination clauses in other international human rights instruments do.¹¹⁹ All the same, article 2 protects equality among children in a more flexible and open way than previous general non-discrimination clauses.¹²⁰ It generally prohibits measures which treat differently similar situations and equally different situations. As such, it clearly protects formal equality and requests negative measures of non-discrimination. However, article 2 has also been interpreted as protecting material equality and as imposing positive duties, and these in turn may include special measures.

More particularly, article 2 could be interpreted as giving rise to two kinds of special measures to promote material equality.

First of all, *special protection measures* which are selective and address special needs. Those measures are even more important in the case of children, as children may be particularly vulnerable by way of past discriminations and those discriminations impact how one may redress their material inequality. The Preamble to the CRC actually recognizes that 'in all countries of the world, there are children living in exceptionally difficult conditions, and that such children need special consideration'. Hence, for instance, the special measures mentioned in articles 22 and 23 of the CRC for the special protection of disabled and refugee children.

These special measures of protection are, however, very controversial. Although one may understand the need for measures of special care, there is a sense in which claiming that some children have special needs and that they are somehow different as a result is in itself discriminatory both against them and other children. Special measures may also be deemed discriminatory because different treatment to answer special needs often amounts to less favourable treatment. Recent European cases of Roma children sent to special schools for 'children with special needs' have highlighted the poor quality of education provided by these schools. The children followed simpler curricula and had fewer opportunities than in mainstream schools.¹²¹

Criticism of special protection measures on grounds of indirect discrimination has led to the development of a new trend in non-discrimination law and the emergence of more inclusive rights and mainstreaming.¹²² Those new approaches reject the differentiating effect of special measures and recommend adopting more inclusive measures which protect neutral activities such as parenthood instead of motherhood or an inclusive right to education instead of a right to special education. One may identify the same trend with respect to the education of children with disabilities. In that context, it is now generally accepted that integration should be the standard and separate schooling the exception.¹²³

¹¹⁸ Bayefsky (n 11) 24–33.

¹¹⁹ See CEDAW art 4(1) and (2); ICERD art 1(4).

¹²⁰ Alston (n 7) 1.

¹²¹ See ECtHR, *D.H. and others v Czech Republic* [GC] ECHR 2007-IV 241. See also regarding the schooling of children with disabilities: ECtHR, *Horváth and Kiss v Hungary* App no 11146/11 (Judgment of 29 January 2013).

¹²² Lansdown, 'It is our World Too!' (n 4) 18–20.

¹²³ See European Committee on Social Rights, *Autism-Europe v France* Complaint no 13/2000 (decision on the merits of 4 November 2003).

The CRC Committee highlighted that point in its general comment on the rights of children with disabilities.¹²⁴ The CRPD has also confirmed this shift in the understanding of the needs of children with disabilities and insists on *inclusive* education at all levels (CRPD art 24).¹²⁵

Second, one should also mention *temporary special measures* which aim at remedying the situation of material inequality of a certain group. They go further than special protection measures. Temporary special measures openly favour certain people identified by their status in order to eliminate conditions which have caused or perpetuated discrimination in practice. As they openly use suspect discrimination grounds to differentiate people and formally discriminate, special temporary measures are subject to strict conditions in international human rights law¹²⁶ and in the practice of the Committee.¹²⁷ First of all, they are only justified for a limited period of time. They should be discontinued when their targeted results have been achieved. Special measures should, moreover, be accompanied by other measures which focus on other dimensions of the discrimination process than its results. Finally, they should be aimed at a special group and never be absolute.¹²⁸

The CRC Committee imposes on States Parties a duty to 'identify individual children and groups of children the recognition and realization of whose rights may demand special measures'.¹²⁹ To identify these children, states are in particular requested to provide statistical data, as explained below.

E. Monitoring

The implementation of States Parties' duties is controlled primarily domestically through the monitoring of national courts and then internationally through that of the CRC Committee. Given its prevalence in practice, the admissibility of the budgetary exception in discrimination cases also needs to be discussed.

1. Domestic Monitoring

Article 2 is directly applicable by domestic authorities, on the model of article 2(1) of the ICCPR.¹³⁰

The implementation of article 2 can and should be monitored by domestic courts, as a result. The latter should apply the Convention's non-discrimination principle like any other domestic non-discrimination principle. To mention one example: a potential domestic piece of legislation that differentiates between adopted children and children conceived artificially could be sanctioned judicially on the basis of article 2, and lead to

¹²⁴ CRC GC 9 (n 54) para 66.

¹²⁵ See chapter 23 of this Commentary.

¹²⁶ HRC GC 18 (n 25) para 10: 'as long as these special measures are needed to correct discrimination in fact, it is a case of legitimate differentiation'.

¹²⁷ CO India, CRC/C/15/Add.228 paras 31–32: ('While welcoming the special temporary programmes and other activities to improve the enjoyment of rights by girls and vulnerable groups such as children belonging to Scheduled Castes and Tribes, the Committee expresses its concern at the possibility that other children in situations similar to that of those groups are not receiving the same benefits. 32. The Committee recommends that all existing and future special temporary programmes be provided with specified goals and timetables, in order to evaluate their success and justify their continuation, expansion and dissemination. The Committee further recommends that the State party start to develop special programmes for the allocation of educational and other benefits that are based on the child's needs and rights rather than on the basis of sex, caste or tribe, or any other characteristic that may result in unjustifiable discrimination').

¹²⁸ HRC GC 18 (n 25) para 10.

¹²⁹ CRC GC 5 (n 37) para 12.

¹³⁰ Detrick (n 7) 69.

the recognition of the absolute right to know one's origins independently of one's mode of conception.¹³¹

Importantly, therefore, the prohibition of discrimination is recognized as a directly justiciable right whether the discrimination occurs in the ambit of a civil right or an economic, social, and cultural right. It is not subject to the progressive realization principle¹³² and the distinction between the two categories of rights under article 4 of the CRC cannot be invoked to mitigate the effects of article 2. On the contrary, the non-discrimination principle can be used to trigger judicial control of economic and social issues, as exemplified in the practice of the HR Committee on article 26 of the ICCPR.¹³³

2. International Monitoring

The international monitoring of states takes place primarily¹³⁴ through the examination of periodic reports submitted to the CRC Committee (CRC art 44). The Committee has issued general guidelines regarding the form and content of initial (CRC art 44(1)a) and periodic (CRC art 44(1)b) reports. Each of them contains specific sections relative to the non-discrimination principle.¹³⁵

These guidelines are complemented by the harmonized guidelines on reporting under the international human rights treaties which contain all relevant indications regarding the constitution of the 'common core document', that is, the first part of the report to be submitted to the UN human rights treaty bodies.¹³⁶ As the non-discrimination principle is a central provision in all international human rights treaties, it is no surprise that States Parties are requested to provide relevant information concerning the application of the principle of non-discrimination in this common core document.

Under those harmonized guidelines, States Parties have the following obligations. First of all, they are requested to provide information on the implementation of their international obligations to guarantee equality before the law and equal protection of the law for everyone under their jurisdiction and factual information on measures taken to eliminate discrimination in all its forms and on all grounds, including multiple discrimination.

¹³¹ It has been the case in Switzerland, in particular. See ATF 128 I 63; Samantha Besson, 'Das Recht auf Kenntnis der eigenen Abstammung—Wege und Auswirkungen der Konkretisierung eines Grundrechts' (2005) *Revue de droit suisse* 39; Samantha Besson, 'Enforcing the Child's Right to Know Her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights' (2007) 21 *International Journal of Law, Policy and the Family* 137.

¹³² See ESCR Committee, 'General Comment No 3: The Nature of States Parties Obligations (art. 2, para 1, of the Covenant)' (1990) reproduced in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* (2008) HRI/GEN/1/Rev.9 (Vol I) 7, para 5; Economic and Social Council, 'Report of the United Nations High Commissioner for Human Rights: the concept of progressive realization of economic, social and cultural rights in international human rights law' (2007) UN Doc E/2007/82, para 15: 'First of all, it is important to note that not all obligations relating to economic, social and cultural rights are subject to progressive realization and the "maximum of available resources" clause. Notably, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities all impose an immediate obligation to guarantee that economic, social and cultural rights are enjoyed without discrimination'.

¹³³ See HR Committee, *F.H. Zwaan-de Vries v the Netherlands* Comm no 182/1984 (final views adopted 9 April 1987) paras 12.4–12.5.

¹³⁴ The Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted 19 December 2011, entered into force 14 April 2014) UN Doc A/RES/66/138 provides an alternative method of international control over the implementation of the Convention by States Parties.

¹³⁵ CRC Committee, 'General guidelines' (n 37) paras 13–14; CRC Committee, 'Treaty-specific guidelines' (n 105) paras 23–27.

¹³⁶ 'Harmonized guidelines' (n 105).

Second, States Parties should indicate whether the principle of non-discrimination is included as a general binding principle in a basic law, the constitution, a bill of rights, or in any other form of domestic legislation, and the definition of and legal grounds for prohibiting discrimination. Interestingly, it is on that basis that the CRC Committee has regularly requested states to revise their domestic law to adapt it to the requirements of article 2.¹³⁷ Third, information should be provided on the steps taken to ensure that discrimination in all its forms and on all grounds is prevented and combated. As already mentioned, the Committee emphasizes, in particular, the need for the collection of data to be disaggregated to enable potential discriminations to be identified. Finally, States Parties are asked to indicate the specific measures adopted to reduce economic, social, and geographical disparities, including between rural and urban areas; the specific measures to prevent discrimination, including situations of multiple discrimination; the specific measures against the persons belonging to the most disadvantaged groups; and in specific circumstances, whether temporary special measures have been taken.¹³⁸

Further, there is an entire section in the treaty-specific guidelines of the CRC Committee on the implementation of the principle of non-discrimination. It provides insights into the Committee's view of the States Parties' duties with regard to the prohibition of discrimination.¹³⁹ For instance, the Committee requests States Parties to provide information on special measures taken in order to prevent discrimination and calls on the States Parties to mention measures taken to combat gender-based discrimination and to ensure the full enjoyment of their rights by children with disabilities, children belonging to minorities, and indigenous children.

3. Budgetary Exception

Limited budgetary resources are a common way of attempting to justify differential or unfavourable treatment of children. As a matter of fact, poverty constitutes one of the main causes of discrimination against children. The invocation of budgetary constraints raises very difficult issues in the context of positive action and special protection measures according to article 2(1) and (2) of the CRC.

The issue of resources and budgetary allocations is treated in further detail elsewhere in this commentary.¹⁴⁰ However, it is worth noting at this stage that, according to the Committee on the Rights of the Child, the application of article 2 'cannot be made dependent upon budgetary resources'.¹⁴¹ Quite the reverse: the Committee requires that the implementation of the principle of non-discrimination of children be an important element of budget-making at national level.¹⁴² Here again, the distinction regarding states' obligations according to whether the right at stake is economic, social, and cultural cannot be invoked to mitigate the effects of article 2.

¹³⁷ CRC Committee, CO Israel, CRC/C/ISR/CO/2-4 para 22; CO Liberia, CRC/C/LBR/CO/2-4 para 412; CO Viet Nam, CRC/C/VNM/CO/3-4 para 30; CO Ukraine, CRC/C/UKR/CO/3-4 para 28; CO The former Yugoslav Republic of Macedonia, CRC/C/MKD/CO/2 para 27.

¹³⁸ 'Harmonized guidelines' (n 105) paras 50-58.

¹³⁹ CRC Committee, 'Treaty-specific guidelines' (n 105) paras 23-27.

¹⁴⁰ See chapter 4 of this Commentary; see CRC Committee, 'General Comment No 19 on public budgeting for the realization of children's rights (art. 4)' (2016) CRC/C/GC/19.

¹⁴¹ CRC Committee, CO Bolivia, CRC/C/15/Add.1 para 14; CO France, CRC/C/15/Add.20, para 19.

¹⁴² Hodgkin and Newell (n 6) 23.

F. Special Provisions Relating to Child Discrimination

The CRC, like other international human rights instruments, guarantees the principle of non-discrimination in many places other than its non-discrimination clause. Those special provisions take priority over article 2 when applicable.

Thus, the principle of non-discrimination may be found in article 22 of the CRC relating to the special protection of refugee children, in article 23 of the CRC relating to the special protection of disabled children, and in article 30 of the CRC relating to the special protection of indigenous children. One also finds echoes of the non-discrimination principle in different other provisions, like article 28 of the CRC in the context of the right to education. These *leges speciales* are addressed in detail elsewhere in this commentary.¹⁴³

Importantly for our purpose, one also finds child-specific non-discrimination clauses in other international human rights instruments and, in particular, in the ICCPR and the ICESCR¹⁴⁴ and the CRPD.

1. *Leges Speciales in the ICCPR and the ICESCR*

The ICCPR and the ICESCR contain two *leges speciales* which extend the applicability of their respective general non-discrimination clause to children. According to article 24(1) of the ICCPR:

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 norm is restricted, however, to foreseeing the possibility of arranging special protection measures in favour of children and the need to ensure the absence of discrimination in these special measures.

This specific approach to child discrimination in the context of special measures of protection is confirmed by article 10(3) of the ICESCR:

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.

2. *Lex Specialis in the CRPD*

The CRPD contains numerous provisions on the rights of children with disabilities.¹⁴⁵ It has also become an important tool to enhance the protection of the rights of children with disabilities in practice. To be clear: *all* provisions in the CRPD apply to children. However, experiences with other international human rights instruments have revealed that the absence of explicit references to children's perspectives tend to make them

¹⁴³ See chapters 22, 23, 30, and 28 of this Commentary.

¹⁴⁴ There are other less general ones, of course, eg the ILO Conventions. See Marks and Clapham (n 31) 27.

¹⁴⁵ See Louis Alfonso de Alba, 'The Rights of the Child in the Convention on the Rights of Persons with Disabilities' in Carol Bellamy and others (eds), *Realizing the Rights of the Child*, Swiss Human Rights Book (Rüffer & Rub 2007) Vol 2, 75-77.

invisible in practice, even when situations of vulnerability are addressed.¹⁴⁶ The inclusion of specific provisions regarding children with disabilities in the CRPD was thus necessary to avoid under-inclusive protection in practice, on the one hand, and restrictive interpretation of the rights in respect of adults only, on the other.

Regarding the principle of non-discrimination, article 7 of the CRPD is the central provision. According to its first paragraph:

States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

It is interesting to note the difference in wording between article 2 of the CRC and article 7 of the CRPD. According to article 2(1) of the CRC, only the rights of the CRC are guaranteed without discrimination (derivative clause). Article 7 of the CRPD, by contrast, stipulates that 'all human rights and fundamental freedoms' of children with disabilities should be enjoyed on an equal basis with other children (autonomous clause).

Various controversies have arisen with respect to article 7 of the CRPD. To start with, when special non-discrimination clauses in a ground-specific instrument are further specified in relation to a specific group (children in this case), there is a risk that other dimensions in the discriminatory treatment may become less visible. Moreover, during the drafting process of the CRPD, some government representatives actually argued that including specific provisions for children with disabilities might undermine the rights included in the CRC. In response to these arguments, it was made clear by the then chair of the Committee on the Rights of the Child that the CRPD had to be considered as reinforcing the existing rights under the CRC.¹⁴⁷ The CRPD helps to 'elaborate the interpretation of the CRC for children with disabilities'.¹⁴⁸ The solution seems to be that whenever the provisions of the CRPD provide higher protection than the similar provisions of the CRC, the former should apply (CRC art 41(b)).

III. Evaluation

More than twenty-five years ago, the Convention on the Rights of the Child was adopted and, within it, a guarantee of the non-discrimination principle entrenched prominently in article 2. This provision captures the child-specific dimensions of child discrimination and has been used most effectively against the latter.

Retrospectively, this provision may be interpreted as a strong signal, for it marked the culmination of the progressive emergence of children's rights. The latter may indeed be conceived as the outcome of the gradual conquest of their equality, first of all, vis-à-vis adults, then in regard to young adults, and finally, with respect to other children.

Regrettably, the prohibition of discrimination enshrined in article 2 CRC remains vague and may be still interpreted in various ways, including weaker ones. The notion of 'special measures' is one of those current interpretive difficulties. That notion is in need of further clarification as special protection measures may have destructive discriminatory

¹⁴⁶ Gerison Lansdown, *See Me, Hear Me: A Guide to using the UN Convention on the Rights of Persons with Disabilities to promote the Rights of Children* (Save the Children 2009); ESCR Committee, 'General Comment No 5: Persons with Disabilities' (1994) reproduced in 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) HRI/GEN/1/Rev.9 (Vol I) 17.

¹⁴⁷ Lansdown, *See Me, Hear Me* (n 146), 23.

¹⁴⁸ *ibid.*

consequences on particularly vulnerable children whose integration should be States Parties' foremost goal. Of course, assessing the objectives and proportionality of these special measures allows one to distinguish between non-discriminatory special measures and discriminatory ones. However, the proportionality test, as often, is open to varying interpretations. Given the centrality but also the complexity of the non-discrimination principle in the context of children's rights, the time has come therefore for a general comment of the CRC Committee on article 2 of the CRC.

More generally, and thinking outside the children's rights realm, one may wonder about the justification of non-discrimination clauses in specific human rights instruments. There certainly are strong arguments in favour of specific instruments of protection against discrimination.¹⁴⁹ This is obvious when members of a specific group (eg children or persons with disabilities) have largely been ignored by the mainstream human rights movement and/or when general treaties are not adapted to the specific situation of a certain group. Specific treaties adopted to protect specific groups always carry with themselves a stigmatizing and essentializing risk, however.¹⁵⁰ Besides inequalities in human rights protection and hence ultimately in equality,¹⁵¹ the fragmentation of international human rights instruments and non-discrimination clauses along group lines risks sidelining those groups' perspectives from general human rights and non-discrimination debates. In this respect, it suffices to observe how the issue of child discrimination has been neglected in recent general debates on the non-discrimination principle.¹⁵² Non-discrimination is an element common to all human rights treaties and should thus be addressed more consistently in the future to avoid not only inequalities, but also gaps in the effective protection of all human beings' equal moral status.

Select Bibliography

Abramson B, *A Commentary on the United Nations Convention on the Rights of the Child, Article 2: The Right of Non-discrimination* (Martinus Nijhoff 2008)

Alston P, 'Cadre juridique de la Convention relative aux droits de l'enfant' (1992) 91(2) Bulletin des droits de l'homme 1

Besson S, 'The Non-discrimination Principle in the Convention on the Rights of the Child' (2005) 13 The International Journal of Children's Rights 433

¹⁴⁹ See on this question: Frédéric Mégret, 'Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?' (2008) 30 Human Rights Quarterly 494; Frédéric Mégret, 'The Human Rights of Older Persons: A Growing Challenge' (2011) 11 Human Rights Law Review 37.

¹⁵⁰ Hitch (n 7) 54.

¹⁵¹ See on the question of the inequality of human rights with respect to minority rights: James Nickel, *Making Sense of Human Rights* (2nd edn, Blackwell 2007) 154–67; Samantha Besson, 'La vulnérabilité et la structure des droits de l'homme—L'exemple de la jurisprudence de la Cour européenne des droits de l'homme' in Laurence Burgogues-Larsen (ed), *La vulnérabilité saisie par les juges* (Bruylant 2014).

¹⁵² See eg: Shelton (n 11); Dagmar Schiek and Anna Lawson (eds), *European Union Non-discrimination Law and Intersectionality* (Ashgate 2011); Malcolm Sargeant (ed), *Age Discrimination and Diversity. Multiple Discrimination from an Age Perspective* (Cambridge 2011). See also Taefi (n 3) for an analysis of the practice of the UN Committee on the Elimination of Discrimination against Women. For a recent effort to adopt a common approach to the issue of harmful practices, see 'Joint General Recommendation/General Comment No 31 of the Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on harmful practices' (2015) CEDAW/C/GC/31-CRC/C/GC/18. The CRC Committee often refers to this joint general recommendation/general comment in its recent concluding observations, see eg: CO Chile, CRC/C/CHL/CO/4-5 para 49; CO Mexico, CRC/C/MEX/CO/4-5, para 38; CO Switzerland, CRC/C/CHE/CO/2-4 para 43.

- Detrick S, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 1999)
- Hitch L, 'Non-discrimination and the Rights of the Child, Article 2' (1989) 7 *New York University Law School Journal of Human Rights* 47
- Hodgkin R and Newell P, *The Implementation Handbook for the Convention on the Rights of the Child* (3rd edn, UNICEF 2007)
- LeBlanc L J, *The Convention on the Rights of the Child. United Nations Lawmaking on Human Rights* (University of Nebraska Press 1995)
- Muscroft S (ed), *Children's Rights: Equal Rights? Diversity, Difference and the Issue of Discrimination* (The International Save the Children Alliance 2000)
- Sandberg K, 'The Convention on the Rights of the Child and the Vulnerability of Children' (2015) 84 *Nordic Journal of International Law* 221
- Schiek D and others (eds), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law* (Hart Publishing 2007)
- Van Bueren G, *The International Law on the Rights of the Child* (Kluwer 1995)
- Child Rights Information Network, *Guide to Non-discrimination and the CRC* (London 2009)
- Vuckovic Sahovic N, Doek J E, and Zermatten J, *The Rights of the Child in International Law* (Stämpfli, 2012), part 2, ch 3

SAMANTHA BESSON ELEONOR KLEBER

Article 3. The Best Interests of the Child

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

I. Introduction	74
A. A Common but Contested and Complex Concept	74
B. Key Issues	76
II. Analysis of Article 3	77
A. Paragraph 1: The Best Interests Principle as a Primary Consideration	77
1. Scope of the Principle	77
2. Measures for the Implementation of the Best Interests Principle	81
3. Assessment of a Child's Best Interests	83
B. Paragraph 2: The Obligation to Ensure a Child's Well-Being	100
1. Overview	101
2. The Meaning of a Child's Well-Being	101
3. Scope of the Obligation to Protect a Child's Well-Being	102
4. Obligation to Take into Account the Rights and Duties of Parents	102
5. Nature of the Appropriate Legislative and Administrative Measures to Be Taken	103
C. Paragraph 3: The Obligation to Regulate Institutions and Services That Provide Care and Protection for Children	104
1. Overview	104
2. Scope of the Obligation	104
3. Content of the Obligation: Conformity with Appropriate Standards	104
III. Evaluation	105
Select Bibliography	106