

Children being civilly disobedient: peaceful assembly and international children's rights

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Introduction

Christof Heyns and I were both appointed to serve on United Nations treaty bodies (UNTBs) in 2016, and we started our terms of office – he on the Human Rights Committee, which oversees the International Covenant on Civil and Political Rights (ICCPR), and I on the committee that oversees the UN Convention on the Rights of the Child (CRC) in 2017. We often met and exchanged reflections about our experiences, most often at the Faculty of Law at the University of Pretoria (UP), or informally in Pretoria, and sometimes in Geneva on rare occasions when our sessions there coincided.

A subject that engaged the interest of both Committees around the same time was the right to peaceful assembly. In 2018, the Committee on the Rights of the Child (CRC Committee) held a Day of General Discussion on the theme of children as human rights defenders. This led to increased attention by the Committee to the subject of civil disobedience by children, and their right to engage in peaceful assembly. In the same year, the Human Rights Committee decided to draft its General Comment 37 on article 21 (right to peaceful assembly) of the ICCPR.

Christof was an expert on civil disobedience, which was the subject matter of his doctoral thesis.¹ Human rights and peaceful protest was a subject he had written about and worked on extensively. As Thomas Probert has noted, Christof was appointed as Special Rapporteur on extra-judicial, summary or arbitrary executions at around the time of the 'Arab Spring', when there was a wave of protest action in different parts of the world.² During the term of his mandate, he focused on the use of force in the context of protest, and wrote a joint report with the

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1 CH Heyns 'A jurisprudential analysis of civil disobedience in South Africa' (LLD thesis, University of Witwatersrand, 1993).

2 T Probert 'Christof Heyns: South African scholar who left his mark on the world's human rights systems' *The Conversation*, 8 April 2021.

then Special Rapporteur on the rights to freedom of peaceful assembly and association, Maina Kiai, which offered normative and practical guidance on the proper management of assemblies.³ That background led to Christof being an obvious candidate to lead the Human Rights Committee's drafting of General Comment 37.

It is the practice of treaty bodies to have a phase of consultation on draft General Comments, during which state parties and members of civil society are able to make written submissions.⁴ Draft General Comment 37 attracted a large number of submissions from a broad range of actors. Nine of them were from children's rights organisations and advocates.⁵ In an unusual move, the CRC Committee submitted a formal written submission. I led the drafting of that document, and of course, had many off the record discussions with Christof about it. This chapter describes the submission of the CRC Committee on the draft General Comment, and examines the final General Comment to detect the impact of this submission.

Background to international children's rights and peaceful assembly

Children's involvement in protests or assemblies is not new. Examples from Western history include child labourers who took part in protests against unfair labour practices in the 1800s, notably in response to the industrial revolution in the United Kingdom,⁶ and the newsboys' strikes in New York in the 1880s and 1890s. Civil disobedience initiated by children sporadically continued throughout the 1900s.⁷ In 1911 there were spontaneous school strikes in many towns across England as

3 Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and association and the Special Rapporteur on extra-judicial, summary or arbitrary executions on the proper management of assemblies, A/HRC/31/66, 2016.

4 At the 27th meeting of Treaty Body Chairs held in Cost Rica in 2015, the Chairpersons acknowledged the importance of consultation for the 'transparency, legitimacy and publicity of general comments'. It was observed that posting draft General Comments on the OHCHR website and inviting comment from state parties, NGOs, NHRIs, UN Agencies and other interested bodies and persons was to be the general practice going forward. Submissions will be taken into account but the final responsibility for drafting rests with the Committees (A/70/302, 2015, paras 21-25).

5 Equal Education Law Centre, Child Rights Information Centre Moldova, Girls Advocacy Alliance, Children Rights International Network, Plan International, Child Rights Connect, Anita Danka (independent expert) and two NHRIs: Defensora de los Derechos de la Ninez de Chile, The Commissioner for Children's Rights Office, Cyprus.

6 J Waller *The real Oliver Twist: Robert Blincoe* (Icon Books Ltd, 2005) 286-7; H Sutherland 'Children's strikes, school walk-outs, and youth political activism' (2018) available at <https://doinghistoryinpublic.org> (accessed 4 January 2022).

7 S Cunningham & M Lavalette *School's out: the hidden history of Britain's student strikes* (Bookmarks 2016) 30.

children protested, primarily against the use of the cane.⁸ Strikes by school children again shot to prominence in the 1960s, allied to the broader civil rights movement. A high profile example was the 'children's campaign' in Birmingham, Alabama.⁹ In his doctoral thesis,¹⁰ Christof Heyns describes the impact of the *Tinker v Des Moines Community School Districts* case,¹¹ in which the United States (US) Supreme Court ruled that school children's right to wear black arm bands in protest against the Vietnam War was protected by the First Amendment to the Constitution regarding free speech.

In South Africa, the struggle against apartheid is often iconically depicted in the photograph of Hector Pieterse, fatally wounded by police, which was taken in June 1976 during the Soweto uprising in which school students protested against an authoritarian education system.¹² Children were also key participants in the First Intifada in the Occupied Palestinian Territories that broke out in 1987.¹³ The first decade of the 21st century saw protest action in the US regarding immigration rights and social expenditure cutbacks in the United Kingdom (UK).¹⁴ Since 2018, there has been a wave of protest action by children regarding the climate emergency, emblemised by the rise of the 'Fridays for Future' movement.¹⁵ In India, children have prominently participated in protests related to citizenship,¹⁶ and in Chile,¹⁷ South Africa¹⁸ and Spain,¹⁹ children have mobilized to gain access to or improve conditions in schools.

- 8 W Baker 'Explaining the outbreak and dynamics of the 1911 school strike wave in Britain' (2010) 6(1) *Reflecting Education* 25.
- 9 S Levingson 'Children have changed America before, braving fire hoses and police dogs for civil rights' *Washington Post*, 23 March 2018.
- 10 Heyns (n 1) 550.
- 11 393 US 503 (1969).
- 12 F Wilson & M Ramphele *Children on the frontline: the impact of apartheid, destabilisation and warfare on children in Southern and South Africa* (UNICEF 1987) 58. The authors recorded that school boycotts were widespread in 1976, 1980 and 1984.
- 13 See generally, S Mansour *Children of the Intifada* (Institute for Palestinian Studies 1990).
- 14 A Daly 'Article 15: the right to freedom of association and freedom of peaceful assembly' in A Alen *et al* (eds) *A commentary on the United Nations Convention on the Rights of the Child* (Brill Nijhoff 2016) 4.
- 15 A Danka 'The right of children to be heard through peaceful protests' (2019) *European Yearbook on Human Rights* 405-415.
- 16 S Misra 'Protecting children's right to protest', *The Hindu*, 18 February 2020.
- 17 J Franklin 'Chilean girls stage occupation of their own school in education rights protest', *The Guardian*, 7 October 2011.
- 18 F Veriava & N Ally 'Legal mobilisation for education in the time of Covid-19' (2021) *South African Journal on Human Rights*, published online 9 December 2021, DOI: 10.1080/02587203.2021.2004919.
- 19 'Starting in 2018, N.S. had campaigned for more than two years with other children in the same situation, demonstrating weekly in front of the Ministry of Education in Melilla to fight for their right to education', see 'UN Committee welcomes Spain's decision to allow Moroccan child to attend public school' (28 May 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?>

The surge of children's participation in mass protests in recent years appears to coincide with the 'Arab Spring', and with rise of social media. In late 2011 and early 2012, 15 year old Ali al-Nimr and 16 year old Dawood Hussain Al-Marhoon participated in a number of anti-government protests in Saudi Arabia. They were arrested, tortured, made to sign 'confessions' and upon being found guilty of *herabah* (banditry) they was sentenced to death. Two letters, signed by four special rapporteurs Maina Kiai, Mónica Pinto, Christof Heyns and Juan Méndez,²⁰ were sent from the Office of the High Commissioner for Human Rights (OHCHR), on 21 September and 19 October 2015, to the Saudi Arabian mission in Geneva. The letters expressed the Rapporteurs' grave concern about the treatment of Ali and Dawood, stressed that their sentences were contrary to international law due to them being below the age of 18 years at the time they committed the alleged crimes. They urged the government to halt the executions, annul the death penalty, order retrials and investigate the allegations of torture. On 29 October 2018 the CRC Committee, together with several Special Rapporteurs, issued a statement calling on Saudi Arabia to halt the execution of six young men who had been children at the relevant time, including Dawood and Ali.²¹ According to the statement, '[t]hey were arrested and sentenced to death for charges that the experts previously have considered to represent criminalization of the exercise of fundamental rights, including freedom of expression, when they were aged less than 18 years old'.²² If Christof had lived to see it, he would have been pleased to note that the government of Saudi Arabia commuted the death sentences of Ali al-Nimr, Dawood al-Marhoon and Abdullah al-Zaher to 10 years imprisonment and indicated that the time already served would be taken into account. Ali al-Nimr was released in October 2021.

The Day of General Discussion on children as human rights defenders

An awareness of the burgeoning civil action by children prompted the CRC Committee to hold its Day of General Discussion in 2018

NewsID=25908&LangID=E (accessed 6 January 2022).

- 20 At the time of signing the letter they were, respectively, the Special Rapporteur on the right to freedom of assembly and association; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur extrajudicial, summary or arbitrary executions; the Special Rapporteur on torture or cruel, inhuman and degrading treatment or punishment.
- 21 The other named individuals were Abdullah al-Zaher, Mutjaba al-Sweikat. Salman Qureish and Abdulkarim al-Hawaj.
- 22 UN experts call on Saudi Arabia to halt death sentences on children <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23795&LangID=E> (accessed 15 December 2021).

on the theme of 'Protecting and empowering children as human rights defenders'. 2018 also marked the 20th anniversary of the UN Declaration of Human Rights Defenders, and the 70th anniversary of the Universal Declaration of Human Rights, and the CRC Committee decided to contribute to this landmark year 'by highlighting the importance of promoting respect and support for the activities of human rights defenders of all ages'.²³

The CRC Committee holds a Day of General Discussion (DGD), usually every second year. It is an opportunity for the Committee to focus on a particular article in the Convention, or a selected theme relating to an article or articles, and aims to guide normative development and implementation of the Convention. This allows for in-depth discussion which can shed light on the content of the CRC within the current context. The DGD also provides an opportunity to hear the views of stakeholders, including those of children themselves. It results in an outcome document, and often leads to the Committee drafting a General Comment on the chosen subject. The selection of the theme 'Protecting and empowering children as human rights defenders' indicates that the Committee considered this to be a contemporary issue that required normative debate and development, and the choice of theme was no doubt driven by an awareness of the growing number of children involved in human rights work, including protest action. In fact, the Committee's first General Comment, on the aims of education, rather far-sightedly included an acknowledgement of the role of children as 'promoters and defenders of children's rights in their daily lives'.²⁴ Furthermore, the Committee's DGD in 2016 on children's rights and the environment had revealed to the Committee that children were active as child rights defenders in that sphere. Consequently, the Committee issued a recommendation in the outcomes report from that DGD that 'States should provide a safe and enabling environment for activists defending environmental rights, and owe a heightened duty of care to activists below the age of 18'.²⁵ The outcome document for the DGD on protecting and empowering children as human rights defenders underscores that 'there is no minimum age to act for the protection, promotion and fulfilment of human rights', and that children who take

23 United Nations Committee on the Rights of the Child *Day of General Discussion (DGD) 2018: Protecting and empowering children as human rights defenders report* (2018) 5.

24 UNCRC General Comment 1 article 29(1): The aims of education (2001) CRC/GC/2001/1.

25 United Nations Committee on the Rights of the Child *Day of General Discussion (DGD) 2016: Report of the 2016 Day of General Discussion: Children's rights and the environment* (2016) 34.

actions to achieve their own rights or the rights of others are human rights defenders.²⁶

Human Rights Committee's process of drafting General Comment 37 on article 21

The Human Rights Committee made a decision during the later part of 2018 to draft a General Comment on article 21 of the ICCPR, the right to peaceful assembly, and designated Christof Heyns as the Rapporteur to lead the process. To get the drafting process started, the Committee held a half day of general discussion on 20 March 2019. The background document, drafted by Christof, mentioned gender as a special issue, but did not mention children. Despite that, South African civil society organisation Equal Education Law Centre (EELC) made a submission at this early stage of the drafting process, entitled 'Children and the right to peaceful assembly'.²⁷ The submission recommended that the draft General Comment 'should recognise and reiterate that children are bearers of the right to peaceful assembly, which is inextricably linked to the right of children to freedom of expression and to participation in social and political life'. Their submission outlined positive and negative obligations resting on the state when developing measures regulating and giving effect to peaceful assembly. EELC focused in particular on prior notification requirements, and urged that these should not result in penalties that have a restrictive effect on children's participation. EELC's interest in this area of the law had been developed through their work involving 'equalisers' who are primarily high school students who participate in various forms of peaceful assembly, and had been honed through the organisation's involvement as an *amicus curiae* in the South African Constitutional Court case *Mlungwana v State*,²⁸ the judgment of which was handed down on 19 November 2018, only months prior to the half day of general discussion. In that case, children were among protestors who were arrested for failing to give adequate notice of a gathering. The Court found the law that criminalised the failure to give notice to be unconstitutional. EELC, in their submissions to the Human Rights Committee's half day of general discussion, quoted the following paragraph from the judgment:²⁹

In particular, it must be emphasised that for children, who cannot vote,

26 n 23, 5.

27 Equal Education Law Centre 'Children and the right to peaceful assembly' (2019), <https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle21/TheEqualEducationLawCentre.pdf> (accessed 7 January 2022).

28 (CCT32/2018) [2018] ZACC 45 (19 November 2018) (*Mlungwana* case). The Special Rapporteur on the right to peaceful assembly was also an *amicus curiae* in this case.

29 *Mlungwana* case (n 28) para 72.

assembly, demonstrating, and picketing are integral to their involvement in the political process. By virtue of their unique station in life the importance of the section 17 rights [to peaceful assembly] has special significance for children who have no other realistic means of expressing their frustrations.

The submission also pointed out that the Constitutional Court had stressed that exposing children to the criminal justice system is traumatic and must be a measure of last resort.³⁰ The EELC argued that these concerns are not abstract, they quoted children who had attended an assembly in 2017. Despite it being a peaceful protest and although there had been compliance with the prior notice requirement, the police had used teargas to disperse the gathering. As one grade 11 equaliser said: 'I felt threatened when a lot of police came because I don't know what teargas does to people. When police arrive, I should feel safe, but I did not because they were angry and threatened me and EE members. I felt really scared and imagined myself at a police station or prison'.³¹ Another organisation that made submissions for the half day of general discussion was the Consortium for Street Children.³² Their submissions focussed on understanding 'peaceful assembly' as a key feature of living in street situations, and they also highlighted how children's rights were being infringed through harassment and roundups of children on the street, children on the street being charged with status offences and being managed through anti-social behaviour and nuisance measures. These submissions also highlighted the CRC Committee's General Comment 21 on children in street situations,³³ which recognised that public spaces are 'integral' to the lives of children in street situations and called on states to ensure that children on the streets 'have access to political and public space in which to associate and peacefully assemble is not denied in a discriminatory way'.³⁴

The interest of children's rights organisations in the HRC's process of drafting General Comment 37 had been piqued. Child Rights Connect, a Geneva-based organisation that works closely with the CRC Committee, decided to conduct a survey of children's opinions on General Comment 37. Opinions were gathered from 91 children, aged 10-18 years old, from 15 different countries, across five regions (East Asia and Pacific, Latin America and Caribbean, Sub-Saharan Africa,

30 EELC submission (n 27) 13, referring to the *Mlungwana* judgment at para 89.

31 n 27, 13.

32 Consortium for Street Children 'Submission for the preparation of a General Comment on article 21 (right to peaceful assembly) of the International Covenant on Civil and Political Rights' (2019) <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC37.aspx> (accessed 12 December 2021).

33 Committee on the Rights of the Child General Comment on children in street situations (2017) CRC/C/GC/21.

34 Consortium for Street Children submission, n 33 at 2, referring to the CRC General Comment 21 at para 36.

Europe, and Central Asia, Middle East and North Africa), and these were included in a submission to the Human Rights Committee.³⁵ The quotes from the children's inputs in the submission bring to life the very real engagement of children in protests, and the challenges they face due to barriers placed on their participation, and in many cases, harsh consequences from law enforcement.

CRC Committee's comments on the Human Rights Committee's draft General Comment 37

The Committee on the Rights of the Child took the opportunity to present a written submission on the draft General Comment. This will be discussed in some detail in the following sections of this chapter.

The views of child human rights defenders

The Committee applauded the efforts made by the Human Rights Committee to hear from children through its partnership with the civil society network partner, Child Rights Connect, who conducted a survey of children's opinions on the General Comment. The very process of consulting with children on a General Comment was an important recognition of their right to express their views. As the CRC Committee observed in its General Comment 12 on children's right to participation, the concept of participation is 'the starting point for an intense exchange between children and adults on the development of policies, programmes and measures in all relevant contexts of children's rights'. The CRC Committee referred to the submissions of Child Rights Connect, and encouraged the HRC to consider the views of children captured in that submission and take them into serious consideration in the finalisation of their General Comment.

The Committee noted that children are increasingly expressing their views on issues that concern them such as access to services, including education, as well as climate change. With regard to the latter, the Committee drew attention to its own public statement, which had been issued in September 2019, indicating its support for children's right to engage in peaceful assembly:

The CRC Committee said it was 'inspired by the millions of children and adolescents who marched for climate change last week', the Committee – which has regularly addressed the environment, climate change and the degradation of the planet in concluding observations – welcomed 'the

35 Joint submission by Child Rights Connect and Anita Danko on the revised General Comment 37 on article 21 (right of peaceful assembly), https://childrightsconnect.org/wp-content/uploads/2020/02/submission_gc27_child_rights_connect.pdf (accessed 6 January 2022).

active and meaningful participation of children, as human rights defenders, in relation to issues of concern to them along with everyone else'.³⁶

Article 15 of the CRC

The CRC Committee's submission then set out article 15 of the CRC on children's right to association and assembly, and pointed out that the formulation bears similarities to the Universal Declaration and differences from the structure of the of the rights in the ICCPR. Article 15 of the CRC is similar to article 21 of the ICCPR. However, like the Universal Declaration (and different from the ICCPR), it includes freedom of association and freedom of assembly within one clause. Nevertheless, the wording of sub-article 2 on restrictions on the freedom of peaceful assembly does not differ, it is identical to the wording of article 21 of the ICCPR. Therefore, there should be no additional restrictions on children than there are on adults in the context of freedom of peaceful assembly. The CRC Committee observed in its submissions on the draft General Comment 37 that the difference in structure was not fundamental, and concluded that children have the same rights as adults when it comes to both association and assembly. The Committee added that children's capacity to participate in such activities of their own volition develops as they mature, in line with the concept of evolving capacity.³⁷

Article 15 is one of a cluster of rights in the CRC, which the Committee's reporting guidelines refer to as 'civil rights and freedoms' (arts 7, 8, and 13-17). These, briefly stated, are the rights to a name and nationality, preservation of identity, freedom of expression, freedom of thought, conscience and religion, privacy, access to information. It is also apparent that article 12 – the freedom to express views on all matters concerning them, and that those views are to be given due weight, often referred to as the principle of participation – is closely allied to the other civil freedoms, including article 15.

Children participating in peaceful assemblies

The CRC Committee's submission pointed out that children who participate in peaceful assembly may do so in a variety of different situations. In some instances, they accompany their parents who are participating in peaceful assembly, including peaceful protests, and in others they participate of their own volition and by themselves (with

36 UN Child Rights committee voices support for children campaigning on climate change, 27 Sept 2019, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25068&LangID=E> (accessed 6 December 2021).

37 Evolving capacity is included in art 5 of the Convention, while art 12 requires the views that a child who is capable of forming views must be able to express their views freely and that their views should be given due weight in accordance with the child's age and maturity.

or without parental approval). This may take place in actual physical assemblies such as strikes, sit-ins or marches, or in the ‘virtual’ context of on-line participation. The submission elaborated on these different contexts.

Children participating in peaceful assembly with their parents

Children are in many instances ‘brought along’ to protests by their parents or other adults. In some cases this is due to the fact that the parent is the caregiver and has no option to leave the child in the care of another. In other situations the parents may consider participation in protest as part of a child’s development of civic awareness.

The CRC Committee underscored that children have the right to be present at peaceful assemblies with their parents or other adults. It was acknowledged that parents bear some responsibility for the care and protection of children in such situations. However, the state has a positive duty to protect children’s rights³⁸ and must at all times act with an awareness that children are present at the assembly, and protect them from the harm that may be caused by others as well as any harm that might be occasioned by law enforcement actions. The CRC Committee observed that banning children from being brought to such assemblies is not a solution to the problem. More nuanced measures must be taken to balance the need to permit the freedom recognised in article 15 of the CRC and at the same time ensure that all reasonable efforts are made to protect children from violence, detention and other negative effects. The state should not take a negative or punitive approach to parents involving their children in peaceful assemblies, even those that turn violent.

Children participating in peaceful assemblies as individuals or groups, separate from their parents

Children often have difficulty in participating in assemblies as they often face first-line resistance from caregivers and teachers, and then also from the state. Indeed, the CRC Committee recorded that it has had to point out to some states during state party reviews that children have a right to associate, to express views and to be involved in peaceful assembly activities.³⁹ The important features of their recommendations to states may be summarised as follows:

38 Daly (n 14) 31-2.

39 See for example the CRC Concluding Observations to Australia: ‘The Committee expresses its concern and disappointment that a protest led by children calling on government to protect the environment received a strongly worded negative response from those in authority, which demonstrates disrespect for the right of children to express their views on this important issue’ (CRC/C/AUS/CO/5-6 2019, para 40). See also the Concluding Observations to Hungary: ‘Ensure that children enjoy their right to freedom of expression including when participating in peaceful demonstrations, and do not suffer negative consequences, such as charges of petty

- Children have a right to participate in peaceful assemblies, and civic education needs to ensure that children, parents and teachers all understand this.
- Children may, in fact and in law, have an enhanced right to participate in peaceful assemblies because they are unable to vote, and therefore peaceful assembly is their only means to bring about change.⁴⁰
- There are certain risks to being involved in peaceful assemblies, especially public protest actions that take place in parks, streets or public places, because they can turn violent. Civic education should thus ensure that children are made aware of these risks so that they can make informed choices on whether to participate or not.
- Facilitation of peaceful protest is the best means to ensure that it remains peaceful, and thus parents, teachers and law enforcement officials should take pro-active steps in this regard.
- Children should never be punished for participating in peaceful assemblies. Even if such assemblies turn violent, children should not be subjected to group punishments, random arrests or detentions.⁴¹ If they are reasonably suspected, as individuals, of having perpetrated violence themselves, they should be dealt with in child justice systems in processes that conform to articles 37 and 40, in line with the CRC Committee's General Comment 24 on the rights of children in child justice systems.

The Committee stressed that children, particularly adolescents, would be likely to exercise their freedom of association and assembly on-line. Children participating in the DGD on Children as Human Rights defenders said that the digital environment is an integral part of their activities. They noted that online activities can be very empowering, but social media involved risk such as being harassed, bullied or victimized

offences by the police' (CRC/C/HUN/6 2020, para 29).

40 As found by the South African Constitutional Court in *Mlungwana v S* (CCT32/18) [2018] ZACC 45, at para 72.

'In particular, it must be emphasised that for children, who cannot vote, assembling, demonstrating, and picketing are integral to their involvement in the political process. By virtue of their unique station in life the importance of the section 17 right has special significance for children who have no other realistic means of expressing their frustrations. Indeed, this is internationally acknowledged in instruments such as the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child which specifically protect the child's right to express its views and to participate in public life'.

41 See for example the CRC Concluding Observations to Chile: 'The Committee is deeply concerned about the repressive manner adopted by the State party to address the 2011-2012 demonstrations by students demanding changes in the education system and the abusive use of detention measures. The committee recommends that the State party develop and monitor the implementation of police protocols and procedures on dealing with public protests that are compliant with human rights standards and the Convention in particular' (CRC/CHL/CO/4-5 2015, para 36).

for their opinions or their work. However, they were clear that these risks can be managed and that states should not restrict online space for children for children expressing their views.⁴² The Committee listed the most important issues in relation to this context, as set out in the final report of the DGD,⁴³ namely that states should provide a safe and enabling online space for child human rights defenders, including access to safe online platforms, and training on online safety. States should also ensure internet providers and companies to facilitate connectivity and accessibility to all children and that safety settings should be clear and accessible, including for children with disabilities. Finally, states should encourage information and communication technology businesses to involve children in the development and monitoring of initiatives and tools for the online protection of children.

Positive obligations on states regarding peaceful assembly in relation to children

The Committee's submission indicated that states need to take proactive steps to ensure that children can exercise their right to freedom of assembly fully and safely. States should ensure a legal framework for peaceful assembly that complies with international human rights standards, including the rights of children. Laws and rules should be communicated in language and in places that are accessible to children. States should ensure that children are provided information on their right to peaceful assembly, and should be encouraged to discuss the benefits and risks so that they can make informed decisions about their participation. Teachers and other relevant persons with whom children might have such discussions, would also need education about the issue. With regard to the role of the state in managing public assembly situations, the Committee expressed the view that officials need to be trained on children's rights in public assembly situations,⁴⁴ and that their rights should be considered at all stages of the relevant planning and decision-making by law enforcement authorities.⁴⁵ The Committee stressed that children should be actively protected from any harm in the context of public assemblies, through nuanced and innovative approaches rather than through restriction or unnecessary limitation of their rights, including in the digital environment.

In the event of breaches of children's rights to peaceful assembly, states should provide mechanisms for complaints, provide assistance to

42 UNCRD DGD 2018 Protecting and empowering children as human rights defenders: Report (DGD 2018), para 15. https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2018/crc_dgd_2018_outcomereport_en.pdf (accessed 5 January 2022).

43 As above, para 34.

44 Concluding Observations to Syria (CRC/C/SYR/CO 3-4 2012, para 47).

45 Danka (n 15) 412.

the complainants, and ensure appropriate remedies where breaches of rights are found to have been violated.

Limitations on peaceful assembly in relation to children

Children's right to peaceful assembly must be recognised and promoted, but at the same time, the CRC requires that their best interests be considered (factoring in their views, according to their evolving capacity), and that they are protected from all forms of violence. This leads to a reasonable concern about whether there are grounds to set a higher level of limitation on the rights of children to participate in peaceful assemblies, as it is understood that such assemblies may turn violent. The Committee's stated its position that there is no need to place additional limits on children's rights to association and assembly, over and above any that may be placed on adults.⁴⁶ The Committee drew attention to the practice of states which do place additional restrictions on children regarding freedom of association and freedom of assembly, and the Committee provided various examples of concluding observations in which it has criticised certain states that have done so, including Costa Rica, Vietnam, Ukraine and Hungary.⁴⁷

Are age limits preventing children from participating a reasonable limitation?

The CRC Committee reiterated its position that placing age limits that bar children below a certain age from being at a protest is not an acceptable form of limitation, even if it is done for the protection of children. The Committee has recommended to a considerable number of state parties that they should amend laws that prevent persons below 18 years from forming associations,⁴⁸ or laws that prevent persons

46 See Daly (n 14) 107, and the references to the CRC Committee's jurisprudence provided there.

47 Concluding Observations to Costa Rica (CRC/C/15/Add.266 2005, para 23); Concluding Observations to Vietnam (CRC/C/VNM/CO/3-4 2012, paras 41-42); Concluding Observations to Ukraine (CRC/C/UKR/CO/3-4 2011, paras 39-40); Concluding Observations to Hungary (CRC/C/HUN/6 2020 para 29).

48 For example, Concluding Observations to Ukraine (UN Doc No CRC/C/UKR/CO/3-4, 2011, paras 39-40); Concluding Observations to Kuwait (CRC/C/KWT/CO/2, 2014, para. 40); Concluding Observations to Hungary (CRC/C/HUN/6 2020, para 29).

below a certain age from organising outdoor meetings,⁴⁹ as such laws are contrary to the rights promoted by article 15.⁵⁰

Are blanket rules about notice periods prior to assembly a reasonable limitation for children?

According to the CRC Committee, this kind of limitation is more disproportionate for children than it would be for adults, as they may have less knowledge of the requirements – unless the authorities can show that children in the particular State have been educated on the rules in this regard.

The Committee cited the South African Constitutional Court in this regard, which found that notice requirements were a particularly problematic limitation for children, especially if they were linked to criminal liability. The Court held that that the limitation was egregious because it did not distinguish between adult and child convenors. In the words of the Court:⁵¹

This means that children – who may not even know about the notice requirements in the Act or have the resources to adhere to the notice requirement – are indiscriminately held criminally liable if they fail to give notice before convening a gathering. This Court has acknowledged how exposing children to the criminal justice system – even if diverted under the Child Justice Act is traumatic and must be a measure of last resort. To expose children to criminal liability, as section 12(1)(a) does, therefore severely exacerbates the extent of the limitation. Accordingly, to subject children to the full rigour of the penal sanction for which section 12(1)(a) provides, given their vulnerability and lack of self-restraint in comparison to adults, cannot be justified on any rational basis.

Recommendations for amendments to revised draft General Comment 37

The CRC Committee expressed a concern that the draft General Comment did not refer specifically to children. The Committee did acknowledge that including a specific group, such as children, might pose difficulties because there would likely be other specific groups who would also need to be considered, and the Committee could foresee that the Human Rights Committee might find it difficult to make such an inclusion. Nevertheless, the CRC Committee proposed certain possible additions. It was suggested that at paragraph 2, which mentioned ‘disenfranchised members’, could be changed by deleting that word so

49 For example, Concluding Observations to Turkey (CRC/C/R/CO/2-3 2012, para 38). See further Daly (n 14) 77.

50 Daly (n 14) 78 notes that the Special Rapporteur on the right to peaceful assembly has made reference in positive terms to a 1996 judgment of the Constitutional Review Chamber of the Supreme Court of Estonia which found legislation banning under 18s from forming or leading associations was incompatible with CRC art 15.

51 *Mlungwana v S* (CCT32/18) [2018] ZACC 45, at para 89.

that the sentence would read: 'It can be of particular importance to marginalised members of society, particularly persons who do not enjoy the right to vote, such as children'.⁵² With regard to paragraph 6, which listed types of peaceful assemblies, it was proposed that 'school strikes' should be included.

The CRC Committee also proposed the addition, after paragraph 28, of the following proposed substantive paragraphs:

States should act on the recognition of children's right to freedom of association and freedom of peaceful assembly by creating an enabling environment for such activities. This includes supporting children's associations, including child-led associations, ensuring that teachers, parents and children themselves are educated about the right to peaceful assembly, and providing support to whose children are involved in peaceful assembly to assist them in their role of protecting and empowering children.

The law and policy frameworks should include specific provisions relating to children's rights. Laws and rules regarding peaceful assembly should be widely communicated in a manner that is accessible to all children. Children should be actively protected from any harm in the context of public assemblies, through nuanced and innovative approaches rather than through restriction or unnecessary limitation of their rights, including in the digital environment. Law enforcement authorities should be trained and plan for children's participation in demonstrations

States should refrain from setting age limits below which persons are banned from participating fully in the right to peaceful assembly, and notice requirements must be applied flexibly in relation to children. Breaches of rules should not result in criminal sanctions or other punishment of children or their parents, and where children are charged for incidents such as violence or damage to property, they must be dealt with in child justice systems compliant with articles 37 and 40 of the CRC.

Children's rights in the final version of General Comment 37

The Human Rights Committee adopted its General Comment 37 at its 129th session (29 June to 24 July 2020).⁵³ The outcome for children's rights to protest was meagre. The Human Rights Committee did not include any of the changes proposed the CRC Committee. The difficulty lay in the fact that by mentioning one specific group, such as children, the Committee would face calls for other groups to be included. This is understandable, although one might ask why listing specific groups is particularly problematic, other than it adding to the word count (which is a factor that has to be considered, as there are strict rules

52 The draft para 2 read as follows: 'It can be of particular importance to marginalised and disenfranchised' members of society'.

53 CCPR General Comment 37 on the right of peaceful assembly (article 21) (2020), CCPR/C/GC/37.

in the treaty body system regarding the length of documents). One way that the Human Rights Committee tried to accommodate children in the General Comment was by underscoring the importance of protest for ‘marginalized individuals and groups’.⁵⁴ Another instance was in the non-discrimination clause, where ‘age’ is included in the list of bases on which discrimination is impermissible, and where it is stated that ‘[p]articular efforts must be made to ensure the equal and effective facilitation and protection of the right of peaceful assembly of individuals who are members of groups that are or have been subjected to discrimination, or that may face particular challenges in participating in assemblies’.⁵⁵ The word facilitation was a ‘win’ for the child rights sector as some submissions had highlighted the positive obligation on the state to create an enabling environment for children’s involvement in protest.⁵⁶ The only specific mention of children is in the paragraph which deals with training of enforcement officials: ‘Training should sensitize officials to the specific needs of individuals or groups in situations of vulnerability, which may in some cases include women, children and persons with disabilities, when participating in peaceful assemblies’.⁵⁷

The problem with the perspective offered by General Comment 37 is that it depicts children only as marginalized, vulnerable and having specific needs. While this may cover some aspects of children’s rights in the context of assembly, this image is at odds with the CRC Committee’s recognition of children as human rights defenders, and frankly, at odds with what is plain for all to see – children are organising and acting to promote and defend their own rights and the rights of others, and there is documented evidence, discussed above, that they have been doing so since the 1800s.

Conclusion

The ‘Arab Spring’, rise of social media and activism have contributed to a context for a burgeoning role being by children in contemporary human rights debates. The CRC Committee’s days of general discussion on climate change in 2016 and on children as human rights defenders in 2018 drew attention to the activism of children. The CRC Committee’s approach to children’s right to freedom of assembly encompasses protection and autonomy, and recognises the balance that needs to be struck. States should ensure that children are not only permitted to participate in non-violent protest action, but are actually enabled to

54 CCPR General Comment 37, CCPR/C/GC/37, para 2.

55 CCPR General Comment 37, CCPR/C/GC/37, para 25.

56 Joint submission of Child Rights Connect and Anita Danka, n 36.

57 CCPR General Comment 37, CCPR/C/GC/37, para 80.

do so in line with their evolving capacities. On the other hand, special measures need to be taken to ensure their protection at protests, especially where these turn violent, or in the face of violent law enforcement activities. The Human Rights Committee's consultative process of drafting General Comment 37 quickened the interest of children's rights groups, as evidenced by the range of submissions on the subject of children's rights to peaceful assembly, and by the participation of children themselves. While the text of General Comment 37 was ultimately disappointing for child rights activists, the process of drafting and the interest it engendered has opened up new avenues of interest. In December 2021, UNICEF launched an expert group, of which I am a member, to develop guidance on policing assemblies involving children.

To end this chapter, I recall that working on General Comment 37 and children's rights within that, led to Christof and I co-authoring an op-ed for *The Daily Maverick* in September 2020, to deplore the deaths of two children caused by police in South Africa.⁵⁸ One of the children was 9 year old Leo Williams who was caught by a stray bullet when police opened fire on protestors. The article made reference to the UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement, which Christof had been instrumental in drafting. The article reiterated that children have the right to protest and that they are highly likely to be directly or indirectly involved in the more than 12,000 protests that take place in South Africa every year, or to be in the vicinity. We concluded that 'police will have to adjust their way of operating, so that they can secure the safety of children in and around demonstrations'. The UNICEF initiative, partially inspired by General Comment 37, appears to be an important step towards detailed guidance in this regard.

58 A Skelton & C Heyns 'Children's deaths as a result of police action: An unacceptable failure of international and constitutional obligations', *The Daily Maverick*, 3 September 2020, <https://www.dailymaverick.co.za/article/2020-09-03-childrens-deaths-as-a-result-of-police-action-an-unacceptable-failure-of-international-and-constitutional-obligations/> (accessed 6 January 2022).