THE IMPACT OF THE RULE OF LAW ON THE IMPLEMENTATION OF THE
CONVENTION ON THE RIGHTS OF THE CHILD IN INDONESIA AND AUSTRALIA

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Abstract

This thesis concerns the implementation of the *Convention on the Rights of the Child* (‘the CRC’) in Indonesia: The chasm between theory and practice. Despite the enactment of several laws and regulations aimed at protecting the rights of the child, Indonesia’s implementation of children’s rights remains very limited. The theme of this thesis is that, despite the existence of adequate written laws, a state can fail to achieve an effective implementation of human rights, as exemplified by Indonesia. This thesis will focus on the impact of the rule of law on the holistic well-being of children, a group that Indonesia has acknowledged plays ‘a strategic role’ and is in a ‘unique position [to ensure] the continued existence of the nation’.

The development of the rule of law and its impact on the implementation of the *CRC* in Indonesia will be compared to Australia, a state where the *CRC* has been much better implemented. There is an inextricable link between the rule of law and human rights. The prevailing view is that the rule of law does not depend on written laws; the rule of law is more about the extra-legal aspects of a society, such as culture, socio-economic factors and political factors. In the absence of the rule of law, human rights can only be selectively implemented and enforced.

The rights of the child are a global human rights issue, which is particularly pertinent to Indonesia, a nation with a poor record for implementing children’s rights. Children’s rights are well established in international law, largely due to the adoption of the *CRC*. The *CRC* has provided the greatest contribution to the field of children’s rights and will serve as the focus of this thesis. Apart from being the most...
A universally ratified human rights convention in history, the CRC expressly recognises a range of children’s rights including civil, political, socio-economic and cultural rights. More importantly, the CRC shifted the responsibility for implementing children’s rights from parents and local communities to State Parties. The CRC is thus an advanced tool for assessing the standard of children’s rights internationally and for implementing change, and will be used to compare the current status of children’s rights in Indonesia and Australia.

Arguably, the issue of children’s rights is complex and the implementation of children’s rights requires a multifaceted approach. This thesis will conclude with recommendations on how Indonesia can move forward to achieve a better implementation of children’s rights.
Preface

When I embarked on my LLM, I wanted my thesis to contribute to the betterment of my country, the Republic of Indonesia. Having worked as an in-house lawyer in a multinational company for 10 years, I have developed a strong interest in the development of the rule of law and law enforcement in Indonesia. As a country with a civil law system, Indonesia relies heavily on its written laws. Although Indonesia has adequate written laws, there are discrepancies when it comes to their implementation.

In considering a topic which may be relevant to a discussion of the rule of law in Indonesia, I became aware that the rule of law is a very broad topic. I chose to focus on the impact of the rule of law on the holistic well-being of children, a group that Indonesia has acknowledged plays ‘a strategic role’ and is in a ‘unique position [to ensure] the continued existence of the nation’ in the Preamble to its Law Number 23 Year 2002 on Child Protection.

From an international perspective, Indonesia has ratified the Convention on the Rights of the Child (‘the CRC’) and accepted international obligations to protect children’s rights. Despite the enactment of several laws and regulations aimed at protecting the rights of the child, Indonesia’s implementation of children’s rights remains very limited. Thus the theme of this thesis is that, despite the existence of adequate written laws, a state can fail to achieve effective implementation human rights, as exemplified by Indonesia.
The development of the rule of law and its impact on the implementation of the *CRC* in Indonesia will be compared to Australia, a state where the *CRC* has been much better implemented. I hope that this work will remind the Indonesian people that the rule of law has impacted on the development and rights of Indonesian children, and will continue to do so into the future.

As a final note, although I relied on a variety of sources in writing my thesis, I have tabled only the most important authorities, namely municipal laws, conventions and treaties, United Nations documents, cases, books and journal articles.

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CHAPTER ONE

The Implementation of the Convention on the Rights of the Child in Indonesia: The Chasm between Theory and Practice

The true measure of a nation’s standing is how well it attends to its children – their health and safety, their material security, their education and socialization, and their sense of being loved, valued, and included in the families and societies into which they are born.

- UNICEF Innocenti Research Centre

1. Introduction

International law is founded on the assumption that when a state ratifies a treaty or convention it accepts its ensuing obligations and will take appropriate steps to fully implement the provisions. The difficulty arises when attempting to identify the factors that account for fundamental differences in the implementation of human rights treaties between Western states and developing states, and between states with a common law system and states with a civil law system. A state’s ability to establish the ‘rule of law’ through its legal, political and cultural systems has a significant impact on the implementation of human rights at a national level.
The international system of human rights has established normative standards based on respect for the ‘inherent dignity and worth’ of every human being.\(^1\) Human rights embody fundamental freedoms which apply to every human being, and which are founded on natural law principles.\(^2\) Aside from being universal, human rights are ‘essential to the well-being of every man, woman and child’.\(^3\) Consequently, human rights and the development of a state are interrelated and ‘mutually reinforcing’.\(^4\) Securing human rights enables individuals to develop in accordance with their fundamental rights and dignity and helps protect them from impoverishment.\(^5\) Full enjoyment of human rights not only sustains the development of individuals, but also encourages the initiative required for further economic and social progress. Conversely, human rights are generally better implemented in a developed state based on the rule of law, than in a developing state.

There is an inextricable link between the rule of law and human rights. The Preamble of the *Universal Declaration of Human Rights*\(^6\) states that the rule of law is an essential component in ensuring protection of human rights. The prevailing view is that the rule of law does not depend on written laws; the rule of law is more about the extra-legal aspects of a society, such as culture, socio-economic factors and political factors.\(^7\) In the absence of the rule of law, human rights can only be

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\(^3\) Norwegian Agency, above n 1, 4.

\(^4\) Ibid.

\(^5\) Ibid.


selectively implemented and enforced, a notion that violates the concept that such rights are inherent, the cornerstone of natural law theory.

2. The Convention on the Rights of the Child (CRC) as the Global Standard for Children’s Rights

The rights of the child are a global human rights issue, which is particularly pertinent to Indonesia, a nation with a poor record for implementing children’s rights. Children’s rights are well established in international law, largely due to the adoption of the Convention on the Rights of the Child (‘the CRC’ or ‘the Convention’). The CRC has provided the greatest contribution to the field of children’s rights and will serve as the focus of this thesis. Apart from being the most universally ratified human rights convention in history, the CRC is the first legally binding international instrument to expressly recognise a range of children’s rights including civil, political, socio-economic and cultural rights. It serves as the benchmark in assessing children’s rights. More importantly, the CRC shifted the responsibility for implementing children’s rights from parents and local communities to State Parties. The CRC is thus an advanced tool for assessing the standard of children’s rights internationally and for implementing change, and will be used to compare the current status of children’s rights in Indonesia and Australia.

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Although both Australia and Indonesia placed reservations on ratifying the *CRC*\(^{11}\), neither state objected to the four fundamental principles of the *CRC*, namely: the best interests of the child; non-discrimination; the right to life, development and survival; and respect for the views of the child. Both states have, at least in principle, accepted the core provisions of the Convention.

3. The Committee on the Rights of the Child as the Guardian of the Implementation of the *CRC*

The focus of this thesis will be on the impact of the rule of law on the implementation of the *CRC* in the Indonesian and Australian contexts. The rule of law requires State Parties to comply with domestic legislation and policies, to meet their international obligations, and to appropriately punish individuals who violate these laws. In addition, states must also allow independent international committees to monitor and interpret human rights standards.\(^{12}\) Article 44 *CRC* requires State Parties to submit reports to the United Nations Committee on the Rights of the Child (‘the CRC Committee’ or ‘the Committee’) which outline the steps they have taken to implement the *CRC* at the domestic level. The Committee provides feedback and recommendations to the State Parties in their Concluding Observations.

The most recent feedback of the CRC Committee indicates that the implementation of the *CRC* varies significantly between Australia and Indonesia. Australia and Indonesia also have markedly different legal, cultural, socio-economic and political

\(^{11}\) *Ibid*; Australia placed a reservation on Article 37(c). Indonesia placed reservations on Articles 1, 14, 16, 17, 21, 22 and 29.

systems. Australia has a common law system where the doctrine of precedent is a primary source of law. In contrast, Indonesia has a civil law system and relies primarily on written or positive laws as its source of law. In the Preamble to Indonesia’s Law Number 23 Year 2002 on Child Protection (Child Protection Law), it is stated that children have a ‘strategic role’, and are in a ‘unique position’ to ensure ‘the continued existence of the nation and the state in the future’. The Child Protection Law also incorporates the four general principles of the CRC. Although Indonesia’s written laws appear adequate, their implementation leaves much to be desired. The hypothesis that will be tested in this thesis is that weakness in the rule of law accounts for the difference between written law and practice in the area of children’s rights.

4. Indonesia’s Implementation of the CRC

Despite acknowledging the importance of children in its legislation, violations of children’s rights are occurring at an alarming rate in Indonesia. Violations occur in relation to children’s education, health, and social integration, as well as physical violence towards children. In early 2008, more than five years after the enactment of the Child Protection Law, the Secretary-General of the Child Protection Committee or Komnas Perlindungan Anak (Komnas PA), Arist Merdeka Sirait, indicated that Komnas PA estimated that the rights of 40.3 million children in

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13 Law Number 23 Year 2002 on Child Protection (Republic of Indonesia), preambular para (c) (Child Protection Law).
14 Child Protection Law, preambular para (c).
16 Komnas PA is recognised by the UN as an independent organisation in the field of children’s rights and child protection in Indonesia. It was established on 26 October 1998 by the National Child Protection Forum, facilitated by the Department of Social Affairs of the Republic of Indonesia and UNICEF; see Komnas PA (2009) <http://www.komnaspa.or.id/> at 5 May 2009.
Indonesia were violated in 2007. This represents a 100 per cent increase from 2006 when 21 million children were recorded as having their rights violated. Sirait indicated that in 2008 the violation of the rights of children may increase by 80 to 100 per cent.

The media regularly reports instances of violations of children’s rights, although there is particular emphasis on this issue on Indonesia’s National Children’s Day, which is celebrated on 23 July every year. Articles in national newspapers indicate serious concern for the welfare of Indonesian children, 'serious flaws in [the Republic of Indonesia]’s childhood education’, and that a Save the Children Movement is needed to address the increasing rate of violence toward children.

A recent case has illustrated the shortcomings of children’s rights in Indonesia. In Semarang, a city in Central Java, a 43-year old wealthy cleric, Pujiono Cahyo Widianto, married a 12-year old girl in an illegal marriage commonly known as ‘nikah siri’. The Indonesian National Commission on Child Protection or Komisi Perlindungan Anak Indonesia (KPAI)’s fact-finding team sent to Semarang reported that the girl was selected through a contest involving Pujiono’s first wife and followers as a panel of judges. This case was reported in October 2008 and has sparked nationwide outrage. Pujiono, popularly known as Syech Puji, was arrested

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17 Pelanggaran, above n 15, 18.
21 The Child Protection Law included a requirement that a child protection commission be created within a year of its adoption. KPAI was established on 20 July 2003 by Presidential Decree Number 77 of 2003.
on 17 March 2009 and is facing charges of gross indecency with a minor under Indonesia’s *Criminal Code*, and charges for ‘forcing’, ‘swindling’ and/or ‘trading’ a minor to engage in sexual activity under Articles 81, 82 and 83 of the *Child Protection Law*. A number of child protection and legal aid groups called on the government to revise the current laws concerning the age of consent and marriage. The slow response of the authorities to this incident raises the question of whether Indonesia has an established rule of law. It also demonstrates Indonesia’s inability to implement the *CRC* due to poor knowledge of child protection issues and a lack of mechanisms to implement child protection.

Data from the National Statistics Agency or Badan Pusat Statistik (BPS) shows that in 2005 more than 38 per cent of Indonesia’s population was less than 19 years of age. Children are the foundation of a society and will form its future generation. Although Indonesia prides itself on being a state based on ‘the rule of law’, this has not been achieved in practice and has had repercussions on the implementation of the *CRC*. Thus far, Indonesia has overlooked the rights of children, both at a government level and at a local community or family level. Having lived in Jakarta for the last 17 years, I am acutely aware of the inadequacies of the government’s ability to afford children their basic rights. In Jakarta, street children roam the ________________

26 *The 1945 Constitution of the Republic of Indonesia (as amended four times from 1999 to 2002)* art 1(3) (**Indonesian Constitution**).
streets, often begging for money. In rural or remote communities, some children are forced to work in order to sustain their family.

5. Implementing the CRC as a Priority in Indonesia

Indonesia is at a point where it needs to recognise the importance of children and, at the very least, assure their fundamental rights. The starting point is for Indonesia to ensure that every child is afforded the best opportunity to optimally develop and grow physically, mentally and socially, and to develop high moral values. Arguably, the issue of children’s rights is complex and the implementation of children’s rights requires a multifaceted approach. This thesis will conclude with recommendations on how Indonesia can move forward to achieve better implementation of children’s rights.

6. Outline of the Thesis

Chapter 1 serves as the introductory chapter.

Chapter 2 will outline the development of the concept of children’s rights in international law, beginning with the Geneva Declaration of the Rights of Child of 1924 and ending with the debating, drafting and subsequent adoption of the CRC in 1989.

Chapter 3 will discuss the major substantive provisions of the CRC. This chapter will discuss the following groups of provisions of the CRC: general rights, such as the right to life, survival and development; civil rights and freedoms; family
environment and alternative care; basic health and welfare; education, leisure and cultural activities; and special protection rights, such as the rights of children to be free of any forms of exploitation. In addition, Chapter 3 will outline the obligations the CRC places on State Parties in general, and specifically on Indonesia and Australia.

Chapter 4 will analyse the concept of the ‘rule of law’ as a key factor in the implementation of the CRC. This chapter will outline the development of the rule of law in Australia and Indonesia, and compare and contrast Indonesia and Australia’s legal, political, cultural, socio-economic and geographical context.

Chapter 5 will evaluate the implementation of the CRC in Australia with respect to the Concluding Observations of the CRC Committee. The chapter will also analyse the factors that account for Australia’s ‘incomplete’ implementation, with emphasis on the impact of the rule of law.

Chapter 6 will evaluate the implementation of the CRC in Indonesia with respect to the Concluding Observations of the CRC Committee, and will include an analysis of the factors that account for Indonesia’s ‘inability’ to fully implement the CRC. Once again, the emphasis will rest of the impact of the rule of law.

Chapter 7 will provide recommendations for changes in relation to Indonesia’s implementation of the CRC.
CHAPTER TWO

The Development of the Rights of the Child under International Law

The international community has recognised the unique and strategic role that children play in shaping the development of their immediate families and local communities. As former UN Secretary-General, Kofi Annan, noted in his foreword to United Nations Children’s Fund (UNICEF)’s State of the World’s Children Report 2005, ‘[o]nly as we move closer to realizing the rights of all children will countries move closer to their goals of development and peace’. 27

1. Historical Background

Although the CRC has been pivotal to the universal recognition of children’s rights, its origins can be traced well beyond its 10-year drafting process. The status of children’s rights in international law has progressed significantly since the Save the Children International Union was founded in 1920. This organisation drafted the Geneva Declaration of the Rights of the Child (Geneva Declaration) in 1924. 28 The Geneva Declaration was the first international instrument to incorporate the concepts

of child protection and children’s rights. The core principles of the Save the Children International Union were set out in the *Geneva Declaration*, which states that the ‘men and women of all nations… declare and accept it as their duty that…:

1) The child must be given the means requisite for its normal development, both materially and spiritually;

2) The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored;

3) The child must be the first to receive relief in times of distress;

4) The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation;

5) The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.’

Several commentators have highlighted the limitations of the *Geneva Declaration*. Most notably, it restricts children’s rights to a mere duty of protection, rather than

incorporating the notion that children possess specific rights and liberties.\(^{30}\) The *Geneva Declaration* places the onus of protecting children on the ‘men and women of all nations’, thereby signifying that adults in each family and community are primarily responsible for the protection of children.

In 1959, 78 members of the United Nations General Assembly adopted the UN *Declaration of the Rights of the Child* (see Appendix I).\(^{31}\) The *Declaration of the Rights of the Child* addressed not only tangible needs such as the right to adequate food, housing, education and medical care, but also the right to be protected from discrimination and exploitation, the right to a name and nationality, the right to love and understanding, and the right to freedom and development. This instrument portrayed children as objects of protection rather than subjects of rights, a theme which continued for a number of years. On the other hand, the *Declaration of the Rights of the Child* recognised that ‘the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection’.

In 1966, the UN General Assembly adopted the *International Covenant on Civil and Political Rights* (*ICCPR*).\(^{32}\) The *ICCPR* also viewed children as ‘passive participants’, and failed to endorse children as owners of specific rights.\(^{33}\) Nevertheless, these early developments constitute valuable milestones in the recognition and development of the rights of the child.


\(^{32}\) *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (*ICCPR*).

\(^{33}\) Shackel, above n 30, 25.
The true catalyst which sparked the international community to develop a legally binding instrument on the rights of the child was the celebration of the International Year of the Child in 1979. In a letter addressed to the Director of the Division of Human Rights, the Permanent Representative of Poland to the United Nations Office at Geneva proposed the adoption of a convention on the rights of the child to commemorate the International Year of the Child. The lengthy 10-year development process that followed culminated in the adoption of the CRC by the UN General Assembly in 1989 (see Appendix II).

2. The Convention on the Rights of the Child

The CRC has been ratified by all UN Member States, except the United States of America, Somalia and St Lucia. It expressly recognises a range of children’s rights including civil, political, socio-economic and cultural rights and will be used to compare the current status of children’s rights in Indonesia and Australia.

3. The Drafting Process of the CRC

The drafting process and creation of the CRC was unique for a variety of reasons, most notably for the widespread international participation. UN conventions are prepared by the UN Economic and Social Council (ECOSOC). ECOSOC is a body that is responsible for human rights issues, and makes recommendations on

35 CRC Legislative History, above n 34, 31.
37 United Nations Treaty Collection, above n 11.
38 Verhellen, above n 28, 71.
draft treaties. ECOSOC set up a special commission, the United Nations Commission on Human Rights (UNCHR), comprised of government representatives.\textsuperscript{39} The drafting of the \textit{CRC} occurred in response to the international community’s eagerness to develop a universal legal instrument pertaining to children’s rights.

The UNCHR received submissions from UN member states or states with observer status, as well as non-governmental organisations (NGOs) and inter-governmental organisations (IGOs).\textsuperscript{40} An Open Working Party was established and charged with preparing the text of the \textit{CRC}.

Although there was a distinction between UN members and non-members in terms of voting, there was no practical difference between them in terms of participation in the drafting and debating process.\textsuperscript{42} The NGOs formed a coalition called the NGO Ad Hoc Group, which had a significant impact on the drafting process of the \textit{CRC}.

The Open Working Party was open for participation to member states of the UNCHR, as well as non-member states and various NGOs.\textsuperscript{44} This broad spectrum of international participation was intended to encourage consideration of the relevance of cultural, political and legal factors. More importantly, it was intended to facilitate contributions from minority groups.

\begin{itemize}
\item \textsuperscript{39} \textit{Ibid}.
\item \textsuperscript{41} Verhellen, above n 28, 73-4.
\item \textsuperscript{42} LeBlanc, above n 40, 25-7.
\item \textsuperscript{43} Verhellen, above n 28, 73; Cynthia Price Cohen, ‘The Role of Nongovernmental Organizations in the Drafting of the \textit{Convention on the Rights of the Child}’ (1990) 12 Human Rights Quarterly 137, 142.
\item \textsuperscript{44} CRC Legislative History, above n 34, 933-7.
\end{itemize}
4. Criticism of the Drafting Process of the CRC

Despite this, both Harris-Short\textsuperscript{45} and Hannan\textsuperscript{46} have questioned the inclusiveness of the CRC drafting process, especially the relative weight given to the views of non-Western nations.\textsuperscript{47} The Open Working Group was reportedly dominated by the more developed, Western nations such as Australia, New Zealand, Canada, the United States and the Western European states.\textsuperscript{48} Developing nations were reportedly marginalised due to their limited resources, funding and training.\textsuperscript{49} Consequently, some scholars have raised concerns that the CRC provisions ‘embody ethnocentric Western standards which are meaningless or irrelevant to much of the non-Western world’.\textsuperscript{50}

For example, the prevailing ‘Western’ view is evidenced in the CRC’s outcome on the issue of child marriage. Whilst this concept is strongly opposed by Western standards, child marriage is commonly practiced in many developing countries, including Indonesia. Although the CRC does not expressly prohibit child marriage, Articles 1, 2 and 24(3) have been interpreted to create an implied prohibition on early marriage. In its Concluding Observations to Indonesia’s Second Periodic Report, the CRC Committee urged Indonesia to take measures to ‘prevent early marriage’ and to


\textsuperscript{47} Harris-Short, above n 45, 305.

\textsuperscript{48} Id, 316-7.

\textsuperscript{49} Id, 328.

\textsuperscript{50} Id, 305.
‘undertake awareness-raising campaigns on the harm and danger resulting from early marriage’.  

Other scholars have questioned the relevance of the provisions of the *CRC* to minority groups. According to the historical records of the *CRC* drafting process, minority groups were not well represented. Most notably, no independent representatives from the Islamic, Hindu or Buddhist faiths were present at the Open Working Party meetings.

Considering Australia’s key role in the drafting of the *CRC*, the heavy ‘Western influence’ did not pose a significant problem for Australia. However, according to critics such as Gerber, Australia’s representation and its contributions were heavily anglicised, lacking any input from Indigenous communities. The significance of this cannot be overlooked, especially in view of Australia’s performance in children’s rights and implementing *CRC* standards in Aboriginal communities.

This raises an obvious question: why was the *CRC* so widely ratified? Hannan suggests that, despite strong reservations, many developing countries ratified the *CRC* in the hope that it would provide an avenue for international funding and support, and for political reasons, such as maintaining international standing.

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52 CRC Legislative History, above n 34, 933-7.

53 Harris-Short, above n 45, 321.


55 Hannan, above n 46, 80.
Despite these criticisms, the negotiation and drafting of the *CRC* included more developing countries and allowed for representation and contribution from more minority groups than any other UN convention in history. This drafting process lasted over 10 years, and has been commended as a product of debate and consensus across a variety of cultural backgrounds, legal systems and political arenas.\(^56\)

5. **The Adoption of the CRC**

The UN General Assembly formally adopts international treaties, which are then signed and/or ratified by member states.\(^57\) In 1989, the UN General Assembly unanimously adopted the final draft of the *CRC*. It was the first human rights treaty to be ratified by nearly\(^58\) all members of the UN within one year of its adoption.

6. **The Significance of the CRC**

The *CRC* is significant for three primary reasons. It covers a comprehensive range of children’s rights, it shift accountability from parents, carers and communities to states, and most importantly, it recognises the child as a holder of rights, rather than a mere ‘object’ of the law.

A distinguishing feature of the *CRC* is the fact that it achieved a dramatic shift in the way that children are viewed. The *CRC* incorporated a new ‘human rights-based approach’, recognising that all human beings hold rights and have obligations

\(^{56}\) CRC Legislative History, above n 34, 933-6.
\(^{57}\) Verhellen, above n 28, 71.
\(^{58}\) The United States, St Lucia and Somalia are yet to ratify the *CRC*; see United Nations Treaty Collection, above n 10.
towards others. The notion of children as holders of human rights constitutes a significant change in the global attitude from the pre-existing view of children as ‘objects’ of the law, which should be seen but not heard. The CRC recognises that children are capable of holding rights by adding provisions that protect the right of children to freedom of expression, freedom of thought, freedom of religion, and freedom of association.

This ‘rights-based approach’ resulted in a shift in accountability. The CRC extended the obligation of the ‘men and women of all nations’ enshrined in the Geneva Declaration to governments and to the general public. Although the CRC mentions the duty of parents in certain provisions, the obligation to take ‘all appropriate legislative, administrative, and other measures to implement the economic, social and cultural rights under the Convention’ rests primarily on State Parties. The concept of placing obligations on the government for matters of child rearing and development has been criticised for interfering with parental rights and duties, however this hardly seems the case when as many as eleven articles emphasise and uphold the importance of parents and family members. The CRC appears to recognise that the obligation to protect children’s rights requires coordination on all levels, including parents, local communities, governments and the international community.

60 Most notably, Article 18 mentions that the duty of bringing up the child ‘shall lie equally with both the parents’.
62 Harris-Short, above n 45, 322-4.
The *CRC* is also significant because it encompasses an extensive range of human rights including civil, political, economic and cultural rights.\(^{64}\) These rights vary from a right to life,\(^{65}\) to the right to be protected from all forms of exploitation,\(^{66}\) to the right to reunification with family,\(^{67}\) and the right to the ‘highest attainable standard of health’.\(^{68}\) With 54 provisions, it is the most extensive international instrument. Its scope is further extended by Article 41 which states that ‘[n]othing in this Convention shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in: (a) the law of a State Party; or (b) international law in force for that State’. Hence, if a provision of the *CRC* coincides with other provisions of international law or the domestic law of State Parties, the provisions which afford the child the greatest protection will prevail.\(^{69}\)

Due to the lengthy negotiating process and the need for compromise, the *CRC* contains only minimum standards of children’s rights.\(^{70}\) Consequently, Article 41 is significant because it obliges State Parties to meet a minimum level of children’s rights.

According to Shackel, the *CRC* is a ‘very powerful vehicle for further development of children’s rights in future years’.\(^{71}\) It has been invaluable across the globe as a legislative model for the purpose of drafting new constitutions, for informing the


\(^{69}\) Verhellen, above n 28, 81.

\(^{70}\) *Ibid*.

\(^{71}\) Shackel, above n 30, 23.
development of child protection policies, and for creating an ombudsman and commissioner for children.

In order to contrast the ways in which Indonesia and Australia have implemented the CRC, we must take a closer look at the provisions of the CRC and at the obligations it places on State Parties.
CHAPTER THREE

The Substantive Provisions of the CRC and
Obligations on State Parties

1. The Structure of the CRC

The Preamble of the CRC outlines the CRC’s main principles, drawing on standards from other UN human rights treaties and proclamations, including the Geneva Declaration and the Declaration of the Rights of the Child. The 54 Articles of the CRC are subdivided into three main parts. Part I contains Articles 1 to 41 which cover general provisions, such as the definition of a ‘child’ and measures of implementation, and a comprehensive set of children’s rights including civil, economic, social, political and cultural rights. Part II contains Articles 42 to 45 which cover the procedures for monitoring the implementation of the CRC. Part III contains Articles 46 to 54 which cover the formal provisions governing the entry into force of the CRC.

2. The Definition of a ‘Child’

Article 1 defines a child as ‘every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier’. Preambular paragraph 9 CRC refers to a child requiring special protection ‘before as well as after birth’, thus implying that the definition of a ‘child’ encompasses the foetus. This is
confirmed in Article 24(2)(d) CRC, which places an obligation on State Parties to ‘ensure appropriate pre-natal and post-natal health care for mothers’.

3. General Measures of Implementation

The CRC Committee identified a wide range of measures that are needed for effective implementation of the CRC, including the development of special structures and monitoring, training and other activities by the government, parliament and judiciary at all levels.\(^ {72}\) For ease of reporting, the CRC Committee developed reporting guidelines and arranged the articles of the CRC into groups.

The first group comprises of the ‘general measures of implementation’ and includes articles 4, 42 and 44(6). Article 4 places an obligation on State Parties to take ‘all appropriate legislative, administrative and other measures’ for the implementation of children’s rights contained in the CRC. Such measures include legislative reform to implement the provisions of the CRC into domestic law and policy, the availability of effective remedies to redress violations of children’s rights, and the establishment of comprehensive national strategies or ‘national plans of action’ built on the framework of the CRC.\(^ {73}\) Article 42 places an obligation on State Parties to make the content of the CRC widely known to children and adults. Article 44(6) places an obligation on State Parties to make the periodical reports widely available within the state. The CRC Committee has stated that the reporting process encourages

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\(^ {73}\) *Id.*, [18-27].
international accountability of the State Party.\textsuperscript{74} The specific obligations on State Parties will be further elaborated in part 6 of this chapter.


Verhellen proposes that the human rights enshrined in the CRC may be classified in a number of ways. According to a traditional classification, the human rights provisions of the CRC may be classified into five categories: civil rights, political rights, economic rights, social rights and cultural rights.\textsuperscript{75} Alternatively, these rights may be classified according to their objective. The principal objectives of the CRC are to promote: the right to self-determination, the right to protection, and specific rights (the rights of child refugees or the rights of children with handicaps).\textsuperscript{76}

The numerous human rights provisions of the CRC are interrelated and have been categorised by the CRC Committee into the following broad groups:

- General Principles;
- Civil Rights and Freedoms;
- Family Environment and Alternative Care;
- Basic Health and Welfare;
- Education, Leisure and Cultural Activities; and
- Special Protection Measures.\textsuperscript{77}

\textsuperscript{74} \textit{Id.} [71].
\textsuperscript{75} Verhellen, above n 28, 81.
\textsuperscript{76} \textit{Ibid.}
Table 1. Overview of the Groups of Human Rights in the *CRC*\textsuperscript{78}

<table>
<thead>
<tr>
<th><strong>Group of Rights</strong></th>
<th><strong>Specific Provisions</strong></th>
</tr>
</thead>
</table>
| **General Principles** | Non-discrimination (art 2)  
Best interests of the child (art 3)  
Right to life, survival and development (art 6)  
Respect for the views of the child (art 12) |
| **Civil Rights and Freedoms** | Right to a name and nationality (art 7)  
Preservation of identity (art 8)  
Freedom of expression (art 13)  
Access to appropriate information (art 17)  
Freedom of thought, conscience and religion (art 14)  
Freedom of association and peaceful assembly (art 15)  
Protection of privacy (art 16)  
Prohibition against torture and the death penalty (art 37(a)) |
| **Family Environment and Alternative Care** | Parental guidance and the child’s evolving capacities (art 5)  
Parental responsibilities (arts 18(1) and 18(2))  
Separation from parents (art 9)  
Family reunification (art 10)  
Recovery of maintenance for the child (art 27(4)) |

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<tr>
<th>Children deprived of a family environment (art 20)</th>
<th>Adoption (art 21)</th>
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<tbody>
<tr>
<td>Illicit transfer and non-return (art 11)</td>
<td></td>
</tr>
<tr>
<td>Prevention of abuse and neglect (art 19), including physical and psychological recovery and social reintegration (art 39)</td>
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<tr>
<td>Periodic review of placement (art 25)</td>
<td></td>
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<tr>
<td><strong>Basic Health and Welfare</strong></td>
<td></td>
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<tr>
<td>Survival and development (art 6(2))</td>
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<tr>
<td>Disabled children (art 23)</td>
<td></td>
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<tr>
<td>Health and health services (art 24)</td>
<td></td>
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<tr>
<td>Social security and child care services and facilities (arts 18(3) and 26)</td>
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<tr>
<td>Standard of living (art 27(1-3))</td>
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<tr>
<td><strong>Education, Leisure and Cultural Activities</strong></td>
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<tr>
<td>Education, including vocational training and guidance (art 28)</td>
<td></td>
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<tr>
<td>Aims of education (art 29)</td>
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<tr>
<td>Leisure, recreation and cultural activities (art 31)</td>
<td></td>
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<tr>
<td><strong>Special Protection Measures</strong></td>
<td></td>
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<tr>
<td><em>Children in situations of emergency</em> - refugee children (art 22); children in armed conflicts (art 38)</td>
<td></td>
</tr>
<tr>
<td><em>Children in conflict with the law</em> - administration of juvenile justice (art 40); children deprived of their liberty (arts 37(b), 37(c) and 37(d); sentencing of juveniles (art 37(a)); physical and psychological recovery and social reintegration (art 39); and</td>
<td></td>
</tr>
<tr>
<td><em>Children in situations of exploitation</em> (including physical and psychological recovery and social</td>
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</tbody>
</table>
reintegration – art 39) - economic exploitation, including child labour (art 32); drug abuse (art 33); sexual exploitation and sexual abuse (art 34); sale, trafficking and abduction (art 35); other forms of exploitation (art 36); children belonging to a minority or indigenous group (art 30).

Each of these broad groups of rights will be discussed in more detail below.

4.1 General Principles

The provisions of the *CRC* are based on four key principles (‘the General Principles’). These principles are specific to children and include: 79

- Best interests of the child;
- Non-discrimination;
- Right to life, survival and development; and
- Respect for the views of the child.

4.1.1 Best Interests of the Child

This is primarily articulated in Article 3, which provides that the best interests of the child should be the primary consideration in all actions concerning children. 80 This principle featured in previous UN declarations and is not a new concept in the human

79 Ibid.
80 This principle is also referred to in Articles 9(1), 9(3), 18(1), 21, 37(c) and 40(2)(ii).
This principle has been interpreted to apply to all of the express provisions and implied obligations under the Convention. However, the wording of Article 3 states that the best interests of the child are only one factor to consider, thus allowing for other factors to be taken into account when making decisions. Nevertheless, the CRC Committee emphasises that State Parties must demonstrate they have given proper consideration to the best interests of the child in all legislative and administrative decisions, by identifying areas of difficulty, and by focusing on public awareness training.

The notion of ‘best interests’ is broad, and thus not restricted to just one set of cultural, religious, social or environmental set of variables. It is intended to be adaptable to each child’s individual circumstances. Justice Chisholm has interpreted the ‘best interests of the child’ to cover a ‘wide range of matters’ including the physical, moral and religious welfare of the child, as well as all factors that affect the future of the child. Similarly, the context of the CRC must be taken into account when identifying the best interests of the child. A decision does not respect the best interests of the child if it breaches rights set out in other provisions of the CRC.

81 See United Nations, Declaration of the Rights of the Child, proclaimed by GA Res 1386(XIV), 20 November 1959, Principles 2 and 7; see also Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 13, arts 5(b) and 16(1)(c) (entered into force 3 September 1981).
82 Shackel, above n 30, 34.
83 Ibid, 37.
84 Ibid.
86 Raman, above n 59, 9.
4.1.2 Non-Discrimination

Article 2 requires State Parties to respect and ensure that all rights set out in the *CRC* apply to each child without discrimination. State Parties must take ‘all appropriate measures’ to ensure that a child is protected against all forms of discrimination or punishment. The term ‘discrimination’ is not expressly defined in the *CRC*. Article 2 *CRC* provides that State Parties must assure all children’s rights, ‘irrespective of... race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.’ The term ‘discrimination’ is not expressly defined in the *CRC*. Article 2 *CRC* provides that State Parties must assure all children’s rights, ‘irrespective of... race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.’ This provision implies both positive and negative obligations on states, in some cases requiring specific ‘affirmative action’ to ensure children can benefit from rights without discrimination.

This is particularly relevant when considering the duties of the Australian government to protect Aboriginal children from discrimination.

4.1.3 Right to Life, Survival and Development

This is one of the most fundamental and important human rights in the *CRC*, and is also evident in a number of other human rights instruments. Article 6 requires State Parties to recognise that every child has an inherent right to life, and

88 Shackel, above n 30, 29-30.
89 Raman, above n 59, 9.
accordingly places an obligation on State Parties to optimise the development and survival of the child. Each child must be given the opportunity to develop to their full potential and have a functional role in society.

‘Development’ is used in the context of a holistic view encompassing physical, mental, spiritual, moral, psychological and social development.91 The general principle that children should be given optimal opportunities for survival and development underpins the entire Convention, and forms the basis of other provisions such as Article 19 and Article 37, which require children to be protected from abuse, neglect, torture and deprivation of liberty.

4.1.4 Respect for the Views of the Child

Article 12 requires State Parties to give children the opportunity to freely express their own views in all matters that concern them, including judicial and administrative proceedings. This principle has been broadly interpreted to refer to all matters that concern a child, and is not limited to the matters contained in the provisions of the CRC.92 The CRC requires that children are not only given an opportunity to express their own views, but that these views are given appropriate consideration, depending on the child’s capacity, age and maturity. The CRC is the first international, legally binding instrument to take a ‘child-centred approach’, encouraging children to be active participants, rather than passive objects owed only a duty of protection from others.93 This fundamental principle is strongly connected

92 Shackel, above n 30, 43.
93 Wight, above n 30, 14.
with other human rights, including freedom of expression (as addressed in Article 13 
 CRC), and choice of religion.

4.2 Civil Rights and Freedoms

This group of rights covers: the right to a name and nationality,\(^94\) the preservation of identity,\(^95\) access to appropriate information,\(^96\) the protection of privacy,\(^97\) the prohibition against torture and the death penalty,\(^98\) freedom of expression, thought, conscience and religion,\(^99\) as well as freedom of association and peaceful assembly.\(^100\)

4.3 Family Environment and Alternative Care

The CRC fully recognises the important role of family in the achievement of children’s rights. Preambular paragraph 5 CRC refers to the family as ‘the fundamental group of society and the natural environment for the growth and well-being of… children’. The provisions included in this group concern parental guidance and the child’s evolving capacities,\(^101\) parental responsibilities,\(^102\)

separation from parents and family reunification, children deprived of a family environment, and prevention of abuse and neglect.

Motivated by an increasing number of children separated from parents and the particularly vulnerable situation they face (i.e. greater risk of sexual exploitation and abuse, military recruitment, child labour), the CRC Committee issued a General Comment on ‘The Treatment of Unaccompanied and Separated Children Outside Their Country of Origin’. 106

**4.4 Basic Health and Welfare**

This group includes issues related to health, standard of living, social security, child care services and facilities, and the rights of disabled children. In relations to this group of rights, the CRC Committee has issued separate General Comments on the issues of ‘HIV/AIDS and the Rights of the Child’, 107 ‘Adolescent Health and Development in the Context of the CRC’, 108 and ‘The Rights of Children with Disabilities’. 109

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102 CRC, opened for signature 20 November 1989, 1577 UNTS 3, art 8(1) and 8(2) (entered into force 2 September 1990).
4.5 Education, Leisure and Cultural Activities

The aims of education set out in Article 29(1) CRC are linked directly to the realisation of the child’s human dignity and inalienable rights, taking into account the child’s special development needs and diverse evolving capacities.\(^{110}\) The aims relate to the holistic and optimal development of the child, including the development of respect for human rights,\(^{111}\) an enhanced sense of identity and affiliation,\(^{112}\) and the child’s socialisation and interaction with others\(^{113}\) and with the environment.\(^{114}\)

4.6 Special Protection Measures

The CRC Committee divides the special protection measures into three groups:

1. *Children in situations of emergency*, which covers refugee children (art 22) and children in armed conflict (art 38);\(^{115}\)

2. *Children in conflict with the law*, which covers the administration of juvenile justice (art 32), children deprived of their liberty (arts 37(b), 37(c) and 37(d)), sentencing of juveniles (art 37(a)), and physical and psychological recovery and social reintegration (art 39);\(^{116}\)


3. **Children in situations of exploitation (including physical and psychological recovery and social reintegration)**, which includes economic exploitation (art 32), drug abuse (art 33), sexual exploitation and sexual abuse (art 34), sale, trafficking and abduction (art 35), other forms of exploitation (art 36), and children belonging to a minority or indigenous group (art 30).

The CRC Committee has been particularly concerned about juvenile justice and issued a General Comment on this issue.\(^{117}\) In this General Comment, the CRC Committee acknowledged international standards on juvenile justice policy, in particular, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the ‘Beijing Rules’), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the ‘Havana Rules’), and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the ‘Riyadh Guidelines’).\(^{118}\)

5. **The Optional Protocols to the CRC**

The United Nations has recognised that the **CRC** has some shortcomings. The UN General Assembly responded by adopting two additional protocols to the **CRC** on 25 May 2005. The **Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict** (**OPAC**) resulted from the CRC Committee’s alarm at the involvement of children in armed conflict. Over half of the members of the UN have ratified this optional protocol. Similarly, the **Optional

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\(^{117}\) See *Ibid*.

Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC) resulted from the CRC Committee’s concern at the increasing rate of sexual exploitation and trafficking of children. Australia ratified the OPAC on 26 September 2006 and the OPSC on 8 January 2007, however Indonesia is yet to take this step.

6. General Obligations on State Parties to the CRC

Different State Parties to the CRC approach the implementation of the Convention in different ways. Scholars in the field of international law have proposed two basic theories on the relationship between international law and domestic law. The dualist view assumes that international law and municipal law are two separate legal systems which exist independently of each other. Consequently, rules of international law do not apply automatically in the domestic sphere, but must be accompanied by an act of Parliament. The dualist view promotes the principle of state sovereignty. The monist view perceives international and domestic law as forming part of one and the same legal order, with the rules of international law being supreme over municipal law. Consequently, a municipal law that is inconsistent with international law is automatically null and void, and rules of international law are directly applicable in the domestic sphere of a state.

120 This is despite the CRC Committee’s strong suggestion that Indonesia does so; see Concluding Observations: Indonesia, above n 51, [93].
122 Ibid.
123 Ibid.
monist-dualist distinction has been criticised by a former Justice of the International Court of Justice, Sir Gerald Fitzmaurice, as ‘unreal’ and ‘artificial’. In his opinion, it is more useful to look at the various approaches taken by national legal systems to international law in practice.\footnote{Gerald Fitzmaurice, ‘The General Principles of International Law Considered from the Standpoint of the Rule of Law’ (1957) 92 Recueil des Cours 1, 71.}

In general terms, when a State Party ratifies the CRC, the Convention does not automatically become part of its domestic law. Instead, a State Party is placed under international contractual obligations to ensure it meets the minimum standard of the rights articulated in the provisions of the CRC.\footnote{CRC Committee General Comment No 5, above n 72, [1].} This entails promoting respect for the rights of the child, preventing violations of these rights, and ensuring that these rights are implemented.\footnote{Raman, above n 59, 9.} Pursuant to Article 2(1), a State Party assumes the basic obligation to ‘respect and ensure’ the rights set forth in the CRC to each child within their jurisdiction. The wording of this provision is based on Article 2(1) ICCPR. The obligation to ‘respect’ requires a State Party not to violate the rights in question.\footnote{Sharon Detrick, A Commentary on the United Nations Convention on the Rights of the Child (The Hague: Martinus Nijhoff Publishers, 1999) 68 (Detrick).} The obligation to ‘ensure’, on the other hand, implies that a State Party must take \textit{affirmative} action, which includes measures necessary to enable individuals to enjoy and exercise the relevant rights.\footnote{For example, numerous provisions in the CRC requires state parties to take appropriate ‘measures’ to ‘ensure’ that certain rights are implemented; see arts 2(1), 2(2), 22(1), 32(2) and 38(4) CRC.} Examples of rights in the CRC that require affirmative action are: the right to life and survival, the right to education, and the right to participation.
The CRC places the onus on State Parties to take ‘all appropriate measures’, to ‘use their best efforts’, and to ‘take legislative, administrative, social and education measures’\textsuperscript{129} to implement the CRC. Neither the CRC, nor the UNICEF Implementation Handbook for the Convention on the Rights of the Child specifies what legislative or administrative measures are required by State Parties. Although it places a heavy onus on State Parties, Article 4 limits this obligation to the ‘maximum extent of the availability’ of each State Party’s resources. In this sense, the CRC expressly allows for limitations in financial and human resources which would be a significant factor impeding implementation in many developing countries. The focus has been on ensuring that domestic policy and legislation is in line with the CRC, both at a local and national level.\textsuperscript{130}

Article 4 requires that State Parties undertake to implement ‘economic, social and cultural’ rights. This raises the question of whether rights which potentially fall outside of these categories place obligations on State Parties to fulfil the minimum requirements irrespective of resource limitations, or indeed the opposite, where State Parties are not required to take measures to the maximum extent of their resources. However, as Shackel\textsuperscript{131} points out, the CRC does not define which rights are ‘economic, social and cultural’, and therefore it does not provide any definitive guidance on the extent of a State Party’s obligations.

Article 4 also refers to a framework of international co-operation to be used by State Parties to assist in the implementation of the CRC. The notion of international co-


\textsuperscript{130} Shackel, above n 30, 48.

\textsuperscript{131} Id, 47-8.
operation, assistance and support is an important factor when assessing the issues of progress facing many developing nations, including Indonesia. International co-operation is a fundamental part of the UN Charter, requiring members to take joint and separate action in co-operation to achieve universal human rights.\textsuperscript{132} However, whilst the CRC refers to the need for international cooperation, it does not expressly make provisions for the redistribution of wealth. In fact, an obligation requiring the more developed nations to provide assistance to developing countries was rejected during the drafting process.\textsuperscript{133} This issue is particularly relevant when comparing the expectations and capacities of both Australia and Indonesia to implement the CRC, in view of the great disparity in resource availability.

On the other hand, commentators such as Van Bueren argue that the CRC provision addressing resource limitations has resulted in some governments using this as an excuse to account for their failure to implement certain provisions.\textsuperscript{134} Nevertheless, it may be that some of the provisions of the CRC place unrealistic obligations on many developing nations. For example, Hannan\textsuperscript{135} points out that the right to play and develop during childhood is impractical in countries with limited resources and where economic development is heavily reliant on child labour.

The CRC also recognises the importance of parents and adults in local communities in fulfilling obligations under the Convention.\textsuperscript{136} In order to balance the duties of parents or guardians, governments must provide adequate opportunities, resources, 

\begin{thebibliography}{9}
\bibitem{132} Id, 48.
\bibitem{133} Hannan, above n 46, 79.
\bibitem{135} Hannan, above n 46, 78-9.
\bibitem{136} This is especially evident in Articles 18 and 27 CRC.
\end{thebibliography}
education and law enforcement, and must empower local communities to use these resources to ensure children’s rights are met.\(^{137}\)

7. **Indonesia’s Obligations under the CRC**

Indonesia ratified the *CRC* in 1990 by Presidential Decree Number 36. Although the *CRC* became part of Indonesia’s domestic law upon ratification, its status was lower than that of an act of Parliament.\(^{138}\) Despite placing reservations,\(^{139}\) Indonesia did not object to the four fundamental principles of the *CRC*, namely: the best interests of the child; non-discrimination; the right to life, development and survival; and respect for the views of the child.

Indonesia committed to take all necessary legislative, administrative and other measures to implement the rights detailed in the *CRC*’s provisions, including the obligation to submit periodic reports to the CRC Committee. The initial report was due two years after ratification, followed by a periodic report every five years.\(^{140}\) However, Indonesia has submitted only two reports thus far: the initial report, due in 1992, was submitted toward the end of 1993, and the second periodic report, due in 1997, was submitted in February 2002. The excuse for the late submission was the

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\(^{137}\) Raman, above n 59, 9.


\(^{139}\) Indonesia initially made reservations to Articles 1, 14, 16, 17, 21, 22 and 29. However, in its Second Periodic Report submitted in February 2002 (CRC/C/65/Add.23), Indonesia observed that the *Child Protection Law* rendered these reservations unnecessary and that it planned to withdraw its reservations.

onset of the economic crisis in the middle of 1997, which was followed by political upheaval and instability.\textsuperscript{141}

The feedback on the second periodic report is contained in the concluding observations of the Committee of the Rights of the Child, dated 26 February, 2006. The Committee invited Indonesia to submit its third and fourth combined report on 4 October, 2007. This report is still not yet available, nor has it been submitted. Hence, the latest concluding observation, dated 26 February, 2004, will be used as the basis for assessing Indonesia’s implementation of the \textit{CRC} and the current situation of children’s rights in Indonesia, as shown in mass media and other reliable sources.

\textbf{8. Australia’s Obligations under the \textit{CRC}}

Australia played a key part in the \textit{CRC} drafting process of the \textit{CRC}, with input from Federal, State and Territory governments. Australia ratified the Convention on the 17 December, 1990. The \textit{CRC} came into force on 16 January, 1991. Despite placing a reservation,\textsuperscript{142} Australia did not object to the four fundamental principles of the \textit{CRC}.

Australia’s Executive arm of government signed and ratified the \textit{CRC} in December 1990, whereby it entered into an agreement to take all necessary legislative, administrative and other measures to implement the rights detailed in the provisions.


\textsuperscript{142} Australia placed a reservation on Article 37(c) on ratifying the \textit{CRC}. 

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In doing so, Australia made an international commitment to: implement the subject matter of the *CRC*, report on a periodic basis to the CRC Committee, make the reports available to the Australian public, and to make the principles of the *CRC* known widely to all adults and children. In practice, this requires Australia to:

1. Review all existing laws and regulations to ensure that they comply with the rights set out in the *CRC* and to repeal or pass amendments to any laws that are non-compliant;

2. Review all policies at a Commonwealth, State, Territory and local government level to check whether they conform with the *CRC* and to review and amend any policies that fail to comply;

3. Develop systems for reviewing and monitoring new laws and policies to ensure that they do not breach the *CRC*;

4. Prepare and implement a global policy and plan of action based on the rights set out in the *CRC*; and

5. Incorporate the rights in the *CRC* into Australian Commonwealth, State and Territory legislation.

When the Commonwealth Executive ratifies a treaty it does not automatically become domestic law unless it is specifically incorporated into Australian law through legislation. However, it is important to note that even if a treaty has not

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143 Jones: Myths, above n 63, 128.
145 Jones: Myths, above n 63, 130.
been incorporated into domestic law it does not mean that it has no effect at all.

According to Jones, a treaty may have an effect on the:

1. Interpretation of statutes;
2. Development of common law rules and principles; and
3. Exercise of administrative discretion.\(^{146}\)

Australia’s interpretation of statutes must be consistent with its international obligations, although a plain meaning is favoured in statutory interpretation. Where the words of the statute are clear and unambiguous, the plain meaning of the statute prevails, even if the result is inconsistent with the terms of a treaty.\(^{147}\) Australian courts may consider international law in assisting them to decide the outcome of cases, especially when there are deficiencies in the common law.

Australia submitted its latest report to the CRC Committee in January 2008 and is awaiting feedback and recommendations from the Committee. The most recent feedback report from the Committee was released in September 2005, and will form the basis of the assessment of Australia’s implementation of the CRC.

Before embarking on such a comparison, we must examine certain underlying differences between the two countries which may affect pre-existing children’s rights, and the success of subsequent implementation of the CRC. The following chapter will examine the development of the rule of law in Australia and Indonesia, as the foundation for assessing the implementation of the CRC.

\(^{146}\) Id, 136-7.
\(^{147}\) Id, 136.
CHAPTER FOUR

The Rule of Law as a Key Factor in the Implementation of the CRC in Australia and Indonesia

The rule of law affects the implementation of laws in general, however it is crucial in relation to the implementation of human rights. The normative standards of international human rights are based on respect for the worth and dignity of every human being. Full implementation of human rights not only promotes the development of individuals, but also encourages the initiative required for further economic and social progress. Conversely, human rights can be effectively implemented only in a society that embraces the rule of law through its legal, political, social and economic systems.148

1. The Definition of the ‘Rule of Law’

Whilst there is no internationally accepted definition of the rule of law, it is a well-established ideal among many nations.149 According to the Secretary-General of the UN,

the rule of law involves adherence to a principle of governance whereby all persons, institutions and entities, public and private, including the

148 Vlot, above n 2, 47.
State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.\footnote{150}

The rule of law is most meaningful in the context of everyday life.\footnote{151} The rule of law is fundamentally based on the notion that the law is supreme and that no one is above it. It governs the interaction between individuals and society, and requires all individuals and institutions, including the government to be under the law. The concept developed from natural law theories, from notions of fairness and justice, and from the need to protect citizens from arbitrary power.\footnote{152}

The definition provided by the Secretary-General is supported by the opinions of scholars. Dicey defined two main principles of the rule of law, namely the supremacy of law in opposition to the influence of arbitrary power, and equality before the law.\footnote{153} Many scholars have attempted to expand this definition and describe what is required for the achievement of the rule of law. Geoffrey de Q Walker has provided one of the most expansive explanations, proposing that the rule of law requires that:

1. Laws prohibit and protect against private violence, coercion, lawlessness and anarchy;

2. The government is bound by the same laws that bind individuals (whenever possible);

\footnote{151}{Ibid.}
\footnote{152}{Vlot, above n 2, 47.}
3. The law is certain, general, and equal. Certainty requires laws to be prospective, clear, open and relatively stable. Laws must be general and must apply equally to all subjects;

4. Laws are in accordance with informed public opinion and general social values and there is a mechanism to ensure this;

5. Institutions and procedures are capable of expeditiously enforcing the law;

6. Effective procedures and institutions to ensure that government action adheres to the law exist;

7. The judiciary is independent;

8. A system of legal representation, preferably by an organised and independent legal professional exists;

9. The principles of natural justice are observed at all judicial hearings;

10. Courts are accessible to all, without long delays or high costs;

11. Law enforcement is impartial and honest; and

12. Enlightened public opinion favours these propositions.\(^{154}\)

From this range of requirements, four key principles can be extracted. Establishment of the rule of law requires:

1) Accountable and representative governance;

2) An independent judiciary;
3) Legal certainty; and
4) Equality before the law.

These factors will be elaborated later in this chapter, both in an Australian and Indonesian context.

2. The Link between the Rule of Law and the Implementation of the CRC

The extent to which the rule of law is entrenched in Australia and Indonesia is an important factor to consider when assessing the implementation of the CRC. The unique way in which each State Party responds to its obligations under the CRC depends on the structure of its government and legal system through which the necessary changes in domestic law and policy are achieved. The effective implementation of any international convention or treaty depends on a government’s willingness to take the necessary legislative steps to fulfil its obligations.

Many of the rights under the CRC are largely programmatic in nature, requiring intensive, long term planning to achieve the minimum standards. These rights are heavily dependent on coordination of funding, resources, legislative and administrative action, as well as social training and awareness and community participation. The CRC requires State Parties to undertake ‘all appropriate legislative, administrative, and other measures’, to implement these rights.\textsuperscript{155} It qualifies this as requiring action to be taken to the ‘maximum extent of available

resources’, therefore implying a concession for countries with limited resources. However, there is a much wider set of considerations that must be taken into account when determining the extent and limits required by each State Party in order to fulfil their obligations under the Convention. Such factors include characteristics of the legal system and adherence to the rule of law, political structure, economic position, cultural traditions and practices, and physical geography.

If governments have influence over judicial decisions, the courts’ independence is compromised and there is a significant risk that society will fail to respect or abide by judicial decisions. For example, this could include bribery, coercion, undue influence, or other methods of political persuasion. It may also come from wealthy and powerful individuals or non-governmental groups. In the case of violations of children’s rights, this could significantly reduce the deterrent effect on potential offenders, and the victims’ (or their families’) faith in the law’s ability to prosecute offenders and protect their rights.

Zimmermann highlights the importance of promoting a ‘culture of legality’ that respects the rule of law.\textsuperscript{156} This requires governments to acknowledge law-abiding citizens and to appropriately deal with those citizens who do not abide by the law. If the rule of law is not consistently maintained in a society, it may ultimately lead to discrimination and arbitrary ruling. This would violate a fundamental human rights principle which requires that all laws apply generally and impartially to all persons.

on a rational and non-arbitrary basis. This features prominently throughout the CRC and many other international human rights instruments.

The rule of law also requires citizens to understand the law, respect the law and lawmakers, and adopt a positive attitude towards following the law. Accordingly, the CRC emphasises the importance of publicising the Convention and making children’s rights widely known within the public domain and amongst law enforcement bodies. Local and national press and media also play a significant role in achieving this through education, awareness and promotion of human rights. Such action is essential for creating clear and certain laws, achieving security and protection of rights, and effective implementation of the Convention.

Before comparing the rule of law in Indonesia and Australia, it is important to acknowledge the opinions of scholars such as Cowdery and Lipscomb who feel that the rule of law is more relevant to democratic Western societies than to certain Asian countries. Although in practice the rule of law may vary according to each country’s background, as a general concept it has wide historical and geographical application. As Zimmermann asserted, an important feature of a state with a strong rule of law is a culture of legality, which depends to a large extent on the socio-political context. Although perhaps more synonymous with Western, developed countries, a culture of legality is a flexible notion which can be achieved across varying political, cultural and economic settings. It is an essential feature

\[157\] Id, 19.
\[158\] Id, 18.
\[159\] Cowdery and Lipscomb, above n 149, 7.
\[160\] Zimmermann: Culture of Legality, above n 156, 24.
which every country committed to human rights, Western or otherwise, should
endeavour to firmly establish.

3. The Development of the Rule of Law in Australia

The development of the rule of law in Australia has been influenced by numerous
factors including a Federal system of government, an independent judiciary and
constitutional provisions that protect human rights. A direct implication of having a
well-entrenched rule of law is a more thorough implementation of human rights,
including children’s rights.

3.1 Historical Background

Australia was first settled by the British in 1788, and was acquired under the doctrine
of *terra nullius*. This historical doctrine allowed nations to obtain ‘uninhabited
territory’ or land occupied by ‘backward populations’ by discovery and
occupation.\(^{161}\) Aboriginal people were not considered to have a legal system, or own
property, and in a sense, were viewed as ‘uncivilised’. This doctrine has since been
overturned by the High Court of Australia, although it did not occur until 1992, over
two centuries later.\(^{162}\)

In 1901, the six Australian States and two self-governing Territories (all British
colonies) joined to establish a Federal system of government under the Constitution
of Australia. The Commonwealth of Australia consists of: the Australian Capital

Sydney: Butterworths, 1999) 53 (*Hanks and Cass*).

\(^{162}\) See *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
Territory (ACT), New South Wales (NSW), Northern Territory (NT), Queensland (Qld), South Australia (SA), Tasmania (Tas), Victoria (Vic), and Western Australia (WA).

### 3.2 Australia’s Federal System

Under Australia’s federal system, power is divided both vertically, between the national Commonwealth government and the State governments, and horizontally, between the executive, legislative and judiciary, as set out in the *Australian Constitution*. Although the creation of the Constitution in 1901 is often regarded as Australia’s ‘independence’ from Britain, the British Parliament’s power to legislate with respect to Australian States or stand as the final court of appeal did not cease until 1986.\(^{163}\) As a result, Australia’s legal system strongly resembles Britain’s common law, Westminster parliamentary system.

Power is divided between the Federal and State Parliaments. The Constitution vests the Federal government with exclusive power to make laws for the peace, order and good government of the Commonwealth on matters including the seat of Government of the Commonwealth, places acquired for public purposes, Federal public services, customs, excises, bounties, surrendered territory, naval and military defence forces, and coinage.\(^ {164}\) There is also a much wider set of concurrent powers that allow both the Commonwealth and the States to legislate on certain matters,

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\(^{163}\) *Australia Act 1986* (UK).

\(^{164}\) *Australian Constitution* s 52.
however, where there is an inconsistency, the Commonwealth legislation will prevail.\textsuperscript{165}

The Constitution reserves legislative power on all matters not specifically assigned to the Federal government to the governments of the Australian States and Territories.\textsuperscript{166} State governments have retained a similar structure to the Federal government with their own constitution, legislature, executive and judiciary. State governments have also established local governments with legislative and executive branches, but not a judicial branch. These local governments oversee matters on a local level.

Another important feature of Australia’s federal system is the separation maintained between judicial, legislative and executive power.\textsuperscript{167} The Australian Constitution sets out the executive, legislative and judicial powers in separate chapters. Executive power is formally vested in the Parliament, consisting of the Queen (represented by the Governor-General), the Senate, and the House of Representatives.\textsuperscript{168} However, in reality the majority of power is held by the Prime Minister and the Cabinet, which comprises of senior ministers.\textsuperscript{169} The Senate is composed of senators for each State, directly chosen by the people of the State, with each State electing 12 Senators, and each Territory electing 2 Senators.\textsuperscript{170} The members of the House of Representatives

\textsuperscript{165}\textit{Australian Constitution} s 51, s 109.
\textsuperscript{166}\textit{Australian Constitution} ss 106-8.
\textsuperscript{168}\textit{Australian Constitution} chapter 1.
\textsuperscript{169}Moens and Trone, above n 167, 242-8.
\textsuperscript{170}\textit{Australian Constitution} chapter 1, pt II.
are elected in a general election, and comprise twice as many members as the Senate.  

In practice, there is no strict demarcation between the executive and legislative powers for two primary reasons: (1) although only the Parliament can pass legislation, acts of Parliament often confer power on the executive to make regulations, rules and by-laws; and (2) the Prime Minister and other government ministers must be members of Parliament. Australia’s federal system is most notable for ensuring strict separation between the judiciary on the one hand, and the executive and the legislative on the other.  

3.3 Australia’s Legal System

Chapter III of the Australian Constitution establishes the judicial branch of government, vesting power in the High Court of Australia, and other Federal courts that the Parliament has created to exercise Federal power. These include the Federal Court, the Family Court, the Federal Magistrates’ Court, and some State courts which are vested with Federal jurisdiction. The decisions of the High Court are final and cannot be appealed. The High Court comprises of a Chief Justice and six other Justices, although not all seven judges hear every matter before the Court.

The High Court has ‘original’ jurisdiction to hear all matters where the Commonwealth government is a party, matters between States, matters concerning

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171 Australian Constitution chapter 1, pt III.
172 Moens and Trone, above n 167, 16.
173 Australian Constitution s 71; for example, s 41(3) Family Law Act 1975 (Cth) may vest Federal power in some State courts.
the interpretation of the Constitution, and matters that arise under international treaties or involve representatives from other countries. It also has the jurisdiction to hear appeals (subject to the Court granting special leave) of decisions of State, Territory and Federal courts on any matter. Each State and Territory court system operates independently. At State level, appeals from the lower courts, including the district courts and magistrate’s courts are directed to either the Supreme Court or the Court of Criminal Appeal.

Australia has a common law system where the main sources of law are the Commonwealth and State Constitutions, legislation, subordinate legislation, and judicial precedent. The doctrine of judicial precedent is the concept whereby a judicial decision which embodies a point of law serves as an authoritative and binding rule. The legally binding section of the judgement is referred to as the ‘ratio decidendi’ or the legal analysis which constitutes a judge’s ‘reason for deciding’. ‘Obiter dicta’ are peripheral comments which relate to the judgement but are not central to the main argument, and do not form part of the precedent. Judges are bound to follow precedents from their own courts and from higher courts, but not from courts lower down in the judicial hierarchy.

3.4 The Australian Constitution and the Protection of Human Rights

The Australian Constitution was not drafted with individual human rights as the primary priority, and accordingly does not include a Bill of Rights. The main focus of the drafters was to establish a federal system of government, which divides power

between a central government and State governments.\textsuperscript{175} However, the drafters did include several express provisions which affect the interaction between individual rights and public power.\textsuperscript{176} Section 51(xxxi) provides that the Commonwealth government has power to compulsorily acquire property only on fair and equitable terms.\textsuperscript{177} Section 80 provides that an individual accused of an indictable Federal offence must be provided with a jury trial.

Section 116 restricts the Federal government’s power to legislate over certain areas of religion, including prohibiting laws establishing a religion, imposing religious observance, or prohibiting the free exercise of religion, and provides that no religious test shall be required to qualify for any Commonwealth office. The ‘establishment clause’ has been interpreted by the High Court as prohibiting the establishment of an official State religion or church.\textsuperscript{178} This section provides protection for freedom of religion, and also protects individuals with no religion.\textsuperscript{179} Finally, Section 117 provides individuals protection from interstate discrimination.

The High Court of Australia has interpreted several provisions in the Constitution to imply protection or preservation of individual rights, primarily arising from the principles of representative democracy and responsible government.\textsuperscript{180} These form two essential features of Australia’s legal system whereby citizens democratically elect individuals to form government and act on their behalf, and where the government is accountable for these decisions to the electors. This has been held to

\begin{footnotes}
\footnotetext[175]{Hanks and Cass, above n 161, 850.}
\footnotetext[176]{\textit{Id}, 853.}
\footnotetext[177]{\textit{Bank of New South Wales v Commonwealth} (1948) 76 CLR 1.}
\footnotetext[178]{\textit{Attorney-General (Vic) (Ex rel Black) v Commonwealth} (1981) 146 CLR 559 at 605.}
\footnotetext[179]{\textit{Adelaide Company of Jehovah’s Witnesses v Commonwealth} (1943) 67 CLR 116 at 123.}
\footnotetext[180]{Hanks and Cass, above n 161, 909.}
\end{footnotes}
include the implied rights of freedom of communication on matters relating to public affairs,\(^\text{181}\) and freedom of movement and association.\(^\text{182}\) The right to protection from arbitrary power and the right to ‘due process’ have also been derived from the separation of judicial power from executive and legislative powers in Chapter III of the Constitution.\(^\text{183}\)

Although scholars, members of the judiciary and politicians have criticised Australia for not having a Bill of Rights,\(^\text{184}\) the doctrines of separation of powers, and representative and responsible government and the independence of the judiciary have ensured that many fundamental human rights are adequately protected.\(^\text{185}\)

The Australian Constitution cannot be altered unless approved by an absolute majority of each House of the Parliament, and the proposed law for the alteration ‘shall’ be submitted to the electorate at a referendum.\(^\text{186}\) At the referendum, a majority of electors in a majority of the States must vote in favour of the proposed alteration.\(^\text{187}\) There have been only eight amendments to the Constitution since 1901.\(^\text{188}\) These have covered matters involving the distribution of power between State governments and the Federal government, and changes in the terms served by senators and judges. From a human rights perspective, constitutional amendments

\(^{181}\) Id, 851; as the High Court of Australia held in the case of Nationwide News Pty Ltd v Wills (1992) 177 CLR 1.

\(^{182}\) Kruger v Commonwealth (1997) 190 CLR 1 at 91-2, 115-6, and 142.

\(^{183}\) Hanks and Cass, above n 161, 945-6.


\(^{186}\) Australian Constitution s 128; see also Suri Ratnapala et al, Australian Constitutional Law: Commentary and Cases (South Melbourne: Oxford University Press, 2007) 768.

\(^{187}\) Australian Constitution s 128.

\(^{188}\) Ie ss 13, 15, 51(xxiiA), 72, 105, 105A, 127 and 128.
have extended the Commonwealth’s power to legislate over Aboriginal people, repealing a section which excluded Aboriginal people from being counted as members of the States of the Commonwealth of Australia.\(^{189}\)

### 3.5 The Importance of a Well-entrenched Rule of Law in Australia

A strong democratic system combined with an independent judiciary limits a state’s power to oppress human rights.\(^{190}\) Australia is a nation that has largely achieved this through its stable and enduring democracy based on respect for the rule of law. James Spigelman, Chief Justice of the NSW Supreme Court, opined that ‘Australians take for granted the strength of their institutions for the administration of justice.’\(^{191}\) Australia is a democratic society where citizens are empowered and assured equal treatment under the law, thus enjoying certainty and knowing that the government is accountable to them.

#### 3.5.1 Representative and Responsible Government

The separation of powers doctrine ensures that the government is accountable to the electors. Chapter III of the Constitution gives the High Court of Australia the role of adjudicating over power disputes between the Commonwealth and the States within the Australian federal system. The process of judicial review of government administrative action acts as a system of ‘checks and balances’ that safeguards against arbitrary power.

\(^{189}\) This was achieved by the 1967 constitutional amendment.

\(^{190}\) Cowdery and Lipscomb, above n 149, 2.

3.5.2 An Independent Judiciary

The separation of powers doctrine also protects the impartiality of the courts and reduces political influences on judicial decision-making because of the partition between the judiciary, and the executive and legislative branches of government. However, in order to achieve this, judges require a clear set of legal principles in order to ensure they apply their powers independently and impartially.192 Broad, generalised laws and unclear principles invite the use of judicial activism, which can erode the rule of law. Judicial activism occurs when judicial power is used for a purpose outside that of the administration of justice according to law, and often involves a political, moral or social agenda.193 In contrast, the doctrine of judicial restraint creates certainty in the application of the law and acts as a safeguard against arbitrary ruling. When judges assume unrestrained discretionary power and fail to exercise judicial restraint, the law becomes unpredictable, which limits the development of judicial precedent.194

More recently, scholars195 and members of the judiciary196 have raised concerns at the increasing influence of the executive government over issues of judicial discretion, and the trend towards judicial activism. For example, Dyson Heydon, a former justice of the High Court, argues that judicial activism has been on the rise in

192 Zimmermann: Culture of Legality, above n 156, 22.
194 Id, 13.
196 Heydon, above n 192, 10.
Australia in recent years and may be a threat causing erosion of the rule of law.\textsuperscript{197} The members of the judiciary are not democratically elected and they are not appointed to represent public opinion; as such, political factors or influences are outside their scope of power.

Despite these concerns, Dyson concedes that Australian judges are virtually ‘incorruptible’, and no corrupt offers of advancement to an Australian judge have ever been proved.\textsuperscript{198} Thus any threat to the rule of law Australia faces seems hardly comparable to the scale of difficulties Indonesia faces. For the purpose of assessing the impact of the rule of law on the implementation of the \textit{CRC}, issues arising from judicial activism do not appear to be a major factor affecting Australia’s performance in the field of children’s rights.

Mansfield argues that the growing number of ill-informed media attacks on judicial reasoning and decisions have the potential to erode the strong rule of law in Australia.\textsuperscript{199} Public education and awareness are vital to the implementation of the \textit{CRC} and to the protection of human rights. Public education and awareness depends heavily on institutions such as the media to promote rights and raise awareness of laws. Consequently, the media plays a significant role in a society’s respect for the rule of law.

\textbf{3.5.3 The Protection of Human Rights}

\textsuperscript{197} \textit{Id}, 13.
\textsuperscript{198} \textit{Id}, 14.
\textsuperscript{199} Mansfield, above n 194, 9.
Although Australia does not have a Bill of Rights, it has managed to consistently uphold a well-entrenched rule of law. There has been widespread debate over the potential benefits and detriments associated with a Federally-enacted Bill of Rights; scholars remain divided, especially on the consequences of protecting individual citizens and human rights. An in-depth analysis of this debate is beyond the scope of this thesis, however Calma argues that a Charter of Rights may assist in raising the standard of indigenous children’s rights. According to Calma, ‘[a] Charter that protects economic, social and cultural rights, as well as political and civil rights, would contribute positively to the much needed recognition of Indigenous rights.’

Despite the absence of a written Bill of Rights, human rights are relatively well-protected in Australia. The High Court of Australia has suggested that legislation should be interpreted by having regard to human rights. As discussed above, the Australian Constitution expressly guarantees certain rights, including: free movement across State boundaries, freedom of interstate trade and commerce, prevention of discrimination of citizens between States, freedom of religion (by prohibiting laws which establish a religion), and just compensation for compulsorily-acquired property. The High Court has also implied certain rights into the Constitution, including the right to a fair trial and representation for criminal offences, and the

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202 Id, 106.
204 Australian Constitution s 92.
205 Australian Constitution s 117.
206 Australian Constitution s 116.
207 Australian Constitution s 51(xxxi).
right to communicate on matters of politics and government.\textsuperscript{208} Furthermore, the doctrines of separation of powers, and responsible and representative government, evident throughout the Constitution,\textsuperscript{209} imply protection of individual rights from capricious power through a system of ‘checks and balances’.

Despite not having a Bill of Rights or a human rights act, Australians are fortunate to have a well-entrenched rule of law.\textsuperscript{210} This has strong implications for the protection of rights, including children’s rights, even in the absence of obligations under international conventions such as the \textit{CRC}. In fact, it is possible to conclude that the rule of law and protection of children’s rights in Australia is sufficient in achieving most of the minimum standards set out in the \textit{CRC}, without the need for further legislative action. On closer analysis, children belonging to minority groups such as those living in remote indigenous communities require additional protection and more proactive government action to prevent violations of their rights.

Judicial independence and certainty of laws in Australia promote the rule of law. The next section will outline the development of the rule of law in Indonesia.

4. The Development of the Rule of Law in Indonesia

4.1 Historical Background

Indonesia had been under Dutch rule for nearly three and a half centuries when it finally became independent from the Netherlands in 1945. Indonesia’s current legal

\begin{flushright}
\textsuperscript{208} Dietrich \textit{v} The Queen (1992) Dietrich 177 CLR 292; Theophanous \textit{v} Herald Weekly Times Ltd (1994) 182 CLR 104. \\
\textsuperscript{209} Australian Constitution ss 7, 24. \\
\textsuperscript{210} Mansfield, above n 194, 15.
\end{flushright}
system retains the influence of European colonial law, which is combined with principles from early 16th and 17th century local customary law (*Hukum Adat*) and Islamic Law principles.211

4.2 Indonesia’s Unitary Republic System

Indonesia is governed by a President and Vice President who are elected for a five-year term by popular vote and supported by an appointed Cabinet.212 The Indonesian parliament, the People’s Consultative Assembly or *Majelis Permusyawaratan Rakyat* (MPR) consists of a House of Representatives or *Dewan Perwakilan Rakyat* (DPR) and a House of Regional Representatives or *Dewan Perwakilan Daerah* (DPD). Although Indonesia remains a centralised and unitary state,213 since the fall of the Suharto government in 1998 it has undergone significant political change to become a more democratic and decentralised state.214

The DPR’s main function is to draft and pass legislation, oversee the government’s budget, and other general governmental functions.215 The DPD has the power to propose, evaluate and monitor legislation relating to regional autonomy. It also has the power to comment on and affect the outcome of proposed legislation relating to tax, religion and education.216

213 *Indonesian Constitution* art 1(1).
214 Department of Foreign Affairs and Trade, above n 211.
215 *Indonesian Constitution* chapter VII.
216 *Indonesian Constitution* chapter VIIA.
The DPR and DPD are made up of elected and appointed representatives, and together form the MPR. The MPR is the supreme power under the Constitution. It was responsible for electing the President and Vice-President, until its powers were limited by the 1999 Constitutional amendment. The President and Vice-President are now elected by the people through a general election; however, the MPR still reserves the power to make amendments or enact new provisions to inaugurate and dismiss the President and Vice President. Despite the MPR’s power, the President maintains a powerful stronghold on the nation, acting as head of state, head of government, and head of the armed forces.²¹⁷

Indonesia is divided into 33 provinces, including the Capital District of Jakarta and the two special regions: Yogyakarta (located in Central Java), and Aceh (located in Northern Sumatera). Each province is headed by a Governor and administered by a provincial government with its own Regional House of People’s Representatives or Dewan Perwakilan Rakyat Daerah (DPRD). Both the Governor and the members of the DPRD are elected by the provincial population, and, unlike the DPD, they do not form part of the MPR.

### 4.3 Indonesia’s Legal System

Indonesia’s legal system is the product of three main influences: European Colonisation, ancient local customs, and the Islamic religion. First and foremost, Indonesia has a civil law system. That means that the main source of law is posited

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or written law. Indonesia’s first Constitution, drafted in 1945 (‘Undang Undang Dasar 1945’), established the country as a unitary republic.

Indonesia’s legislation is created in a variety of forms, which can at times create some confusing inconsistencies.\(^{218}\) The range of main sources includes the Constitution, Acts or Undang-undang (UU), Government Regulations in Lieu-of-law or Peraturan Pemerintah Pengganti Undang-undang (Perpu), Government Regulations or Peraturan Pemerintah (PP), Presidential Decrees or Peraturan Presiden (Perpres) and Regional Regulations or Peraturan Daerah (Perda).\(^{219}\)

The significance of these different forms of legislation is apparent when inconsistencies arise. For example, the CRC was first ratified in the form of a Presidential Decree which meant that any rights in the CRC that were inconsistent with higher level domestic laws were subsequently overridden. In its Concluding Observations, the CRC Committee shared the concern of the State Party on this matter and recommended that this be upgraded to an Act of Parliament or UU which would increase the priority of the CRC over domestic law.\(^{220}\) Indonesia has since enacted the Child Protection Law. In 2004, the CRC Committee acknowledged this as a positive step towards giving priority to the provisions of the CRC.\(^{221}\)

An examination of Indonesia’s judicial system reveals a similar influence of Dutch colonisation, as reflected in the Constitution. As a civil law system, the main sources of law are the positive laws and regulations enacted by the government. The

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\(^{218}\) Tabalujan, above n 216.

\(^{219}\) Listed in hierarchical order, as stipulated in Law Number10 of 2004 on the Legislation.

\(^{220}\) Concluding Observations: Indonesia, above n 51, [13-4].

\(^{221}\) Id, [13].
Indonesian courts do not apply the principle of precedent. Accordingly, jurisprudence does not play a significant role in the creation of law in Indonesia.

The Constitution vests judicial power in the Supreme Court\textsuperscript{222} and the Constitutional Court.\textsuperscript{223} The Supreme Court or Mahkamah Agung has the authority to hear final appeals from the lower courts, cases involving regulations made under any act, and any other matters as provided by law. The Supreme Court oversees a number of judicial bodies including public courts, courts dealing with religious affairs, military tribunals, and state administrative courts. Appeals from these lower courts are heard before the High Court which acts as the highest level of judicature at the provincial level (see illustration below).

**Figure 1. Court Structure of Indonesia (Created by the author, Susi Susantijo)**

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\textsuperscript{222} Indonesian Constitution art 24A.

\textsuperscript{223} Indonesian Constitution art 24C.
The Constitutional Court or *Mahkamah Konstitusi* has jurisdiction to try cases at both the first instance and at the final level of appeal. Indonesia has only one Constitutional Court, located in its capital, Jakarta. This court has the power to make final rulings on: constitutional matters, disputes between state authorities vested with power under the Constitution, the dissolution of political parties, disputes over general election results, and petitions from the House of Representatives alleging constitutional violations by the President and/or Vice-President.

Special courts can be formed in accordance with *Law Number 14 of 1970 on Judicial Power* (as amended by *Law Number 4 of 2004*). The Human Rights Court and Juvenile Court are amongst these special courts. These special courts function at the same level as the District Court. The Juvenile Court was established by *Law Number 3 of 1997 on the Juvenile Court* (‘*the Law on Juvenile Court*’), one of the legislative measures taken by Indonesia in implementing the *CRC*. Article 1(1) *Law on Juvenile Court* defines a child as any person between the ages of 8 and 18 years of age who has never been married. Article 1(2) defines a ‘juvenile delinquent’ (*Anak Nakal*) as any child who commits a crime or an act that is forbidden under Indonesian law. The Juvenile Court has criminal jurisdiction, and the procedures used in hearing matters in the Juvenile Court are similar to those used in the Criminal Court, except for some special features. For example, all Juvenile Court matters

224 Other special courts include: the Commercial Court (established by *Law Number 4 of 1998* and *Law Number 37 of 2004*), the Industrial Relations Court (established by *Law Number 2 of 2004*), the Tax Tribunal (established by *Law Number 14 of 2002*), and the Special Court on Corruption Crimes (established by *Law Number 4 of 2004*).

225 The Supreme Court of Indonesia and the Faculty of Law, University of Indonesia, *Indonesian Legal System* (Jakarta: University of Indonesia, 2005) 70.
are to be heard in a closed court, thereby ensuring the confidentiality of the identity of the child.\textsuperscript{226}

The doctrine of separation of powers between the judiciary, the executive and the legislative branches of government is not constitutionally entrenched in Indonesia’s Constitution. Tomasic and Kamarul\textsuperscript{227} note that in many Asian countries the judiciary is heavily influenced and controlled by the executive or other political groups. Judicial independence is a fundamental aspect of ensuring and protecting individual rights and has significant implications for the rule of law and arbitrary government power as discussed below. This feature of Indonesia’s legal system is a substantial factor affecting the implementation of the CRC, and the protection of children’s rights.

\textbf{4.4 The Indonesian Constitution and the Protection of Human Rights}

Human rights did not figure prominently during the drafting process; instead the focus was on citizens’ duties and obligations towards the state. However, as Juwana\textsuperscript{228} observed, human rights did form the basis of self-determination for the Indonesian people, an important theme evident throughout the Constitution. A limited number of specific human rights provisions were incorporated in the first Constitution, taken directly from the \textit{Universal Declaration of Human Rights}. These included freedom of religion, expression, and association; equality under the law; a

\textsuperscript{226} \textit{Law Number 3 of 1997 on the Juvenile Court}, art 8.
\textsuperscript{228} Juwana, above n 210, 364.
right to education, social security; cultural protection; and economic rights.\textsuperscript{229} Despite the express provision of these rights, Indonesia suffered gross violations of human rights especially throughout President Suharto’s 32-year reign.\textsuperscript{230}

The 1945 Constitution was not amended until after Suharto’s reign ended in 1998. It was then amended four times between 1999 and 2002. The 2002 amendment had the greatest impact on expanding human rights by creating positive duties of protection which the state was required to fulfil.\textsuperscript{231} Other amendments related to matters such as limitations on the power of the President, decentralisation of authority from the national government to local and regional governments, and the creation of three new national constitutional bodies.\textsuperscript{232}

\subsection*{4.5 Indonesia and the Rule of Law}

Article 1(3) of the Indonesian Constitution of 1945 expressly states that Indonesia is a ‘state based on the rule of law’. This is a very bold statement which must be questioned in view of Indonesia’s history of a weak rule of law.\textsuperscript{233} Similarly, the Preamble to the Indonesian Constitution states that Indonesia is a sovereign state based on belief in the One and Only God, just and civilized humanity, the unity of Indonesia, the democratic life led by wisdom of thoughts in deliberation.

\begin{thebibliography}{9}
\bibitem{229} Ibid.
\bibitem{231} Juwana, above n 210, 364.
\bibitem{232} Tabalujan, above n 216.
\end{thebibliography}
amongst representatives of the people, and achieving social justice for all the people of Indonesia.

Tomasic and Kamarul attribute certain Asian legal ideologies, cultural and social values, and the role of government institutions to the trend of the rule of law being translated into ‘rule by law’. It may be the case that aspects of Indonesia’s culture, religious practices, social values and traditions may marginalise the true meaning of the rule of law, or perhaps the more ‘Western’ understanding of the concept.

### 4.5.1 Emphasis on the Written Law

Legislative protection of individual rights set out in constitutional provisions, substantive laws, and government policies plays a role in achieving the rule of law, however it does not guarantee it. Many countries, including Indonesia, have impressive constitutions with provisions based on the UN *Universal Declaration of Human Rights*, but are still frequent and serious violators of these rights because of weaknesses in the rule of law. Although statistics from international watchdogs and NGOs such as UNICEF suggest that the standard of human rights in Indonesia is generally improving, significant breaches continue to occur despite the existence of such well-drafted, all encompassing human rights legislation.

### 4.5.2 Lack of Judicial Independence

Tomasic and Kamarul suggest that Indonesia’s lack of judicial independence and reliance on extra-legal, informal and even illegal methods of resolving disputes

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234 Tomasic and Kamarul, above n 226, 140.
235 Zimmermann: Culture of Legality, above n 156, 24.
significantly contribute to the difference between law and practice. Judicial
independence and impartiality is essential in a democratic state that upholds the rule
of law. If the judiciary does not maintain objectivity, independence and impartiality,
its decisions can be unstable, unpredictable and uncertain. Judicial activism and the
encroachment of politics and other arbitrary influences on decision-making result in
individuals taking law enforcement into their own hands, leading to increasing
violence, corruption, instability and unrest. These factors have resulted in a
general lack of faith and reliance on the law. As a result, Indonesians often resort to
informal networks or relationships, rather than the law, to protect their interests.

Separation of judicial, executive and legislative powers was notably absent from
Indonesia’s 1945 Constitution. Instead, the MPR was the supreme and sovereign
body, with unlimited power. In the past, this meant that ‘judges were corrupt and
the government always won’. However, in 1999 an amendment was made which
declared that the separation of judicial and executive powers must be implemented
within the following five years. This required power to be taken from the Ministry
of Judicial Affairs or Kehakiman and given to the Supreme Court or Mahkamah
Agung. Despite the time frame of this amendment, it proved to be a complex and
long-term process which is yet to be completed. Even in recent years, the courts
have been subjected to the control and management of the Ministry of Justice. This
interference with judicial independence has resulted in high levels of uncertainty and

236 Tomasic and Kamarul, above n 226, 140.
237 Heydon, above n 192, 10.
238 Tomasic and Kamarul, above n 226, 151.
240 Tomasic and Kamarul, above n 226, 150.
inconsistency in the application of laws and the outcomes of decisions,\textsuperscript{242} which has in turn impeded the establishment of the rule of law.

Indonesia’s judiciary has also been subject to political and administrative constraints outside of the Ministry of Justice, influences Tomasic and Kamarul attribute to its patriarchal system and culture.\textsuperscript{243} The anti-corruption watchdog, Transparency International, has consistently ranked Indonesia as one of the most corrupt nations in the world with bribery of the judiciary, police and security forces.\textsuperscript{244} Corruption erodes the independence and impartiality of the judiciary, and the accountability of the legislative and executive systems in a representative democracy. Other reports suggest that a large portion of the police force are corrupt, that local officials resort to bribes, that the legal code is disorganised and ineffective, and that the constitution itself creates many legal problems.\textsuperscript{245}

Weaknesses in judicial independence and the trial process have resulted in violations of fundamental human rights principles and have eroded the rule of law. Instead of everyone being equal before and under the law, the situation in Indonesia seems to be that those who have power or status are exempt from the law’s application. Indicted war criminals, for example, remain in active service of the Indonesian Army (the TNI), and many of those found guilty have had their convictions overturned on

\textsuperscript{242} Tomasic and Kamarul, above n 226, 150.
\textsuperscript{243} Ibid.
\textsuperscript{245} Damien Kingsbury, ‘Human Rights Prospects for Indonesia’ (1999) 8(a) \textit{Human Rights Defender} 6, 7.
In fact, many ordinary Indonesian citizens consider the TNI corrupt and open to bribery.\footnote{247}

Fair and just criminal trials are a crucial requirement in order to uphold the rule of law and basic democratic principles. As Hooper states, a human right has practical value only if its implementation can be guaranteed.\footnote{248} Impunity acts as a serious barrier to the implementation of human rights. The Indonesian government must ensure that all suspected human rights violations are properly investigated and, where appropriate, punished.\footnote{249} The TNI, as the military, must be held accountable to the democratically elected civilian government.\footnote{250} Indonesia’s history of failing to punish human rights violators has resulted in a society governed by a weak rule of law. As a consequence, there is the danger that Indonesia will continue to foster further human rights abuses, including violations of international conventions such as the \textit{CRC}.\footnote{251}

Although extensive measures have been put in place,\footnote{252} the government has failed to apply the law strictly and follow it through in every case. Police are still failing to arrest, prosecutors are reducing or dropping charges, judges are failing to convict and

\footnotesize\textsuperscript{246} Adam Hughes Henry ‘When is Hypocrisy “Good Governance”?’ (2006) \textit{Dissent} 33, 34.
\footnotesize\textsuperscript{247} Id, 35.
\footnotesize\textsuperscript{248} Hooper, above n 8, 182.
\footnotesize\textsuperscript{250} Ibid.
\footnotesize\textsuperscript{251} Hooper, above n 8, 188.
\footnotesize\textsuperscript{252} Such as the Corruption Eradication Commission or \textit{Komisi Pemberantasan Korupsi (KPK)}, and the President’s Anti-Corruption Team or \textit{Tim Task Tipikor}. 

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sentence the ‘flagrantly besmirched’, appeal judges are reversing convictions. As a result, offenders are either absconding or otherwise staying out of jail. 253

Nevertheless, there have been significant steps in the right direction from NGOs such as the Indonesian Transparency Society (Masyarakat Transparansi Indonesia), and the Indonesian Corruption Watch. 254 These NGOs have achieved a great deal in working with the government and local communities to try and improve the situation in Indonesia. The tasks they face are colossal; changing the attitudes, policy and practice entrenched during decades of authoritarian regimes will be a complex and ongoing process. Critics must bear in mind that this is no ‘quick fix’ reform. As with all political, social or legal reforms, this process will require extensive time and resources. 255

4.5.3 A Centralised Government

A centralised, unitary government is often incompatible with democracy and the rule of law. This is because in a centralised system the separation of powers between different branches of government is often unclear. A centralised government lacks a system of ‘checks and balances’ required to prevent arbitrary ruling. 256 Further, centralism does not facilitate the participation of local communities in decision-making; instead of control mechanisms being open and transparent, they are distant

254 Id, 15.
255 Lindsey and Santosa, above n 240, 15-6.
and hidden by layers of bureaucracy. It makes it easy for central governments to dominate minority groups, depriving them of certain political, economic and cultural rights. In contrast, in a federal system such as Australia all levels of government share in decision-making and policy-making. This emphasises the separation of powers and the rule of law.

Indonesia’s decentralisation and legal reform began as early as 1906, although it was not until the end of Suharto’s 32-year reign that large parts of the public resources and service delivery were transferred from the national government to the provincial and local governments. This has resulted in increased participation from local communities and strengthened democratic structures, which has reduced the potential for the central government to exercise arbitrary power and has helped combat bureaucracy and corruption.

On face value, the rights declared in Indonesia’s Constitution are quite extensive and cover many of the fundamental rights incorporated into the CRC. However, in the context of weak judicial independence, an unstable democracy, and a general lack of respect for the rule of law, the implementation of these rights in practice is a different matter. Zimmermann provides an excellent example of a nation which is in direct contrast with Indonesia in this sense. Great Britain has no written or codified constitution that guarantees human rights or the rule of law as does Indonesia, yet it functions as one of the strongest democracies in the world. Great Britain’s

257 Id, 36-7.
259 For example: the right to citizenship and equality before the law [arts 26, 27, 28D and 28I(5)], non-discrimination and equal opportunity [arts 28I(2), 28D(3) and 28H(2)], freedom of expression [arts 28, 28E(3), 28C(2), 28I(1)], right to education [arts 28C(1), 28F and 31], and freedom from torture [arts 28G(2) and 28I(1)].
260 Zimmermann: Culture of Legality, above n 156, 25.
government is under the law and individual rights are powerfully protected. The essential distinguishing features of Great Britain’s legal system are the doctrine of separation of powers, judicial review of legislation, the strength of the rule of law, and a culture of legality.261

Achieving the rule of law requires a complex interaction and balance between the government, law enforcement bodies, society and the individual. Even though there is no universally accepted definition of the rule of law, it is clear that it does not mean ‘rule by law’ or ‘the law of the rulers’.262 The existence of a fundamental and supreme set of written laws does not mean that the rule of law is operating effectively. Governments can use the law as a vehicle for oppression when a country is not protected by the rule of law, especially in the absence of a separation of executive, legislative and judicial powers263 The individuals that govern must be under the law and adhere to a universal set of higher ethical and moral values. Therefore, the most significant factor is not the law itself, but a system of ‘checks and balances’ which ensures restraint of arbitrary power.264 In this sense, the rule of law is more about the extra-legal, social circumstances rather than the legal mechanisms themselves.265

261 Id, 26.
262 Cowdery and Lipscomb, above n 149, 4.
263 Zimmermann: Culture of Legality, above n 156, 26.
265 Zimmermann: Culture of Legality, above n 156, 25.
5. Extra-legal Factors that Influence the Implementation of the CRC

5.1 Culture

5.1.1 Australia

Australia is a highly multicultural nation. The original immigrants were of British origin, but after the Second World War Australia’s population became much more ethnically diverse with immigration from a vast number of other nations. Nevertheless, people of European descent still constitute the majority of the population, approximately 91 per cent, followed by seven per cent of people of Asian descent, 1.9 per cent of Middle Eastern origin, with indigenous Aboriginal and Torres Strait Islanders making up 2.2 per cent. In June 2006, the Aboriginal and Torres Strait Islander population was estimated at 517,000, with approximately 30 per cent living in urban areas.

Indigenous Australians have been economically and socially marginalised since the British colonisation of Australia in 1788. They have been dispossessed and displaced, enduring violent treatment by the first settlers and exposure to diseases against which they had no immunity. For example, Aboriginals have been subjected to forcible removal of their children to ‘assimilate’ them into non-indigenous communities in the 1960s and 1970s. The disadvantaged position of indigenous

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Australians is still a major issue for the nation today in the areas of health, education, unemployment, poverty and crime, in both remote and urban populations.\textsuperscript{269}

With a 65 per cent following, Australia’s main religion is Christianity, the most popular denominations being Roman Catholic, Anglican, and Protestant.\textsuperscript{270} Five per cent of people follow ‘other’ religions such as Buddhism, Hinduism, Judaism or Islam, whilst approximately 15 per cent have no religious affiliation.\textsuperscript{271}

Australia does not face any significant barriers to implementing changes in policy and practice across a vast array of ethnic groups and languages. However, there have been concerns raised over implementing the standards under the CRC amongst its own indigenous ethnic groups.\textsuperscript{272} The standard of Aboriginal children’s health, education, housing, employment and representation in the juvenile justice system is of particular concern, and has been identified in feedback from the CRC Committee. According to Commissioner Jonas, the Aboriginal and Torres Strait Islander Social Justice Commissioner, there is an overwhelming sense that the crisis situation that Indigenous peoples face is highly likely to worsen substantially over the next decade due to the [fact] … that government programs will not be able to keep up with the growth of the Indigenous population.\textsuperscript{273}

\begin{thebibliography}{9}
  \bibitem{269} Evatt, above n 12, 12.
  \bibitem{271} \textit{Ibid}.
  \bibitem{272} Evatt, above n 12, 12.
\end{thebibliography}
He urges the Australian government to commit to do ‘whatever it takes to progressively improve the life chances and opportunities for Indigenous people’. 274

5.1.2 Indonesia

Indonesian culture is remarkably diverse. Spread across a vast array of islands, Indonesia varies in its ethnic, linguistic, religious and cultural groups. The Javanese are the largest and most politically dominant ethnic group and make up 45 per cent of Indonesia’s total population. 275 The next largest ethnic group are the Sundanese, which make up 14 per cent of the population, followed by the Madurese, Malays, Bataks, Minangkabau, Acehnese, Lampungese, Minahasans, Bugis, Makassarese, Toraja, and Dayak tribes. 276 A large percentage of the Papuan population are of Melanesian descent, and there are also several million Chinese descendants, with smaller populations of Indians, Arabs and Europeans spread across the nation. 277 Indonesia has a history of ethnic discrimination, especially towards people of Chinese origin. These have included social, religious and ethnic tensions with violent conflicts which have undermined Indonesia’s political and economic stability.

Over 742 different dialects and languages are spoken in Indonesia. 278 However, the official national language is Bahasa Indonesia. This is spoken by a majority of the

274 Ibid.
276 Ibid.
277 Ibid.
278 Ibid.
population and used in newspapers, television, and in education. There are many more languages that are popularly spoken, with the majority of Indonesians being bilingual. These include Javanese, Sundanese, Acehnese, Batak, Minangkaku, Malay, Minahasan, Balinese, Sasak, Sumbawan, some Trans-New Guinean and West Papuan languages, as well as the dialects of Torajan, Buginese and Makassarese. Some portions of the population still speak Dutch, the language of the Dutch colonisers, although an increasing number of people speak English.

Indonesia is the most populous Muslim-majority country in the world, with 87 per cent of the population being followers of Islam. Approximately nine per cent of the population is Christian, mostly Protestant, with approximately two per cent being Roman Catholic. Buddhists make up only one per cent of the population, being mainly Chinese descendants, whilst Hinduism does not have a significant following outside of Bali. Freedom of religion is expressly included in the Indonesian Constitution, but the government recognises only the above-mentioned four religions and Confucianism.

Indonesia’s immense cultural diversity adds further complexity to implementing changes in legislation, policy, attitudes and practice as required by the CRC. As there are so many different languages and competing religious and cultural groups, it is not surprising that the CRC Committee has identified this as impeding the effective and expeditious implementation of the Convention. It is also important to note that there are many traditional cultural and ethnic practices amongst these

\[279\] Ibid.
\[280\] Ibid.
\[282\] Microsoft Encarta 2008: Indonesia, above n 274.
groups which are considered violations of provisions of the CRC. One such example is child marriage. Changing such historical, well-entrenched traditions and attitudes presents enormous challenges that require long-term planning and input.

5.2 Socio-Economic Factors
5.2.1 Australia

Australia is a nation rich in natural resources and enjoyed a growth in gross domestic product (GDP) per capita from $AU41,000 to 51,000 in the 10 years up to 2007/2008.284 This amounts to an annual increase in GDP of 2.2 per cent.285 Australia’s main industries are industrial and transportation equipment, food processing, chemicals, steel, and mining which have all experienced growth in recent years.286 Australia is a major exporter of wool, meat, dairy products and wheat.

Australia is in a better position financially and in terms of national resources to fund legislative changes, and initiate government action to implement the CRC and raise the standards of children’s rights. However, it is important to note the Concluding Observations of the CRC Committee, which stated that, despite increases in budgetary allocations in many areas of child care and well-being, indigenous children and other vulnerable groups still require greater input.287 Particular attention was drawn to Article 4 CRC, which requires State Parties to prioritize

285 Ibid.
286 Microsoft Encarta 2008: Indonesia, above n 274.
287 Concluding Observations: Australia, above n 119, [17].
budget allocations to ensure the implementation of the ‘economic, social, and cultural rights’ of children ‘to the maximum extent of their available resources’.  

Van Bueren claims that children’s social and economic rights are essentially ‘transformative and redistributive’ because children have a legitimate claim to benefit from an equal share in a states’ resources. The term ‘economic resources’ should be defined more broadly to include human resources, such as time, energy, motivation and skills, and organisational resources, such as the formal and informal relationships by which actions are taken in society. Van Bueren acknowledges the difficulties in ascertaining whether State or Federal governments are spending enough on specific categories of child expenditure. This is why she recommends that governments introduce a ‘children’s budget’. This would not be a separate budget for children, but ‘an analysis of the resources that the government is spending on children and services’. She suggests that this is the type of information which is required by the CRC Committee.

5.2.2 Indonesia

Indonesia’s current GDP per capita is $US 3,361 (PPP), and its annual GDP growth was 6.3 per cent in 2007. Although Australia’s overall GDP per capita is more than 10 times greater than Indonesia’s, Australia’s annual GDP growth is

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288 Id, [18].
289 Van Bueren, above n 134, 13.
290 Ibid.
291 Ibid.
292 Ibid.
293 Ibid.
294 United Nations in Indonesia, above n 280.
295 Department of Foreign Affairs and Trade, above n 211.
significantly lower than Indonesia’s. Indonesia currently produces over 80 per cent of the oil and gas supplied to Southeast Asia.\textsuperscript{296}

Indonesia’s economy thrived between 1980 and 1990, although this mainly resulted in expansion of the middle class, whilst the lower classes and percentage of population living in poverty remained relatively stable.\textsuperscript{297} Much of this can be attributed to corruption among government officials, with an estimated 20-30 per cent of the $US30 billion World Bank/IMF loans disappearing during the Suharto era.\textsuperscript{298} Indonesia’s earlier economic growth was brought to a halt by the 1997-98 East Asian financial crisis. Indonesia’s solid economic growth has resumed in recent years following the end of President Suharto’s era and significant political and economic reforms.\textsuperscript{299}

Despite this, Indonesia still needs to address many challenges in order to achieve a sustainable GDP growth and a reduction in unemployment and poverty.\textsuperscript{300} As identified by the Australian Department of Foreign Affairs and Trade, these challenges include: declining competitiveness compared to China and India, labour skills, financial system reforms, anti-corruption efforts, tax system reforms, legal system reforms and the need to invest significantly in infrastructure.\textsuperscript{301} Particularly relevant to the implementation of the CRC is the fact that recent growth in Indonesia’s economy has not been accompanied by strengthening of the rule of law.

\textsuperscript{296} Microsoft Encarta 2008: Indonesia, above n 274.
\textsuperscript{297} Ibid.
\textsuperscript{298} Hughes Henry, above n 245, 35.
\textsuperscript{299} Department of Foreign Affairs and Trade, above n 211.
\textsuperscript{300} Ibid.
\textsuperscript{301} Ibid.
which would protect citizens from arbitrary power from the government and powerful private institutions.\(^{302}\)

International aid is another issue which must be considered when assessing Indonesia’s resource limitations in implementing the \textit{CRC}. Hannan suggests that developing states did not approve of the final version of the \textit{CRC} but nevertheless ratified it, hoping they would receive much-needed funds from the international community.\(^{303}\) Indonesia received aid from the International Monetary Fund (\textit{IMF}) up until December 2003, and still receives aid from the Asian Development Bank and the Consultative Group on Indonesia (\textit{CGI}).\(^{304}\) However, as discussed earlier, it is estimated that 20-30\% of the $US30 billion World Bank/IMF loans disappeared during the Suharto era.\(^{305}\) Although anti-corruption measures have been partially effective, corruption remains a concern that overshadows the transparency and use of foreign aid.

The CRC Committee has criticised Indonesia for the way in which it has utilised its existing resources, expressing concern that it has not allocated sufficient resources to the social sector, especially to education and health.\(^{306}\) However, the reality remains that Indonesia is faced with fewer resources than Australia with which to undertake appropriate ‘legislative, administrative and other measures’ to implement the \textit{CRC}.

\footnotesize
\begin{itemize}
\item \(^{302}\) Tomasic and Kamarul, above n 226, 142.
\item \(^{303}\) Hannan, above n 46, 80.
\item \(^{304}\) Hughes Henry, above n 245, 35.
\item \(^{305}\) \textit{Ibid}.
\end{itemize}
5.3 Physical Geography and Demographics

5.3.1 Australia

Australia has a large landmass that stretches over seven and a half million square kilometres and comprises of six States and two Territories.\(^{307}\) Although it has over 8000 subsidiary islands, the majority of the population lives on the mainland which alone has an area of over seven million square kilometres.\(^{308}\) Despite Australia’s land area being more than four times larger than Indonesia’s, Australia’s population density is significantly lower. In 2008, Australia’s estimated population was just over 20.5 million people, 10 times less than Indonesia’s population.\(^{309}\) Approximately 93 per cent of the population lives in major cities and urban areas, mostly situated along the coastline.

At first glance, it may seem that Australia’s vast uniform land mass would provide a practical advantage over Indonesia’s segmented archipelago of islands. However, many of the areas of need in terms of children’s rights identified by the CRC Committee relate to rural and remote indigenous communities. The vast interior of Australia, locally referred to as ‘the outback’, consists mostly of desert plains with limited urban development or infrastructure. Service delivery and resource allocation are logistically difficult in these regions, especially in regard to health care and education. Such difficulties explain why Australia is yet to achieve an adequate level of children’s rights in rural and remote areas.

\(^{307}\) Microsoft Encarta 2008: Australia, above n 265.
\(^{308}\) Ibid.
\(^{309}\) Ibid.
As a result of Australia’s physical geography, it is difficult for the government to recruit teachers to remote areas, leading to a lower standard of education than in urban areas. It is also difficult to attract qualified medical staff, which may account for generally poorer health care standards in remote areas. Compounding these issues is the fact that it is difficult to ensure that children in rural areas receive the same resources or services as those in urban areas. Considering that children in rural areas are largely Aboriginal, it accounts for the resulting discrepancy between the standard of children’s rights in Aboriginal communities, when opposed to other communities.

5.3.2 Indonesia

Indonesia is the largest archipelago nation in the world, comprising of over 17,000 islands including the five main islands of Sumatera, Java, Borneo/Kalimantan, Sulawesi and Papua.\(^{310}\) More than half of the population lives on the island of Java, where Indonesia’s capital city, Jakarta, is located.\(^{311}\) Indonesia’s total land area covers 1.9 million square miles and is divided into 33 provinces.\(^{312}\) Indonesia is the fourth most populous country in the world.\(^{313}\) In 2006, the estimated population was 222 million, with 48 per cent estimated to live in urban areas.\(^{314}\)

Understandably, the CRC Committee identified aspects of Indonesia’s geography as barriers to the implementation of the CRC. Having such a large population spread


\(^{311}\) Microsoft Encarta 2008: Indonesia, above n 274.

\(^{312}\) Profile of Indonesia, above n 309.

\(^{313}\) United Nations in Indonesia, above n 280.

\(^{314}\) WHO, above n 282.
across thousands of separate islands creates obvious practical and logistic barriers to law enforcement, public awareness and education, and uniform policy, standards and practice. This is especially so when one considers that many of these islands are largely underdeveloped with limitations in technology, communications and infrastructure. In a similar way to Australia, people in rural areas generally have a lower standard of health, education and opportunities than people in urban areas.
CHAPTER FIVE

Australia’s ‘Incomplete’ Implementation of the *CRC*

1. Evaluating the Implementation of the *CRC*

In order to objectively assess a state’s response to its international obligations and its accountability under human rights conventions, the United Nations Development Programme (UNDP) developed a human rights international accountability index in 2000.

Table 2. An outline for a Human Rights International Accountability Index

<table>
<thead>
<tr>
<th>Dimension</th>
<th>Basis for Indicators</th>
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</thead>
<tbody>
<tr>
<td>Accept: fundamental acknowledgment of international accountability</td>
<td>Ratification or accession to:</td>
</tr>
<tr>
<td></td>
<td>• International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td></td>
<td>• International Covenant on Economic, Social and Cultural Rights</td>
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<td></td>
<td>• International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<td></td>
<td>• Convention on the Elimination of all Forms of Discrimination Against Women</td>
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<td></td>
<td>• Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment</td>
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<td></td>
<td>• Convention on the Rights of the Child</td>
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<tr>
<td></td>
<td>• The four Geneva Conventions of 1949</td>
</tr>
<tr>
<td>Cooperate: Participation in established international procedures</td>
<td>Submission of reports due to treaty bodies in good time</td>
</tr>
<tr>
<td></td>
<td>• Provision of requested information to special rapporteurs and thematic missions</td>
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<td></td>
<td>• Cooperation with monitoring missions</td>
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<tr>
<td></td>
<td>• Cooperation with UN-sponsored election monitors</td>
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<tr>
<td></td>
<td>• Cooperation with the International Committee of the Red Cross in relation to prison visits</td>
</tr>
<tr>
<td>Respond: Extent of adequate replies to requests</td>
<td>Adequate response to recommendation by treaty bodies</td>
</tr>
<tr>
<td></td>
<td>• Adequate response to final views adopted in connection with communication procedures</td>
</tr>
<tr>
<td></td>
<td>• Adequate response to recommendation by country rapporteurs and thematic mechanisms</td>
</tr>
</tbody>
</table>

This ‘index’ looks at three main factors, including a state’s:

1. Acceptance of international human rights treaties through accession or ratification;
2. Cooperation through submission of periodic reports to committees (assessed according to whether there are any delays in submissions, and whether they have provided the information which has been requested); and
3. Responsiveness to the views and conclusions of UN treaty committees.

In addition, the CRC Committee is the UN body entrusted with the monitoring of the implementation of the CRC by State Parties. The Committee is well-qualified to assess the implementation of CRC provisions by State Parties. The Committee aims to establish a ‘constructive dialogue’ with State Parties and welcomes open discussion and co-operation. An analysis of the Concluding Observations of the CRC Committee reveals that the Committee is more concerned with the actual implementation of the CRC provisions, rather than with the legislative reforms undertaken by the State Parties. The Concluding Observations will be used to analyse the implementation of the CRC in Australia and Indonesia.

2. Feedback from the CRC Committee to Australia

2.1 General Measures of Implementation

The Committee expressed concern that many of its previous recommendations to Australia’s 1997 report had still not been addressed. These included ‘special
problems still faced by indigenous children, corporal punishment, the spread of homelessness among young people, children in immigration detention, juvenile justice, and the disproportionately high percentage of indigenous children in the juvenile justice system.  These issues will be explored individually below; however, it is important to note that in terms of general implementation of the Convention, Australia’s delay in addressing previous recommendations demonstrates a lack of responsiveness to the views and recommendations of the UN Committee.

The Committee also expressed general concern at how the Convention has been used and implemented into domestic law and policy. Whilst commentators such as Van Bueren call for incorporation of provisions of the CRC into national law, they also acknowledge the complexities and challenges involved in incorporating economic and social rights, especially when considering matters of resource allocation.

However, the Committee expressed concern that the Australian judiciary cannot override legislation if it is inconsistent with the CRC. This distinctive feature of the Australian legal system arises from the sovereignty of the Commonwealth government and the principles of judicial independence and judicial interpretation. Much debate has arisen over the legal weight that should be given to international human rights law when inconsistencies in Australian domestic law arise. Many fear a threat to Australia’s sovereignty from the increasingly powerful body of international laws and treaties which the Commonwealth has ratified and thus agreed to ensure that Australia’s domestic law and policy complies with. Attitudes arise

316 Concluding Observations: Australia, above n 119, [5].
317 Van Bueren, above n 134, 14.
318 Concluding Observations: Australia, above n 119, [9].
from the concern that Australian law should not be dictated by a ‘non-elected, non-
democratic, non-government body outside of Australia’. However, as a signatory
to the Convention, Australia is under a legal obligation to ensure that there are no
inconsistencies between its domestic law and policy, and the rights under the CRC.
Despite having taken considerable steps in implementing extensive State and Federal
initiatives such as the ‘National Plan of Action’ and ‘National Agenda for Early
Childhood’, Australia still does not have a uniform national children’s rights
policy or legislation.

Howard conducted a recent analysis into how State, Territory and Commonwealth
governments have addressed some of the international standards in the CRC relating
to child protection. Whilst she found that a majority of the relevant child protection
standards were met by each State and Territory, there were gaps in specific policies,
including the best interests of the child, special measures of child protection, the
child’s right to an identity, the child’s right to judicial review, and child’s right to
participate in decision-making. Howard concluded that aspects such as the need to
observe cultural factors in relation to indigenous children, and the need to afford
special protection to children in care, disabled children, and child victims of abuse or
torture were neglected. The implementation of a comprehensive children’s rights
legislation or policy across all States is essential. The Committee has also expressed
concern that Australia lacks a comprehensive national policy on children’s rights to

319 Jones: Myths, above n 63, 133.
320 See Commonwealth of Australia, Australia’s Combined Second and Third Reports under the
Convention on the Rights of the Child (2003), 4-9 (Australia’s Combined Second and Third
Reports).
Australian Children’s Rights News 19, 19.
322 Id, 21.
323 Ibid.
address gaps in current legislation and policy and to prevent inconsistencies between its domestic laws and its international obligations.\textsuperscript{324}

The absence of a national policy may be in part due to fears that international conventions such as the \textit{CRC} interfere with Australia’s Federal balance. This arises from the opinion that the \textit{CRC} gives the Commonwealth unprecedented power over the States where, in the absence of the treaty, they would not have been able to legislate. It may also result from the lack of coordination between the States and the Commonwealth, and jurisdictional debates regarding the implementation of children’s rights.

Australia’s systems of monitoring and accountability were also raised as an area of concern in the Committee’s feedback. Whilst some Australian States have a Commissioner for Children\textsuperscript{325}, at a Federal level there is no Commissioner specifically devoted to children’s rights in the Human Rights and Equal Opportunity Commission (\textit{HREOC}). The Committee also noted that there have been substantial cuts in HREOC’s funding, which has undoubtedly reduced its capacity to manage issues of children’s rights.\textsuperscript{326} The Committee recommended that Australia needed to reassess and reallocate resources in order to address this problem.\textsuperscript{327} This clearly arises from the Committee’s assumption that Australia does indeed have the resources available within its budget, but has failed to allocate them adequately in order to properly implement and maintain accountability under the \textit{CRC}. This could

\textsuperscript{325} New South Wales and Queensland (Commissioners for Children and Young People), Tasmania (Commissioners for Children)
\textsuperscript{326} Id, [15].
\textsuperscript{327} Id, [16].
also be considered a breach of the requirement for appropriate recourse allocation expressly outlined in Article 4 of the Convention requiring all State Parties to make necessary steps to implement the CRC ‘to the maximum extent of their available resources’.

Further, the Committee raised the issue of resource allocation in relation to budgetary allocations to ‘child care and well-being, indigenous children and other vulnerable groups’. Despite the significant increases in resource allocation to children’s services, there are considerable differences in the standard of living across vulnerable groups. Whilst the Committee recognises Australia’s improvements since their initial report, it urges that more focus must be given to prioritisation of resources.

The Committee’s comments on matters of resource allocation echo one of the themes of this thesis in relation to Australia’s response to its obligations under the CRC. Australia has indeed taken some measures to implement the CRC and advance children’s rights, but given its solid political and economic foundation, it appears well within its capacity to do much more.

2.2 The General Principles

2.2.1 Non-discrimination

The Committee expressed serious concern over Australia’s compliance with the principle of non-discrimination, especially in regard to Aboriginal and Torres

\[328\] Id., [17].
Straight Islander children, asylum-seeking children and children belonging to ethnic and/or national minorities such as Arabs and Muslims.\textsuperscript{329}

Action taken by the Federal government has so far included enactment of the \textit{Age Discrimination Act 2004} (Cth), the \textit{Disability Discrimination Act 1992} (Cth), the \textit{Human Rights and Equal Opportunity Commission Act 1986} (Cth), the \textit{Racial Discrimination Act 1975} (Cth) and the \textit{Sex Discrimination Act 1984} (Cth). There have also been changes to anti-discrimination legislation in some States to prohibit racial and religious vilification and to protect pregnant and lactating women, as well as various other new sources of anti-discrimination legislation which have been passed.\textsuperscript{330} The Federal government has also launched the ‘\textit{Living in Harmony}’ program which specifically tackles racism and discrimination issues by aiming to increase respect for indigenous youths and people from different cultural backgrounds.\textsuperscript{331}

Despite this, the Committee urges Australia to further strengthen its administrative and judicial measures in specifically-identified areas. The Committee recognises that implementation of the principle of non-discrimination into domestic law is fundamental, but not sufficient in itself; other strategies are needed in response to challenges arising from discriminatory traditions or customs.\textsuperscript{332} As suggested by Shackel, further practical measures may include: ‘studies of discrimination..., development of comprehensive strategies, information and awareness campaigns,

\textsuperscript{329} Concluding Observations: Australia, above n 119, [24-6].
\textsuperscript{330} Australia’s Combined Second and Third Reports, above n 319, 17-21.
\textsuperscript{331} Id, 19.
and involvement of political, religious and community leaders in influencing attitudes and discouraging discrimination. 333

2.2.2 The Best Interests of the Child

Australia has maintained that this is a key principle underpinning all legislation and practice.334 The Committee agrees that many of Australia’s laws and policies fundamentally reflect this principle, but contends that, in practice, implementation does not always reflect this.335 It refers to the example of alternative care, an issue which Lynch336 has also declared as an area of concern, especially for indigenous children. A 2001 Victorian report found that Aboriginal children are 10 times more likely to be involved in the child protection system than non-Aboriginal children, resulting in multiple and damaging effects from the separation or removal from their families with a high percentage being placed with non-Aboriginal carers.337 Whilst Australia’s child protection laws reflect the notion that the best interests of the child are paramount in making any decisions regarding alternative care and placement in theory, in practice, outcomes do not necessarily reflect the standard that the CRC intends to achieve.

Lynch criticizes the courts for viewing indigenous children as ‘decontextualised individuals’ whose interests are considered separate from those of their families, communities and culture, and thus ignoring the devastating impact that follows from

333 Shackel, above n 30, 34.
334 Australia’s Combined Second and Third Reports, above n 319, 21.
335 Concluding Observations: Australia, above n 119, [27-8].
337 Id, 504.
placing these children in care outside their family or community. Given the supreme importance of family and community in Aboriginal culture, decisions to place children with non-Aboriginal carers rather than with other appropriate carers within their extended family must be questioned in light of what is in the best interests of the child. Such factors must be taken into account when implementing law and policy into practice.

2.2.3 Respect for the Views of the Child

Australia appears to have taken extensive measures to ensure full implementation of the principle requiring State Parties to respect the views of the child. Children have been given an active role in many levels of government decision-making and processes. Examples include the establishment of a Youth Roundtable at a Federal level and in some States, children’s commissions, a National Indigenous Youth Leadership Group and various schemes addressing how children are dealt with in the legal system. There have also been changes to family services, especially in relation to parental conflict or separation, and legislation passed for children in out-of-home care, although this area requires further attention. However, the Committee has commented that despite these extensive measures, the views of the child are not always taken into account in judicial and administrative proceedings. It also expressed concern at the limited equity and participation of children in practice, for example, the average age of the participants in the Federal Roundtable

338 Id., 522.
339 Australia’s Combined Second and Third Reports, above n 319, 22-7.
340 Ibid.
341 Concluding Observations: Australia, above n 119, [29-30].
in 2004 was 20.\textsuperscript{342} Certainly these are areas that Australia can improve on; however, a lack of respect for the views of the child does not appear to be one of the major areas of concern for children’s rights in Australia.

2.3 Civil Rights and Freedoms

Australia’s performance in the implementation of the CRC’s remaining substantial provisions appears to vary greatly across the five main groups of rights. Australia has generally achieved satisfactory outcomes in the implementation of the articles which make up ‘civil rights and freedoms’. Nevertheless, the Committee did express concerns about children’s exposure to violence, racism and pornography, especially over the Internet,\textsuperscript{343} and the fact that corporal punishment is still lawful in Australia under the guise of ‘reasonable chastisement’ in certain State legislation and in many private education institutions.\textsuperscript{344} Another major concern expressed by the Committee is the preservation of indigenous children’s rights to an identity, name, culture, language, and family relationships. The CRC is one of the few international treaties that specifically recognises indigenous rights, as seen in Article 30 which states that:

In those States on which ethnic, religious, or linguistic minorities or persons of indigenous origins exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own religion, or to use his or her own language.

Article 29(1)(c) CRC also discusses the requirement that children develop respect for their own ‘cultural identity, language and values’, which is particularly relevant to

\begin{itemize}
  \item \textsuperscript{342} Ibid.
  \item \textsuperscript{343} Id. [33].
  \item \textsuperscript{344} Id. [35].
\end{itemize}
the preservation and promotion of indigenous rights and to the principle of self-
determination. Article 29(1)(d) CRC specifically mentions the importance of
educating children to be prepared to understand ‘friendship among all peoples’
including those of ‘indigenous origin’. The CRC is unique as an international
instrument because it expressly recognises indigenous rights. Gerber\textsuperscript{345} has
criticised the wording of some of these provisions arguing that it relates more to
educating others on how to live with indigenous people, rather than asserting any
particular rights for indigenous children themselves. Even so, it remains an
important article that has significant implications for the preservation of indigenous
identity.

As a signatory to the CRC, Australia has a legal obligation to protect the rights of
indigenous Australian children and to ensure they are given access to basic rights of
cultural preservation and self-determination. The basic principle of self-
determination has been consistently asserted by indigenous Australians as their most
important and fundamental right.\textsuperscript{346} Australia’s shortcomings in implementing this
provision and recognising such fundamental rights for its indigenous people are
definitely an area of priority it needs to address.

### 2.4 Family Environment and Alternative Care

Greater concerns were expressed in relation to Australia’s implementation of the
provisions under ‘family environment and alternative care’. It must be noted that

\textsuperscript{345} Gerber, above n 54, 74.
\textsuperscript{346} Sarah Pritchard, ‘From Welfare to Rights: Self-determination is Fundamental’ (Feb-Mar 2000)
\textit{Arena} 45, 45.
Australia has taken a number of measures to strengthen and support Australian families by: (a) improving parenting support services, and (b) addressing the importance of balancing work and family through:

- changes in workplace agreements and legislation;
- provisions for mandatory paid paternity leave;
- creating access to optional paid parental leave;
- initiating family support services such as provision of family law information and dispute resolution resources;
- introducing new legislation addressing enforcement of parenting orders; and
- the establishment of ‘safe points’ for handing over children in shared parenting agreements.\(^{347}\)

Despite this, the Committee noted a considerable increase in the number of children in out-of-home care with an overrepresentation of indigenous children.\(^{348}\) As discussed above, the concerns which arise from this include lack of stability and security for children in alternative care, difficulties maintaining contact with families, and inadequate medical care.\(^{349}\) In response to this issue, the Committee echoed the opinion of Lynch,\(^{350}\) calling for Australia to ‘intensify its cooperation with Indigenous community leaders and communities to find suitable solutions for indigenous children in need of alternative care within indigenous families’.\(^{351}\) Whilst the Federal government had begun to implement its new Indigenous Child Placement

\(^{347}\) Australia’s Combined Second and Third Reports, above n 319, 38–42.
\(^{348}\) Concluding Observations: Australia, above n 119, [37(a),(b) and (c)].
\(^{349}\) Ibid.
\(^{350}\) Lynch, above n 334, 508.
\(^{351}\) Concluding Observations: Australia, above n 119, [39].
Principle aimed at addressing this issue, the Committee stresses that full execution is required.

The Committee also highlighted issues surrounding the rights of the children of imprisoned parents. Australia has taken steps to introduce legislation and reform policies in order to guarantee that the children of asylum seekers and refugees are reunited with their parents as soon as practically possible. However, the Committee stresses that a considerable number of children, especially amongst indigenous populations, still have a parent in prison. This is an area in which Australia needs to strengthen its current measures in order to provide these vulnerable children with adequate support, and to assist in the safe reunification with their parents.

In Australia’s Combined Second and Third Reports to the CRC Committee, child abuse and violence within the family are identified as a ‘major concern in the Australian Community’ despite ongoing efforts of the government. Similarly, Australian NGOs have raised concern over the high rates of abuse and neglect within family units and inadequacies in the availability of services to assist children in this area.

352 Australia’s Combined Second and Third Reports, above n 319, 43-8.
353 Id, 51-3.
354 Concluding Observations: Australia, above n 119, [40].
355 Australia’s Combined Second and Third Reports, above n 319, 50.
356 Id, 58-9.
In response, many State governments have significantly increased budgetary resources allocated to child protection, and selected States, such as Western Australia, Queensland and Victoria, have undertaken significant legislative changes and implemented new government programmes designed to reduce child abuse and family violence. Under the Australian Constitution, child protection is an area under State and Territory jurisdiction, however, the Federal government has also provided support in the way of collaborative work on indigenous issues and has also trialled various projects to improve family law procedures. In order to address specific issues relating to domestic violence, the Federal government has set up a programme called Partnerships Against Violence (PADV) which is specifically aimed at protecting children and implementing strategies to address issues in indigenous communities. Similarly, the Aboriginal and Torres Strait Islander Commission (ATSIC) has funded various programmes to prevent violence and child abuse in families as well as various initiatives led by individual States. However, an alarmingly high number of children within Australia are still exposed to domestic violence and child abuse, which not only affects their mental and physical health, but also their educational and employment opportunities.

2.5 Basic Health and Welfare

The Committee raised a number of concerns in relation to this group of provisions. One concern was in relation to children with disabilities, an area which was scarcely

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357 Id, 59.
358 Id, 54-6.
359 Id, 59.
360 Id, 60.
361 Id, 60-1.
362 Concluding Observations: Australia, above n 119, [45].
addressed in Australia’s Periodic Combined Second and Third Reports. Concerns were raised over the lack of data and information on disabled indigenous children, disabled children in rural or remote communities and alternative care for children with disabilities.\textsuperscript{363} The Committee made a number of recommendations to address this issue which ranged from improving national data collection to increasing public awareness and accessibility to financial and professional resources, and implementing various child development, rehabilitation and disability standards programs.\textsuperscript{364} These are fundamental requirements that would be expected to already be in place as minimum standards in most developed countries, especially in relation to data collection and provision of services to children with disabilities, and especially given Australia’s access to technological, financial and human resources.

The Committee also raised a number of concerns specifically in relation to the health standards of the indigenous population. Despite the reported decline in infant mortality rates in indigenous populations, these rates continue to be higher than for non-indigenous populations, a statistical pattern which can be seen across many other indicators of children’s health.\textsuperscript{365} Other concerns specific to indigenous populations included: higher rates of malnutrition amongst indigenous children compared to non-indigenous children despite governmental efforts aimed at improving childhood nutrition and food health, high youth suicide rates, especially among indigenous and homeless populations, and the concern that persons diagnosed with AIDS had more than doubled in the previous four years.\textsuperscript{366} State and Federal governments have initiated various health plans and programs in order to address areas of need.

\textsuperscript{363} Ibid.
\textsuperscript{364} Id, [46].
\textsuperscript{365} Id, [47].
\textsuperscript{366} Id, [47-54].
especially in improving the situation of mental health. However, these measures do not appear to be targeted specifically at indigenous populations in order to address the concerning disparity in children’s rights and health standards.

Australia attributes the differences in the health status between indigenous and non-indigenous Australians to a combination of a multitude of factors such as:

- **Socioeconomic** – low education, employment and income levels;
- **Social and Political** – dislocation of communities, problems with mainstream services and lack of culturally appropriate services;
- **Environmental** – poor living environments, poor housing, poor environmental infrastructure, poor access to fresh, healthy foods for those in remote areas;
- **Access** – location, poor health linkages between Aboriginal Community Controlled Health Services and mainstream health providers, cultural/social issues, workforce issues (numbers and qualifications), financial barriers; and
- **Specific Health Risks** – low birth weight, poor nutrition, hazardous levels of alcohol use, high tobacco use, low levels of physical activity.367

Indeed, many health problems identified by the Committee in relation to indigenous children appear to stem from the complex interactions between social and cultural disruption, including dispossession of land and introduction of new diseases.368 The Committee also identified access to health care services, in particular for those living in rural and remote communities, as an area that needs attention.369 Despite Australia’s excellent rural medical training, and the existence of community health clinics in most communities, the statistics reflect a significant inequality in access to emergency medical services in remote areas. As one physician points out, children

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367 Australia’s Combined Second and Third Reports, above n 319, 56.
369 Concluding Observations: Australia, above n 119, [47].
living in central Australia have highest rates of rheumatic fever than anywhere else in
the world, coupled with rates of skin, lung, and gastrointestinal infections which are
comparable to children living in poverty in Africa.\textsuperscript{370} Although there are certainly
practical difficulties in providing health care services to children living in remote
communities, it is nevertheless an area which Australia should be able to address
given its wealth of economic and human resources. Nettheim quotes from the Social
Justice Report 2005, which states that it is ‘inconceivable that a country as wealthy
as Australia cannot solve a health crisis affecting less than 3 per cent of its
population’.\textsuperscript{371}

Other health-related concerns raised by the Committee include potential
misdiagnoses of Attention Deficit Hyperactivity Disorder (\textbf{ADHD}) and Attention
Deficit Disorder (\textbf{ADD}), and increasing rates of mental health problems associated
with substance abuse. Despite the injection of significant Federal government funds
towards improving provision of health care services to rural and remote
communities, few of these initiatives are specifically directed at improving children’s
services.\textsuperscript{372}

The Australian government has made many efforts towards raising the standards of
living, especially in relation to indigenous housing and infrastructure, where
significant resources and funding have been allocated over the past few years.\textsuperscript{373}
Nevertheless, the Committee continues to raise concerns over the inadequate

\textsuperscript{370} Quilty, above n 366, 5.
\textsuperscript{371} Garth Nettheim, ‘Human Rights and Indigenous Reconciliation in Australia’ (2007) 10 Flinders
\textsuperscript{372} Australia’s Combined Second and Third Reports, above n 319, 60-4.
\textsuperscript{373} Concluding Observations: Australia, above n 119, [55-8].
standard of living of children in indigenous, and rural and remote communities. Further concerns are raised over the fact that Australia is yet to define an official poverty line, and over inadequate consideration of the resulting negative impact of poor living conditions on children’s well-being and development.

2.6 Education, Leisure and Cultural Activities

In this group of substantial provisions, Australia has undertaken various measures in order to implement the corresponding provisions of the CRC. These legislative and administrative actions spread extensively across education, vocational training, human rights promotion including anti-racism education and awareness, and promotion of leisure and cultural activities. The Committee’s feedback on the implementation of these provisions was generally positive, although it identified two areas of concern, namely: the impact of bullying in schools on children’s psychological health, educational achievements and social development, and the standard of education and academic achievements in children living in rural and remote Australia and amongst indigenous communities.

Loizou also agrees that Australia’s provision of educational services and support for indigenous children is inadequate. Education is one of the most basic and fundamental components of child development, and Articles 28 and 29 of the CRC

\[Footnotes\]

374 Id. [55].
375 Id. [56].
376 See Australia’s Combined Second and Third Reports, above n 319, 68-76.
377 Concluding Observations: Australia, above n 119, [59-60].
provide a greater emphasis on education than any other human rights instrument.\textsuperscript{379} There is a significant disparity in educational outcomes compared to non-indigenous Australians, directly related to the high rate of non-attendance and school suspensions.\textsuperscript{380} Loizou attributes this to the limitations of the Australian education system to provide for marginalised groups, and deficiencies in the home environment of indigenous Australians, which adversely impact on children’s general health, well-being and ability to do well at school.\textsuperscript{381} He praises the Australian government for its outstanding policy statements on the education priorities for indigenous children, but highlights the need for follow-up and implementation of these policies in order to fulfil its international obligations to indigenous Australian children.\textsuperscript{382}

\section*{2.7 Special Protection Measures}

This is where the greatest number of concerns have been raised in relation to Australia’s performance in the area of children’s rights and response to the legal obligations under the \textit{CRC}. Areas of concern include children in immigration detention, homeless children, children affected by sexual exploitation, trafficking and substance abuse, the administration of juvenile justice, and children belonging to indigenous groups.\textsuperscript{383}

In Australia’s Combined Second and Third Reports to the CRC Committee, the State Party acknowledged that the Committee and certain NGOs were concerned about

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{380} Loizou, above n 376, 35.
\item \textsuperscript{381} \textit{Ibid}.
\item \textsuperscript{382} \textit{Ibid}.
\item \textsuperscript{383} Concluding Observations: Australia, above n 119, [66-7].
\end{itemize}
\end{footnotesize}
Australia’s immigration detention policy; however, it maintained that the Federal government believed that this policy was not inconsistent with Australia’s obligations under the Convention.\(^{384}\) The report claimed that Australia provides adequate protection to children who are refugees, including the consideration of the best interests of the child in the administration process.\(^{385}\) Indeed there have been changes to the Migration Act 1958 (Cth) whereby children can now be held in detention only as a measure of last resort. However, in practice children who are found to be unlawful entrants in Australia are still automatically placed in administrative detention until their situation can be assessed.\(^{386}\)

Guillen\(^{387}\) shares the concern of the Committee over Australia’s mandatory detention laws which deprive children of their basic rights and breach the CRC. Prolonged detention of children in immigration detention centres may result in violations of children’s rights, including the right to be protected from violence, the right to enjoy the highest attainable standard of physical and mental health, the right to an education, the right of disabled children to live optimally, and the right of unaccompanied children to receive special protection and assistance.\(^{388}\) This not only violates Article 37(b) CRC, which specifically states that detention should only be used as a last resort for the shortest period of time, but also one of the fundamental principles of the CRC, that all actions should be in the best interests of the child.\(^{389}\) Guillen also points out that Australia’s legal obligations under the CRC

\(^{384}\) Australia’s Combined Second and Third Reports, above n 319, 77.

\(^{385}\) Ibid.

\(^{386}\) Concluding Observations: Australia, above n 119, [62].


\(^{388}\) Ibid.

require the standards to be applied to all children in Australia without discrimination or exception in certain areas such as immigration detention. Guillen claims that detention is not a necessary policy and that Australia needs to undertake immediate and significant change in this area in order to prevent children from being subjected to cruel and inhumane treatment.

The Committee has raised concerns not only at the period of time children are detained, but also at the poor conditions in detention centres. In reality, there is no Commonwealth legislation that sets up minimum standards for treatment of children in detention. Furthermore, children that are granted a temporary protection visa are only allowed limited access to social security, health services and education, and are denied the right to family reunification.

The Committee offered seven key recommendations and urged Australia to take action. In particular, it recommended that: children only be detained as a last resort and for the shortest possible time, an assessment be sought from a court or tribunal within the first 48 hours of detention, conditions of detention be improved, detention of children be periodically reviewed, family reunification in certain circumstances be considered, and that an independent support institution for unaccompanied immigrant children be considered promptly.

390 Guillen, above n 385, 73.
391 Ibid.
392 Ibid.
393 Concluding Observations: Australia, above n 119, [62].
395 Concluding Observations: Australia, above n 119, [63].
396 Id, [64].
In its report to the CRC Committee, Australia claimed that it has a ‘strong record of protecting children from all forms of sexual abuse and exploitation, with legislative, regulatory and policy measures at the Federal, State and Territory level’. Australia has certainly achieved significant developments in preventing trafficking and prostitution at both a Federal and State level, including a National Plan of Action, criminalisation of related offences, creation of a sex offenders’ register, and introduction of protection measures for child witnesses. However, the Committee continues to express concern that Australia remains a destination for trafficked girls in the sex industry, urging the State Party to strengthen efforts to implement minimum standards outlined in the Convention.

Substance abuse is another issue where the specific focus of concern is on indigenous communities, especially in rural, central Australian areas where petrol sniffing is a regular practice carrying high risks. Federal and State governments have initiated various preventative, education and rehabilitation programs aimed at reducing substance abuse through schools and other educational institutions, however, there is no evidence of any programs specific to indigenous communities.

The Committee had previously expressed concerns at the administration of juvenile justice, including high rates of incarceration of indigenous youths and a disproportionately high rate of indigenous children in conflict with the law compared

396 Australia’s Combined Second and Third Reports, above n 319, 98.
397 Id, 98-9.
398 Concluding Observations: Australia, above n 119, [68].
399 Id, [70].
400 See Australia’s Combined Second and Third Reports, above n 319, 95-8.
to non-indigenous children.\textsuperscript{401} Australia acknowledged these concerns in its report, and responded by contributing significant government funding to projects addressing changes to the juvenile justice system, crime prevention, diversion schemes, and initiatives aimed at reducing the rate of indigenous youths in conflict with the law.\textsuperscript{402} Whilst Australia’s report details an overall reduction in the rates of juvenile detention and re-offending, indigenous youths remain over-represented in the juvenile justice system. Despite the fact that indigenous Australians only make up two per cent of the Australian population, they account for an astounding 57 per cent of females and 46 per cent of males in juvenile detention.\textsuperscript{403} This means that indigenous children are 20 times more likely to be imprisoned than non-indigenous children.\textsuperscript{404}

The Committee also raised concerns in regard to juvenile justice, including the age of criminal responsibility, over-representation of children suffering from mental illness or intellectual disability, legislation in some States allowing 17-year olds to be tried as adults, mandatory sentencing legislation, and instances of police removing youths who are congregating.\textsuperscript{405} In its recommendations, the Committee urged Australia to address these issues.\textsuperscript{406} Raman stresses that there are a wide range of factors that contribute to higher rates of indigenous children being imprisoned.\textsuperscript{407} He emphasises the need for the Australian government to take a holistic approach to this problem.\textsuperscript{408}

\textsuperscript{401} Concluding Observations: Australia, above n 119, [72].
\textsuperscript{402} See Australia’s Combined Second and Third Reports, above n 319, 88-92.
\textsuperscript{403} Raman, above n 59, 9.
\textsuperscript{404} Ibid.
\textsuperscript{405} Ibid.
\textsuperscript{406} Concluding Observations: Australia, above note 119, [73].
\textsuperscript{407} Id, [74].
\textsuperscript{408} Raman, above n 59, 9.
\textsuperscript{409} Ibid.
Another area of concern for the Committee is the rights of children belonging to indigenous groups. The Committee has expressed concerns about the health, education, housing, employment and standards of living of indigenous children.  

Another concern is the abolition of ATSIC, which was recently replaced by a ministerial taskforce. ATSIC played a key role in the assessment, monitoring and implementation of a vast number of initiatives which were central to achieving much of the high standards and progress in children’s rights which Australia enjoys today. It will be interesting to assess the success of the new ministerial committee’s administration over indigenous issues in Australia’s most recent report pending feedback from the CRC Committee.

Nettheim makes an interesting comparison between Australia and other ‘Western’ nations with marginalised indigenous groups and a similar history, such as New Zealand, Canada, and the United States. He demonstrates how the gap between Australia’s indigenous and non-indigenous populations is significantly greater than that of the other above-mentioned nations. He attributes the lack of progress to the simple failure to take the necessary steps to implement the minimum agreed universal standards. Nettheim states that ‘slowly getting there’ is simply not good enough to address the situation of Aboriginal and Torres Strait Islander people.

Although Nettheim’s point may be valid in an Australian context, it would perhaps be inappropriate advice in the case of Indonesia, whose path to achieving full

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409 Concluding Observations: Australia, above n 119, [75].
411 Nettheim, above n 369, 181.
412 Ibid.
413 Id, 182.
implementation of the *CRC* is realistically a long-term process which requires adequate planning and a step-by-step process.

3. Factors Affecting Australia’s Implementation of the *CRC*

Given Australia’s heavy involvement in the drafting process and the fact that it was one of the first countries to ratify the *CRC*, one may question why there are still areas of Australian law and practice which are incompatible with its obligations under the *CRC*. Dick highlights the contradiction between Australia’s leading role in the promotion of human rights in the international community and a background of actively denying their own indigenous people many fundamental rights.\(^\text{414}\) It has only been due to the scrutiny from independent monitoring bodies such as the CRC Committee, and recent focus on indigenous discrimination issues that attention has turned to Australia to address these deficiencies.

Indeed, Australia’s general commitment to its obligations under UN treaties has been questioned at times. Evatt suggests that effective implementation does depend on time and resources, but more importantly relies on giving more serious consideration to the feedback from UN committees, and to accordingly reviewing domestic laws and practice.\(^\text{415}\) Australia’s past lack of respect for the views of the CRC Committee is evidenced by the Australian government’s assertion in 2000 that each State Party is entitled to interpret human rights standards as it sees appropriate. The Australian government claimed that it was permitted to accept or reject the views of the UN

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\(^{414}\) Dick, above n 267, 22.  
\(^{415}\) Evatt, above n 12, 15.
committees as part of the international process. Similarly, Dick concludes that it is Australia’s unwillingness to improve its human rights record with treaty committees that prevents progress from being achieved on many matters.

One factor that accounts for Australia’s lack of response to its obligations under the Convention and to the Committee’s feedback is the prevailing attitude that the Convention is an affront to sovereignty. Turner claims that judges, politicians and bureaucrats continue to indicate that the CRC cannot override domestic law. However, this goes against the obligations that Australia agreed to when ratifying the Convention, and it disrespects the comments and recommendations of independent international monitoring bodies and the international rule of law. In this sense, Evatt claims that Australia has ‘lost its claim to be described as a good citizen in the human rights area’.

Jones also discusses the fear of interference with Australia’s sovereignty due to concerns that laws are made by ‘non-elected, non-democratic, non-government bodies outside of Australia’ as a misconception affecting the acceptance and implementation of the CRC. Although the High Court of Australia has interpreted the external affairs power in section 51(xxix) of the Constitution to confer treaty-making power on the Commonwealth executive, in practice, especially since new treaty-making procedures were created in 1996, the decision to enter into a treaty

416 Ibid.
417 Dick, above n 267, 26.
419 Ibid.
420 Evatt, above n 12, 15.
421 Jones: Myths, above n 63, 133.
requires significant involvement from the elected Parliament.\textsuperscript{423} Additionally, in order for treaty obligations to become an enforceable part of Australian law they must be specifically incorporated into domestic legislation, thus requiring input from both Houses of Parliament. These procedures mean that Australia’s sovereignty is protected from any threats that may arise from international law.

Another barrier to effective implementation of the \textit{CRC} in Australia has been the fear that it interferes with the Federal balance of power between the States and the Commonwealth. This ‘myth’ arises from the concern that in the process of the Commonwealth executive ratifying treaties, legislative power is taken from the States and centralised in the Commonwealth.\textsuperscript{424} Although there have been some areas where the Commonwealth has expanded its legislative power at the expense of the States through ratifying international treaties,\textsuperscript{425} this does not appear to be the case with children’s rights. As previously noted, the States were actively involved in both the drafting and the ratification of the Convention.\textsuperscript{426} In fact, every State and Territory government consented to the Commonwealth government proceeding to the ratification of the \textit{CRC}.\textsuperscript{427} Jones makes the point that States accepted their obligations under the \textit{CRC} as much as the Commonwealth has.\textsuperscript{428} Consequently, the \textit{CRC} was not imposed upon them.

\begin{footnotes}
\footnotetext{423}{Jones: Myths, above n 63, 135.}
\footnotetext{424}{Id, 138.}
\footnotetext{425}{Ibid.}
\footnotetext{426}{Ibid.}
\footnotetext{427}{Neil, above n 377, 14.}
\footnotetext{428}{Jones: Myths, above n 63, 139.}
\end{footnotes}
Interestingly, the Commonwealth has claimed that certain issues related to child protection are primarily within State jurisdiction.\textsuperscript{429} Clearly, what is needed is a coordinated approach and clear policy guidelines which ensure jurisdictional debates are not used as an excuse for the development of national strategies to address areas of need.

Another ‘myth’ which affects the implementation of the \textit{CRC} in Australia is that the \textit{CRC} interferes with parents’ rights and is ‘anti-family’.\textsuperscript{430} Wight\textsuperscript{431} suggests that Australia’s reluctance to fully implement the \textit{CRC} into domestic law and policy reflects political concerns over the notion of ‘children’s rights’. The major concern which was reportedly highlighted by Australia’s Joint Standing Committee on Treaties at the time of ratification was granting autonomous rights to children at the risk of potentially overriding the rights of parents.\textsuperscript{432} Wight argues that this is not the case at all; for example, the right for children to participate in decision-making does not give children the right to decide everything unanimously, and nothing in these provisions can be seen as placing a restriction on parental rights or the family unit.\textsuperscript{433} On the contrary, the \textit{CRC} reinforces the importance of the family unit and the role of parents in at least 11 of its provisions.\textsuperscript{434} The \textit{CRC} clearly acknowledges that parents have principal responsibility for the welfare and care of their children, and that the role of the government is to support parents in fulfilling their obligations and meeting the appropriate standards.

\textsuperscript{429} Howard, above n 320, 21.
\textsuperscript{430} Jones: Myths, above n 63, 140.
\textsuperscript{431} Wight, above n 30, 14.
\textsuperscript{432} \textit{Ibid}.
\textsuperscript{433} \textit{Ibid}.
\textsuperscript{434} For example, Articles 5 and 18(1); see Jones: Myths, above n 63, 142.
Perhaps the only argument which has any real merit is the notion that Australian laws are already adequate.435 The rationale behind such a statement can be said to arise from Australia’s strength as a democratic state under the rule of law where children’s issues are adequately addressed through existing legal structures. Whilst it is clear that there are areas of significant concern where existing structures are inadequate and much more needs to be done, the situation for many Australian children is well within the CRC’s minimum standards. Whilst Australia has done very little to implement the CRC compared to Indonesia, statistics show that it has enjoyed much higher child welfare standards than most countries for years before the CRC was ratified. However, this should not be an excuse for Australia to delay addressing areas of vital need such as indigenous children, children with disabilities, children in the juvenile justice system, and children detained in immigration centres.

Using a novel approach, Turner ranked five countries based on the impact and improvements that the CRC has made in each country.436 Australia was ranked last out of the five countries considered, below India, Sri Lanka, Malaysia, and Singapore. Although this report was concluded prior to Australia’s most recent feedback report, it is still relevant as many of the issues it raised remain to be addressed. Turner argues that the established popular opinion in Australia is that the Convention can be ‘safely ignored’.437 However, it is clear that Australia can no longer afford to be complacent about children’s rights.

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435 Jones: Myths, above n 63, 146.
436 Turner, above 416, 15.
437 Id, 16.
4. Suggested Areas for Improvement

The Committee was positive about a number of steps that the Australian government has taken, including the adoption of new legislation in relation to children and families, changes to policies affecting asylum seekers, and initiatives taken to prevent child trafficking. However, the above discussion demonstrates that despite Australia ratifying the CRC, the Commonwealth government has not managed to bring law, policy and practice to within the minimum standards of the Convention.438 Howard argues that both State and Commonwealth child protection policies need to:

(1) cover the full continuum of child protection from prevention to early intervention and tertiary intervention;

(2) provide a means for children to express their views in decisions about their welfare;

(3) ensure that the views of indigenous people are included in decision-making and policy development; and

(4) ensure that the best interests of the child are paramount.439

In order to address these problems, Jones highlights the importance of educating the Australian public about children’s rights generally.440 Australia has a legal obligation to fulfil the requirement for education and awareness in regard to children’s rights, which is expressly included in Article 42 CRC. Human rights education requires the ‘development of values, beliefs and attitudes which encourage

438 Dr Sev Ozdowski, (Speech delivered at the LAWASIA Conference on Children and the Law: Issues in the Asia Pacific Region, Brisbane, 20 June 2003).
439 Howard, above n 320, 21.
people to protect, defend and promote human rights.

Efforts to raise awareness of children’s rights and the CRC have been repeatedly encouraged by the CRC Committee.

Human rights education can be a powerful tool in addressing issues related to children’s rights; however, it is underutilised in Australia. It can be particularly useful for minority groups, such as indigenous children, to ensure they can effectively assert and secure their rights. In addressing the poor standards of indigenous children’s rights, Gerber reports that there are only a few human rights programs aimed at indigenous communities, and most of these programs are inappropriate for an indigenous audience, both in their content and teaching methods. Gerber advocates for indigenous children to be empowered by culturally qualified teachers using methods such as storytelling, art, theatre, dance and rituals, rather than being ‘passive recipients’ of information from a dominant culture. She also highlights the need for a holistic community approach where indigenous communities have extensive input into the planning and implementation of any human rights program.

Gerber also raises an important point when he argues that indigenous people had no input into drafting the CRC. She discusses the difficulties this may present in terms of applicability and cultural relevance. For example, the prosecution of child

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441 Gerber, above n 54, 62.
442 See for example Concluding Observations: Australia, above note 119, [21-3].
443 Gerber, above n 54, 62.
444 Id, 62-3.
445 Id, 87.
446 Ibid.
447 Id, 63-4.
abusers in Aboriginal communities in accordance with the CRC has faced significant cultural barriers.\textsuperscript{448} Certain customary laws based on kinship and other family relationships mean that women in particular face significant difficulties and danger if they confront abusers in order to protect their children.\textsuperscript{449} These difficulties also operate to prevent children from reporting cases of abuse as ‘from birth the fundamental concepts of family and belonging is taught and ingrained in children’.\textsuperscript{450} For example, Western Desert Aboriginal men’s law is incredibly powerful amongst local communities and, at times, it has been exploited to justify abuse of young women and girls on the grounds of customary practice.\textsuperscript{451} This means many of these Aboriginal children are in an even more vulnerable position than children are generally.

The exclusion of indigenous people from the drafting of the CRC is unfortunately not a new phenomenon. In fact, the first international convention to focus specifically on indigenous rights, the \textit{ILO Indigenous and Tribal Populations Covenant 107} of 1957 was ironically drafted without any input from the indigenous communities it aimed to protect.\textsuperscript{452} This ‘colonial paternalism’ has in part contributed to the lack of input from indigenous groups into the drafting of conventions such as the CRC, where indigenous rights are clearly one of the main issues.

\begin{flushleft}
\textsuperscript{449} \textit{Ibid}. \\
\textsuperscript{450} \textit{Ibid}. \\
\textsuperscript{451} \textit{Ibid}. \\
\textsuperscript{452} Gerber, above n 54, 81.
\end{flushleft}
However, Gerber concludes that international human rights law is an important vehicle for indigenous people to advance standards of human rights through their own awareness, and raising the awareness of the international community. Indigenous Australians must have an awareness of their rights, and indeed the rights of their children in order for them to have any impact or to allow these rights to be asserted or enforced in any way. Gerber states that ‘the more skills, knowledge and confidence that indigenous people have about human rights and the mechanisms for enforcing them, the less likely they are to be the object of human rights violations.’\(^{453}\)

\(^{453}\) *Id.* 84.
CHAPTER SIX

Indonesia’s ‘Inability’ to Implement the CRC

1. Feedback from the CRC Committee to Indonesia
1.1 General Measures of Implementation

As mentioned in the introduction of Indonesia’s Second Periodic Report, a new era of reform began in May 1998 bringing several fundamental changes to the nation. The 1999 general election, which resulted in the election of a new legitimate and democratic government, helped propel these fundamental changes in the nation.\(^{454}\)

Between the submission date and the date of the concluding observation, the *Child Protection* Law and *Law Number 20 of 2003 on the National Education System* were enacted.

The Committee was encouraged by the follow-up measures undertaken and by the progress achieved by Indonesia (such as the ratification of a number of human rights instruments, the translation and relatively wide publication and distribution of the *CRC*, the adoption of laws and establishment of various mechanism aimed at protecting and promoting the rights of the child).\(^{455}\) However, the first point raised by the Committee\(^{456}\) is that some of the concerns and recommendations made by the


\(^{455}\) Concluding Observations: Indonesia, above n 51, [5-7].

\(^{456}\) Id. [9].
State Party’s initial report have been insufficiently addressed, especially those regarding reform of the national legislation relating to child labour, the need for monitoring the implementation of children’s rights, the need for comprehensive reform of the juvenile justice system, the need for allocation of sufficient resources to children, the urgent measures needed to combat all forms of discrimination against children, and the measures needed to prevent violence against children.

As discussed previously, Indonesia ratified the CRC in 1990 by Presidential Decree Number 36 of 1990. This has raised concerns that the ratification was not backed by an act of Parliament which is two levels higher than a Presidential Decree in legislative hierarchy. In its Second Periodic Report, Indonesia stated that it planed to change the instrument of ratification of the CRC from a Presidential Decree to an Act.\(^{457}\) Subsequently, the CRC Committee recommended that Indonesia consider the possibility of supporting the ratification of the CRC by an Act of Parliament.\(^{458}\) Instead of changing the ratification tool, on 22 October 2002, the Parliament (DPR) enacted the Child Protection Law. Before it was adopted by the Indonesian Parliament, the Child Protection Bill was widely debated through a long participatory process that involved representatives from various government sectors and NGOs, academics and children’s rights experts.\(^{459}\) The provisions of the Child Protection Law include:

1. Definitions (including the definition of a child);

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\(^{458}\) Concluding Observations: Indonesia, above n 51, [14].

\(^{459}\) Republic of Indonesia, *Foreword to Law Number 23 on Child Protection 2002 by the Representative for UNICEF Indonesia, Steven Allen*, 6.
2. The General Principles;

3. The rights and obligations of children;

4. The government, legal enforcers, the community, social institutions, family and parents responsible for the protection of children;

5. Status of children, parental rights, guardianship, fostering and adoption;

6. Protection of children (including their religion, health, education, social development);

7. Special protection for children in emergency situations, children in contact with the law, children from minority and isolated groups, children who are exploited economically and sexually, children who become the victims of the misuse of alcohol and drugs, victims of kidnapping, sale and trafficking, victims of physical and mental violence or abuse, disabled children, and neglected or abandoned children;

8. The establishment of the Indonesian National Commission on Child Protection or KPAI within one year after the adoption of the law; and

9. Specific sanctions against violators of children’s rights.

In contrast to Australia, which received feedback only on its interpretation of statutes, the CRC Committee has a number of concerns in regard to the general measures of implementation. The CRC Committee was concerned that the decentralisation process undertaken by Indonesia could have a negative impact on the protection of children’s rights. The Committee has recommended that provincial laws and practices should be in conformity with the CRC, and that the National Plan
of Action for Children should be incorporated into programs at the provincial and district levels.\textsuperscript{460}

As for the purpose of independent monitoring, the Committee recommends that Indonesia take immediate measures to strengthen the independence, objectivity, effectiveness and public accountability of the KPAI, the National Commission on the Elimination of the Worst Forms of Child Labour, and the National Commission on Human Rights or \textit{Komnas HAM}.\textsuperscript{461}

Due to the lack of an adequate data collection mechanism in Indonesia, the CRC Committee recommended that the system of data collection be remedied in order to allow a systematic and comprehensive collection of disaggregated, quantitative and qualitative data in all areas covered by the \textit{CRC}.\textsuperscript{462}

1.2 The Definition of a ‘Child’

The CRC Committee did not have any feedback for Australia on this matter. As far as Indonesia is concerned, the CRC Committee considered Indonesia’s legal age of marriage,\textsuperscript{463} which is 16 for females and 19 for males, as discriminatory. The \textit{Child Protection Law} defines a child as anyone under 18, regardless of whether they are married or not. This harmonised the age of majority in view of the fact that various age limits are contained in different laws and regulations. This harmonisation stems from the specific language in the legislation, which indicates that ‘[u]pon the entry

\begin{footnotes}
\footnote{460}{Concluding Observations: Indonesia, above n 51, [16].}
\footnote{461}{\textit{Id}, [20,21].}
\footnote{462}{\textit{Id}, [22].}
\footnote{463}{\textit{Law Number 1 of 1974 on Marriage}.}
\end{footnotes}
into effect of this Law, all other laws and regulations that do not conflict with the provisions hereof shall continue in effect’.\footnote{Republic of Indonesia, \textit{Transitory Provisions of Law Number 23 on Child Protection 2002}, art 91.} Despite this, the \textit{Marriage Law Number 1 of 1974} provides that the marriage age is 16 for females and 19 for males. Prima facie, this appears to conflict with the provisions of the \textit{Child Protection Law}. Although the \textit{CRC} does not expressly prohibit child marriage, the \textit{CRC} Committee has recommended that Indonesia takes all necessary measures to prevent early marriage and undertake awareness-raising campaigns on the harm and dangers resulting from early marriage.\footnote{Concluding Observations: Indonesia, above n 51, [26-7].}

\section*{1.3 The General Principles}

The Committee’s main concern in regard to Australia’s implementation of the General Principles related to its compliance with the principle of non-discrimination in regard to Aboriginal and Torres Straight Islander children. In regard to Indonesia, the \textit{CRC} Committee expressed concerns in regard to all four principles.

The Committee welcomed the provisions contained in the \textit{Child Protection Law}, which were based on the \textit{CRC}’s general principles. However, the Committee remained concerned that these principles are not fully reflected in all areas of Indonesia’s legislation, administrative and judicial decisions, nor in its policies and programs relevant to children at the state, provincial, and local levels and in conflict-affected areas.\footnote{\textit{Id.}, [28].}
1.3.1 Non-discrimination

Societal discrimination persisted against girls and against other vulnerable groups of children, in particular children living in poverty, children out of wedlock, children displaced by conflict, and children belonging to minority groups. The Committee urged Indonesia to adopt a proactive and comprehensive strategy to eliminate discrimination on any grounds and against all vulnerable groups. The CRC Committee highlighted the need to take affirmative action in order to protect vulnerable groups from discrimination.

1.3.2 Best Interests of the Child

According to the Committee, the ‘best interests of the child’ policy was not a primary consideration in action concerning children, including in matters relating to family law (e.g. custody under the law is determined by the child’s age rather than by the child’s best interests).

1.3.3 Respect for the Views of the Child

The Committee was also concerned that children are rarely heard in the family, schools and communities, even on matters concerning them. The Committee recommended that Indonesia develops a nationwide campaign to increase public

467 Id., [30-1].

468 Shackel, above n 30, 29-30.
469 Concluding Observations: Indonesia, above n 51, [33].
awareness of the participatory rights of children, particularly at the local level and in traditional communities.\textsuperscript{470}

1.4 Civil Rights and Freedoms

Regarding this group of rights, the Committee raised concerns related to birth registration, the right to a nationality, violence against children, and corporal punishment. The CRC Committee welcomed the provisions of the \textit{Child Protection Law}, which stipulates that a birth certificate shall be issued by the Government, free of charge. On the other hand, it remained concerned by the low birth registration rate and the fact that few concrete measures had been taken to increase it.\textsuperscript{471} It is difficult to obtain an accurate or consistent account of Indonesia’s birth registration rate, although in 1998 UNICEF estimated that 50-69 per cent of births were being registered.\textsuperscript{472} The Committee recommended that Indonesia implement a comprehensive strategy that involved cooperation with UNICEF and other international agencies to achieve 100 per cent birth registration by 2015.\textsuperscript{473}

The Committee was also concerned about the high number of child victims of violence, abuse and neglect, including sexual abuse in schools, public places, detention centres and the family.\textsuperscript{474} Commemorating Indonesia’s National Children’s Day in 2008, the Chairperson of the National Commission of Child

\textsuperscript{470} \textit{Id}. [35-6].
\textsuperscript{471} \textit{Id}. [37].
\textsuperscript{473} Concluding Observations: Indonesia, above note 51, [36, 39].
\textsuperscript{474} \textit{Id}. [41].
Protection or *Komnas PA*\(^{475}\), Seto Mulyadi, opined that violence toward children has increased because of the paradigm ‘children are owned by the parents and can be treated according to the parents’ wishes’.\(^{476}\)

The Committee was *deeply* concerned that corporal punishment in the family and in schools is widespread, culturally accepted and still lawful.\(^{477}\) In December 2008, there were a couple of amateur videos, shown on television news, where a high school teacher in Sulawesi slapped some students in front of the class. The teacher was transferred to another institution with no further explanation or action taken to prevent that sort of abuse from recurring.\(^{478}\)

### 1.5 Family Environment and Alternative Care

The Committee expressed concerns in relation to the following issues:

- *Parenting Responsibilities*. According to the Islamic Law applicable to Indonesian Muslims, in divorce proceedings, decisions relating to the custody of children are based on the age of the children rather than on their best interests.\(^{479}\) In addition, children cannot legally have a father unless their biological parents are legally married.\(^{480}\) The Committee recommended that Indonesia reviews its legislation relating to the custody of children to ensure that all decisions are based on the best interests of the child, and takes all necessary

\(^{475}\) See fn 16.  
\(^{477}\) Concluding Observations: Indonesia, above note 51, [43].  
\(^{479}\) Concluding Observations: Indonesia, above note 51, [45].  
\(^{480}\) *Ibid.*
measures to facilitate and guarantee, as far as possible, the child’s right to know both biological parents.

- **Family Reunification.** The Committee recommended that Indonesia continues its collaboration with UNHCR to ensure the quick and safe repatriation to Timor-Leste of all East Timorese children separated from their families.

- **Children Deprived of their Family Environment.** The Committee was concerned by the high number of children placed in institutions, at the living conditions in these institutions, and at the increasing number of children abandoned by their parents.\(^\text{481}\) To address this concern, the Committee recommended that Indonesia treats the placement of children in institution as a measure of last resort, that it sets clear standards on living conditions and services provided in the existing institution, and that it ensures periodic review. In addition, the Committee recommended that Indonesia conducts awareness-raising campaigns and develops programmes and policies to prevent the placement of children in institutions.

- **Adoption.** The Committee was concerned that Indonesia’s adoption legislation did not provide sufficient safeguards against abusive practices, including trafficking of children.\(^\text{482}\)

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\(^{481}\) Concluding Observations: Indonesia, above n 51, [49].

\(^{482}\) Id. [51].
1.6 Basic Health and Welfare

The Committee had several concerns on the basic health and welfare of Indonesian children, namely:

- Very few children with disabilities have access to special services and rehabilitation centres;\(^{483}\)
- The high maternal mortality rate;
- High incidence of child malnutrition;
- High proportion of children born with low birth weight;
- The low immunization rate; and
- The lack of access to safe drinking water and sanitation, particularly in conflict-affected areas.\(^{484}\)

The Committee is also concerned about issues related to adolescent health, HIV/AIDS prevention and family planning. In particular, the Committee was concerned at the lack of a formal system of reproductive health counselling or education programs for youth regarding sexually transmitted diseases (STDs) such as HIV/AIDS for youth,\(^{485}\) and the high number of tobacco smokers among adolescents.\(^{486}\)

\(^{483}\) Id, [53].
\(^{484}\) Id, [55].
\(^{485}\) Id, [58].
\(^{486}\) Ibid.
1.7 Education, Leisure and Cultural Activities

Despite welcoming the measures that Indonesia had taken towards improving education, the Committee was very concerned that:

- education is not free (even at primary level), higher education is not affordable for many families, and that the dropout and repeat rates are high;
- married children and pregnant teenagers do not generally continue their education;
- the low teacher-pupil ratio and the low-level ability of teachers;
- the high incidence of violence against children in schools, including bullying and fighting among students, and that no specific law exists to regulate school discipline and protect children against violence and abuse in the school;\(^\text{487}\)
- the narrow education provided in madrasas\(^\text{488}\) and boarding schools and the lack of supervision of their curricula.\(^\text{489}\)

1.8 Special Protection Measures

1.8.1 Refugees Children

The Committee was very concerned at the situation of refugees and internally displaced children living in refugee camps.\(^\text{490}\) It recommended that Indonesia takes immediate action to ensure all displaced and refugee children and their families have access to basic health and education services, and that all their rights contained in the CRC are protected.

\(^{487}\) Id., [61].
\(^{488}\) Muslim educational institutions.
\(^{489}\) Id., [62].
\(^{490}\) Id., [65].
1.8.2 Children Affected by Armed Conflict

The Committee was gravely concerned by the large number of children displaced as a consequence of armed conflict.\(^{491}\) Children in these situations remain particularly vulnerable, and perpetrators of violations of their rights are rarely prosecuted.\(^ {492}\) In addition, the Committee was deeply concerned at the report of the use of child soldiers, notably in Aceh and Maluku, as well as in East Timor until 1999.\(^ {493}\)

1.8.3 Drug Abuse

The Committee remarked with concern that there was a large number of children who used drugs or narcotics and that such children were treated as criminals, rather than victims.\(^ {494}\)

1.8.4 Juvenile Justice

The Committee was very concerned at the large number of children sentenced to jail for petty crimes, and at the fact that these children are often detained with adults and in poor conditions, even when placed in detention centres for children.\(^ {495}\) Bryne, the Chief of the Child Protection Unit of UNICEF Indonesia, reported that an average of 5,000 children appear in Indonesian courts every year, and of those, 90 per cent end up in prisons or detention centres.\(^ {496}\) Research has shown that the majority of offences are only petty theft, and that children have poor or no access to

\(^{491}\) Id, [70].  
\(^{492}\) Id, [67]; the Committee was also alarmed at the high level of fatalities in Aceh, West Kalimantan, Central Sulawesi, Maluku and Ambon, as well as those which resulted from the conflict in East Timor in 1999.  
\(^{493}\) Concluding Observations: Indonesia, above n 51, [69].  
\(^{494}\) Id, [73].  
\(^{495}\) Id, [75-6].  
legal services, despite the fact that Indonesia’s *Juvenile Court Law, Child Protection Law*, and *Law on Advocates* stipulate that access to legal representation is a basic requirement of due process.\footnote{Ibid.} The Committee also reiterated its serious concern that the minimum age of criminal responsibility, set at eight years, remains too low.\footnote{Concluding Observations: Indonesia, above n 51, [77].}

### 1.8.5 Street Children

Even though the Committee welcomed the introduction of the Social Safety Net Programme for Street Children and Free Street Children Programme in Bandung Raya, it remained concerned at the high number of street children, and at the violence to which they are subjected, especially during sweep operations.\footnote{Id. [79].}

### 1.8.6 Sexual Exploitation

The Committee welcomed Indonesia’s launch of the National Plan of Action for The Elimination of Trafficking in Women and Children,\footnote{Presidential Decree Number 88 of 2002.} but remained concerned that the existing legislation did not provide effective protection (for example, the age of consent of 12 years was considered as too low), and that child victims of sexual exploitation often did not receive adequate protection and assistance with recovery.\footnote{Concluding Observations: Indonesia, above n 51, [81].}

### 1.8.7 Economic Exploitation

Despite Indonesia’s ratification of the International Labour Organization (\textit{ILO})’s Conventions No 138 and No 182 in 1999 and 2000 respectively, the Committee
remains concern at the high number of children, many of them under 15, still working in the informal sector, on fishing platforms, in factories, as domestic servants, on plantations, in the shoe, food and toy industries, in the mining and quarrying sector, and on the streets.\textsuperscript{502}

2. Factors Affecting Indonesia’s Implementation of the CRC

There are many factors that contribute to Indonesia’s continual struggle to achieve the minimum standard for children’s rights, despite the government having undertaken significant steps to implement its provisions. One of these is the immense cultural diversity across the archipelago. Harris-Short\textsuperscript{503} has highlighted the difficulties that certain cultural traditions and beliefs can impose on the practice of human rights in substance, interpretation and implementation. She points out that the CRC Committee must be responsive to different cultural interpretations from different countries, and must recognise the legitimacy of a variety of readings, through assessment in light of the socio-economic needs, traditions and beliefs.\textsuperscript{504}

The Committee must be careful not to criticise ‘non-Western’ values and practices without proper, genuine consideration of the effect on children’s welfare in the context of developing the cultural traditions of countries. An example is the issue of arranged marriages in certain cultures, a notion that was argued by many developing

\textsuperscript{502} Id., [84].
\textsuperscript{503} Harris-Short, above n 45, 312.
\textsuperscript{504} Id., 333.
countries in the drafting of the *CRC* as not being a ‘harmful traditional practice’ despite opposing Western views.\(^{505}\)

There are undoubtedly areas where Indonesia’s standards of children’s rights can be directly attributed to difficulties in changing well-entrenched and culturally-specific attitudes and practice, such as the position of females in the Islamic religion and the paradigm that ‘children are owned by their parents’. That is not to say that all culturally based practices that are inconsistent with children’s rights should be automatically viewed in a more compassionate light. However, it is important to remember that many such practices are often deep-rooted, and that culture is undeniably an evolutionary concept requiring patience and long term commitment to harness community education and promote awareness.\(^{506}\) What must be guarded against is the use of culture as a means to serve alternative ends, such as marginalisation of groups, including ethnic minorities and women.\(^{507}\) There is no evidence suggesting that the Indonesian government or law enforcement authorities have alternative agendas such as this, however the possibility must be considered when contemplating potential factors impeding change.

Harris-Short\(^{508}\) appears to share Hannan’s opinion, at least in part, that the *CRC*’s proposed ‘universal rights’ are heavily Western-biased, and thus not entirely appropriate to many developing countries. However, this seems to go against the fundamental notion that human rights that are universal and apply to all persons. Harris-Short argues that human rights responsive to cultural differences are in theory

\(^{505}\) *Id.*, 338.
\(^{506}\) *Id.*, 312-3.
\(^{507}\) *Id.*, 314-5.
\(^{508}\) *Id.*, 306.
possible, but then nevertheless concludes that the CRC has not managed to achieve this.\textsuperscript{509} This is relevant to the discrepancy Indonesia demonstrates between law, policy and practice as a developing country under contractual obligations to achieve ‘Western’ standards.

Hannan illustrates but questions the value of empowerment programmes and human rights training in areas of such poverty where education appears to make no difference to children’s standards.\textsuperscript{510} Promoting children’s rights and awareness of the CRC is an important provision that the CRC Committee has repeatedly addressed as an area of need in Indonesia’s feedback reports. Awareness training is undoubtedly an essential part of educating society regarding acceptable standards and in empowering them to strive for such rights. However, in certain situations such as in the case of Indonesia’s most impoverished, rural communities, investing funds into awareness training to fulfil Convention obligations will not make a difference to the performance of other substantive provisions. For example, conducting a training program on the importance of primary school education would be of little use in a village where children are required to work long days and plough the fields in order to secure a minimum portion of rice for each family member.

In the words of Hannan, ‘with the best will or parenting classes in the world, many parents and their societies will continue to be unable to ensure their children are properly clothed and fed and receive education’.\textsuperscript{511} This would certainly account for Indonesia’s poor performance in key areas such as child labour where such standards

\textsuperscript{509} Ibid.
\textsuperscript{510} Hannan, above n 46, 78.
\textsuperscript{511} Id., 85.
or expectations are simply unachievable in the short term without the injection of substantial human and financial resources. This option is often completely unfeasible in the short term in view of Indonesia’s political, social, and economic situation. That is not to say that such standards should not be strived for in the long-term; rather, the international community must take a much wider context into account when assessing and reviewing Indonesia’s performance under the *CRC*.

Similar issues have also been acknowledged by the CRC Committee, namely: characteristics of the legal system and adherence to the rule of law, political structure, economic position, cultural traditions and practices, and physical geography. These are only some of the difficulties Indonesia faces in the implementation of the *CRC*. The Committee has acknowledged the fact that the expectations of what can be achieved within a certain period of time may be limited in Indonesia, compared to Australia for example, where no such difficulties have been identified. Indeed, for many reasons it seems clear that despite Indonesia’s best efforts to undertake legislative and administrative change promoting children’s rights, issues such as the continuing process of democratic reform, decentralisation, and strengthening understanding and application of the rule of law act as a barrier to achieving the desired results in practice. Improvement across all levels of society will inevitably result in better standards for children. As with all processes of reform, and especially given Indonesia’s long history as an authoritarian unitary state rife with corruption, human rights abuses and lack of respect for the rule of law, achieving minimum standards under the *CRC* will be a long term, programmatic process.
Limitations in resource availability have already been discussed as a barrier to Indonesia’s effective implementation of the CRC. For example, the right to play and develop during childhood is impractical in countries with limited resources and where economic development heavily depends on child labour.\textsuperscript{512} With such significant areas of need, it is likely that Indonesia requires a much greater amount of funds and human resources in order to fulfil its obligations under the Convention, compared to Australia. The CRC does include a provision on international co-operation, but ironically, other non-financial forms of assistance such as the transfer of technology to help improve standards for the disabled were rejected in the drafting stages because of patency laws.\textsuperscript{513}

Nevertheless, countries such as Australia do contribute significant amounts of aid to Indonesia, although this tends to result in Western donor states controlling what is in the best interests of the child when making decisions on what areas and programs to fund.\textsuperscript{514} However, Hannan warns that this ‘colonial paternalism’ may be an obstacle to developing countries achieving respect and trust in their own systems of self-government, and thus erode the rule of law.\textsuperscript{515} This may arise from children blaming their parents or the government for failing to meet standards in the CRC, rather than understanding the much wider circumstances, such as resource availability, as accounting for inadequacies. In boosting the profile of international NGOs and other agencies there is the potential to undermine and cast doubt on the confidence and ability of local authorities to manage issues.

\textsuperscript{512} Id, 79.
\textsuperscript{513} Id, 78.
\textsuperscript{514} Ibid.
\textsuperscript{515} Ibid.
Although the CRC expressly recognises limitations in financial and human resources as factors which may significantly impede its effective implementation in developing countries, focusing on these limitations is likely to be detrimental in achieving longer term coordination and commitment needed to achieve effective implementation of the CRC.

Finally, it has been suggested that some developing nations ratified the CRC despite holding many reservations and hesitations about its relevance and applicability, primarily due to international pressure and the political consequences of not ratifying the Convention. Perhaps this factor also partly contributes to the Indonesian government’s shortcomings in the implementation of the CRC. The government may have in fact had an underlying intention to continue governing as it sees fit despite ratifying the treaty for reasons other than that intention. Juwana asserts that many changes in Indonesia’s human rights legislation resulting from ratification of the CRC have occurred for the ‘wrong reasons’; namely in response to pressure from the international community, rather than in an attempt to actually improve human rights standards. This had a significant impact on the effectiveness of the implementation process and the subsequent violations of children’s rights which continue to exist in Indonesia.

3. Suggested Areas for Improvement

The concerns of the CRC Committee seem endless, covering all aspects of the rights of the child, and prompting many recommendations from the Committee. The

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516 Juwana, above n 210, 379.
concerns of the Committee are shared by the Director General of Human Rights in Indonesia, Professor Harkristuti Harkrisnowo. In one of her articles, Professor Harkrisnowo stated that Indonesian children ‘still do not have the proper attention from society’.\(^5\) She added:

> It is sad to see the present reality that the position of the rights of the child from a legal point of view is still far from what it is supposed to be. The current civil law, criminal law, constitutional law, health system, social welfare as well as education system are insufficient to protect the rights of the child. This condition is made worse by the weak law enforcement of children’s rights, even though a law is in effect.\(^6\)

The rights of the child are enshrined in Article 28B(2) of the Indonesian Constitution. After Indonesia ratified the CRC, a few laws have been enacted, interalia, Law Number 3 of 1997 on the Juvenile Court, the Child Protection Law, Within one year of the enactment of the Child Protection Law, the KPAI was established by Presidential Decree Number 77 of 2003. The KPAI is an independent institution at the same level as a State Committee being formed under Presidential Decree Number 77 of 2003 and Article 74 Child Protection Law to promote the effective implementation of child protection in Indonesia. This institution is an independent government body, not influenced by any person or any political interest group, and it operates in ‘the best interest of the child’. The KPAI is responsible for promulgation of all the laws and regulations in relation to child protection, collection of data and information, handling of claims from the general public, observation and


\(^6\) Ibid, as translated by author; original text:
> ‘Sangatlah memperhatinkan bahwasanya pada masa ini kedudukan dan hak anak dilihat dari perspektif yuridis masih jauh apa yang sebenarnya harus diberikan kepada mereka. Hak-hak yang berkenaan dengan hukum perdata, hukum pidana, ketenagakerjaan, kesehatan, kesejahteraan sosial dan juga pendidikan yang kini ada, tiadalah memadai untuk memberian perlindungan khusus bagi anak-anak. Kondisi ini makin dipersulit oleh lemahnya penerapan hukum mengenai hak-hak anak yang sedikit sudah ditentukan dalam peraturan perundang-undangan.’
evaluation of conduct, supervision of the implementation of child protection, and production of reports and suggestions, including recommendations to the President of the Republic of Indonesia.

With all those legislative and administrative measures in place, there are laws and regulations related to the rights of the child in Indonesia, but the implementation is still very limited. As the Representative of UNICEF to Indonesia, Steven Allen, mentioned in his foreword to the English translation of the Child Protection Law, ‘[l]aw enforcement remains one of the biggest challenges in Indonesia.’

The awareness of society and legal enforcers of the rights of the child is still limited; this was demonstrated at a recent training seminar for Lawyers entitled ‘Handling Children in Conflict with Law’ held in Jakarta from 17 to 19 July 2008 by UNICEF-LAPA. Towards the end of the seminar, the chairperson of the Indonesian Advocates Society stated that, ‘we are beginning to understand that children are special and that they deserve special treatment when they are in contact with law.’

Indonesia had taken quite a few legislative, administrative and other measures in regards to the rights of the child, such as the adoption of laws and the establishment of various mechanisms aimed at protecting and promoting the rights of the child. Examples include:

520 LAPA (Lembaga Advokasi dan Pemberdayaan Pekerja & Anak) is an NGO whose mission is to advocate for children.
- The inclusion of human rights, as well as rights of the child in its Constitution, the *Child Protection Law* and the establishment of KPAI; and
- Awareness training for legal enforcers as well as for the general public.

The problem is that its implementation is still very limited. Law enforcement remains one of the biggest challenges in Indonesia. The *Child Protection Law* (English Translation) is attached as Appendix III.
CHAPTER SEVEN

Recommendations for Indonesia

‘If people do not have access to the law, they cannot know their rights. If people do not know their rights, they cannot demand the enforcement of their rights. If people are not empowered to demand the enforcement of their rights, they will be exploited and abused by those with access to power over the law.’

- Andrew Siro
Dyah Ersita & Partners

A state’s implementation of the provisions of the CRC will be heavily influenced by its legal, political, socio-economic and cultural systems. The crucial point is that legislative reforms alone do not equate to effective implementation; such reforms must be supported by extra-legal mechanisms that promote respect for the rule of law. In its latest Concluding Observations, the CRC Committee was generally satisfied with Australia’s implementation of the CRC. Despite this, the Committee urged Australia to immediately address the rights of indigenous children by providing additional funding and educational programs.

Despite this, the situation for many Australian children is well within the minimum standards of the CRC. A ‘lesson’ that Indonesia can and should learn from Australia is that a well-entrenched rule of law can facilitate the implementation of the CRC. In Australia, children’s issues are adequately addressed through existing legal structures. Schooling has been compulsory since the 19th century. The government monitors early childhood education. More recently, Australia has also implemented
numerous child welfare programs, including promotion of foster family arrangements. However, one should recall that the implementation of the rights of the child was satisfactory even before Australia ratified the CRC.

On the other hand, the CRC Committee expressed concerns at Indonesia’s poor implementation of the CRC in regard to numerous provisions of the CRC. A multitude of factors have contributed to Indonesia’s inadequate implementation of the CRC. Some of the most important ones include: a general lack of awareness and understanding of children’s rights, a lack of response or slow response from the authorities in punishing known violators of children’s rights, corruption among authorities, and a general lack of respect for existing legal structures and law enforcement authorities among Indonesian citizens. Indonesia needs to address some or all of these issues if it wishes to improve its implementation of the CRC and its international standing.

A good starting point would be for Indonesia to follow the Committee’s recommendation and ensure that Indonesia’s Second Periodic Report, written replies and concluding observations adopted by the Committee are made widely available to the public and published (in light of art 44(6) CRC). The Committee anticipates that the distribution of such a document would serve to ‘generate debate and awareness of the Convention and its implementation… within the Government, the Parliament and the general public’. However, according to the Committee, a ‘crucial’ issue is that Indonesia first achieves compliance with the reporting rules set out in Article 44 CRC. The Committee urged Indonesia to submit its next report, a

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521 Concluding Observations: Indonesia, above note 51, [94].
522 Ibid.
combined third and fourth periodic report, by 4 October 2007. Unfortunately, this report is yet to be submitted, raising the issue of whether Indonesia is capable of meeting even basic requirements of the *CRC*.

Indonesian authorities need to allocate more resources to educational programs generally and specifically to programs designed to increase awareness and understanding of children’s rights, as has been the case in Australia. UNICEF Indonesia has conducted some educational programs in cooperation with NGOs, although on a limited scale. The Indonesian government can assist by allocating funds, and by incorporating issues related to children’s rights in the curricula of schools, universities and other education institutions nationwide. It is questionable that Indonesia has the adequate financial resources to implement such resource-intensive programs, however it may appeal for international cooperation or directly to its neighbour, Australia, to provide assistance.

The Indonesian government needs to take urgent actions to limit or eradicate corruption, especially among government officials, which would promote accountable governance. Indonesia must also strive to create a clearer separation between its judiciary on the one hand, and the legislative and executive on the other. These steps may promote public trust in the authorities. In this respect, Indonesia may learn from Australia, which has an enviable record in this area; corruption and bias is a rare occurrence and is often associated with swift and severe punishment.

Indonesian authorities need to react more swiftly and decisively in arresting and convicting known violators of children’s rights. Aside from deterring these
individuals from re-offending, such action would serve to increase public confidence in the authorities. Unfortunately, such action seems elusive in a system rife with corruption, lacking an independent judiciary, and where members of the government are often the ones that perpetrate human rights violations.

Most importantly, Indonesian authorities need to earn the respect of Indonesian citizens by obeying and enforcing the laws, and ultimately promoting a culture of legality. This may be achieved by educating the general public and promoting awareness of children’s rights, by taking steps to reduce corruption, and by promoting independence of its judiciary. Once again, Indonesia can learn from Australia, a state which has established and successfully maintained a culture of legality within its borders.

One must recognize that certain barriers to the implementation of the CRC cannot be easily addressed or removed. For example, Indonesia’s geographical barriers and enormous cultural variety may mean that it is difficult to implement the CRC uniformly at a national level. By recognizing this, Indonesian authorities can focus on implementation at a local government and local community level, where education programs can be culture-specific and potentially more relevant. In particular, the Indonesian government needs to ensure better coordination between the various organizations at different levels; for example, there must be synchronisation between KPAI and the Deputy Minister for Child Protection (which is under the authority of the Minister for Women’s Empowerment). Indonesia’s limited resources are also likely to continue posing a major barrier to implementation
of the *CRC*. This may be an area where Australia can assist its neighbor by continuing to engage in trade and commerce with Indonesia.

The implementation of children’s rights may be best considered in context. It is impossible to separate implementation of cultural rights enshrined in the *CRC* from the cultural context of the state in which the children live. Likewise, it is impossible to separate the implementation of political rights from a child’s political environment. This is a point that is pertinent in relation to the implementation of the *CRC* both in Australia and Indonesia.

Creating a uniform standard of social, economic, cultural and political rights for children may be an idealistic goal in such a diverse world. For countries like Indonesia, the most that may be expected is an ongoing effort to achieve the minimal goals under the Convention. The Committee has acknowledged Indonesia’s recent efforts to implement legislation to facilitate implementation of the *CRC*. Despite its limited resources and its low socio-economic status, Indonesia enacted the *Child Protection Law*, established the Indonesian Child Protection Commission (KPAI), and amended its Constitution to incorporate a Bill of Rights (Chapter XA, arts 28A-28 J). Unfortunately, these legislative measures have not equated to improved implementation of children’s rights in practice.

As a result of this comparative study between Australia and Indonesia, it is recommended that the Indonesian government:

1. Strengthens and enforces adherence to the rule of law;
2. Promotes public awareness of children’s rights; and
3. Prioritises the issue of children’s rights on the state’s agenda.

Although adherence to the rule of law is a key factor in ensuring successful implementation of the rights of the child, increased public awareness and contribution from all levels of government are also crucial in supporting what is essentially a long-term and complex process.
APPENDIX I

United Nations Declaration of the Rights of the Child

Declaration of the Rights of the Child

Proclaimed by General Assembly resolution 1386(XIV) of 20 November 1959

Whereas the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Whereas the United Nations has, in the Universal Declaration of Human Rights, proclaimed that everyone is entitled to all the rights and freedoms set forth therein, 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,

Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth,

Whereas the need for such special safeguards has been stated in the Geneva Declaration of the Rights of the Child of 1924, and recognized in the Universal Declaration of Human Rights and in the statutes of specialized agencies and international organizations concerned with the welfare of children,

Whereas mankind owes to the child the best it has to give,

Now therefore,

The General Assembly

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

Principle 1

The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or
discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.

**Principle 2**

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

**Principle 3**

The child shall be entitled from his birth to a name and a nationality.

**Principle 4**

The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care. The child shall have the right to adequate nutrition, housing, recreation and medical services.

**Principle 5**

The child who is physically, mentally or socially handicapped shall be given the special treatment, education and care required by his particular condition.

**Principle 6**

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

**Principle 7**

The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society.

The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.
The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right.

**Principle 8**

The child shall in all circumstances be among the first to receive protection and relief.

**Principle 9**

The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.

The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.

**Principle 10**

The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.
APPENDIX II

The Convention on the Rights of the Child

Convention on the Rights of the Child

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989

entry into force 2 September 1990, in accordance with article 49

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, 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,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,
Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,

Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

**PART I**

*Article 1*

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.
**Article 2**

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 his or her 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.

**Article 3**

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.

**Article 4**

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

**Article 5**

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

**Article 6**

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

**Article 7**

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

**Article 8**

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

**Article 9**

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.
**Article 10**

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

**Article 11**

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

**Article 12**

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

**Article 13**

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

**Article 14**

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

**Article 15**

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

**Article 16**

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

**Article 17**

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

(c) Encourage the production and dissemination of children's books;

(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

**Article 21**

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

**Article 22**

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, cooperation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information
necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

**Article 23**

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child. 3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

**Article 24**

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and
through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to
implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

**Article 30**

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

**Article 31**

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

**Article 32**

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular: (a) Provide for a minimum age or minimum ages for admission to employment;
(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

**Article 33**

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

**Article 34**

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

**Article 35**

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

**Article 36**

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

**Article 37**

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and
shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which
takes into account the child's age and the desirability of promoting the child's reinteg ration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings. 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes
and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

PART II

Article 42

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

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two
thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the
Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.
PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.
Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General.

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.
APPENDIX III

Republic of Indonesia’s Law Number 23 of 2002 on
Child Protection

REPUBLIC OF INDONESIA LAW
NUMBER 23 YEAR 2002
ON
CHILD PROTECTION

BY THE GRACE OF ALMIGHTY GOD,
THE PRESIDENT OF THE REPUBLIC OF INDONESIA

Whereas:

(a) The Unitary Republic of Indonesia guarantee the rights of all its citizens, including the protection of the rights of children as part of the protection of overall human rights;
(b) Children represent a gift and a blessing from Almighty God, with each individual child being entitled to the dignity and respect accorded to human beings;
(c) Children represent those who will advance the hopes of the nation struggle, and have a strategic role, special characteristics and unique position in ensuring the continued existence of the nation and the state in the future;
(d) So that each child will be able to properly carry out this role, he must be afforded the greatest possible opportunities to optimally develop and grow physically, mentally and socially, and to develop high moral values. Accordingly, it is essential that protection be afforded to children and that their welfare and well-being be cultivated through guarantees that their rights will be protected and that they will not be subjected to discriminatory treatment;
(e) In order to provide for the protection and welfare of children, institutional and legislative support is required;
(f) The prevailing laws only provide the specific aspects of the rights of children, and do not address the overall need for the protection of children;
(g) Based upon the considerations set out in paragraphs a, b, c, d, e and f above, it is deemed necessary to enact a Law on Child Protection.
In accordance with:

(1) Articles 20, 20A (1), 21, 28B (2) and 34 of the 1945 Constitution;
(2) Law number 4 of 1979 on Children’s Welfare (Official Gazette of the Republic of Indonesia number 3143);
(3) Law number 7 of 1984 on the Convention on The Elimination of All Forms of Discrimination Against Women (Official Gazette of the Republic of Indonesia 1984 number 29, Supplement of the Official Gazette of the Republic of Indonesia number 3277);
(4) Law number 3 of 1997 on Juvenile Court (Official Gazette of the Republic of Indonesia 1997 number 3, Supplement to the Official Gazette of the Republic of Indonesia number 3668);
(5) Law number 4 of 1997 on the Disabled Persons (Official Gazette of the Republic of Indonesia 1997 number 9, Supplement to the Official Gazette of the Republic of Indonesia number 3670);
(6) Law number 20 of 1999 on The Ratification of ILO Convention number 138 concerning the Minimum Age for Admission to Employment (Official Gazette of the Republic of Indonesia 1999 number 56, Supplement of the Official Gazette of the Republic of Indonesia number 3835);
(7) Law number 39 of 1999 on Human Rights (Official Gazette of the Republic of Indonesia 1999 number 165, Supplement to the Official Gazette of the Republic of Indonesia number 3886);
(8) Law number 1 of 2000 on the Ratification of ILO Convention number 182 concerning The Prohibition and Immediate Action for The Elimination of The Worst Forms of Child Labour (Official Gazette of the Republic of Indonesia 2000 number 30, Supplement to the Official Gazette of the Republic of Indonesia number 3941);

WITH THE JOINT APPROVAL OF THE REPUBLIC OF INDONESIA HOUSE OF REPRESENTATIVES AND THE PRESIDENT OF THE REPUBLIC OF INDONESIA

BE IT HEREBY RESOLVED

To Enact: A LAW ON CHILD PROTECTION

CHAPTER I
DEFINITIONS

Article 1
The following definitions shall apply in this Law:
A “Child” shall mean a person under eighteen (18) years of age, including the unborn;

“Protection of Children” shall mean all activities designed to guarantee and protect children and their rights so that they may live, grow, develop and participate optimally in society in accordance with the dignity to which they are entitled as human beings, and so that they may be protected against violence and discrimination;

“Family” shall mean the smallest unit in society and shall consist of husband and wife, or husband, wife and child, or father and child, or mother and child, or a family consisting of blood relations in a straight line up to the third degree;

“Parent” shall mean a natural father and/or mother, or stepfather and/or mother, or adoptive father and/or mother;

“Guardian” shall mean a person or body that acts in loco parentis to a child;

“Neglected/Abandoned Child” shall mean a child whose reasonable needs, whether physical, mental, spiritual or social, are not fulfilled;

“Disabled Children” shall mean a child who suffers from a physical or mental disability that interferes with his normal growth and development;

“Gifted Child” shall mean a child that is blessed with exceptional intelligence, potential or gifts;

“Adopted Child” shall mean a child over whom rights have been assigned by his parents, lawful guardians, or such other persons as may have responsibility in respect of his upkeep, education and upbringing to adoptive parents pursuant to a decision or ruling of the court;

“Foster Child” shall mean a child who has been placed in foster care with an individual or institution for the purpose of guidance, upkeep, education, and healthcare due to the fact that one or both of his parents are unable to guarantee his proper development and growth;

“Parental Rights” shall mean the rights of a child’s parents to care for, educate, maintain, develop, protect and ensure the growth and development of a child in accordance with his religion, talents and interests;

“Rights of Children” shall mean those human rights pertaining to children that must be guaranteed, protected and complied with by parents, families, the government and the state;

“Society” shall mean individuals, families, groups, and charitable and/or community organizations;

“Counselor” shall mean a social worker who has professional competence in his respective field;

“Special Protection” shall mean protection of children in emergency situations, children who find themselves in contact with law, children from minority and isolated groups, children being economically or sexually exploited, child victims of the misuse of narcotics, alcohol, psychotropic substances and other addictive substances, child victims of kidnapping, sale and trading, child victims of physical, sexual and/or mental violence, disabled children, child victim of abuse, and neglected/abandoned children;
CHAPTER II
PRINCIPLES AND OBJECTIVES

Article 2
The protection of children shall be based upon Pancasila (the national ideology), the 1945 Constitution and the basic principles contained in the Convention on the Rights of the Child, including the following:
   a. Non-discrimination;
   b. The best interests of the child
   c. The right to life, continuity of life and to develop;
   d. Respect for the opinions of children.

Article 3
The protection of children is intended to guarantee the rights of children so that they may live, grow, develop and participate optimally in society in accordance with their dignity as human beings, and that they will be protected against violence and discrimination in order to ensure the moral values and well-being of Indonesian children.

CHAPTER III
RIGHTS AND OBLIGATIONS OF CHILDREN

Article 4
Every child shall be entitled to live, grow, develop and participate normally in society in accordance with his/her dignity as a human being, and to be protected against violence and discrimination.

Article 5
Every child shall be entitled to possess a name to show his/her individual identity and status as a citizen.

Article 6
Every child shall be entitled to practice his/her religion, and to think and express himself/herself in accordance with his/her intellect and age, based upon the guidance of his/her parents.

Article 7
(1) Every child shall be entitled to know his/her parents, and to be brought up and cared for by his/her own parents.
(2) Should for any reason his/her natural parents not be able to guarantee the child’s growth and development, or the child has been neglected and/or abandoned, then

(16) “Person” shall mean an individual person or body corporate;
(17) “Government” shall mean both the central and local governments.
the said child may be fostered or adopted as a foster or adopted child by other persons in accordance with the provisions of the laws and regulations in effect.

**Article 8**
Every child shall have the right to healthcare services and social security in accordance with his physical, mental, spiritual and social needs.

**Article 9**
(1) Every child shall have the right to an education and training in the context of his personal and intellectual development based upon his interests and talents.
(2) Every child, as referred to in Section (1) above, particularly disabled children and gifted children, shall be entitled to receive special-need education.

**Article 10**
Every child shall be entitled to speak and have his/her opinions listened to, and to receive, seek and impart information in accordance with his/her intellect and age for the sake of his/her personal development in accordance with the norms of morality and propriety.

**Article 11**
Every child shall be entitled to rest and enjoy free time, to mix with other children of his/her own age, to play, enjoy recreation, and to give expression to his/her creativity in accordance with his/her interests, talents, and intellect for the sake of his/her personal development.

**Article 12**
Every child who suffers from a handicap shall be entitled to rehabilitation, social assistance and have his/her level of social well being maintained.

**Article 13**
(1) Every child under the care of his/her parents, guardians, or other persons who are responsible for his/her care, shall be entitled to receive protection from the following:
   a. Discrimination;
   b. Exploitation of an economic or sexual nature;
   c. Neglect;
   d. Harsh treatment, violence and abuse;
   e. Injustice; and
   f. Other forms of mistreatment.
(2) Should a parent, guardian or person responsible for the care of a child subject a child to one of the forms of mistreatment referred to in Section (1) above, he/she shall be subject to legal sanction.

**Article 14**
Every child shall be entitled to be brought up by his/her own parents save where there is a valid reason and/or legal provision that requires the separation of a child from his/her parents in the interests of the child. Such separation shall only be used as a last resort.
Article 15
Every child shall be entitled to protection from the following:
   a. Misused for political activities;
   b. Involvement in an armed conflict;
   c. Involvement in social unrest;
   d. Involvement in an event that involves violence; and
   e. Involvement in war.

Article 16
(1) Every child shall be entitled to protection from abuse, torture or inhuman punishment under the law.
(2) Every child shall be entitled to liberty in accordance with the law.
(3) The arrest, detention or criminal prosecution of a child may only be undertaken in accordance with the provisions of the laws and regulations in effect, and shall only be used as a last resort.

Article 17
(1) Every child whose liberty has been taken away shall be entitled to:
   a. Receive humane treatment and be housed separately from adults;
   b. Receive legal aid or other effective assistance at every stage of the legal process; and
   c. Defend himself/herself or to be given a fair trial in an objective and neutral children’s court and in open sessions.
(2) Every child who is a victim or perpetrator of sexual abuse or who finds himself/herself having dealings with the law shall be entitled to have his/her identity kept confidential.

Article 18
Every child who is a victim or is suspected of being the perpetrator of a criminal offence shall be entitled to legal and other assistance.

Article 19
Every child shall have the following obligations:
   a. To respect his/her parents, guardians and teachers;
   b. To love his/her family and the community, and to respect his/her friends;
   c. To love the homeland, the nation and the state;
   d. To practice his/her religion in accordance with its teachings;
   e. To uphold noble values and ethics.

CHAPTER IV
OBLIGATIONS AND RESPONSIBILITIES

Part One
General

Article 20
The state, government, community, the family and parents shall be responsible and accountable for protecting children.
Part Two
Obligations and Responsibilities
of the State and Government

Article 21
The state and the government shall be responsible and accountable for respecting and guaranteeing the human rights of every child irrespective of ethnicity, religion, class, sex, culture or language, legal status, sequence of birth, or physical and/or mental condition.

Article 22
The state and the government shall be responsible and accountable for putting in place infrastructure and facilities designed to provide protection for children.

Article 23
(1) The state and the government shall guarantee the protection, upkeep and well being of children having regard to the rights of parents, guardians and other person responsible for the care of a child under the law.
(2) The state and the government shall oversee the protection of children.

Article 24
The state and the government shall guarantee that children shall be allowed to voice their opinions based upon their age and intellectual development.

Part Three
Obligations and Responsibilities of the Communities

Article 25
The obligations and responsibilities of the community in protecting children shall be realized through the role of the community in providing protection for children.

Part Four
Obligations and Responsibilities of Families and Parents

Article 26
(1) Parents shall be responsible and accountable for:
   a. Caring for, maintaining, educating and protecting children;
   b. Ensuring the growth and development of the child in accordance with his capabilities, talents and interests; and
   c. Preventing underage marriages.
(2) Should the parents be absent of their whereabouts unknown, or for some other reason be unable to fulfil their obligations and responsibilities, then the obligations and responsibilities as referred to in Section (1) above may be
assigned to another family in accordance with the provisions of the laws and regulations in effect.

CHAPTER V
STATUS OF CHILDREN

Part One
Identity of the Child

Article 27
(1) Every child must be given an identity from birth.
(2) An identity as referred to in Section (1) above shall be stated in a birth certificate.
(3) The issuing of birth certificate shall be based upon a declaration by a person who witnessed or assisted at the birth.
(4) Should a particular of a child’s birth be unknown, and the whereabouts of his/her parents are also unknown, then the issuance of the child’s birth certificate shall be based upon a declaration by the person who found the child.

Article 28
(1) The issuance of a birth certificate shall be the responsibility of the government, and be carried out in practice at a level that is not lower than that of the village or sub-district.
(2) The issuance of a birth certificate as referred to in section (1) above must be carried out not later than thirty (30) day subsequent to the filing of an application.
(3) The issuance of a birth certificate as referred to in section (1) above shall be free of charge.
(4) The procedures and requirements for the issuance of a birth certificate as referred to in section (1) above shall be further provided for by law.

Part Two
Children born of International Marriages

Article 29
(1) In the case of a child born from a marriage between a citizen of the Republic of Indonesia and a foreign national, he/she shall be entitled to take his/her citizenship from either his/her father or his/her mother in accordance with the provisions of the laws and regulations in effect.
(2) In a case where a marriage as referred to in Section (1) above ends in divorce, the said child shall be entitled to choose, or may be ordered by a court, to be brought up by one of his/her two parents.
(3) In a case of divorce as referred to in Section (2) above where the child is not capable of making such a choice, and the child’s mother is a Republic of Indonesia citizen, then in the interests of the child and at the request of the mother, the government shall be required to provide the child with Republic of Indonesia citizenship.
CHAPTER VI
PARENTAL RIGHTS

Article 30
(1) Should parents as referred to in article 26 herein neglect their obligations, then supervisory measures may be put in place or parental rights may be revoked.
(2) In order for supervisory measures to be put in place or parental rights to be revoked as referred to in Section (1) above, a ruling of the court shall be required.

Article 31
(1) One of the parents, a blood sibling or a family member of up to third degree may submit an application to the court for a ruling on the revocation of parental rights or the putting in place of supervisory measures should there be sufficient grounds for this.
(2) Should one of the parents, a blood sibling or a family member of up to the third degree not be able to lodge an application as referred to in Section (1) above, then an authorized official or institution may do so.
(3) An order of the court as referred to in Section (1) above may appoint an individual or a government/community institution to act as guardian for the child in question.
(4) An individual who is to serve as the guardian of a child as referred to in Section (3) above must be of the same religion as the child.

Article 32
An order of the court as referred to in Article 31 (3) herein shall, at the minimum, provide for the following:
   a. There shall be no severance of relations between the child and his/her natural parents;
   b. The child’s parent shall continue to be required to pay for the upkeep of the child; and
   c. The period of time during which parental rights shall be revoked.

CHAPTER VII
GUARDIANSHIP

Article 33
(1) Should a child’s parents be legally incompetent or their whereabouts are unknown, then an individual or an institution that meets the requirements may be appointed to serve as a guardian of the child.
(2) In order for a child to be placed under guardianship as referred to in Section (1) above, an order of the court shall be required.
(3) A guardian as referred to in Section (2) above must be of the same religion as the child.
(4) In the interests of the child, a guardian as referred to in Section (2) above shall be required to manage the assets of the child.

(5) The requirements and procedures for the appointment of a guardian as referred to in Section (1) above shall be further provided for by Government Regulation.

**Article 34**

A guardian who has been appointed based upon a court order as referred to in Article 23 hereof shall be entitled in the best interests of the child to represent the child both in and out of court and to undertake legal acts on behalf of the child.

**Article 35**

(1) In a case where an order of the court on guardianship has yet to be issued, the assets of the child in question may be managed by the Trustee of Estates (Balai Harta Peninggalan), or another institution that has authority for such purposes.

(2) The Trustee of Estates or other institution as referred to in Section (1) above shall act as the guardian of the child in the best interests of the child.

(3) The administration of an estate as referred to in Sections (1) and (2) must be based upon an order of the court.

**Article 36**

(1) Should an appointed guardian subsequently be found to be legally incompetent or to have abused his/her position as guardian, then his/her status as guardian shall be revoked and another person shall be appointed, based upon an order of the court, to act as guardian.

(2) In the case of the demise of a guardian, another person shall be appointed based upon an order of the court to act as guardian.

**CHAPTER VIII**

**FOSTERING AND ADOPTION**

**Part One**

**Guardianship**

**Article 37**

(1) The fostering of children shall be provided for in the case of children whose parents are unable to guarantee their proper physical, mental, spiritual and social development.

(2) The fostering of a child as referred to in section (1) above shall be undertaken by an institution that is authorized for such purpose.

(3) Should an institution as referred to in section (2) above be founded upon religious principles, a child being fostered must be the same religion as the religion that forms the basis on the institution concerned.

(4) Should a child be fostered by an institution that is not founded upon religious principles, then regard must be given to the religion of the child in question.

(5) The fostering of a child by an institution may take place within or outside the said institution.

(6) An individual who wishes to participate may do so through an institution as referred to in Section (3), Section (4) and Section (5) above.
Article 38
(1) The fostering of a child as referred to in Article 37 hereof shall not discriminate based upon the ethnicity, religion, class, sex, culture or language, legal status, sequence of birth, or physical and/or mental condition of the child.
(2) The fostering of a child as referred to in Section (1) above shall involve the guidance, upkeep, maintenance and education of the child on an ongoing basis, and the provisions of assistance with costs and/or other facilities, so as to guarantee the physical, mental, spiritual and social growth and development of the child, without affecting the religion of the child.

Part Two
Adoption

Article 39
(1) The adoption of a child may only be carried out in the best interests of the child, and be based upon local custom and the provisions of the laws and regulations in effect.
(2) The adoption of a child as referred to in Section (1) above shall not sever the blood relationship between the adopted child and his/her natural parents.
(3) Candidate adoptive parents must be on the same religion as the child who is to be adopted.
(4) The adoption of children by foreign nationals shall only be permitted as the last resort.
(5) In a case where the background of a child is unknown, his/her religion shall be taken to be the same as that of the majority of inhabitants in the area in question.

Article 40
(1) Adoptive parents shall be required to inform an adopted child about his/her background and natural parents.
(2) The giving of information to the child regarding his/her background and natural parents as described in Section (1) above shall have regard to the readiness of the child to receive such information.

Article 41
(1) The government and the community shall provide guidance and exercise oversight in respect of the adoption of children.
(2) The procedures concerning the guidance and oversight referred to in Section (1) above shall be provided for by the Government Regulations.

CHAPTER IX
PROTECTION OF CHILDREN

Part One
Religion
Article 42
(1) Every child shall receive protection so that he/she may practice his/her religion.
(2) Until such time as a child may make his/her decision, his/her religion shall be that of his/her parents.

Article 43
(1) The state, community, family, parents, guardians and social institutions shall be required to ensure the protection of the child’s right to practice his/her religion.
(2) The protection of a child’s right to practice his/her religion as referred to in Section (1) above shall include the right to receive guidance and instruction in his/her religion.

Part Two
Health

Article 44
(1) The government shall be required to provide facilities and make efforts to ensure comprehensive healthcare for children so that every child shall obtain optimum healthcare from conception.
(2) The provision of the comprehensive healthcare facilities as referred to in Section (1) above shall be supported by the participatory role of the community.
(3) The provision of comprehensive healthcare facilities as referred to in Section (1) above shall include promotional, preventative, curative, and rehabilitative efforts both as regards basic and referral healthcare services.
(4) The provision of comprehensive healthcare facilities as referred to in Section (1) above shall be provided free of charge for families of limited means.
(5) The implementation of Sections (1), (2), (3) and (4) above shall be subject to the provisions of the laws and regulations in effect.

Article 45
(1) A child’s parents and family shall be responsible for maintaining the health of the child from the womb.
(2) Should the child’s parents and family be incapable of fulfilling their responsibilities as referred to in Section (1) above, then the government shall be fully responsible.
(3) The responsibility of the government referred to in Section (2) above shall be subject to the provisions of the laws and regulations in effect.

Article 46
The state, the government, the family and the parents shall be responsible for ensuring that a child is borne free of life threatening or incapacitating diseases.

Article 47
(1) The state, the government, the family and the parents shall be responsible for protecting a child against transplantation of the child’s organs undertaken in the interests of a third party.
(2) The state, the government, the family and the parents shall be responsible for protecting a child against the following:
a. The removal of the child’s body organs and/or body tissues against the health of the child;
b. The trading in the organs and/or body tissue of a child; and
c. Medical research using children as the subjects of the research without the permission of the parents and the prioritizing of the best interests of the child.

Part Three
Education

Article 48
The Government shall be required to provide a minimum of nine (9) years basic education for all children.

Article 49
The state, the government, the family and the parents shall be responsible for providing the widest possible opportunities for a child to obtain an education.

Article 50
Education as referred to in Article 48 herein shall be focused on the following objectives:
a. Developing the behaviour, personal capacities, talents and intellectual and physical capabilities of the child so that he/she may achieve his/her full potential;
b. Developing respect for human rights and freedoms;
c. Developing respects for elders, cultural identity, language and values, the national values of the place where the child lives and the place where he/she originated, and respect for cultures that are different from his/her own;
d. Preparing the child to lead a responsible life; and
e. Developing a sense of respect and love for the environment.

Article 51
A physically or mentally disabled child shall be given the same opportunities to receive and have access to both a normal and a special education.

Article 52
A gifted child shall be given the opportunity to receive and have access to a special education.

Article 53
(1) The government shall be responsible for providing free education, or assistance, or special services to children from families of limited means, neglected and/or abandoned children, and children who live in remote areas.
(2) The responsibility of the government as referred to in Section (1) shall also include encouraging the community to be actively involved.

Article 54
Children attending school must be protected against violence and abuse from teachers, school managers, and schoolmates both in the schools and in other educational institutions.
Part Four
Social Development

Article 55
(1) The government shall be required to ensure the maintenance and upkeep of neglected and/or abandoned children, whether in the context of an institution or outside an institution.
(2) The provision of maintenance and upkeep as referred to in Section (1) above may be undertaken by community institutions.
(3) In ensuring the provision of maintenance and upkeep for neglected and/or abandoned children, government institutions and community institutions, as referred to in Section (2) above, may collaborate with other relevant parties.
(4) With regard to the maintenance and upkeep of neglected and/or abandoned children as referred to in Section (3), oversight and supervision shall be carried out by the Minister of Social Affairs.

Article 56
(1) In performing its duties of maintenance and upkeep, the government shall make efforts to ensure that a child can:
   a. Participate;
   b. Express his/her views and thoughts in accordance with his/her conscience and religious beliefs;
   c. Receive both oral and written information in accordance with his/her age and development;
   d. Organize and associate;
   e. Have sufficient time to rest, play, have recreation, express his/her creativity, and engage in artistic expression; and
   f. Have play facilities that meet health and safety requirements.
(2) The efforts referred to in Section (1) above shall be adjusted to take account of the child’s age, capabilities and environment so that the child’s development is not hampered or otherwise interfered with.

Article 57
Should a child be neglected due to the failure of his/her parents to exercise their responsibilities for some reason, then an institution as referred to in Article 55 hereof, the family and/or authorized officer may submit an application to the court for an order declaring the child to be neglected.

Article 58
(1) An order of the court as referred to in article 57 herein shall state the place/institution where the neglected child is to be accommodated and maintained.
(2) The government or authorized institutions shall be required to provide places/institutions as referred to in Section (1) above.

Part Five
Special Protection
Article 59
The government and/or authorized state institution shall be responsible and accountable for providing special protection to children in emergency situations, children in contact with the law, children from minority and isolated groups, children being exploited economically or sexually, children who are traded, children who becomes the victims of the misuse of narcotics, alcohol, psychotropic substances and other additive substances, children who are the victims of kidnapping, sale, trading, children who are the victims of both physical and/or mental violence, disabled children, children who are the victims of abuse, and neglected/abandoned children.

Article 60
Children who find themselves in emergency situation as referred to in Article 59 above shall consist of:
   a. Refugee children;
   b. Children who are the victims of social disturbances;
   c. Children who are the victims of natural disasters; and
   d. Children who find themselves in the midst of armed conflicts.

Article 61
The special protection to be afforded to refugee children as referred to in Article 60 a hereof shall be in accordance with humanitarian law.

Article 62
The special protection to be afforded to children who are the victims of social disturbances and natural disasters, and children who find themselves in the middle of armed conflicts as referred to in Article 60 sections b, c and d hereof shall be provided through:
   a. Meeting the basic needs of the children as regards to food, clothing, shelter, education, healthcare, learning and recreation, social security and equality of treatment; and
   b. Meeting the special needs of children who are disabled or who suffer from psychological problems.

Article 63
All persons shall be prohibited from recruiting or equipping children for military or similar purposes, and from putting the lives of children in danger.

Article 64
(1) The special protection to be afforded to children who find themselves in contact with the law as referred to in Article 59 herein shall cover children who are in conflict with the law and who are the victims of criminal acts. Such special protection shall be the responsibility of both the government and the community.
(2) The special protection to be afforded to children who find themselves in contact with the law as referred to in Section (1) above shall cover the following:
   a. Ensuring humane treatment of children in accordance with the dignity and rights of children;
   b. The early assignment of counsellors to help children;
c. The provision of special infrastructure and facilities;
d. Ensuring the imposition of appropriate sanctions in accordance with the best interests of the child;
e. Continuous monitoring and recording the development of a child who finds himself/herself in contact with the law;
f. The provision of guarantees concerning the protection of the relationship between a child and his/her parents or family;
g. Ensuring that the child’s identity is not released in the mass media and preventing stigmatization of the child.

3) The special protection to be afforded to children who are the victims of criminal offences as referred to in Section (1) above shall cover the following:
   a. Rehabilitation efforts of both an institutional non-institutional nature;
   b. Ensuring that the child’s identity is not released through the mass media and preventing stigmatization of the child;
   c. Providing physical, mental, and social safety guarantees to victims and expert witnesses;
   d. Ensuring access to information regarding the development of the legal process.

Article 65
(1) The special protection to be afforded to children from minority and isolated groups as referred to in Article 59 hereof shall cover the provision of infrastructure and facilities so that such children may enjoy their own culture, practice their own religion and speak their own language.
(2) All persons shall be prohibited from preventing children as referred to in section (1) above from enjoying their own culture, practicing their own religion and speaking their own language subject to the need of access to social culture development.

Article 66
(1) The special protection to be afforded to children who have suffered economic or sexual exploitation as referred to in Article 59 hereof shall be the responsibility of the government and community.
(2) The special protection to be afforded to children who have suffered exploitation of a type referred to in Section (1) above shall cover the following:
   a. The dissemination and/or socialization of the laws and regulations concerned with the protection of children from economic and sexual exploitation;
   b. Monitoring, reporting and imposition of sanctions; and
   c. The involvement of various government agencies, companies, labour unions, and non-governmental and community organizations in the effort to eradicate the economic and/or sexual exploitation of children.
(3) All persons shall be prohibited from permitting, undertaking, ordering to be undertaken or participating in the exploitation of children as referred to in Section (1) above.

Article 67
(1) The special protection to be afforded to children who become victims of the misuse of narcotics, alcohol, psychotropic substances and other additive substances as referred to in Article 59 hereof, or who are involved in the production or distribution of such substances, shall cover supervision,
(2) All persons shall be prohibited from permitting, undertaking, ordering or participating in the exploitation of children through the misuse, production or distribution of additive substances as referred to in Section (1) above.

**Article 68**

(1) The special protection to be afforded to children who become victims of kidnapping, sale or trading as referred to in Article 59 above shall cover supervision, protection, prevention, care and rehabilitation efforts on the part of both the government and the community.

(2) All persons shall be prohibited from permitting, undertaking, ordering to be undertaken or participating in the kidnapping, sale or trading in children as referred to in Section (1) above.

**Article 69**

(1) The special protection to be afforded to children who are the victims of violence, including physical, psychological, and sexual violence, as referred to Article 59 hereof shall include the following:
   a. The dissemination and/or socialization of the laws and regulations concerned with the protection of children from violence;
   b. Monitoring, reporting and the imposition of sanctions.

(2) All persons shall be prohibited from permitting, undertaking, ordering to be undertaken or participating in the type of violence referred to in section (1) above.

**Article 70**

(1) The special protection of disabled children as referred to in Article 59 hereof shall include the following:
   a. Ensuring the humane treatment of these children in accordance with their dignity and rights as children;
   b. Meeting the special requirements of these children;
   c. Ensuring that such children enjoy the same treatment as other children regarding their social integration and personal development.

(2) All persons shall be prohibited from discrimination against disabled children, including their stigmatization, and shall be required to ensure equality of educational opportunities for disabled children.

**Article 71**

(1) The Special protection to be afforded to children who become the victims of mistreatment and neglect as referred to in Article 59 hereof shall cover supervision, prevention, care and rehabilitation efforts on the part of both the government and the community.

(2) All persons shall be prohibited from permitting, undertaking, ordering or participating in the mistreatment or neglect of children as referred to in Section (1) above.
CHAPTER X
ROLE OF THE COMMUNITY

Article 72
(1) The community shall be entitled to play as broad a role as possible in the effort to protect children.
(2) The participatory role of the community as referred to in Section (1) above shall involve individuals, child protection agencies, community and charitable institutions, non-governmental organizations, educational institutions, religious institutions, business, and the mass media.

Article 73
The participatory role of the community shall be realized in accordance with the provisions of the laws and regulations in effect.

CHAPTER XI
COMMISSION FOR THE PROTECTION OF INDOONESIAN CHILDREN

Article 74
For the purpose of improving the effectiveness of the efforts to provide protection for children, an independent Commission on the Protection of Indonesian children shall be established by law.

Article 75
(1) The Commission on the Protection of Indonesian children shall consist of a chairman, two (2) vice chairmen, one (1) secretary and five (5) members.
(2) The members of the Commission on the Protection of Indonesian children shall consist of representatives of the government, religious figures, community figures, charitable organizations, community organizations, professional associations, non-governmental organizations, business, and community groups that are concerned with the protection of children.
(3) The members of the Commission on the Protection of Indonesian children as referred to in Sections (1) and (2) above shall be appointed and removed by the President, based upon the advice of the Republic of Indonesia House of representatives, for individual terms of three (3) years and may be reappointed for (1) additional term.
(4) Further provisions concerning the organizational structure, working procedures and financing of the Commission for the Protection of Indonesian children shall be set regulated by Presidential Decree.

Article 76
The Commission on the Protection of Indonesian children shall have the following duties:
   a. Conducting socialization of all the laws and regulations involved in the field of child protection, collecting data and information, receiving community
complaints, and conducting studies, monitoring, evaluation and supervision in respect of the protection of children’s rights;
b. Submitting reports, advice, input and considerations to the President in respect of the protection of children’s rights.

CHAPTER XII
CRIMINAL OFFENCES

Article 77
Every person who deliberately commits one of the following acts:

a. Discriminating against a child so that the child experiences either material or psychological loss with the result that his/her social functions are impaired; or

b. Neglecting a child with the result that the child falls ill or suffers physically, mentally or socially;
shall be subject to a term of imprisonment of not more than five (5) years and/or a fine of not more than one hundred million rupiah (Rp 100,000,000).

Article 78
Every person who knowingly and deliberately exposes children to an emergency situation as referred to in Article 60 hereof, or knowingly and deliberately allows children to find themselves in contact with the law, children from minority and isolated groups to be mistreated, children to be exploited economically or sexually, children to be traded, children to become the victims of the misuse of narcotics, alcohol, psychotropic substances and other additive substances, children to become the victims of kidnapping, sale and trading, children to become the victims of violence as referred to in Article 59 hereof, knowing that such children need help and must be assisted, shall be subject to a term of imprisonment of not more than five (5) years and/or a maximum fine of one hundred million rupiah (Rp 100,000,000).

Article 79
Every person who adopts a child in contravention of the provisions set out in Article 39 (1), (2) and (4) hereof shall be subject to a term of imprisonment of not more than five (5) years and/or a maximum fine of one hundred million rupiah (Rp 100,000,000).

Article 80
(1) Every person who commits an act of violence or threatens violence against, or tortures a child, shall be subject to a term of imprisonment of not more than three (3) years and six months, and/or a maximum fine of seventy two million rupiah (Rp 72,000,000).

(2) Should a child as referred to in Section (1) above be seriously injured, then the perpetrator shall be subject to a term of imprisonment of not more than five (5) years and/or a maximum fine of one hundred million rupiah (Rp 100,000,000).

(3) Should a child as referred to in Section (2) above die, then the perpetrator shall be subject to a term of imprisonment and not more than ten (10) years and/or a maximum fine of two hundred million rupiah (Rp 200,000,000).

(4) The punishments provided for in sections (1), (2) and (3) above shall be increase by one-third should the perpetrator be a parent of the child.
Article 81
(1) Every person who through the deliberate use or threat of violence forces a child to engage in sexual intercourse with him/her or with other people shall be subject to a maximum term of imprisonment of fifteen (15) years and a minimum term of three (3) years, and a maximum fine of three hundred million rupiah (Rp 300,000,000) and a minimum fine of sixty million rupiah (Rp 60,000,000).

(2) The punishments set out in Section (1) above shall also be applicable to any person who employs tricks, lies or ruses to persuade, or who encourages, a child to engage in sexual intercourse with him/her or with another person.

Article 82
Every person who uses violence or the threat of violence to force, or who employs tricks, lies or ruses to persuade, or who encourages, a child to engage in indecent behaviour, or who allows such indecent behaviour to occur, shall be subject to a maximum term of imprisonment of fifteen (15) years and a minimum term of three (3) years, and a maximum fine of three hundred million rupiah (Rp 300,000,000) and a minimum fine of sixty million rupiah (Rp 60,000,000).

Article 83
Every person who trades in, sells or kidnaps a child either for his/her own purposes or for sale shall be subject to a maximum term of imprisonment of fifteen (15) years and a minimum term of three (3) years, and a maximum fine of three hundred million rupiah (Rp 300,000,000) and a minimum fine of sixty million rupiah (Rp 60,000,000).

Article 84
Every person who illegally conduct an operation involving an organ or body tissue of a child in the interests of a third party for his/her own gain or the gain of some other person shall be subject to a term of imprisonment of not more than ten (10) years and/or a maximum fine of two hundred million rupiah (Rp 200,000,000).

Article 85
(1) Every person who trades in the organs and/or body tissues of children shall be subject to a term of imprisonment of not more than fifteen (15) years and/or a maximum fine of three hundred million rupiah (Rp 300,000,000)

(2) Every person who contravenes the law by taking the organs and/or body tissues of children without having regard to the health of the said children, or medical researchers who use children as the subjects of research without the permission of their parents, or who do not prioritize the best interests of the children involved, shall be subject to a term of imprisonment of not more than ten (10) years and/or a maximum fine of two hundred million rupiah (Rp 200,000,000).

Article 86
Every person who uses tricks or lies to persuade, or encourages, a child to convert to another religion against his/her free will even though the perpetrator knows or should know that the child in question is not sufficiently intellectually developed or responsible enough to make such a choice, shall be subject to a term of imprisonment of not more than five (5) years and/or a maximum fine of one hundred million rupiah (Rp 100,000,000).
Article 87
Every person who contravenes the law by recruiting and equipping children for military purposes as referred to in Article 63 hereof, or who misuses children by involving them in political activities, or in armed conflict, or in a social disturbance, or in a violent event, or in a war as described in Article 15 hereof, shall be subject to a term of imprisonment of not more than five (5) years and/or a maximum fine of one hundred million rupiah (Rp 100,000,000).

Article 88
Every person who economically or sexually exploits a child for his/her own gain or the gain of some third party shall be subject to a term of imprisonment of not more than ten (10) years and/or a maximum fine of two hundred million rupiah (Rp 200,000,000).

Article 89
(1) Every person who deliberately allows a child to become involved, involves, or orders the involvement of a child in the misuse, production or distribution of narcotics and/or psychotropic substances shall be subject to the death penalty, or life imprisonment, or a term of imprisonment not exceeding twenty (20) years and a minimum term of five (5) years, and a maximum fine of five hundred million rupiah (Rp 500,000,000), and a minimum fine of fifty million rupiah (Rp 50,000,000).

(2) Every person who deliberately allows a child to become involved, involves, or orders the involvement of a child in the misuse, production or distribution of alcohol or other additive substances shall be subject to a term of imprisonment not exceeding ten (10) years and a minimum term of two (2) years, and a maximum fine of two hundred million rupiah (Rp 200,000,000), and a minimum fine of twenty million rupiah (Rp 20,000,000).

Article 90
(1) Should any of the criminal offenses provided for in Articles 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88 and 89 hereof be committed by a body corporate, then the relevant sanctions shall be imposed upon the management and/or the said body corporate.

(2) Only fines may be imposed upon a body corporate subject to the provision that any fine imposed shall be increased by one-third (1/3) over the amount of the fines provided for herein.

CHAPTER XIII
TRANSITORY PROVISIONS

Article 91
Upon the entry into effect of this law, all other laws and regulations that do not conflict with the provisions hereof shall continue in effect.
CHAPTER XIV
CONCLUDING PROVISIONS

Article 92
Within a maximum period of one (1) year after the coming into effect hereof, the Commission of the Protection of Indonesian Children shall have been properly established and constituted.

Article 93
This law shall enter into effect on the date of enactment hereof. So that all may be aware, it is hereby ordered the enactment of this Law be listed in the Official Gazette of the republic of Indonesia.

Approved in Jakarta
On October 22, 2002
President of the Republic of Indonesia,

Megawati Soekarnoputri

Enacted in Jakarta
On October 22, 2002

State Secretary of the Republic of Indonesia

Bambang Kesowo

Official Gazette of the Republic of Indonesia Year 2002
Number 109
President
Of the Republic of Indonesia

Elucidations on
Law Number 23 Year 2002
on
Child Protection

GENERAL

Children represent a gift and blessing from Almighty God, and must always be protected, as they possess human dignity and rights that must consistently be held in high regard. The rights of children constitute part of the overall set of human rights provided for in the 1945 Constitution and are enumerated in the United Nations’ Convention on the Rights of the Child. From the perspective of national and state life, children represent the future of the nation and constitute the generation that will take over the mantle of advancing the hopes of the nation. Thus every child is entitled to live, grow and develop, to participate in society, to be protected from violence and discrimination, and to have his/her rights and liberties upheld.

While Law number 39 of 1999 refers to the rights of children, the specific obligations and responsibilities of parents, the family, the community, the government and the state still need to be spelled out in a law on the protection of children that is capable of providing a juridical basis for the fulfilment of such obligations and responsibilities. Accordingly, the provisions of this law have been based upon the consideration that the protection of children, in all its aspects, forms part and parcel of the national development effort, particularly as regards the advancement of national and state life.

Parents, the family and the community are all responsible for the protecting and upholding the rights referred to above in accordance with the obligations that have been respectively placed upon them by law. In addition, the state and the government are also responsible for providing facilities and access to children so as to ensure their optimum growth and development.

This law stresses that the responsibilities of parents, the family, the community, the government and the state take the form of a series of activities that must be undertaken on an ongoing basis so as to ensure the protection of children’s rights. These activities must be sustained and be directed at ensuring the proper physical, mental, spiritual and social growth and development of children. All this is necessary so as to ensure the best possible life for the child as a potential leader of the nation,
and to make sure that he grows up to be resilient, imbued with the spirit of patriotism and the values of Pancasila, and is of good moral character, as well as being determined to uphold the unity and integrity of the nation and state.

The efforts to protect children need to be undertaken as early as possible, that is to say, from the time the child is still the womb, and must continue until the child reaches the age of maturity (18 years). Based upon the overall and comprehensive protection of children, this law assigns the obligations to protect children in accordance with the following principles:

a. Non-discrimination;
b. The best interests of the child;
c. The right to life, continuity of life, and development;
   and
d. Respect for the opinions of child.

In encouraging the development and protection of children, the community must be afforded a role through the efforts undertaken by child protection institutions, religious institutions, non-governmental organizations, community organizations, business, the mass media and educational institutions.

ELUCIDATION ARTICLE BY ARTICLE

Article 1
Self-explanatory

Article 2
The principles set out here are in accordance with the basic principles contained in the Convention on the rights of the child.

The “best interests of the child” principle means that all actions involving children that are undertaken by the government, the community, the legislature, and the judiciary must take the best interests of the child as the paramount consideration.

The term “life, continuity of life, and to develop” refers to the most fundamental human rights of children that must be protected by the state, the government, the community, the family and the parents.

“Respect for the opinion of children” refers to respect for the rights of children to participate and to voice their opinions as regards the taking of decisions that will influence their lives.

Article 3
Self-explanatory

Article 4
This right is in accordance with that which is contained in Article 28 B (2) of the 1945 Constitution and the basic principles set out in the Convention on the Rights of the Child.
Article 5
Self-explanatory

Article 6
This provision is designed to ensure freedom for children in developing their creativity and intellects in accordance with the age of the child in question. This Article also stresses that such development must continue to be guided by the child’s parents.

Article 7
Section (1)
This provision concerns the right of a child to be informed who his/her parents are, in the sense of his/her background (including his natural mother), and is intended to avoid the severance of the relationship between the child and his/her natural parents. Meanwhile, the inclusion of the provision that every child shall have the right to be brought up and cared for by his/her parents is intended to encourage respect and obedience on the part of children

Section (2)
The fostering or adoption of a child shall be undertaken in accordance with legal and customary norms, and the norms of the religion adhered to by the child.

Article 8
Self-explanatory

Article 9
Self-explanatory

Article 10
Self-explanatory

Article 11
Self-explanatory

Article 12
This rights provided for in this provision are designed to guarantee the child’s life based upon his/her dignity as a human being, and to improve the child’s self-confidence and his/her ability to participate in the life of the community, nation and state.

Article 13
Section (1)
Paragraph a.
Discriminatory treatment includes, but is not limited to, discrimination based upon ethnicity, religion, race, class, sex, culture, language, legal status of the child, sequence in which the child was born, or the physical and/or mental condition of the child.
Paragraph b.
Exploitation includes, but is not limited to, an act of manipulation of a child, using or forcing a child to act for profit in the interests of a particular party, the family or a group.

Paragraph c.
“Neglect and/or abandonment” includes, but is not limited to, an act of deliberately abdicating one’s responsibilities to properly maintain and look after a child.

Paragraph d.
“Harsh treatment” includes, but is not limited to, tyrannical treatment, vilification, cruelty or not giving a child the love to which he/she is entitled to. Meanwhile, “violence and abuse” refers to, for example, the injuring or wounding of the child. It is not confined to physical abuse, but also encompasses mental and social abuse.

Paragraph e.
“Injustice” includes, but is not limited to, siding with one child against another, or acting arbitrarily in respect of a child.

Paragraph f.
“Other forms of mistreatment” includes, but is not limited to, verbally abusing a child or speaking rudely to a child.

Section (2)
Self-explanatory

Article 14
“Separation” as referred to in this Article does not mean that the relationship between the child and his/her parents shall be severed.

Article 15
“Protection” as referred to in this Article means both direct and indirect actions taken to save a child from activities that endanger him/her either physically or mentally.

Article 16
Self-explanatory

Article 17
Section (1)
Paragraph a.
Self-explanatory

Paragraph b.
“Other assistance” as referred to in this Article means, for example, guidance from a social worker, consultation with a psychologist or psychiatrist, or assistance from a language expert.
Paragraph c.
Self-explanatory

Section (2)
Self-explanatory

**Article 18**
“Other assistance” as referred to in this Article includes medical, social, rehabilitation, and vocational or educational assistance.

**Article 19**
Self-explanatory

**Article 20**
Self-explanatory

**Article 21**
Self-explanatory

**Article 22**
“Infrastructure and facilities” as referred to in this Article means, for example, schools, playgrounds, sports facilities, places of worship, health facilities, art facilities, recreational facilities, crèches, places for nursing mothers, and juvenile detention centers.

**Article 23**
Self-explanatory

**Article 24**
Self-explanatory

**Article 25**
Self-explanatory

**Article 26**
Self-explanatory

**Article 27**
Self-explanatory

**Article 28**
Self-explanatory

**Article 29**
Self-explanatory

**Article 30**
Self-explanatory
Article 31
Self-explanatory

Article 32
Self-explanatory

Article 33
Section (1)
Self-explanatory

Section (2)
The “court” as referred to in this Article means the Religious Court for Muslims and the District Court for non-Muslims.
Self-explanatory

Section (3)
Self-explanatory

Section (4)
Self-explanatory

Section (5)
Self-explanatory

Article 34
Self-explanatory

Article 35
Self-explanatory

Article 36
See Elucidation on Article 33 (2)

Article 37
Section (1)
Self-explanatory

Section (2)
The Term “institution” as used herein means an institution that is involved in the fostering of children.

Section (3)
Self-explanatory

Section (4)
Self-explanatory

Section (5)
The provisions of this Article apply to children who are not yet intellectually developed and responsible. The determination of the child’s religion shall be in
accordance with the religion of the majority of the local inhabitants (at the village or sub-district level), and be based upon consensus after a proper study has been carried out.

**Article 40**

Section (1)
Self-explanatory

Section (2)
The word “readiness” as used in this section shall mean whether psychologically or socially the child is ready. The child will normally be ready upon reaching the age of eighteen (18) years.

**Article 41**
Self-explanatory

**Article 42**

Section (1)
Self-explanatory

Section (2)
A child shall be permitted to choose his/her religion if he/she is sufficiently mentally developed, and meets the requirements set by the religion of his/her choice, as well as the provisions of the laws and regulations in effect.

**Article 43**
Self-explanatory

**Article 44**
Self-explanatory

**Article 45**
Self-explanatory

**Article 46**
The phrase “life threatening or incapacitating diseases” as used in this Article refers, for example, to HIV/AIDS, tuberculosis, leprosy or polio.

**Article 47**
Self-explanatory

**Article 48**
Self-explanatory

**Article 49**
Self-explanatory

**Article 50**
Self-explanatory
Article 51
Self-explanatory

Article 52
Self-explanatory

Article 53
Self-explanatory

Article 54
Self-explanatory

Article 55
Section (1)
By “institution” as referred to in this Section is meant the system of government or private institutions, while “outside an institution” means fostering by a family or individual.

Section (2)
Self-explanatory

Section (3)
Self-explanatory

Section (4)
Self-explanatory

Article 56
Self-explanatory

Article 57
Self-explanatory

Article 58
Self-explanatory

Article 59
Self-explanatory

Article 60
Self-explanatory

Article 61
Self-explanatory

Article 62
The phrase “psychological problems” as used in this Article refers to mental trauma and other developmental problems affecting a child at an early age.
Article 63
Self-explanatory

Article 64
Self-explanatory

Article 65
Self-explanatory

Article 66
Self-explanatory

Article 67
Self-explanatory

Article 68
Self-explanatory

Article 69
Self-explanatory

Article 70
Self-explanatory

Article 71
Self-explanatory

Article 72
Self-explanatory

Article 73
Self-explanatory

Article 74
Self-explanatory

Article 75
Section (1)
Self-explanatory

Section (2)
The phrase “community figures” as used in this Section includes traditional leaders.

Section (3)
Self-explanatory

Section (4)
The organizational structures to be established by Presidential Decree include structures at the local level.
Article 76
Self-explanatory

Article 77
Self-explanatory

Article 78
Self-explanatory

Article 79
Self-explanatory

Article 80
Self-explanatory

Article 81
Self-explanatory

Article 82
Self-explanatory

Article 83
Self-explanatory

Article 84
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Article 85
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Article 86
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Article 87
Self-explanatory

Article 88
Self-explanatory

Article 89
Self-explanatory

Article 90
Self-explanatory

Article 91
Self-explanatory
Article 92
Self-explanatory

Article 93
Self-explanatory
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