How do institutions engage with the idea of a human rights-based approach to matters involving children?

A case study of UNICEF and the World Bank

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Abstract

This thesis examines some of the different ways in which institutions engage with the idea of human rights-based approaches to matters involving children. Despite the widespread adoption of human rights-based approaches, legitimate concerns continue to be raised about what a human rights-based approach actually is, and the extent to which the change in discourse has resulted in any meaningful change in practice. Additionally, significant confusion exists about where children fit into the idea of human rights-based approaches, with many organisations espousing child-rights programming as a separate approach. However a number of scholars have rightly criticised this distinction, arguing that a conceptually coherent understanding of human rights implies the consideration of children’s rights, needs, perspectives and interests within human rights-based approaches – a strategy this thesis terms “human rights-based approaches to matters involving children”.

Against this background of promise, perplexity and scepticism, this thesis analyses how UNICEF and the World Bank engage with the idea of human rights-based approaches to matters involving children, and reveals inconsistencies within and across the two organisations vis-à-vis the formulation, understanding and implementation of human rights-based approaches, particularly in relation to children.

The analysis examines coherence at multiple levels: between international human rights norms and institutional rhetoric; between institutional rhetoric and institutional practice; and, ultimately, between international human rights norms and institutional practice. The underlying objectives of this multi-layered approach are, first, to uncover conceptual, institutional and operational explanations for the differences in organisational engagement with the idea of human rights-based approaches to matters involving children, including the opportunities and
challenges they face; and, second, to contribute to the development of a conceptually coherent, workable model of a human rights-based approach to matters involving children. A better understanding how institutions engage with the idea of human rights-based approaches to matters involving children is a necessary first step toward these objectives.
I, Leilani Elliott, do hereby declare:

1. That this thesis comprises only my original work towards the Doctor of Philosophy in Melbourne Law School; and

2. That due acknowledgement has been made in the text to all other material used; and

3. That the length of this thesis does not exceed the maximum word limit, exclusive of the bibliography.

_______________________
Leilani Elliott
For Sandra Aizen and Judit Horvath-Lindberg
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Acronyms and abbreviations

CAT: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
CCC: [UNICEF] Core Commitments to Children in Emergencies
CEDAW: Convention on the Elimination of All Forms of Discrimination Against Women (1979)
CERD: Convention on the Elimination of Racial Discrimination (1965)
DRD: Declaration on the Right to Development (1986)
ExDir: [UNICEF] Executive Directive
HRBA: Human Rights-Based Approach
ICCPR: International Covenant on Civil and Political Rights (1966)
ICRMW: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)
RDTL: Republica Democratica de East Timor [Democratic Republic of East Timor]
MSS: Ministerio Solidaridade Social [RDTL Ministry of Social Solidarity]
MTSP: [UNICEF] Medium-Term Strategic Plan
PPPM: [UNICEF] Programme, Policy and Procedure Manual
UDHR: Universal Declaration of Human Rights (1948)
UN: United Nations
UNCT: United Nations Country Team
UNICEF: United Nations Children’s Fund
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INTRODUCTION

I. Human rights-based approaches to development

“The blueprints for a more just international and social order, oriented toward human rights, are available. They are, in fact, well conceived. The problem, however, is with the implementation of these lofty proclamations. In other words, realities are in very short supply. The gap between standards — of justice, achievement, and performance — and aspiration is evident everywhere.”

The idea of a human rights-based approach to development emerged in the mid-1980s, as a counter to the then dominant welfare models of development assistance. They have, in the subsequent decades, been embraced, to varying degrees, by an increasing number of organisations. All United Nations funds, programmes and specialised agencies, including UNICEF and the World Bank, are to some extent engaged with the idea of human rights-based approaches. Human rights-based approaches also feature heavily in the agendas of non-government organisations, and

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3 See for example: Plan International, Promoting child rights to end child poverty: Achieving lasting change through Child-Centred Community Development (Plan International, 2010) 17: "Plan’s vision is of a world in which all children realise their full potential in societies that respect people’s rights and dignity. The Child-Centred Community Development (CCCD) approach is Plan’s translation of this vision into the practice of international development. CCCD is a rights-based approach”; Save the Children Sweden, Child Rights Programming: How to Apply Rights-Based Approaches to Programming (Save the Children Sweden, 2005) 9: "This handbook aims to provide an introduction to Child Rights Programming – Save the Children’s approach to the use of human rights principles and standards in its work with children, their families, carers and communities”; ActionAid Australia website: “Securing human rights is the missing link between the world’s rich and poor. It’s the key to ending poverty”, available at http://www.actionaid.org/australia/learn/about-actionaid; Oxfam International
government development assistance programs. Yet in the face of this growing engagement, legitimate concerns continue to be raised about what a human rights-based approach actually is, and the extent to which the change


in discourse has resulted in any meaningful change in practice.\(^5\)

Additionally, significant confusion exists about where children fit into the idea of human rights-based approaches, with many organisations, UNICEF amongst them, espousing child-rights programming as a separate approach.\(^6\)

However a number of scholars have rightly criticised this distinction, arguing that a conceptually coherent understanding of human rights implies the consideration of children’s rights, needs, perspectives and interests within human rights-based approaches\(^7\) – a strategy this thesis terms “human rights-based approaches to matters involving children”. Against this background of promise, perplexity and scepticism, this thesis analyses how UNICEF and the World Bank engage with the idea of human rights-based approaches to matters involving children, and identifies some conceptual, institutional and operational reasons for the discrepancies between international human rights norms and their integration into institutional rhetoric and practice.

In the context of this thesis, the term “institutional rhetoric” encompasses


\(^6\) Joachim Theis and Claire O’Kane, ‘Children’s participation, civil rights and power’ in Paul Gready and Jonathan Ensor (eds), Reinventing Development?: Translating Rights-Based Approaches from Theory Into Practice (Zed Books, 2005) 156, 167; Overseas Development Institute, Raising the game: mainstreaming children’s rights – Children still ‘invisible’ in development debates, ODI Briefing Paper 56 (November 2009) 1.

\(^7\) Theis and O’Kane, Ibid 167; Overseas Development Institute, Ibid 4.
formal UNICEF and World Bank commitments and policies, as well as informal statements made by UNICEF and World Bank officials in public fora or contained in publically available documents. The term “practice” refers predominantly to information provided by research participants about how institutional rhetoric is understood and implemented, but also includes information derived from secondary sources, that is, existing research by other scholars and practitioners. The term “discrepancies” serves a number of functions: it signifies the different types of institutional engagement with the idea of human rights-based approaches to matters involving children; it expresses the disparities between international human rights standards and institutional rhetoric; and it conveys the inconsistencies between institutional rhetoric and institutional practice.

The analysis of how UNICEF and the World Bank engage with the idea of human rights-based approaches to matters involving children examines coherence at all of these levels: between international human rights norms and institutional rhetoric; between institutional rhetoric and institutional practice; and, ultimately, between international human rights norms and institutional practice. The underlying objectives of this multi-layered approach are, first, to uncover conceptual, institutional and operational explanations for the differences in organisational engagement with the idea of human rights-based approaches to matters involving children, including the opportunities and challenges they face; and, second, to contribute to the development of a conceptually coherent, workable model of a human rights-based approach to matters involving children. A better understanding how institutions engage with the idea of human rights-based approaches to matters involving children is a necessary first step toward these objectives.
II. **Scope**

*A focus on children*

The focus on children is justified for three reasons. First, children comprise a significant percentage of the world’s population. Approximately one-third of all humanity – 2.2 billion people out of an estimated 7 billion – is under 18 years of age. Second, children are disproportionately affected by poverty and humanitarian crises. Eighty-six per cent of the world’s children (1.9 billion) live in developing countries, where they account for an average 47 per cent of population. An estimated one billion children are living in countries affected by conflict, with an estimated 200 million of them directly affected by these conflicts. Half of the world’s 16.7 million refugees are children. Third, despite the widespread adoption of human rights-based approaches, “human rights continue to be ethically grounded in the experiences and perspectives of adults”. As a result, children are often overlooked by mainstream development organisations, which tend to

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12 Steven, Ibid 6.

13 UNHCR, ’Global Trends 2013: War’s Human Cost’ (UNHCR, 2014) 36. Note that the percentage of refugee children in the major refugee-hosting countries varies dramatically, from 78% in Uganda to 19% in Yemen.

consider working with children to be the exclusive domain of children’s rights organisations.\textsuperscript{15} This thesis builds on these observations through an analysis of the degree to which children’s rights (within the broader human rights framework) are taken into account in the organisational policies and practices of UNICEF and the World Bank.

**UNICEF and the World Bank**

UNICEF and the World Bank were selected as case study organisations for opportunities they offer to compare different types of engagement with human rights-based approaches generally, and with the rights of children in particular. UNICEF has an established, explicitly articulated formal commitment to human rights and a human rights-based approach. The World Bank does not; indeed, it has repeatedly rejected the idea that it is bound by international human rights standards. At the same time, the Bank has espoused commitments to human rights in key international fora. Moreover, an analysis of its policies and practices reveals that aspects of what might be considered a human rights-based approach are evident in some projects and program areas. Significantly, both organisations are committed to addressing the needs and interests of children. UNICEF is an expressly child-focused agency, while the World Bank incorporates programs relating to children as part of broader poverty alleviation and development objectives. These commonalities and distinctions provide the opportunity for a more comprehensive examination of some of the different ways in which organisations engage with and respond to the idea of human rights-based approaches to matters involving children.

\textsuperscript{15} Theis and O’Kane, above n 6, 167; Overseas Development Institute, above n 6, 2; Philip Alston and John Tobin, *Laying the foundations for children’s rights: An Independent Study of some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child* (UNICEF Innocenti Research Centre, 2005) 44.
East Timor

The República Democrática de Timor Leste ("East Timor") was chosen for the field office component of the research in part due to the in-country presence of both UNICEF and the World Bank, which allows for a comparative analysis of the two organisations in the one country. More broadly, however, the situation context of East Timor is reflective of some of the difficult external challenges organisations face in translating human rights commitments from policy to practice, such as a recent history of violent conflict and human rights violations, an extremely high population of children per capita, a new government that despite having ratified all core international human rights instruments faces enormous capacity constraints, deeply embedded cultural traditions, and widespread poverty and social exclusion.\(^\text{16}\) Yet to be taken seriously, these are precisely the sorts of challenges which human rights-based approaches must be able to address. This background makes East Timor an ideal context in which to examine some of the ways in which institutions engage with the idea of human rights-based approaches to matters involving children.

III. Methodology

Despite some shared discourses, organisational engagement with the idea of human rights-based approaches to matters involving children varies significantly. A small but growing number of scholars have begun studying the issue from an ethnographic perspective, examining what this concept

\(^{16}\) While other countries may be similarly representative, and hence offer comparable opportunities for the exploration of human rights-based programming in relation to children in a post-conflict environment, my experience living and working in East Timor facilitated more ready access to, and a deeper contextual understanding of, research data than would be available elsewhere.
means to real people, in real situations, and why. Building on their research, this thesis utilises legal ethnography to bring different institutional narratives to light, revealing some of ways in which human rights-based approaches to matters involving children are formulated, understood, conceptualised and implemented by staff at UNICEF and the World Bank. It comprises both a *vertical analysis* (between international norms and institutional rhetoric and practice) and a *horizontal analysis* (between UNICEF and the World Bank).

*Data collection*

The research comprises three elements: a review of scholarly literature; an analysis of UNICEF and World Bank documents that present organisational engagements to human rights-based approaches to matters involving children; and semi-structured interviews with UNICEF and World Bank staff at their respective international headquarters, in New York City and Washington D.C., and at their field offices in East Timor.

The first stage of the research, conducted in 2006 to 2007, involved a thorough review of the literature on human rights and children’s rights, human rights-based approaches to development, conceptualisations of children and childhood, and the impacts of armed conflict on children. This in turn led to the development of a questionnaire for use in interviews with

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research participants from UNICEF and the World Bank. Interviews were chosen in order to interrogate organisational policies and discourses, and to gain an understanding of how these policies and discourses are conceptualised and utilised by individuals within those organisations on a day-to-day basis.18

The second stage of the research – the headquarters interview component – was undertaken in the United States during January and February 2008. I had made email contact with the majority of research participants before I departed Melbourne, and telephoned when I arrived to arrange meeting times. Due to unforeseen commitments, not all officials who had agreed to participate in the research were ultimately available to do so. Nonetheless, while the number of research participants is relatively small, those who did take part came from a range of departments within each organisation and reflected diverse opinions. A total of 16 officials were interviewed for the second stage of the research: six from the UNICEF headquarters in New York City, and ten from the World Bank headquarters in Washington D.C. Interviews ran for approximately 45-60 minutes, and were generally held in the office of the research participant. Most interviews were conducted individually. However some research participants, upon learning that their colleagues were also being interviewed, requested that they be interviewed together or in small groups. This occurred on four occasions: with two UNICEF staff, with two World Bank staff, with three World Bank staff, and with five members of the World Bank legal team. Of these, three World Bank staff subsequently took part in individual follow-up interviews.

18 Sarfaty, 'Why Culture Matters,' Ibid 652: “Why do certain norms and policies become adopted in an institution while others do not? An ethnographic analysis of organizational culture can explain how and why certain norms are framed, interpreted, and implemented by [international organisations].”
The third and final stage of my research – the field level interview component – took place in Dili, East Timor between April 2008 and July 2009. During this period, East Timor was still recovering economically, socially and politically from the 2006 crisis: 150,000 people remained internally displaced, and investigations were being conducted into the causes of, and the crimes and human rights violations committed during, the crisis. As with interviews in the United States, contact was made with many potential research participants prior to leaving Melbourne, while others were identified in situ. A total of five officials from UNICEF East Timor and three officials from the World Bank East Timor were interviewed. In contrast to their counterparts in New York City and Washington D.C., however, many of the respondents in East Timor participated in multiple interviews, with the result that more detailed information was able to be elicited, and subsequent questions and clarifications were easily accommodated. The initial interviews lasted approximately 45-60 minutes, and took place either at a local café or at the respondent’s office (as determined by the respondent). Follow up interviews ranged in time from ten minutes to an hour.

*An ethnographic approach*

While care has been taken to present the research objectively, it is inevitable that the findings, and the conclusions drawn from them, are to some extent influenced by the preconceptions and interpretations of the author. As James explains:

“[I]t remains the case that the words and phrases have been chosen by the researcher and have been inserted into the text to illustrate an argument or underline a point of view. The point of view being presented is, therefore, the view
In this case, the research findings – particularly those relating to operational context – have likely been informed by my experiences working in East Timor in the child protection sector during the period July 2004 to June 2009. Some mitigation measures were taken. For example, potential research participants – both in the USA and East Timor – were informed in advance of my previous and current professional affiliation; while all research notes, including interview transcripts, were maintained separately from my work.

Despite these precautions, reflections of my observations and experiences into the research findings cannot be entirely discounted. Yet ethnographic inquiry allows this, because it focuses not on proving the truth of one view over another, but in revealing the existence of, and reinforcing the validity of, alternative voices:

“[A]t its most basic level, ethnography involves one person listening to another. Even if such listening is partial, biased and ultimately limited as a mode of investigation, it does foreground and acknowledge the existence of multiple perspectives and positions.”

Indeed, scholars are increasingly emphasising the need to look beyond the formal, legalistic and normative dimensions of human rights in favour of thorough, empirical, inter-disciplinary analysis of human rights as they exist in people’s day-to-day lives, across a range of cultural contexts, social

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practices, spatial relationships, and political landscapes.\textsuperscript{21} Darian-Smith, for example, stresses the need for scholars to “leave behind their intellectual pretensions, acknowledge the limits and deficiencies of disciplines, and open themselves up to new cultural understandings, new analytical questions and new theoretical explorations”.\textsuperscript{22} Similarly, Wilson calls for a more rigorous examination of “how rights are transformed, deformed, appropriated and resisted by state and societal actors when inserted into a particular historical and political context”.\textsuperscript{23}

Such exhortations are underscored by growing recognition of two important, inter-related factors: first, that human rights, while codified in international legal treaties, do not operate solely in the legal domain; and second, that despite their formal universality at the normative level, the ways in which human rights are understood and implemented remain relative. Although they share certain immutable characteristics, people are not homogenous; for both inherent and socially constructed reasons, individual experiences of human rights (including their enjoyment and their violation) vary both within and between communities, as do vulnerabilities to abuse and opportunities for effective redress. In this context, black letter analysis of human rights norms and policies is often insufficient, since it fails to adequately capture different modes of engagement with those norms and policies, and their impacts, in real life. As Hasrup notes, legal language is inherently limited; whether written or spoken, law merely represents ideas, it...


\textsuperscript{22} Darian-Smith, above n 20, xii.

\textsuperscript{23} Wilson, ‘Politics of Truth and Reconciliation in South Africa,’ above n 21, xvii. See also Cowan and Wilson, above n 21, 1; Merry, above n 21, 29.
is not itself a primary locus of understanding:

“Talk of rights may externalise implicit values and potentially bind people together in a speech community, but the possibility remains that the language spoken is semantically empty, because the words refer to no actual experience.”  

A key strength of ethnographic research is that, by exploring attitudes and habits in relation to human rights, and by questioning some of the assumptions behind the rhetoric, transcendental theory becomes grounded in lived experience. Applied to human rights-based approaches to matters involving children, an ethnographic lens provides an opportunity to examine “what people say they do with human rights and what they actually do with human rights in specific fields of political contestation.”

**IV. Thesis structure**

The thesis is comprised of five substantive chapters, plus a conclusion. Chapters one and two develop a conceptual framework for understanding human rights-based approaches to matters involving children. Chapter one asks what a human rights-based approach actually is, and what it entails for implementing organisations. Chapter two delves deeper into the idea of how children fit into human rights based-approaches – that is, what is unique about human rights-based approaches to matters involving children. Chapters three, four and five use these conceptual frameworks to interrogate the two case study organisations, analysing the different ways in

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25 Ibid xii.

26 Wilson, 'Afterword,' above n 17, 78.
which UNICEF and the World Bank engage with the idea of human rights-based approaches to matters involving children, and identifying some of the conceptual, institutional and operational obstacles they face in translating international human rights norms into practice.

**CHAPTER ONE: Human rights-based approaches – clarifying conceptual confusion**

Chapter one seeks to define the parameters of the idea of human rights-based approaches and the problems associated with this concept. It does not provide an exhaustive analysis of all of the conceptual problems associated with human rights-based approaches. Instead, the main objective of this chapter is to clarify the core features of a human rights-based approach, which will be used as the framework for analysing how UNICEF and the World Bank engage with the idea of human rights-based approaches to matters involving children.

The first part of the chapter details the emergence of human rights-based approaches and its influence on the contemporary policies of development actors, both within and beyond the United Nations system. The second part notes that, despite its ubiquity, the term “human rights-based approach” is today open to diverse interpretations, and is associated with a range of different methodologies, disciplines and practices. The complexity and lack of definitional clarity associated with human rights-based approaches risks undermining cohesion within and across different institutions because it creates space for dissimilar, potentially competing conceptualisations to co-exist.

The third part of the chapter demonstrates that, the diversity of human rights-based approaches notwithstanding, some central themes can be
distilled, namely that human rights-based approaches are grounded in international human rights law, and are guided by human rights principles contained in and derived from international human rights instruments. The fourth and final part of the chapter identifies some of the reasons organisations may choose to engage with, or reject, human rights-based approaches. It outlines the main normative and instrumental arguments in favour of human rights-based approaches, in order to better analyse the motivations behind UNICEF’s and the World Bank’s engagement, and better appreciate why the ways in which they formulate, conceptualise, interpret, and implement human rights-based approaches to matters involving children differ.

CHAPTER TWO: Situating children within human rights-based approaches

Chapter two seeks to resolve some of the particular conceptual challenges associated with the human rights-based approaches to matters involving children. The first part of the chapter considers how children are situated within human rights-based approaches. Commentators have observed that children are frequently marginalised in the application of human rights-based approaches by ‘mainstream’ organisations: at best, such organisations may consider children’s rights in separate, dedicated programmes; more often, however, children’s rights are treated as an issue best left to expressly-mandated ‘child rights’ or ‘child welfare’ organisations. Such distinctions ignore the fact that – despite some persisting philosophical objections – international law recognises children’s rights as human rights; consequently, they must be included within the norms and principles that underpin human rights-based approaches. These distinctions are also increasingly untenable in the face of convincing evidence that children may be affected by a wide range of activities across all sectors, whether or not children are the primary
(intended) beneficiaries. Thus, rather than relegating children to a separate category of “child rights-based programming”, a more conceptually coherent strategy is to embrace the notion of a human rights-based approach to matters involving children.

The second part of the chapter explores, and attempts to resolve, some of the difficulties involved in translating into practice two of the human rights principles essential to human rights-based approaches to matters involving children: (a) participation, and (b) the best interests of the child. The chapter notes that these principles are too often expressed at a high level of generality, thus leading to multiple (and possibly incompatible) interpretations. An additional manifestation of this conceptual confusion is the tension between the two principles and the different visions of children they present, including the basis upon which conflicts between the child’s wishes and the child’s best interests should be reconciled. The aim of this discussion is to move beyond identification of the dilemmas associated with understanding and operationalizing these principles, and to offer a degree of conceptual clarity that would make them workable. Consequently, the chapter also seeks to reconcile these two key principles.

CHAPTER THREE: An examination of institutional engagement with the idea of human rights-based approaches at UNICEF and the World Bank

Chapter three explores the different ways in which UNICEF and the World Bank engage with the idea of human rights-based approaches to matters involving children. It does this through an analysis of each organisation’s publically stated position on human rights, interviews with research participants, and secondary literature.
The first part of the chapter examines the ebb and flow of UNICEF’s engagement with human rights-based approaches, charting its journey from a service provision model upon its establishment in 1946 to an expressly human rights-based organisation in 1998. Over the subsequent years, UNICEF reinforced this normative commitment with a series of institutional measures embedding a human rights-based approach in its policies, programmes, and strategic plans. Yet the research – which includes participant interviews and UNICEF’s own evaluations – reveals ongoing confusion amongst staff about what a human rights-based approach means for them, a stronger uptake of language than practice, and doubts about how effective a human rights-based approach actually is. Rather than address these issues, UNICEF appears to have retreated from the human rights-based approach in favour of an “equity focus”, thereby prompting questions about whether, for UNICEF, the human rights-based approach was just another fad.

The second part of the chapter compares and contrasts UNICEF’s approach with that of the World Bank. It analyses the World Bank’s limited but evolving engagement with human rights-based approaches, commencing with its creation in 1944 as a development institution bound by Articles of Agreement that allow its decisions to be guided only by economic considerations. World Bank orthodoxy has been, and to a large extent continues to be, to treat human rights as a political matter that falls outside the Bank’s mandate. In the mid-1990s, however, as the World Bank came under increasing pressure to engage with human rights, Bank officials began interpreting the Articles of Agreement more permissively, and the organisation’s discourse, including its mandate and policies, began expanding into human rights territory. Nonetheless, the Bank’s current engagement with human rights-based approaches remains somewhat
schizophrenic. Although the World Bank has publically and repeatedly promoted itself as a human rights-realizing organisation, it has neither formally adopted nor endorsed a human rights-based approach; it does not have any explicit human rights policies; and its priorities continue to be guided by economic development and poverty reduction concerns. Yet there is a growing engagement with some aspects of human rights-based approaches in the service of these objectives, evident in the Bank’s adoption of certain policies that are compatible with a human rights-based approach, albeit for instrumental rather than normative reasons, and often phrased without explicit reference to human rights. These developments raise questions about how important language and motives actually are, and to what extent human rights-based approaches can be employed without being named as such.

The chapter concludes that engagement with human rights-based approaches to matters involving children varies both within and across organizations, regardless of whether that organisation has formally adopted a human rights-based approach. At both UNICEF and the World Bank, human rights-based approaches are formulated, understood and implemented in different ways, and are associated with a range of goals, terminologies, methodologies and practices. Perhaps the most significant finding though, is how differently UNICEF and the World Bank have responded to the challenges and opportunities that human rights-based approaches present. Although its formal commitments remain in place, UNICEF appears to be pulling away from a human rights-based approach and moving on to a new strategy – the equity focus. Meanwhile, even as the World Bank continues to resist any binding human rights obligations, it is trending toward deeper engagement with the values and principles that underpin a human rights-based approach.
CHAPTER FOUR: The enabling environment: Institutional factors

Having explored the different ways in which UNICEF and the World Bank engage with human rights-based approaches to matters involving children in chapter three, chapter four shifts the focus to some of the underlying reasons for these differences. It does so by examining the institutional factors (inside the organisation) that influence how organisations, and their staff, engage with human rights-based approaches to matters involving children. Drawing on interviews with UNICEF and the World Bank staff, at their respective headquarters and in East Timor, it demonstrates the importance of the enabling environment, and reveals that staff must be willing and able to engage.

One of the common findings to emerge is the significance of organisational culture in shaping staff attitudes and behaviour with respect to human rights. Scholars have observed that organisational culture – that is, the formal goals of the organisation, together with the implicit (and often unspoken) beliefs, expectations, values, ideologies, rules, norms and practices that foster organisational cohesion – is reflected in and reinforced by management structures, incentive systems, and the prioritisation of certain discourses and disciplinary models over others. The research confirms that these factors do indeed influence how UNICEF and World Bank officials engage with human rights-based approaches, and the extent to which they feel comfortable doing so.

At the World Bank, despite the increasing engagement with human rights-based approaches, there is a prevailing culture of scepticism toward explicit human rights language, and resistance to the idea of human rights as a
normative (as opposed to instrumental) concept. At UNICEF, organisational culture perpetuates the notion of UNICEF being a human rights-based organisation. Yet the research reveals that, for many staff, this notion is more a mantra than a substantive practice, due in part to insufficient staff training, limited resources, and misperceptions between headquarters and country offices. These observations lead to another key finding: that formal adoption by an organisation of a human rights-based approach does not necessarily ensure that its culture is human rights-based approach enabling. On the contrary, deeper engagement with human rights-based approaches depends on both disposition and capacity. This requires significant institutional investments in the development of technical skills, adequate management support, and the allocation of sufficient human and financial resources.

CHAPTER FIVE: The enabling environment: Operational factors

Chapter five continues the investigation of the enabling environment in influencing organisational engagement with human rights-based approaches to matters involving children at UNICEF and the World Bank. Unlike chapter four, which focused on internal factors such as organisational culture, chapter five considers operational factors related to the external development context. The research suggests that country context is a major determinant in how successfully commitments to human rights can be implemented in human rights practice. Despite the differing natures of their institutional engagements with a human rights-based approach to matters involving children, officials from UNICEF and the World Bank expressed concerns about applying global policies, determined in their respective headquarters, in countries where local counterparts are unwilling or unable to support those endeavours. This was particularly the case for research
participants based in the field.

The experiences of UNICEF and the World Bank in East Timor confirm that factors such as social dynamics, local conceptions of children, material and human capital scarcity, and the ongoing economic and psychosocial impacts of violent conflict can limit the range and parameters of choices available to implement human rights-based approaches. Indeed, the data strongly indicates that human rights-based approaches cannot exist in the abstract; they must instead be tailored to the realities on the ground. This in turn raises questions about the trade-offs involved in developing local capacities and changing local attitudes, while still ensuring that the needs, and rights, of project beneficiaries do not go neglected.

**CONCLUSION**

The thesis concludes by drawing together the key findings of the research. It highlights the main challenges UNICEF and the World Bank face in engaging with the idea of a human rights-based approach to matters involving children, and offers some organisation-specific recommendations on how each could deepen its engagement. The conclusion also synthesises some of the conceptual issues around human rights-based approaches to matters involving children. Drawing on the scholarly literature examined in chapters one and two; and the experiences of UNICEF and the World Bank analysed in chapters three, four and five; it proposes a rethinking of how children are conceptualised and situated within human rights-based approaches. These suggestions provide a basis for further study – beyond the scope of this thesis – aimed at developing a conceptually coherent, workable model of a human rights-based approach to matters involving children.
CHAPTER ONE: Human rights-based approaches: clarifying conceptual confusion

1.1. Introduction

Chapter one serves four functions: it locates the evolution of human rights-based approaches within a historical context; it recognises some of the conceptual limitations of human rights-based approaches as they exist today; it seeks to identify the core foundational values that comprise a coherent, workable model; and it presents some of the normative and instrumental rationales for human rights-based approaches. Its overall objective is to lay the foundation for analysis, in chapters three, four and five, of the ways in which UNICEF and the World Bank engage with the idea of human rights-based approaches to matters involving children.

The first part of the chapter details the emergence of human rights-based approaches and how they have influenced the policies of development actors, both within and beyond the United Nations system. The second part of the chapter notes that, despite its ubiquity, the term ‘human rights-based approach’ remains open to diverse interpretations, and is associated with a range of different methodologies, disciplines and practices. This leads to the third part of the chapter, which distils two core features of a human rights-based approach. These are: (a) that interventions should be grounded in the international human rights legal framework; and (b) that interventions should be guided by standards and principles derived from international human rights instruments.

The fourth and final part of the chapter identifies the main normative and
instrumental arguments in favour of human rights-based approaches. This will provide a basis for understanding UNICEF’s and the World Bank’s rationales for engaging with the idea of human rights-based approaches, and for appreciating the differences in their formulation, conceptualisation, interpretation, and implementation of such strategies.

1.2. The emergence of human rights-based approaches

Despite the recognised symbiosis between human rights and development, and their designation as complementary legal obligations in the founding documents of the United Nations, the emergence of human rights-based approaches is a relatively recent phenomenon. The preamble to the Charter of the United Nations (1945) expresses a determination, in the wake of two devastating world wars, to “reaffirm faith in fundamental human rights [and] in the dignity and worth of the human person” and to “promote social progress and better standards of life”.1 These intentions are reaffirmed in the ensuing operational provisions, in particular Article 1, which describes the purposes of the United Nations as, inter alia, “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all”; and Article 55, which obliges the organisation to “promote (a) higher standards of living […] and conditions of economic and social progress and development, (b) solutions of international economic, social, health, and related problems, and (c) universal respect for, and observance of, human rights and

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1 Charter of the United Nations (hereafter “UN Charter”) (signed 26 June 1945, 1 UNTS 16, entered into force 24 October 1945), preamble
2 Ibid art 1(3): Purposes of the United Nations
fundamental freedoms…” 3 Nonetheless, during the first half-century of the United Nations’ existence, human rights and development were considered, and practised, as two distinct and separate fields, characterised by different cultures, vocabularies, procedures and institutions.4

A rethinking of traditional development strategies

The coalescence between human rights and development in the form of today’s “human rights-based approaches to development” can be traced to the mid-1980s and early 1990s, when a growing body of literature began “questioning traditional notions of development and asking whether the existing or past models in this respect [had] actually resulted in an overall betterment of the global human condition.”5 The established development paradigms of this period were challenged by mounting recognition of the failure of structural adjustment programmes, increasing inequality in wealth distribution within and between States, and the flourishing democratisation processes following the end of the cold war.6

At the same time, there was a broadening consensus that human rights were

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3 Ibid art 55: International Economic and Social Cooperation
not limited to civil and political rights, “but include all those rights essential for human survival, physical security, liberty and development in dignity”, such as the rights to a standard of living adequate for health and wellbeing, to education and healthcare, and to just and favourable conditions of work. Conversely, there was increasing acceptance that poverty was not simply the consequence of lack of resources, but often the result of exclusion, discrimination and a failure by the State to fulfil its human rights obligations. From this perspective, development was no longer a matter of charity or largesse, but of entitlement and obligation. Thus the compartmentalisation of human rights and development activities was no longer tenable. Recognition of the benefits that each sector could offer the other led to a more direct and constructive engagement between the human rights and development communities, and the emerging idea of a human rights-based approach to development.

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The Declaration on the Right to Development

The changing discourse was reflected in, and complemented by, developments in international standard-setting fora. In 1986, the United Nations General Assembly adopted the Declaration on the Right to Development. Although non-binding, the Declaration contributed significantly toward the reunification of human rights and development by defining the latter (rather circularly) as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”.\(^\text{11}\)

The Vienna Declaration and Programme of Action


\(^{13}\) Ibid para 10.
fundamental freedoms as interdependent and mutually reinforcing, and praised the efforts of the United Nations system towards the universal respect for, and observance of, human rights and fundamental freedoms for all, as essential contributions to social and economic development, in conformity with the Charter of the United Nations. Five years later, the Vienna Declaration was hailed as a significant achievement by the High Commissioner for Human Rights, Mary Robinson, who proclaimed that, “by making this statement, the World Conference established the foundation for a holistic and integrated approach to human rights not only by the human rights machinery but also by the entire United Nations system”. Nonetheless, greater emphasis was paid to highlighting the complementarities between human rights and development than on promoting mechanisms that would actually integrate the two disciplines.

**Human rights mainstreaming within the United Nations system**

The breakthrough came in 1997 when the United Nations system, under the stewardship of Secretary General Kofi Annan, commenced an era of mainstreaming human rights within the objectives and activities of the United Nations system. Arguing that “developments in the present decade have underscored that human rights are inherent in the promotion of peace, security, economic prosperity and social equity”, the Secretary General described human rights as a crosscutting priority for all United Nations

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14 Ibid para 8.
agencies, and called for the integration of human rights in all areas and at all levels throughout the United Nations system.

A consensus was quickly forming within the United Nations system that human rights could support and reinforce the realisation of broader development objectives, and within only a few years, a number of UN agencies and funds – including UNICEF – had endorsed a human rights-based approach to mark this shift in perspective. The key remaining challenges now were, first, to harmonise understandings of a human rights-based approach amongst the different UN entities; and, second, to complement the discourse on the theoretical linkages between human rights and development with practical guidance on how to effectively transform these ideas into concrete actions.

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18 Ibid paras 194-196.
19 Ibid para 201.
The Statement of Common Understanding among United Nations Agencies on the Human Rights-Based Approach to Development Cooperation

In order to address these concerns, in May 2003, the United Nations Development Group, a coalition of 32 UN entities established to coordinate, harmonize and align UN development activities, hosted an Inter-Agency Workshop on Implementing a Human Rights-Based Approach to Development in the Context of UN Reform. The resulting Statement of Common Understanding among United Nations Agencies on the Human Rights-Based Approach to Development Cooperation ("Common Understanding") represents a collaborative, system-wide model of what a human rights-based approach is and how it should be operationalized. It identifies in particular three aspects of a human rights-based approach:

1. "All programmes of development co-operation, policies and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.

2. All development co-operation and programming in all sectors and in all phases of the programming process should be guided by human rights standards contained in, and principles derived from, the Universal

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22 Convener: UNDP; Members: UNICEF, UNFPA, WFP, OHCHR, UNIFEM, UNOPS, UNAIDS, UN Habitat, UNODC, WHO, DESA, IFAD, UNCTAD, UNESCO, FAO, UNIDO, ILO, UNDPI, OHRRLS, SRSG/CAAC, UNEP, UNHCR, OSAA, UNWTO, WMO, ITU; Observers: World Bank, UNFIP, OCHA, Spokesperson for the Secretary-General, Office of the Deputy Secretary General


Declaration of Human Rights and other international human rights instruments.

3. Development co-operation should contribute to strengthening the capacities of ‘duty-bearers’ to meet their obligations and/or of ‘rights-holders’ to claim their rights.”

1.3. Human rights-based approaches today

The Common Understanding has had a continuing impact on the evolution of operational policies relating to human rights-based approaches, establishing a benchmark upon which subsequent efforts have been built. All United Nations funds, programmes and specialised agencies have espoused commitments to implementing human rights. Critically, both UNICEF and the World Bank were represented at the inter-agency workshop that drafted the Common Understanding – UNICEF as a full participant, and the World Bank in observer capacity. Moreover, as detailed later in chapter three, both UNICEF and the World Bank have expressly incorporated the Common Understanding into their policy standpoints on human rights.

Beyond the United Nations, the Common Understanding has also influenced other development actors. There is, for example, general agreement that while aid agencies and donors have adopted different definitions of human rights-based programming, these tend to be variations of the Common Understanding. It is important to emphasise that despite

25 Ibid.
26 Darrow and Thomas, above n 6, 71.
28 Laure-Hélène Piron and Tammie O’Neil, Integrating Human Rights into Development: A
these similarities, there is still no single, universal definition of what a human rights-based approach is or entails. On the contrary, despite some similarities, the term is open to diverse interpretations and is associated with a range of different methodologies, disciplines and practices, both within and across organisations.  

Insufficient analysis of conceptual foundations

Underlying and exacerbating the multiplicity of human rights-based approaches is the absence of much sustained critical analysis regarding the conceptual foundations of such an approach. As Alston notes, “the advice proffered does not [always] seem to follow inexorably from human rights principles per se, but rather to be a reflection of what the authors consider to be sound policy on the basis of their expertise.” Moreover, the level of


influence that human rights exert within an organisation is similarly variable, ranging from absolutist models, pursuant to which “everything the organisation does must be based on human rights… rights literally form the basis of all actions” to less rigid versions premised on the notion that “human rights provide only a partial framework for action”. Consequently, the list of criteria said to encapsulate a human rights-based approach can vary markedly amongst scholars and practitioners organisations.

Imprecise language that provides little practical guidance

Compounding the confusion, the criteria themselves are often expressed at such a level of abstraction and generality as to be almost meaningless to laypeople and practitioners alike. The UN Common Understanding, for instance, cites as essential elements of a human rights-based approach vague exhortations to ensure that “strategies are empowering, not disempowering”, that “analysis includes all stakeholders”, and that “both top-down and bottom-up approaches are used in synergy”, without any further explanation as to what the embedded terms and concepts mean, or

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32 Lauchlan T Munro, "The "Human Rights-Based Approach to Programming": A contradiction in terms?" in Samuel Hickey and Diana Mitlin (eds), Rights-based approaches to development: exploring the potential and pitfalls (Kumarian Press, 2009) 187-208, 201.


34 Alston, ‘Ships passing in the night,’ above n 31, 802.
how they are to be implemented. Consequently, rights-talk “risks remaining fluffy and meaningless”:\(^3^6\) a collection of words and phrases that can be safely deployed without any significant consequences.\(^3^7\)

The failure to clearly define terms is a particularly insidious problem because “different language may mask broadly similar purposes, [while] similar terms may come to carry vastly different meanings”.\(^3^8\) This is discussed in greater detail in chapter three, which analyses the how UNICEF and the World Bank engage with the idea of human rights-based approaches. Some have speculate that the misuse of vocabulary is a deliberate strategy, aimed at making human rights “as user-friendly as possible”.\(^3^9\) Others have argued in favour of a flexible idea of human rights-based approaches comprised of “essential characteristics” that can be tailored to suit specific organisational and programming circumstances.\(^4^0\)

Whatever the reasons, the combination of linguistic imprecision, indeterminacy and poorly theorised conceptual foundations significantly undermines the integrity of human rights-based approaches. Indeed, these factors risk the human rights-based approach becoming a smorgasbord of


\(^{3^8}\) Celestine Nyamu-Musembi and Andrea Cornwall, *What is the “rights-based approach” all about? Perspectives from international development agencies* (Institute of Development Studies, 2004) 45.


\(^{4^0}\) Darrow and Tomas, above n 6, 501.
loosely defined characteristics open to a multitude of interpretations depending on the requirements of the implementing organisation. This in turn is likely to lead to greater confusion about precisely what, and how useful, a human rights-based approach is. With these challenges in mind, the following section seeks to identify the core foundational values that comprise a conceptually coherent, workable model of a human rights-based approach.

1.4. The central themes of a human rights-based approach

As noted above, human rights-based approaches are distinguished from other development models by their focus on rights rather than needs. This is a significant distinction, since rights are associated with ‘being”, whereas needs are associated with ‘having’:

“A right is something to which I am entitled solely by virtue of being a person. It is that which enables me to live with dignity. Moreover, a right can be enforced before [a duty-bearer] and entails an obligation on the part of the [duty-bearer]. A need, on the other hand, is an aspiration that can be quite legitimate, but it is not necessarily associated with an obligation on the part of [a duty-bearer] to cater to it; satisfaction of a need cannot be enforced.”

The particular rights and obligations with which human rights-based approaches are concerned are those established by international human rights law. Yet a human rights-based approach is not merely an

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41 Nyamu-Musembi and Cornwall, above n 9, 46-47.
43 Office of the United Nations High Commissioner for Human Rights, 'Frequently Asked
operational strategy directed to protecting and promoting human rights; it is a holistic conceptual framework that places equal emphasis on means and ends. Consequently, it seeks to ensure that interventions aimed at delivering human rights outcomes are pursued in a manner consistent with international human rights norms and standards. For organisations engaging with a human rights-based approach, this means that their objectives, policies and processes must be grounded in international human rights law, and guided by international human rights principles.

**Grounded in international human rights law**

Human rights-based approaches are normatively grounded in international legal standards. The reference to the international legal framework is important, and adds conceptual clarity, because ‘human rights’ is a highly contested concept possessing a range of denotations and connotations.


Indeed, a review of the literature reveals that human rights are variously understood as the sum of all rights laid out in international legal instruments, a system of values within moral philosophy, an expression of political aspirations, a discourse capturing social practice, and a language of governance.\textsuperscript{47} Further complicating the issue, while in some instances the intended meaning of the term is expressly revealed, in other cases it is kept implicit, or allowed to emerge in context without being formally or analytically addressed.\textsuperscript{48} Being upfront about the grounding of human rights-based approaches in international human rights law dispels much of this confusion. It also provides recognisable parameters.

Freeman has commented that if the concept of human rights is to be useful, human rights must be distinguished from other legal rights or socially desirable objectives.\textsuperscript{49} Not every social struggle or injustice is a human rights issue. A country could, for example, have “too much income development: A comment on challenges and opportunities from a legal perspective’ (2009) 1(1) Journal of Human Rights Practice 51, 56; David Kinley, ‘Human rights fundamentalisms’ (2007) 29 Sydney Law Review 545, 550; Paul Gready, ‘Rights-based approaches to development: what is the value-added?’ (2008) 18(6) Development in practice 735, 736.


\textsuperscript{48} Goodale, Ibid 6.

\textsuperscript{49} Michael Freeman, \textit{Human rights: an interdisciplinary approach} (Polity Press, 1992) 5. See also Kirsten Hastrup, 'Representing the common good: The limits of legal language' in Richard A Wilson and Jon P Mitchell (eds), \textit{Human rights in global perspective: anthropological studies of rights, claims and entitlements} (Routledge, 2003), who at p.27 argues that the more human rights tries to be all things to all people, the more likely the concept is to be morally and semantically empty.
inequality, inadequate provision for higher education, or no national parks without violating any human rights”.50 By specifying that all interventions should seek to further, and be guided by, the standards and principles derived from, and contained in, international human rights instruments, human rights-based approaches make clear that ‘human rights’ is not simply a phrase used to capture any self-identified socially beneficial objective, but is instead a term of art specifically linked with internationally defined legal norms.

**Guided by human rights principles**

The human rights principles that guide human rights-based approaches are to be applied during all stages of the intervention, “including assessment and analysis, programme planning and design (such as setting of goals, objectives and strategies); and implementation, monitoring and evaluation”.51 But which principles ought to be relied upon, and why? The UN Common Understanding (2003) presents six principles as being “among” those that guide human rights-based programming: (1) Universality and inalienability; (2) Indivisibility; (3) Inter-dependence and Inter-relatedness; (4) Equality and Non-discrimination; (5) Participation and Inclusion; and (6) Accountability and Rule of Law. The term “among” implies that this list is not definitive, which raises questions around what other principles might apply; why they were not explicitly articulated; when they would apply; and

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how they should be weighed against the expressly mentioned guiding principles. Indeed, although different models of human rights-based approaches often contain adaptations and combinations of these six principles, some include fewer principles, while others include additional principles.\textsuperscript{52}

Darrow and Tomas suggest that it is immaterial whether any given list of human rights principles purports to be comprehensive or not. Maintaining that “human rights principles should be selected and applied on the basis of their potential to facilitate the enjoyment of human rights through the [programming] process”, they propose two dominant factors for governing the selection of human rights principles: “functionality – the extent to which they gear the [...] process more directly toward the realisation of human rights – and their practicality, that is to say, the extent to which they can provide [...] practitioners with clear and effective guidance”.\textsuperscript{53} Tobin, by contrast, places greater emphasis on conceptual coherence, arguing that a credible account of guiding principles demands that more profound consideration be given to their normative foundations; that is, to “the basis upon which features can be said to be integral to rights-based approaches”.\textsuperscript{54}

The following discussion follows Tobin’s suggestion, because it reinforces the notion that the guiding principles of a human rights-based approach must reflect, and be consistent with, the nature of international human rights themselves. Otherwise, the danger remains that prospective guiding


\textsuperscript{53} Darrow and Tomas, above n 6, 501.

\textsuperscript{54} John Tobin, ‘Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations’ in Antonella Invernizzi and Jane Williams (eds), Human Rights of Children: From Visions to Implementation, 98.
principles continue to be based on appeals to “good development practice” rather than a solid and conceptually coherent grounding in international human rights law.\textsuperscript{55} With this in mind, the following five principles are identified as being intrinsic to a conceptually coherent account of a human rights-based approach: (i) accountability; (ii) inherent and inalienable human dignity; (iii) universality, equality and non-discrimination; (iv) participation; and (v) indivisibility, inter-dependence and inter-relatedness.

**Accountability**

Conceptually, the idea of human rights-based approaches is undergirded by the principle of accountability. From a philosophical standpoint, rights are meaningless in the absence of corresponding obligations against duty-bearers from whom those rights can be claimed.\textsuperscript{56} Put simply, “rights imply duties, and duties demand accountability”.\textsuperscript{57} From a legal perspective, accountability is embedded in the fabric of international human rights law, which imposes on States, as the primary duty-bearer, certain non-derogable obligations toward rights-holders.\textsuperscript{58} Human rights – unlike other worldviews and value systems – are the only legally structured set of normative standards,\textsuperscript{59} and by ratifying international human rights treaties, States voluntarily assume legal obligations to respect, protect, promote and


\textsuperscript{56} Gready, above n 29, 741; Tobin, above n 54, 69; Alston, ‘Ships passing in the night,’ above n 31, 813; Jonsson, above n 9, 15; Peter Uvin, *Human Rights and Development* (Kumarian Press, 2004) 131.

\textsuperscript{57} OHCHR: Draft Guidelines for a Human Rights Approach to Poverty Reduction Strategies, para 23.

\textsuperscript{58} Hamm, above n 52, 1015; Tobin, above n 54, 69.

\textsuperscript{59} Nowak, above n 47, 3.
fulfil the standards and principles contained therein.\textsuperscript{60} As Zwart rightly emphasises, these obligations are binding on all contracting parties, “regardless of their philosophical views on human rights”.\textsuperscript{61}

State accountability is confirmed in the operative provisions of many international human rights instruments. Under Article 2 of the ICESCR, for example, “Each State Party to the present Covenant \textit{undertakes} to take steps, individually and through international assistance and co-operation, […] with a view to achieving progressively the full realization of the rights recognized in the present Covenant…”\textsuperscript{62} and “undertake[s] to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind”.\textsuperscript{63} Likewise, under Article 2 of the ICCPR, “Each State Party to the present Covenant \textit{undertakes} to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant…”\textsuperscript{64} and “undertakes to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”.\textsuperscript{65} A similar formula is used in the more targeted international human rights instruments. For instance, under Article 2 of the CRC, “States Parties \textit{shall} respect and ensure the rights set forth in the present


\textsuperscript{61} Zwart, above n 46, 547.


\textsuperscript{63} Ibid art 2.2, emphasis added.

\textsuperscript{64} \textit{International Covenant on Civil and Political Rights} (hereafter ‘ICCPR’) (opened for signature 9 December 1966, 999 UNTS 171, UN Doc A/6316, entered into force 23 March 1976), art 2.1, emphasis added.

\textsuperscript{65} Ibid art 2.2, emphasis added.
Convention to each child within their jurisdiction…”66 and “shall undertake all appropriate measures for the implementation of the rights recognised in the present Convention”.67

It is important to note that, as articulated in these international human rights instruments, States’ have both direct and indirect human rights obligations. States undertake to themselves ‘respect’, ‘implement’ and ‘progressively realise’ human rights. However States also undertake to ‘ensure’ and ‘guarantee’ human rights, implying an oversight function that requires States to regulate the activities of non-state actors.68 This latter obligation forms the basis for suggestions that humanitarian and development organisations are, to some extent, accountable toward rights-holders.69 The idea that humanitarian and development organisations have at least some human rights obligations is reflected in the text of the Universal Declaration of Human Rights and the core international human rights instruments.

The Universal Declaration of Human Rights is proclaimed as “a common

67 CRC, above n.66, art 4; emphasis added.
standard of achievement for all peoples and all nations,” and calls on “every individual and every organ of society, keeping this Declaration constantly in mind, shall strive […] to promote respect for these rights and freedoms and […] to secure their universal and effective recognition and observance”. 70 Article 29(1) recognises that “Everyone has duties to the community in which alone the free and full development of his personality is possible”71 – a sentiment elaborated on in Article 30, which expressly states that “Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein”. 72 Comparable obligations and limitations are also reflected in the ICCPR73 and the ICESCR74, including in their respective preambles, which realise that “the individual, having duties to other individuals and to the community to which he [or she] belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant…”75

The Convention on the Rights of the Child is unique in imposing obligations on specific non-state actors. For example, Article 3.2 recognises “the rights and duties of [the child’s] parents, legal guardians, or other individuals legally responsible for [the child]” to protect and care for the child,76 while Article 5 refers to the “responsibilities, rights and duties of parents… the members of the extended family or community… legal guardians or other persons legally responsible

70 Universal Declaration of Human Rights (hereafter 'UDHR') (GA Res 217A (III), 3rd sess, 183rd plen mtg, UN Doc A/810, 10 December 1948), preamble, final stanza; emphasis added.
71 Ibid art 29(1), emphasis added.
72 Ibid art 30, emphasis added.
73 ICCPR, above n 64, art 19, 20, 21 and 22.
74 ICESCR, above n 62 art 5.1.
75 Ibid preamble; ICCPR preamble.
76 CRC, above n.66, art 3.2, emphasis added.
for the child’ to provide the child with guidance and direction in the exercise of his or her rights. An even wider range of duty-bearers is captured in Article 3.1 of the CRC, which requires that “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.”

The notion of third-party accountability, particularly with respect to humanitarian and development organisations, is also a matter of conceptual and institutional consistency. Regardless of the extent to which such organisations are formally bound by international human rights law, their engagement with human rights-based approaches demand that they practice what they preach:

“As ‘guardians’ of human rights standards, human rights organisations call on those in authority to protect, promote and respect human rights and demand that governments and other authorities should be accountable, responsible and transparent… [It] is clearly reasonable to expect them to honour the same principles themselves.”

This observation is equally applicable to United Nations agencies and funds, since “it seems axiomatic that, as an international organization dedicated to promoting ‘universal respect for, and observance of, human rights,’ the United Nations itself cannot disregard, and should comply with, internationally recognized human rights”. Consequently, organisations –

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77 CRC, above n.66, art 5, emphasis added.
78 Ibid art 3.1, emphasis added.
79 Darrow and Arbour, above n 68, 452.
81 Darrow and Arbour, above n 68, 472.
whether intergovernmental or non-governmental – that claim to engage in a human rights-based approach are not merely committing to support citizens in holding the State accountable for its human rights obligations. They are also implying that they too can, and should, be held accountable to the same human rights standards and principles. 82

Inherent and inalienable human dignity

The preamble to the Charter of the United Nations expresses a determination to “reaffirm faith in fundamental human rights, [and] in the dignity and worth of the human person”, 83 and this aspiration has been reiterated in the preambles to the Universal Declaration of Human Rights 84 and the core international human rights instruments alike. Additionally, the Universal Declaration of Human Rights expressly recognises “the inherent dignity and […] the equal and inalienable rights of all members of the human family”, 85 and proclaims that “all human beings are born free and equal in dignity and rights”. 86 Meanwhile, the twin Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, recognise that human

83 UN Charter, above n 1, preamble, first stanza
84 UDHR, above n 70, preamble, fifth stanza.
85 Ibid preamble, first stanza.
86 Ibid art 1.
rights “derive from the inherent dignity of the human person.” 87

Amongst the specialised treaties, the Convention on the Elimination of Racial Discrimination “affirms the necessity of speedily eliminating racial discrimination throughout the world” as a means to “securing understanding of and respect for the dignity of the human person” 88; the Convention on the Elimination of Discrimination Against Women asserts that “discrimination against women violates the principles of equality of rights and respect for human dignity…” 89; and the Convention on the Rights of Persons with Disabilities recognises “that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person” 90.

Specific articles in the core international human rights instruments further reinforce the view that human rights reflect, and aim to enhance, people’s inherent and inalienable human dignity. For instance: Every-one who works is entitled to just and favourable remuneration that ensures an existence worthy of human dignity. 91 Education shall be directed toward the full development of human potential and its sense of dignity and self-worth. 92 Measures to promote the recovery, rehabilitation and social reintegration of victims of neglect exploitation, violence or abuse shall take place in an environment

87 ICESCR, above n 62, preamble; ICCPR, above n 64, preamble.
91 UDHR, above n 70, art 23(3), emphasis added.
92 ICESCR, above n 62, art 13.1; CRPD, above n 89 art 24.1(a)
that fosters the survivor’s *self-respect and dignity*.\(^{93}\) School discipline should be administered in a manner consistent with the child’s *human dignity*.\(^{94}\) Persons deprived of their liberty shall be treated with humanity and *respect for the inherent dignity of the human person*.\(^{95}\)

These legal instruments do not merely reaffirm their faith in the dignity and worth of the human person; they also make it clear that human rights are founded on the idea of inherent and inalienable human dignity.\(^{96}\) Human rights are “the birth right of all human beings”.\(^{97}\) They inhere in all human beings, by virtue of them being human,\(^{98}\) and they are necessarily inalienable, since one cannot stop being human.\(^{99}\) Thus rights-bearers cannot give away their rights, and nor can others take them. This grounding in inherent and inalienable human dignity is fundamental to the idea of a human rights-based approach, and informs the other guiding principles.\(^{100}\)

### Universality, Equality and Non-discrimination

The inter-related principles of universality, equality and non-discrimination

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\(^{93}\) CRPD, above n 89, art 16.4; CRC, above n.66, art 39
\(^{94}\) CRC, above n.66, art 28.2
\(^{95}\) ICCPR, above n 64, art 10.1; CRC, above n.66, art 37(c).
\(^{97}\) Vienna Declaration, above n 12, art 1.
\(^{99}\) Donnelly, ‘Universal Human Rights,’ above n 97, 10.
follow logically from the fact of human rights inhering “in all human beings, throughout their lives, by virtue of their humanity alone”.101 They are also explicit features of the international human rights legal framework. The Charter of the United Nations reaffirms faith “in the equal rights of men and women” 102, and undertakes to “promote universal respect for, and observance of, human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.103 These commitments are reiterated in the preamble to the Universal Declaration of Human Rights104, and reinforced in its first two articles, which proclaim that “All human beings are born free and equal in dignity and rights”105, and that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” 106

The universality, equality and non-discrimination principles are confirmed and elaborated on in subsequent international human rights instruments. The twin Covenants, for instance, oblige States Parties to respect, guarantee and ensure the rights therein to all individuals “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.107 Some of these prohibited grounds have spawned specialised human rights instruments, such as the Convention on the Elimination of Racial Discrimination108 and the Convention on the Elimination of All Forms of Discrimination against

102 UN Charter, above n 1, preamble, stanza 2.
103 Ibid art 55. See also art 1.3.
104 UDHR, above n 70, preamble, stanzas 5 and 6 respectively.
105 Ibid art 1, emphasis added.
106 Ibid art 2, emphasis added.
107 ICCPR, above n 64, art 2.1; ICESCR, above n 62, art 2.2.
108 CERD, above n 87, art 2.1.
Women\textsuperscript{109}. Meanwhile, other specialised human rights instruments have fortified the universality of human rights by articulating \textit{additional} prohibited grounds of discrimination.

The Convention on the Rights of People with Disabilities, for example, “prohibit[s] all discrimination on the basis of disability and guarantee[s] to persons with disabilities equal and effective legal protection against discrimination on all grounds”.\textsuperscript{110} The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families includes “economic position” and “marital status” as prohibited grounds of discrimination.\textsuperscript{111} The Convention on the Rights of the Child encompasses not only the child’s status or characteristics, but also those of the child’s parents or legal guardians.\textsuperscript{112}

Although it predates some of these human rights treaties, the 1993 World Conference on Human Rights categorically declared that the universal nature of human rights and fundamental freedoms “is beyond question”.\textsuperscript{113} Nonetheless, some scholars reject the universality of human rights, maintaining that the human rights corpus is a Euro-centric Western construct that cannot rightfully be transposed onto non-Western cultures and polities.\textsuperscript{114} Such arguments are difficult to sustain. It is true that in

\textsuperscript{109} CEDAW, above n 88, stanza 3.
\textsuperscript{110} CRPD, above n 89, art 5.2.
\textsuperscript{112} CRC, above n.66, art 2.1. It also reaffirms ethnicity and disability as prohibited grounds of discrimination.
\textsuperscript{113} Vienna Declaration, above n 12, art 1.
some human societies, dignity and justice are based on socially defined categories or hierarchies, which accord people different rights depending on their status.\textsuperscript{115} Yet notions of dignity and justice based on discriminatory concepts of human nature are no substitute for a human rights system that values individuals simply, and solely, for their humanness.\textsuperscript{116}

Human rights are not just an abstract set of values or objectives, but a unique set of social practices tied to a particular notion of human dignity.\textsuperscript{117} As Donnelly correctly deduces, human rights are universal because all members of the species \textit{Homo sapiens} are human beings; and they apply equally, without discrimination of any kind, because one either is or is not a human being.\textsuperscript{118} Likewise, arguments that dismiss the universality of human rights with reference to the historical political context in which the international human rights system emerged pay disproportionate attention to origin over substance.\textsuperscript{119}

Orend, for example, suggests that framing criticism of human rights in terms of their (actual or apparent) Euro-centrism errs because “it does not deal with the merits of the human rights idea itself but, rather, with the

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\textsuperscript{115} Howard, above n 95, 15; Donnelly, 'Universal Human Rights,' above n 97, 71.
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\textsuperscript{117} Howard, above n 95, 99.
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\textsuperscript{118} Donnelly, 'Universal Human Rights,' above n 97, 10.
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characteristics of the people and civilisation out of which it first came”. Even if one grants, for the sake of argument, that human rights were developed and shaped by the West, “this tells us absolutely nothing about the ‘applicability’, ‘relevance’, ‘appropriateness’ or ‘value’ of these ideas, values and practices…” Good ideas can arise anywhere, and there is no logical reason to deny the universal applicability of a particular conception of human dignity, such as human rights, just because it may not be universal in origin.

Within discussions about the universality of human rights, children’s rights present an additional, unique set of philosophical challenges. Some have proposed that children are incapable of exercising human rights, alleging that, unlike adults, children lack the necessary cognitive and volitional abilities. Others have questioned whether children even require human rights, suggesting that children’s interests can be adequately protected by a system of adult obligations. These arguments can be easily addressed.

Human rights derive from the equal and inherent human dignity of all

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120 Orend, above n 95, 158.
121 Donnelly, ‘Universal Human Rights,’ above n 97, 69. Others however also sought to dispel the notion that the West has a monopoly on human rights by arguing that even so-called ‘liberal values’ are not exclusively Western in their antecedence. See for example Amartya Sen: ‘Universal truths: human rights and the westernizing illusion’ (1998) 20(3) Harvard International Review 40, 43: ‘While we do find some anticipatory components in parts of the ancient Western traditions, there are other such anticipatory components in parts of non-Western ancient traditions as well.”
122 Orend, above n 95, 158; Howard, above n 95, 82; Donnelly, ‘Universal Human Rights,’ above n 97, 69.
persons, regardless of the stage of life they have reached; they are not dependent on cognitive and volitional abilities.\textsuperscript{125} Indeed, if these attributes were the sole conditions pursuant to which a person was adjudged capable and deserving of exercising human rights, it is far from certain that all adults would retain their rights, and equally likely that many children would join the ranks of full, independent rights-holders.\textsuperscript{126} Thus, in addition to violating the legal principles of universality, equality and non-discrimination, capacity-based arguments for denying children human rights are also logically unsustainable.\textsuperscript{127} (This topic is discussed in greater detail in chapter two, which examines how children are situated within human rights-based approaches.) As to suggestions that children’s wellbeing may be safeguarded by adult obligations toward children, “the concept of dignity requires that every child is recognized, respected and protected as a rights holder and as a unique and valuable human being with an individual personality, distinct needs, interests and privacy”.\textsuperscript{128} The inherent and unassailable dignity that human rights confer cannot be properly expressed


\textsuperscript{127} C A J Coady, ‘Theory, Rights and Children: A Comment on O’Neil and Campbell’ in Philip Alston, Stephen Parker and John A Seymour (eds), Children, Rights, and the Law (Oxford University Press, 1992) 44; Freeman, ‘Taking children’s rights more seriously’, Ibid, 58; Elizabeth F Cohen, ‘Neither Seen nor Heard: Children’s Citizenship in Contemporary Democracies’ (2005) 9(2) Citizenship Studies 221, 225. For an absurd defence of this proposition see Brighouse, above n 122, who at p.45 concedes that adults sometimes fail to act in their own interests “because of weakness of will, bad luck, imperfect knowledge or other adverse conditions; or because they conscientiously prioritise the advantage of others over their own” but nonetheless maintains that adults, unlike children, “have, or at least have access to, self-knowledge which enables them to negotiate opportunities to their own advantage.”

\textsuperscript{128} Committee on the Rights of the Child: General Comment No. 13: The right of the child to freedom from all forms of violence, 2011, CRC/GC/13, para 3(c)
solely in terms of adult care, since neither love nor benevolence nor compassion can take the place of the dignity and respect that being a rights-bearer confers.\textsuperscript{129}

**Participation**

The participation principle is both explicitly and implicitly a feature of the Universal Declaration of Human Rights and other core international human rights instruments, albeit expressed in slightly different iterations. The Universal Declaration of Human Rights enshrines the right of everyone to “take part in the government of his country, directly or through freely chosen representatives”,\textsuperscript{130} a right replicated almost verbatim in the International Covenant on Civil and Political Rights, which affords every citizen “the right and the opportunity [to] take part in the conduct of public affairs, directly or through freely chosen representatives”.\textsuperscript{131} Additionally, it may be inferred from the Vienna Declaration and Programme of Action, which confirmed the interdependence between democracy, development and respect for human rights and fundamental freedoms, and highlighted the importance of the “freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives”.\textsuperscript{132}

International human rights instruments dealing with the rights of specific groups of people have reiterated and expanded on these rights. For example, the Convention on the Elimination of Racial Discrimination


\textsuperscript{130} UDHR, above n 70, art 21(1).

\textsuperscript{131} UDHR, above n 70 art 21(a); ICCPR, above n 64, art 25(a)

\textsuperscript{132} Vienna Declaration, above n 12, para.8
“guarantees the right of all persons, on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level”. Likewise, the Convention on the Rights of People with Disabilities affirms the rights of people with disabilities to effectively and fully participate in political and public life, including in the conduct of public affairs, both through the electoral process and as members of non-governmental organisations. It goes a step further however, in confirming the rights of people with disabilities to “full and effective participation and inclusion in society”, and requiring States to identify and eliminate barriers that would otherwise impede people with disabilities from “participat[ing] fully in all aspects of life”.

A similar expansion in the scope of the participation principle is found in the Convention on the Elimination of All Forms of Discrimination against Women. In addition to reaffirming the right of women to participate on terms equal with men in the political and public life of the country through, inter alia, participation in “the formulation of government policy and the implementation thereof…” the CEDAW expressly extends this right into the development sphere. It draws special attention to the particular problems facing rural women, requiring that all appropriate measures be taken to ensure that rural women “participate in and benefit from rural development”, including by guaranteeing to such women the right “[t]o participate in the elaboration and implementation of development planning at all levels…”

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133 CERD, above n 87, art 5(c).
134 CRPD, above n 89, art 29.
135 Ibid art 1, art 3(c).
137 CEDAW, above n 88, arts 7(b) and 7(c).
138 Ibid art 14.2.
139 Ibid art 14.2(a).
The widest ranging articulation of the participation principle is contained in the Convention of the Rights of the Child, which assures to every child the right to freely express his or her views “in all matters affecting the child”, and requires that the child’s views be given “due weight in accordance with the age and maturity of the child”.140 A considerable part of the next chapter is devoted to a discussion of children’s participation; thus the commentary here will remain brief, and it is sufficient to emphasise two points. First, because it encompasses “all matters affecting the child”, this manifestation of a right to participation is broader than both the traditional suffrage rights afforded rights-holders in other international human rights instruments, and the specific rights assured rural women in the Convention on the Elimination of All Forms of Discrimination against Women. Second, it is also unique, as it places concomitant obligations on third parties to actively solicit and give due weight to children’s views.

The idea of participation as a constitutive principle of human rights-based approaches, rather than a limited mechanism for engaging in periodical electoral processes, is reinforced and informed by related rights guaranteed in the Universal Declaration of Human Rights and other international human rights instruments.141 These include the right to freedom of opinion and expression, incorporating the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers;142 the right of peaceful assembly;143 and the right to freedom of association with others.144

140 CRC, above n.66, art 12.1.
141 Abramovich, above n 44, 43; Alston, ‘Ships passing in the night,’ above n 31, 812.
142 UDHR, above n 70, art 19; ICCPR, above n 64, art 19.2; CRC, above n.66, art 13; CERD, above n 87, art 5(viii); CRPD, above n 89, art 21.
143 UDHR, above n 70, art 20; ICCPR, above n 64, art 21; CRC, above n.66, art 15.1; CERD, above n 87, art 5(ix).
144 UDHR, above n 70, art 20; ICCPR, above n 64, art 22; CRC, above n.66, art 15.1; CERD, above n 87 art 5(ix).
More fundamentally, the participation principle also derives from the principle of inherent human dignity, which entails an entitlement to partake in decisions that affect one’s life, and contribute to the realisation of one’s own rights, rather than depending on their fulfilment by external actors. This concept is explicitly laid out in the Convention on the Rights of People with Disabilities, which proclaims as the first of its eight general principles “Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons…” A life of dignity does not merely comprise the satisfaction of basic survival requirements; it also includes the ability to freely and effectively exercise one’s full range of human rights.

A conceptually coherent account of human rights-based approach cannot equate fulfilment of human rights with entitlements to handouts, since passive receipt of goods and services is incompatible with a dignified life, even if, from a superficial perspective, it may seem that certain human rights (to adequate housing, to nutritious food, etc.) have been fulfilled. As Uvin observes: “To have a right to something—say, food—it not just about having enough of that: a slave can be well nourished too”. On the contrary, a human dignity-based interpretation of the participation principle recognizes that programme beneficiaries are “actors with the potential [and the right] to shape their own destiny”, albeit actors who have been prevented from doing so by structural impediments such as discrimination.

146 CRPD, above n 89, art 1, art 3(a).
147 Ibid. See also SDC 2004: 13
148 Alston, 'Ships passing in the night,' above n 31, 789.
149 Peter Uvin, 'From the right to development to the rights-based approach: How 'human rights' entered development' (2007) 17(4-5) Development in Practice 597, 600.
and social exclusion. Consequently, it acknowledges the need for a reconfiguration of social and political relationships, focused on the dismantling of structures that preclude rights-holders from claiming their rights, and the facilitation of rights-holders’ active involvement in these processes.

Indivisibility, Inter-dependence and Inter-relatedness

The notion that human rights are indivisible, inter-dependent and inter-related is generally attributed to the Vienna Declaration and Programme of Action, which proclaimed that: “All human rights are universal, indivisible and interdependent and interrelated” and should be treated “in a fair and equal manner, on the same footing, and with the same emphasis.” This was effectively a political statement, aimed at ending the long-standing distinction between civil and political rights on the one hand, and economic, social and cultural rights on the other, and encouraging recognition that each set of rights helped to make each other viable. Yet it also indicated a return to the ideals reflected in the early documents of the international legal human rights framework.

The Universal Declaration of Human Rights anticipated “the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom

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150 Offenheiser and Holcombe, above n 30, 268.
from fear and want”, and the rights and freedoms contained in the substantive text of the Declaration include economic, social, cultural, political and civil rights. Although the ensuing cold war landscape resulted in the formalisation of those rights in two separate legal human rights instruments – the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and cultural Rights – subsequent treaties have endorsed a unified model covering “all the traditionally defined areas of human rights”. Thus the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Elimination of Racial Discrimination; the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families are all more comprehensive in scope, including economic, social, cultural, political and civil rights in the one document.

Aside from the legal foundations of these principles, the indivisibility, interdependence and inter-relatedness of human rights also derives from the inherent and inalienable nature of human dignity. Human rights refer to the whole human being, a being whose dignity is indivisible. Consequently, respecting human dignity entails respecting the full range of economic, social, cultural, political and civil human rights, since denial of one human right can affect, or even impair, other human rights. Conversely, effective fulfilment of one human right is often linked with, and dependent on,

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154 UDHR, above n 70, preamble, second stanza, emphasis added.
156 Darrow and Tomas, above n 6, 503; Alston, ‘Ships passing in the night,’ above n 31, 789.
157 Hamm, above n 52, 1010; Darrow and Tomas, Ibid 503.
158 Freeman, ‘Value and values,’ above n 124, 21.
fulfilment of other human rights.\footnote{Jakob Kirkemann Boesen and Thomas Martin, ‘Applying a Rights-Based Approach–an Inspirational Guide for Civil Society’ (The Danish Institute for Human Rights, 2007) 9; Abramovic, above n 44, 35; Lewis, above n 152, 57.} Extreme poverty, for example, is both a cause and a consequence of human right violations, characterised and compounded by an array of mutually reinforcing deprivations such as inadequate standards of living, including food, safe water and sanitation; limited educational opportunities and poor educational outcomes; increased vulnerable to accidents, diseases, disability and preventable deaths; lack of access to quality healthcare services; discrimination, marginalisation and social exclusion.\footnote{Final Draft of the Guiding Principles on Extreme Poverty and Human Rights, Submitted by the Special Rapporteur on Extreme Poverty and Human Rights, para 2-3; OHCHR: Principles and Guidelines, above n 8, para 15; Boesen and Martin, Ibid 9; Abramovic, Ibid 35.} Cumulatively, these factors impair the abilities of poor people “to engage in income-generating or productive livelihood activities”, which in turn increases their vulnerabilities, and the vulnerabilities of their dependents, to further poverty-related human rights violations.\footnote{OHCHR: Principles and Guidelines, Ibid para 81; ActionAid Asia: The Hua Hin Declaration, above n 8.}

In addition to being a self-perpetuating cycle, extreme poverty is also an enabling condition for other human rights violations.\footnote{Michael Freeman, Article 3: The Best Interests of the Child, A Commentary on the United Nations Convention on the Rights of the Child (Martinus Nijhoff Publishers, 2007) 56; Final Draft of the Guiding Principles on Extreme Poverty and Human Rights, Submitted by the Special Rapporteur on Extreme Poverty and Human Rights, paras 3-4.} Because their opportunities are so constrained, “many people living in poverty are drawn into work that is anti-social, dangerous and illegal, such as sex work, child labour, bonded labour and other slavery-like practices”.\footnote{OHCHR: Principles and Guidelines, above n 8, para 109} These linkages are well illustrated in respect of children, who are the single largest demographic living in poverty, representing an estimated 47 per cent of those affected.\footnote{Ibid para 32; UNICEF Division of Policy and Strategy, ‘Child Poverty in the Post-2015

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attend school, in order to engage in income-generating activities or perform household tasks. Alongside the immediate violation of their rights to education, this heightens their risks of exploitation, neglect and abuses, including harmful traditional practices, and decreases their future chances “of finding employment, of participating more effectively in society and of escaping poverty”. As a result, poor children are “more likely to become impoverished adults and have poor children”.

1.5. Why engage with a human rights-based approach?

Although the previous discussion has identified the core principles of a human rights-based approach, a credible examination of institutional engagement with human rights-based approaches also requires an understanding of the motivations for adopting such an approach. As Darrow and Thomas rightly observe, it is a “self-evident yet fundamental premise [that] what you do depends upon why you do it”. There are two main reasons that organisations choose to engage in human rights-based approaches: *intrinsic* reasons, based on a normative belief that a human rights-based approach is, legally or morally, the right thing to do; and *instrumental* reasons, which consider that human rights-based approaches lead to better and more effective programming outcomes. These
rationales are not mutually exclusive, and indeed, engagement with human rights-based approaches is often motivated by a combination of the two.  

**Intrinsic rationales for engaging in human rights-based approaches**

Intrinsic rationales for engaging in human rights-based approaches stem from a conceptualisation of human rights as moral or legal obligations, which infuse interventions with a sense of what *must* or *ought* to be done; regardless of whether, and to what extent, other ends are (also) served.  

**(i) Human rights as moral obligations**

From a moral standpoint, the intrinsic value of human rights-based approaches derives from a particular set of beliefs about what it means to be human, and how human beings should be treated. According to this account, human rights are literally “the rights that one has simply because one is a human being”. The moral transcendence of the idea of human rights is strongly reflected in the preamble to the Universal Declaration of Human Rights, which refers to “barbarous acts which have outraged the conscience of mankind”, and proclaims the human rights therein as “the

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171 OHCHR, Ibid 16; OECD Ibid 6; Cornwall and Nyamu-Musembi, above n 9.
172 Cornwall and Nyamu-Musembi, above n 9, 1416; Robinson, above n 43, 38; Darrow and Tomas, above n 6, 492.
173 Nicholas Howan, Secretary-General, International Commission of Jurists, 'Business, Human Rights and Accountability' (Speech delivered at the Business and Human Rights Conference organised by the Danish Section of the International Commission of Jurists, Copenhagen, 21 September 2005); Gready, above n 29, 735.
highest aspiration of the common people.” Yet the moral value of human rights exists independently of, and precedes, their consolidation into international legal instruments. Although human rights are guaranteed under human rights law, the law does not establish human rights. Instead, “human rights are inherent entitlements which come to every person as a consequence of being human.” By explicitly recognising every human being as worthy of development and fulfilment, human rights-based approaches indicate the higher valuing of an individual than kindness or duty alone.

(ii) Human rights as legal obligations

While human rights represent an internationally shared value system, they are distinguished from other moral values by their grounding in international law. Since the adoption of the Universal Declaration of Human Rights in 1948, all UN Member States have ratified at least one of the core international human rights treaties, and 80 per cent have ratified four or more. The CEDAW has been ratified by all but seven member

175 UDHR, above n 70, preamble, second stanza.
176 Morsink, above n 97, 33.
179 Darrow and Arbor, above n 68, 492; Nowak, above n 47, 1.
180 Lundy and McEvoy, above n 28, 77.
states;\textsuperscript{182} the CRC has been signed by all member states and ratified by all but one.\textsuperscript{183} This high degree of international consensus has led many to conclude “human rights legal obligations are now, beyond doubt, universal, whether through treaty, custom, general principles of law, or \textit{jus cogens}”.\textsuperscript{184} Human rights entail specific, binding obligations that demand accountability and action.\textsuperscript{185} Consequently, human rights-based approaches “provide a mechanism for reanalysing and renaming ‘problems’ as ‘violations’, and, as such, something that need not and \textit{should not} be tolerated”.\textsuperscript{186}

\textit{Instrumental rationales for engaging in human rights-based approaches}

Instrumental rationales for human rights-based approaches are founded on a belief that such approaches improve project outcomes.\textsuperscript{187} Within this

\textsuperscript{182} The six UN member states that have not ratified the CEDAW are Iran, Nauru, Palau, Somalia, Sudan and the United States. See Office of the United Nations High Commissioner for Human Rights, Status of Ratification Interactive Dashboard, <http://indicators.ohchr.org/>

\textsuperscript{183} The only UN member state that has not ratified the CRC is the United States. See Ibid <http://indicators.ohchr.org/>


\textsuperscript{185} McKinerny-Lankford, above n 46, 75; Canan Gundez, \textit{Human Rights and Development: The World Bank's Need for a Consistent Approach} (Development Studies Institute, London School of Economics and Political Science, 2004) 5.

\textsuperscript{186} Chris Jochnick, ‘Confronting the impunity of non-state actors: new fields for the promotion of human rights’ (1999) 21(1) \textit{Human Rights Quarterly} 56, 60, emphasis added.

\textsuperscript{187} Galit A Sarfaty, ‘Doing good business or just doing good: Competing human rights frameworks at the World Bank’ in Bronwen Morgan (ed), \textit{The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship} (Ashgate, 2007) 93-106; Darrow and Arbor, above n 68, 492; Save the Children Sweden, ‘Child Rights Programming: How to Apply Rights-Based Approaches to Programming’ (Save the Children Sweden, Second ed, 2005), 22; Cornwall and Nyamu-Musembi, above n 9, 2; Piron and Watkins, above n 45, 9-10, 79-81; Swiss Agency for Development and Cooperation, \textit{Integrating Human
framework, a human rights-based approach is employed as a means to an end, rather than as an end in itself.

(i) A more comprehensive analytical framework

The indivisibility, inter-dependence and inter-relatedness of human rights means that human rights-based approaches look beyond the immediate non-fulfilment of rights to include identification of underlying structural and root causes. Human rights-based analysis encompasses drivers and consequences of deprivation, such as entrenched inequalities and unequal power dynamics, and “a lack of access to, representation in and control over resources, services, institutions and processes to which they are entitled”.\(^\text{188}\) It focuses not only on service provision, but also examines the abilities, willingness, obstacles and constraints that duty-bearers face in meeting their international obligations, and that rights-holders face in claiming their rights.\(^\text{189}\) This data informs more comprehensive policy and programmatic responses aimed at addressing these underlying factors, and at supporting duty-bearers to fulfil their obligations and rights-holders to claim their rights.\(^\text{190}\)

(ii) A more coherent advocacy framework

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\(^{188}\) ActionAid Asia, The Hua Hin Declaration, above n 8.

\(^{189}\) Organisation For Economic Co-Operation and Development (OECD) and World Bank, Integrating Human Rights into Development: Donor Approaches, Experiences, and Challenges (The World Bank, Second ed, 2013) 78.

In working toward these objectives, the normative moral and legal status of human rights provides implementing organisations leverage for more coherent and effective advocacy. One of the strengths of human rights-based approaches is “their potential to resonate with basic ideas of human dignity shared by many cultures around the world.” Indeed, even critics of the historical and political dimensions of the international human rights legal framework have acknowledged that “the idea of human rights – the quest to craft a universal bundle of attributes with which all societies must endow all human beings – is a noble one”. And, insofar as human rights build on the presumption of a shared humanity, the argument for universality is a uniting idea. By appealing to a shared set of moral values, human rights-based approaches may inspire greater commitment, and accountability, on the part of duty-bearers.

In a similar vein, by allowing challenges to the status quo to be framed around universally agreed legal standards, human rights-based approaches may serve to legitimise ‘progressive’ development strategies and practices that would otherwise risk being dismissed as charitable aid. Scholars have noted that legalisation “tends to bolster the credibility of normative commitments [and] increase compliance with international norms.” The international human rights legal framework means that human rights-based

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191 Darrow and Arbor, above n 68, 496.
192 Mutua, above n 113, 14.
193 Sen, ‘Universal Truths,’ above n 120, 40.
approaches offer a legal foundation for development organisations to assert, and to present as non-negotiable, certain values and policy choices. Because human rights are legal obligations that States have voluntarily assumed, human rights based-approaches provide universally agreed, legally binding entry points for action, and empower those who may otherwise be perceived as victims or as beneficiaries to “know and present themselves as rightful and dignified people who can make just demands of power…”

(iii) More sustainable outcomes

Human rights-based approaches can also improve the sustainability of outcomes by linking interventions with local needs and local actors. Human rights-based approaches assume “that those who are most directly affected know firsthand what institutional obstacles thwart their aspirations and are essential actors in deciding what to do about it”. Consequently, the


199 Offenheiser and Holcombe, above n 30, 271.
effectiveness and relevance of interventions may be diluted unless the people affected by those interventions, and in whose names those interventions are undertaken, are engaged in these processes.\textsuperscript{200} A good illustration of this is captured in the following description of a hand-tubewell programme for irrigation in Bangladesh, which collapsed because it did not reflect the priorities of the organisation’s so-called beneficiaries:

“The pumps were located in the fields to be used for vegetable production. The villagers, however, considered water for domestic use a higher priority. They therefore moved the pumps from the fields to their homes. Rather than recognising this as the expression of people’s genuine interests, the NGO began to issue plastic pipes, which could not be re-located. Applications for the tubewells rapidly declined, and the programme was deemed a failure”.\textsuperscript{201}

In a similar example concerning an urban health project, children rejected local council proposals for grassed play areas in favour of concrete, so they could more easily identify broken glass, dog excrement and discarded needles used by drug addicts.\textsuperscript{202} These cases demonstrate that while participation is a right, it also has instrumental value: the relevance and sustainability of interventions is increased when the intended beneficiaries are actively and meaningfully engaged in the identification of problems and solutions, and in the implementation of remedial measures.

\textsuperscript{202} Stepney and Wapping Community Child Health Project, Stepney Community Nursing Development Unit, Research and development programme, 1993-1995, cited in Lansdown, above n 33, 5.
1.6. Conclusions

Chapter one has sought to identify the elements of a conceptually coherent human rights-based approach, which will form the framework for later analysis of the ways in which UNICEF and the World Bank engage with the idea of human rights-based approaches to matters involving children.

The chapter began by tracing the historical evolution of human rights-based approaches, from a rethinking of traditional development strategies and recognition of human rights and development as mutually reinforcing, to the Statement of Common Understanding among United Nations Agencies on the Human Rights-Based Approach to Development Cooperation and its wider impacts for both United Nations and non-governmental organisations. It then noted that, despite the widespread adoption of human rights-based approaches, there is still no clear, unified definition of what a human rights-based approach is. In particular, there is confusion about the core features of such an approach. Consequently, the term “human rights-based approach” remains open to diverse interpretations, and is associated with various methodologies, disciplines and practices, depending on the implementing organisation.

The third part of the chapter attempted to resolve some of these conceptual limitations by identifying the foundational values that comprise a coherent, workable model; namely: (a) that interventions are grounded in the international human rights legal framework; and (b) that interventions are guided by standards and principles derived from the international legal human rights framework. It argued that the grounding of human rights-based approaches in international human rights law is imperative in order to provide clear parameters and conceptual coherence. Since the term ‘human
rights’ is subject to a range of denotations and connotations, specifying a basis in universally recognised and recognisable international legal norms serves to differentiate the human rights that human rights-based approaches seek to achieve from other, self-designated socially beneficial objectives.

With regard to guiding principles, the chapter recognised that, while some organisations had adopted the same six principles contained in the Common Understanding, others had adopted fewer principles, additional principles, or adaptations of these principles. Against this lack of clarity, it argued that determinations of the guiding principles should not be based on practicality and functionality alone. Rather, a conceptually coherent model of a human rights-based approach requires that greater be paid to the normative foundations of proposed guiding principles. The chapter identified five guiding principles that are inseparable from, and intrinsic to, a human rights-based approach: (i) accountability; (ii) inherent and inalienable human dignity; (iii) universality, equality and non-discrimination; (iv) participation; and (v) indivisibility, inter-dependence and inter-relatedness. In this context, it emphasised that the three latter principles – universality, equality and non-discrimination; participation; and indivisibility, inter-dependence and inter-relatedness – are both explicit aspects of a human rights-based approach in their own right, and implicit aspects of a human rights-based approach, deriving from the concept of inherent and inalienable human dignity. This theme is developed in the following chapter, which examines human rights-based approaches to matters involving children, and in this context analyses the extent to which children’s rights are recognised as human rights.

The fourth and final part of the chapter considered why organisations might choose to engage with a human rights-based approach. It presented the
main normative and instrumental rationales for engaging in human rights-based approaches, noting that these rationales are not mutually exclusive and that organisations are often motivated by a combination of the two. These concepts are revisited in chapters three and four, which explore how, and why, UNICEF and the World Bank engage with the idea of human rights-based approaches.
CHAPTER TWO: Situating children within human rights-based approaches

2.1. Introduction

Having outlined the general features of a human rights-based approach, chapter two examines this model as it relates to children. The chapter serves two functions. First, it examines the status of children as rights-bearers, concluding that there are at least two sources of children’s human rights: the instruments comprising the international bill of rights, and the Convention on the Rights of the Child. Second, it considers the characteristics of a human rights-based approach to matters involving children, focusing in particular on the best interests and participation principles. The overall objective is to contribute to the development of a workable, practicable, and conceptually clear model of a human rights-based approach to matters involving children. This in turn will form the basis of the analysis, in chapters three, four and five, of how UNICEF and the World Bank engage with this topic.

The first part of this chapter focuses on how the human rights norms, standards and principles that underpin human rights-based approaches are conceptualised in matters involving children. Although human rights-based approaches are founded on the human rights standards contained in, and principles derived from, all international human rights instruments, children and their rights are often treated as belonging to a separate category of ‘child rights programming’, best left to expressly-mandated ‘child rights’ organisations. This thesis challenges such distinctions as artificial, counter-productive, and conceptually incoherent. First, children’s rights are human
rights. Second, segregating children’s rights from human rights (and the CRC from other international human rights instruments) perpetuates the notion that human rights are adult rights and reinforces children’s disconnection from the broader social context in which they live, thereby paving the way for children’s exclusion from ‘mainstream’ human rights-based approaches. Third, conceptual integrity demands that human rights-based approaches promote the equal value of all international human rights instruments and their applicability to all human beings who fall within their ambit. Thus rather than advocating a discrete ‘child rights-based approach’, this thesis favours the concept of a human rights-based approaches to matters involving children.

Two CRC principles that are especially important to increasing children’s visibility within human rights-based approaches are participation and the best interests of the child. The second and third parts of this chapter explain why these principles are so central to human rights-based approaches to matters involving children, and some of the conceptual and logistical challenges associated with their interpretation and application. The second part of the chapter examines the best interests principle, as contained in Article 3(1) of the CRC. It begins by briefly noting some of the common criticisms about determining with certainty what the best interests of the child are, before moving on to consider what it means to treat the best interests of the child as ‘a primary consideration’. A particular difficulty in this regard is the lack of direction as to what weight the child’s best interests should carry in relation to competing or conflicting interests, and why. Analysis focuses on two facets of this impasse: first, conflict

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between the best of a child and the best interests of other rights-holders; and second, conflict between the best interests the child and his or her expressed wishes.

The third part of this chapter analyses the participation principle, as expressed in Article 12 of the CRC. The discussion begins by observing that simply calling for participation without clarifying what participation entails, who is entitled to participate and how participants’ views influence project design and implementation, is an unhelpful contribution to human rights-based programming. It then examines some of the specific conceptual and logistical challenges associated with children’s participation, as outlined in Article 12 of the CRC. The CRC is the only international human rights instrument that obliges decision-makers to listen to the views of affected rights-holders and to give those views due weight. Nonetheless, it does not provide clear guidance on what it means to give children’s views “due weight”. Two aspects of this dilemma are highlighted: first, the potential for conflicts between the views of the child and the views of other rights-holders; and second, interpretation of the qualifications attached to the directive that the child’s views be given due weight.

The fourth and final part of the chapter analyses the potential conflict between the participation and best interests principles, and the seemingly incompatible visions of children that they present. Much of the scholarly discourse on this topic tends either to criticise the possibility of adult decision-makers vetoing children’s decisions based on their third-party evaluations of the child’s maturity and his or her best interests, or to seek ways of maximising children’s decision-making power within parameters that would also safeguard their transition to adulthood. This thesis argues that a conceptually coherent, contextual reading of the Convention on the
Rights of the Child requires that a child’s competence, rather than his or her age, be the relevant factor in balancing these principles. The CRC does not suggest that decision-makers give children’s views due weight, but rather obliges them to do so; thus the views of a child of sufficient maturity will be determinative of his or her best interests. The chapter concludes by articulating some ideas about how a workable model of a human rights-based approach to matters involving children might look. It proposes that transformation of the best interests and participation principles into practicable concepts demands a greater shift in focus from concerns about getting the outcomes right to ensuring that the process respects children’s status as rights-holders.

2.2. **Toward an inclusive definition of human rights**

*The artificial distinction between children’s rights and human rights*

Human rights-based approaches are founded on the human rights standards contained in, and principles derived from, all international human rights instruments. In practice, however, implementation tends to ignore the full range of human experience in favour of an adult-centric (male) interpretation of what it means to be human, with people falling outside this dominant archetype “disorganised from their own context and re-organised into [...] categories” to be targeted in separate, dedicated programmes (or not at all).² As with feminist critiques about the androcentric nature of human rights –that human rights are articulated, interpreted and applied to reflect men’s experiences, with women’s experiences considered the

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deviation from this norm—scholars have noted that children are frequently understood not as having human rights, but as having children's rights. As the following section discusses, international human rights law confirms that children are human beings endowed with human rights, while simultaneously recognising children as a distinctive group with “their own particular needs and interests”. Nonetheless, children and their rights are frequently overlooked within ‘mainstream’ human rights-based approaches, and are instead addressed as part of programmes specifically targeting children or focusing on ‘children’s issues’:

“Few mainstream development agencies and government departments pay much attention to children. Working with children and their rights remains, to a large extent, the exclusive domain of child welfare and children’s rights organisations.”

The artificial distinction between human rights and children’s rights is implicitly reinforced by child rights organisations, which often emphasise their obligations under the Convention on the Rights of the Child to the

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5 Michael King, 'You have to start somewhere' in Gillian Douglas and Leslie Sebba (eds), Children's rights and traditional values (Ashgate, 1998) 4.


exclusion of other human rights instruments that also have relevance for children’s rights. In relation to UNICEF, for example, studies indicate that the organisation’s commitment to the CRC has come at the expense of its formal commitments under other international instruments, such as the CEDAW. Against this tendency, Lansdown highlights the importance for child rights organisations to understand the wider range of human rights standards that exist, arguing that this awareness “is needed not only to ensure that advocacy is informed by all relevant rights, but also in order to promote the mainstreaming of children’s rights into the broader human rights agenda”.

Human rights are grounded in the equal moral significance of all human beings, regardless of the stage of life they have reached. Consequently, a conceptually coherent account of human rights-based approaches must be predicated on an inclusive definition of human rights that incorporates the experiences and perspectives of children. This is necessary to ensure that children’s claims are taken seriously, and that human rights live up to their promise of universality. Additionally, the notion that the CRC is of relevance only to child rights organisations, and applicable only to child rights programming, must be dispelled. As the Committee on the Rights of

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9 Lansdown, Ibid 56.

10 Similar arguments have been made in respect of women’s human rights. See for example Eva Brems, ‘Protecting the rights of women’ in Richard Pierre Claude (ed), *Human rights in the world community: issues and action* (University of Pennsylvania Press, 2006) 127: “How seriously will the claims of women be taken if they are applicable to women alone? Real participation implies the power to change the general parameters, the power to contribute to the definition of what human rights are about, not only for women but also for all… The assertion that women’s rights are human rights expresses both a demand to be included in the project of human rights and a radical redefinition of what that project entails.”
the Child has correctly observed, “the concept of dignity requires that every child is recognized, respected and protected as a rights holder and as a unique and valuable human being with an individual personality, distinct needs, interests and privacy”.\textsuperscript{11}

\textit{The human rights of children under international law}

\textbf{The international bill of rights}

Children – as persons – fall within the ambit of general human rights instruments such as the Universal Declaration of Human Rights (1948) and the twin Covenants. In each of these instruments, the preamble opens with the same recognition “of the inherent dignity and of the equal and inalienable rights of \textit{all members of the human family}”.\textsuperscript{12} The applicability of these instruments is also reinforced by the principles of universality, equality and non-discrimination, as detailed in chapter one. Rather than repeat these arguments, this section focuses specifically on international jurisprudence relating to age and non-discrimination.

Age is not specifically listed as a prohibited ground for discrimination in any international human rights instrument. Nonetheless, the Committee on Economic, Social and Cultural Rights has rightly observed that the “nature

\textsuperscript{11} Committee on the Rights of the Child, \textit{General comment No. 13 (2011): The right of the child to freedom from all forms of violence}, UN Doc CRC/C/GC/13 (18 April 2011)

of discrimination varies according to context and evolves over time”. Recognising the need to ensure the equal enjoyment of human rights by “social groups that are vulnerable and have suffered and continue to suffer marginalisation”, the Committee determined that a “flexible approach to the ground of ‘other status’ is thus needed to capture other forms of differential treatment that cannot be reasonably and objectively justified”. Accordingly, the Committee has repeatedly emphasised the applicability of the ICESCR to children through its rejection of age-based discrimination in relation to the enjoyment of specific rights, such as the right to an adequate standard of living (including adequate housing, adequate food and access to water), the right to social security, and the right to participate in

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14 Ibid.

15 Ibid General Comment No. 4: The right to adequate housing (UN ESCOR, Committee on Economic, Social and Cultural Rights, 6th sess, 1991, contained in UN Doc E/1992/23, annex III at 114), para 8(e): “Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus such disadvantaged groups as [...] children [...] must be accorded full and sustainable access to adequate housing resources”, and para 8(f): “adequate housing must be in a location which allows access to [...] schools, child-care centres and other social facilities.”

16 Ibid General Comment No. 12: The right to adequate food (art. 11), UN ESCOR, Committee on Economic, Social and Cultural Rights, 20th sess, Geneva, 26 April-14 May 1999, Agenda Item 7, UN Doc E/C.12/1999/5 (12 May 1999), para 6: “The right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement”.

17 Ibid General Comment No. 15 (2002): The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN ESCOR, Committee on Economic, Social and Cultural Rights, 29th sess, Geneva, 11-29 November 2002, Agenda Item 3, UN Doc E/C.12/2002/11 No (20 January 2003), para 16: “Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including [...] children [...] In particular, States parties should take steps to ensure that: (b) Children are not prevented from enjoying their human rights due to the lack of adequate water in educational institutions and households or through the burden of collecting water”.

18 Ibid General Comment No. 19: The right to social security (art. 9), UN ESCOR, Committee on Economic, Social and Cultural Rights, 39th sess, 5-23 November 2007, UN
Meanwhile, Doek rightly observes that children’s inclusion is consistent with both a contextual and a contractual reading of the ICCPR:

“There are no articles in the ICCPR stating that ‘everyone’ does not include persons below the age of eighteen. Additionally, [no State Parties], when ratifying the ICCPR, made [any] reservations indicating the rights guaranteed in the ICCPR cannot be enjoyed by persons under the age of eighteen.”  

Doek’s position coheres with the Human Rights Committee’s *General Comment on The Rights of the Child*, in which the Committee expressly stated that, “as individuals, children benefit from all of the civil rights enunciated in the Covenant”. The ICCPR does contain articles that mandate special protection measures for children. Article 24(1), for example, states that “Every child shall have […] the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state.”

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19 Ibid General comment No. 21: Right of everyone to take part in cultural life (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights), UN ESCOR, Committee on Economic, Social and Cultural Rights, 43rd sess, 2–20 November 2009, UN Doc E/C.12/GC/21 (21 December 2009), para 26: “Children play a fundamental role as the bearers and transmitters of cultural values from generation to generation. States parties should take all the steps necessary to stimulate and develop children’s full potential in the area of cultural life, with due regard for the rights and responsibilities of their parents or guardians.”


Specific special protection measures for children are also included in many of the articles relating to the administration of justice. Nonetheless, the Committee has clarified that these are in addition to the non-discrimination measures that States are required to take to ensure that everyone enjoys the rights provided for in the ICCPR. This is a strong endorsement of children’s claims to all human rights articulated within the international legal corpus – a conclusion underscored by the preamble to the Convention on the Rights of the Child, which frames children’s rights within a recognition 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…”

The Convention on the Rights of the Child

Due to their special needs and their vulnerability to human rights violations arising from their status as children, children also have human rights that are separate from and additional to those of adults. These rights, codified in a distinct international treaty – the Convention on the Rights of the Child

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23 Ibid art 10(2) requires children deprived of their liberty to be “separated from adult [detainees] and brought as speedily as possible for adjudication”; art 14(4) requires judicial proceedings against child defendants to “take account of their age and the desirability of promoting their rehabilitation”; art 10(3) requires children convicted of offences to be “segregated from adult [prisoners] and be accorded treatment appropriate to their age and legal status”; and Article 6(5) prohibits imposition of the death penalty “for crimes committed by persons below eighteen years of age”. Moreover, under art 14(1), children’s wellbeing is identified as an express constraint on the exercise of the right to publish judgements rendered in a criminal case or in a suit at law, such publication being prohibited “where the interest of juvenile persons otherwise requires or the proceedings concern [...] the guardianship of children”.

24 Human Rights Committee, above n 21, para 1.

(1989) – cover children’s rights to survival (rights to life and having their basic needs met), development (rights enabling them to reach their fullest potential), participation (rights that facilitate children’s role in the community), and protection (rights that safeguard against neglect, abuse and exploitation). The Convention does not dislodge or replace children’s rights under other international human rights instruments, since human rights are inherent to the human dignity of all people, which includes children. Nonetheless, one of the greatest achievements of the CRC is its express affirmation that children, as independent human beings, are also independent rights-holders:

“The Convention, for the first time in international law, establishes a direct relationship between the child and the State that challenges the presumption that parents have rights of ownership over the child. It renders the child visible as a subject of rights within the family, entitled to protection on his or her own behalf, and empowers the State to intervene, when necessary, to protect the rights of the child, in recognition that the best interests of children are not always protected by parents.”

The Convention on the Rights of the Child includes many rights that are already assured to children, as human beings, under other international human rights instruments. For example, the right to life (Article 6), the right to a name and nationality (Article 7), freedom of expression (Article 13), freedom of thought, conscience and religion (Article 14), freedom of

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27 Gerison Lansdown, The evolving capacities of the child, UNICEF Innocenti Research Centre (2005), ix.
association and freedom to peaceful assembly (Article 15), protection against unlawful attacks and interference (Article 16), the rights of minorities (Article 30), freedom from torture (Article 37), and the rights of detainees (Articles 37 and 40) all have counterparts in the International Covenant on Civil and Political Rights (1966). Likewise, versions of the right to family assistance (Article 18), the right to the highest attainable standard of health (Article 24), the right to social security (Article 26), the right to an adequate standard of living (Article 27), the right to education (Article 28) and freedom from economic exploitation (Article 32) can be found in the International Covenant on Economic and Social Rights (1966).

However the CRC does not merely restate the economic, social, cultural, civil and political rights contained in the pre-existing international human rights instruments and endorse their inherence in children; it also expands and elaborates on many of these rights, specifying their particular application to child rights rights-holders. The CRC moreover transforms the general obligations, expressed in Article 25(2) of the UDHR, Article

29 See International Covenant on Civil and Political Rights, above n 22, arts 6 (right to life), 24 (right to name and nationality), 19 (freedom of expression), 18 (freedom of thought, conscience and religion), 21 (right to peaceful assembly), 22 (freedom of association), 17 (protection against unlawful interference), 27 (rights of minorities), 7 (freedom from torture), 9 (rights to liberty and security of person) and 10 (right to dignified and humane detention conditions).

30 See International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, 993 UNTS 3, UN Doc A/6316, entered into force 3 January 1976) arts 10 (right to family assistance), 12 (right to highest attainable standard of health), 9 (right to social security), 11 (right to adequate standard of living), 13 (right to education) and 7 (freedom to just and favourable conditions of work).

24(1) of the ICCPR and Article 10(3) of the ICESCR, to render children special protection, care and assistance into a series of newly established individual rights detailing certain prohibited forms of harm and reinforcing the entitlements of children in situations of potentially heightened vulnerability. These include: protecting children “from the illicit use of narcotic drugs and psychotropic substances” and preventing “the use of children in the illicit production and trafficking of such substances”; protecting children from “all forms of sexual exploitation and sexual abuse”, including use of children in prostitution or pornography; and to prevent the abduction of, sale of and traffic in children; and taking “all appropriate measures to promote physical and psychological recovery and social reintegration” of children whose protection rights have been violated.

Such designation of additional rights or favourable adjustment of the rights due to all human beings is neither unique nor exceptional in the system of promotion and protection of human rights. Other categories of persons – women; the differently-abled; racial, ethnic and linguistic minorities – have also been granted certain additional rights in order to secure for these individuals “an enjoyment of human rights that would be equal to those of the others, and sometimes simply to safeguard their survival”. Viewed in this context, it becomes evident that the CRC does not so much create human rights for children as reaffirm children’s status as rights-holders under

33 Convention on the Rights of the Child, above n 26, art 33.
34 Ibid, art 34.
36 Ibid, art 39.
pre-existing international human rights instruments while also seeking to address the inherent and socially constructed barriers that children face in fully exercising their rights.\textsuperscript{38} As the Committee on the Rights of the Child has observed:

\begin{quote}
\textit{“[C]hildren’s developmental state makes them particularly vulnerable to human rights violations; their opinions are still rarely taken into account; most children have no vote and cannot play a meaningful role in the political process that determines Governments’ response to human rights; children encounter significant problems in using the judicial system to protect their rights or to seek remedies for violations of their rights; and children’s access to organizations that may protect their rights is generally limited.”}\textsuperscript{39}
\end{quote}

Recognising children’s human rights in a separate convention, and spelling out a distinctive approach that recognises children on their own terms, is important because it holds State Parties and society at large legally accountable for respecting, protecting, promoting and fulfilling the rights of those who risk otherwise being ignored.\textsuperscript{40} By consolidating the entitlements that children, as human beings, already have into one human rights instrument, and elaborating on the measures that must be taken to ensure their realisation, the CRC may enable children to claim their rights more effectively. But that does not make the CRC the sole source of children’s human rights; nor does it diminish children’s entitlements under other


\textsuperscript{40}White, above n 2, 1095; Hammarberg, above n 32, 99.
human rights instruments. Consequently, the CRC may be considered the primary, but by no means the exclusive, instrument from which the standards, norms and principles of a human rights-based approach to matters involving children should be derived.

**Child rights principles are human rights principles**

Current thinking about human rights-based approaches to programming with children draws on the four so-called “foundational principles” articulated in the Convention on the Rights of the Child. These are:

1. Non-discrimination (article 2);
2. The best interests of the child (article 3);
3. The right to survive and develop (article 6); and
4. The right to participate and have one’s views considered (article 12).

The taxonomy derives from the Committee on the Rights of the Child, whose guidelines purport to “group the articles according to content and logical order” in an effort to structure the reporting process and the dialogue with the State party “in such a way that issues of principal concern are dealt with in a methodical and informative manner”. A number of

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child rights organisations, including UNICEF and Save the Children, have subsequently endorsed this classification, adopting the view that non-discrimination, the best interests of the child, the right to survive and develop, and the right to participate and have one’s views considered are the four overarching principles that guide human rights-based programming with children.44

It is worth noting that, despite the official imprimatur, the matter of which CRC standards constitute guiding principles is far from settled. Abramson, for example, rejects entirely the designation of substantive rights as ‘general principles’, calling the practice an “extremely weak way to talk about the legal obligations of States under the CRC: it undermines the concept of rights, and it misrepresents the state’s legal obligations”.45 He draws particular attention to Article 6, maintaining that calling the right to life, survival and development a general principle “turns a human right into a superficial cliché”.46 Meanwhile, Cantwell raises concerns about “counter-productive rights inflation” in the children’s rights sphere, noting that participation is not expressly mentioned in Article 12, and appears explicitly in only three provisions of the CRC: Article 9 (right of child to participate in proceedings relating to removal of child from parental care), Article 23


46 Ibid, 16.
(right of disabled child to actively participate in community life) and Article 31 (right of child to participate in cultural and artistic life).^47

Even amongst those who accept the idea of guiding principles, disagreement persists about which rights ought to be included. By way of illustration, a number of scholars refer to “the evolving capacities of the child”, outlined in Article 5, as a principle relevant to implementation of all rights in the CRC, because it recognises that childhood “is not a single, fixed, universal experience” and provides a basis for resolving tensions between parental rights and the rights of the child.^48

Regardless of which principles are ultimately accepted as central to human rights-based approaches to matters involving children, greater clarity is required about when should these should principles apply. As argued in chapter one, one of the defining features of a human rights-based approach is that all phases of all interventions in all sectors are guided by those human rights principles derived from, and contained in, international human rights instruments. Yet the literature on mainstream human rights-based approaches is largely silent in regard to whether, and how extensively, principles derived from the CRC must be considered in projects where children are not the primary beneficiaries.

^47 Cantwell, above n 4, 54.

One significant exception that is of particular relevance to this thesis, and its analysis of how UNICEF and the World Bank engage with the idea of human rights-based approaches to matters involving children, is the Committee on the Rights of the Child’s *General Comment on CRC implementation measures*. This expressly stipulates that, “in their promotion of international cooperation and technical assistance, all United Nations and United Nations-related agencies should be guided by the Convention and should mainstream children’s rights throughout their activities…” 49

Nonetheless, the tendency remains for children’s rights to be disaggregated from human rights, and to be addressed in discrete ‘child rights’ programmes focusing on ‘children’s issues’. And as a result, principles deriving from the CRC are often overlooked within human rights-based approaches, because they are assumed to be relevant only for interventions expressed in terms of furthering the realisation of rights contained in the CRC, or when children are the explicitly intended beneficiaries. 50

This chapter dismisses such segregation as conceptually incoherent, and has argued that human rights principles deriving from the CRC should guide human rights-based programming by all actors and in all sectors, in any interventions where children are affected. That separation of child rights principles from other human rights principles is neither required by human rights-based approaches, nor conceptually sustainable, is underscored by two factors: first, recognition that all human rights are “universal, indivisible, interdependent and interrelated”, 51 which includes the human rights of


50 Theis and O’Kane, above n 7, 167; Overseas Development Institute, above n 7; Alston and Tobin, above n 7, 44.

children;\textsuperscript{52} second, the fact that two of the four CRC-derived guiding principles (non-discrimination and participation) are not actually unique to programming with children, while a third (the best interests principle) is expressed in such wide terms as to render it applicable in almost any situation, regardless of whether children are the express, intended beneficiaries. It is therefore unclear what purpose is served by severing them from the other human rights principles that guide human rights-based programming.

**Participation and non-discrimination**

In his analysis of the conceptual foundations of human rights-based approaches to matters involving children, Tobin rightly challenges the orthodox position of treating the CRC-derived non-discrimination and participation principles as though they belong to a separate category of guiding principles than those already included in human rights-based approaches. The practice is, according to Tobin, misleading and conceptually difficult to justify because neither of these principles is unique or specific to a child rights-based approach – indeed, both are basic principles of any human rights-based approach.\textsuperscript{53} Thus one might legitimately ask why these principles were not simply incorporated into human rights-based approaches, but were instead constituted as a separate group of guiding principles specific to human rights-based approaches to programming with children.

\textsuperscript{52} See for example: Ibid para 21: “[T]he rights of the child should be a priority in the United Nations system-wide action on human rights.”

As expressed in Article 2(2) of the CRC, the non-discrimination principle extends children’s protection against non-discrimination to encompass discrimination “on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members”. Similarly, the participation principle articulated in Article 12(1) of the CRC assures “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”. Yet these qualifications – some of which are discussed in the following chapter – do not render non-discrimination and participation as principles peculiar to child rights-based approaches to programming; instead, “a more accurate and internally coherent account of a rights-based approach” is to consider these as general guiding principles that are “modified with respect to children”.

Read in this light, the duplication of non-discrimination and participation principles could be understood as an attempt to reinforce children’s inclusion, as persons, within the ambit of the generic non-discrimination and participation principles while simultaneously, and in line with the CRC, extending children additional protection. It is an unnecessary duplication though if human rights standards and principles are interpreted in an inclusive manner that takes full account of the diversity of human experiences. It is also an example of the incompletely theorised nature of human rights-based approaches.

**The best interests of the child**

Where does this leave the best interests principle? Article 3(1) of the CRC requires that, “in all actions concerning children, whether undertaken by

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54 Ibid 71.
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.” Because of the range of actions that could conceivably ‘concern’ children, a strong case can be made for this principle to be treated as a guiding principle for all human rights-based interventions, rather than as a principle that is unique to human rights-based programming with children:

“It is difficult to think of many governmental decisions which do not concern children. Decisions taken in relation to global warming concerns children – and generations beyond. The decision to build a new major road concerns children. The decision to go to war certainly concerns children… The passing of laws about cloning, pre-implantation genetic diagnosis, abortion all concern ‘children’…”

Commentators have been inclined to construe the best interests principle extremely broadly, citing its significance in circumstances beyond those expressly anticipated by the CRC, because of its applicability in all actions concerning children:

“Since [the best interests of the child] is to be considered in all actions affecting children, as stressed by Article 3 of the Convention, it may even be decisive […] in relation to situations not clearly covered by the Convention, but which are necessary for the child’s well-being.”

Moreover, application of the best interests principle is not limited to actions directly concerned with children, but extends to instances where children’s

55 Freeman, Article 3: The Best Interests of the Child (Martinus Nijhoff Publishers, 2007), 45-46. See also Hammarberg, above n 32, 104.

rights and interests are or will be indirectly affected by the contemplated actions. Of special relevance to this thesis, the Committee on the Rights of the Child has emphasised the importance of considering the best interests of the child in respect of economic policies, which although not expressly aimed a furthering the realisation of rights enshrined in the CRC, “are never neutral in their effect on children’s rights” and often entail “negative effects”. The Committee drew particular attention to the obligations of UN-related international financial institutions toward children in this regard, stating:

“The World Bank Group [...] should ensure that their activities related to international cooperation and economic development give primary consideration to the best interests of children and promote full implementation of the Convention.”

Such broad constructions of the best interests principle have the potential to

57 Committee on the Rights of the Child, General Comment No.5 (2003): General Measures on the implementation of the Convention on the Rights of the Child, above n 43, para 12. See also Committee on the Rights of the Child: General Comment No.7 (2005): Implementing child rights in early childhood, U.N.Doc. CRC/C/GC/7/Rev.1, 20 September 2006, para 13(b): “This includes actions directly affecting children (e.g. related to health services, care systems, or schools), as well as actions that indirectly impact on young children (e.g. related to the environment, housing or transport); and U.N. Committee on the Rights of the Child: Summary Record of the 680th Meeting: Egypt, U.N. Doc. CRC/C/SR.680, 2001, comments of Ms. Tigerstedt-Tähtelä, who at para 2 stated that relevance of the best interests principle “was not confined to children’s codes or family codes. It should be applied across the board and taken into consideration, as a matter of priority, in the areas of health, welfare, education, culture and leisure and even in State budgeting and security policy.”

58 Ibid General Comment No.5, para 52. See also Committee on the Rights of the Child: General Comment No.14 (2013), on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art.3, Para 1), (62nd sess, 14 January-1 February 2013, UN Doc CRC/GC/14, 29 May 2013), which at para 26 states that the best interests principle binds “all institutions whose work and decisions impact on children and the realisation of their rights”, encompassing both for-profit and non-profit private sector organisations “which play a role in the provision of services that are critical to children’s enjoyment of their rights…”, be they economic, social, cultural, civil or political rights.

59 Ibid para 64.
not only admit, but to actively prescribe its applicability in virtually every context, regardless of whether the action is initiated by a ‘child rights organisation’, focused on ‘children’s issues’, or contemplates children as the primary beneficiaries. Are there any limits to the scope of the best interests principle? Freeman, while supporting a broad interpretation of the phrase ‘all actions concerning children’, has also cautioned (without explaining why) that the mandate should “not become so general as to embrace absolutely everything”.  

Apprehensions in this regard are misplaced, however, as the principle requires only that children’s best interests be a primary consideration, not that children’s best interests trump all other interests. Thus the principle could embrace absolutely everything and still not be determinative – an issue discussed in the following part of this chapter. Moreover, the use of the word children (plural) rather than child (singular) renders demarcation of any such limits on the principle highly challenging. As Alston rightly notes:

“There is clearly a point at which an action can be considered to be too general in nature, or too indirect in focus, to warrant its being considered to concern a particular child. But if we use the term 'children', as does the introduction to Article 3(1), then the difficulty of determining whether an action is so indirect as to no longer 'concern' children at large becomes somewhat greater.”

Given the breadth of development and humanitarian interventions related matters that could be said to concern children, it makes little sense to treat the best interests principle as though it were extraneous to the general guiding principles said to underpin human rights-based approaches. An inclusive approach to the best interests principle may also help combat the

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60 Freeman, ‘Article 3’, above n 54, 46.
adult-centrism that characterises traditional interpretations of ‘human rights’ by increasing the visibility of children as persons and as rights-holders, and by ensuring that the possible impacts on children of proposed interventions are actively considered at every stage of the project cycle, in every sector. For these reasons, the best interests of the child should not be considered as a principle unique to child-rights programming, but as a guiding principle for all human rights-based interventions that may affect children.

It is not enough, however, to simply identify the human rights principles that underpin the idea of human rights-based approach to matters involving children. A workable model of human rights-based approaches to matters involving children requires a deeper understanding “of the philosophical principles involved and how they apply on the ground in local development contexts”. The following section considers two such principles that are especially critical to the idea of human rights-based approach to matters involving children: participation and the best interests of the child. It explains why these norms are so important, identifies some of the challenges associated with their operationalisation as guiding principles, and attempts to interpret them in a clear, principled and coherent manner that facilitates their practical application.

2.3. Translating principles into practice: The best interests of the child

The best interests principle is most broadly expressed in Article 3(1) of the

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CRC, which states: “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.” The words ‘shall be’ entail a strong legal obligation to treat the best interests of the child as the subject of active deliberation.\textsuperscript{64} Thus decision-makers “may not exercise discretion as to whether children’s best interests are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken”.\textsuperscript{65} This requirement is of enormous political significance, as it confirms that children are rights-holders in their own right, whose best interests must be expressly considered in all relevant decision-making processes.\textsuperscript{66}

Nonetheless, interpretation and application of the best interests principle is an extraordinarily complex and multi-dimensional endeavour.\textsuperscript{67} One source of conceptual confusion is that fact that the CRC does not expressly define embedded terms and concepts, such as what ‘the best interests of the child’ are, and what it means to treat the best interests of the child as ‘a primary consideration’. As a result, the best interests principle has been criticised for offering “little guidance to decision-makers who have to make decisions impacting on the lives of children”.\textsuperscript{68} While some of this criticism is

\textsuperscript{64} Committee on the Rights of the Child: \textit{General Comment No.14 (2013), on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art.3, Para 1)}, above n 57, para 36.

\textsuperscript{65} Ibid.

\textsuperscript{66} Gerison Lansdown, ‘Evolving capacities, above n 27, ix.


\textsuperscript{68} Marit Skivenes, ‘Judging the Child’s Best Interests: Rational Reasoning or Subjective Presumptions?’ (2010) 53(4) \textit{Acta Sociologica} 339, 339. See also Wright S. Walling, \textit{Best Interest of the Child: Do we have a clue?} (Walling, Berg & Debele, 1995) available at
justified, much of it is misplaced. This is because such criticisms tend to place excessive emphasis on outcomes (deciding what is in the best interests of the child) at the expense of processes (how the decision is reached).

*Defining best interests*

*Best interests and indeterminacy*

One of the most common criticisms of the best interests principle relates to indeterminacy – the difficulty of knowing, with full certainty, which one of a multitude of available options is in the best interests of the child. Yet treating the best interests principle as a straightjacket that immobilises decision-makers undermines its utility as a guiding principle. A more functional reading must focus on the manner in which best interests are determined, valuing children's own knowledge about what they need and can do, and facilitating their active involvement in decision-making processes in all matters that concern them.

*The best interests of the child in cultural context*

Another frequent criticism of the best interests principles is that the best interests

\[\text{http://www.wbdlaw.com/In-the-News/Bestinterestofthechild.pdf}\]


interests of the child will, as a matter of necessity, “be determined in light of the cultural context in which each child lives”. Consequently, conceptions of the best interests of the child can vary markedly within and between communities, depending on local social arrangements, child development goals and child rearing practices. The CRC recognizes the importance of “taking due account of the importance of the traditions and cultural values of each people for protection and harmonious development of the child”. Indeed, it specifically enshrines the rights of the child to “participate fully in cultural and artistic life” and protects the rights of children of minority or indigenous origin “to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language”.

Nonetheless, the CRC does not grant unequivocal priority to local conceptions of the best interests of the child. On the contrary, the Convention clearly indicates that the ‘best interests’ principle should protect

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75 Ibid art 31.

76 Ibid art 30.
children from harmful practices, even if attempts are made to justify them in terms of culture and tradition.\textsuperscript{77} For example, in their \textit{General Comment on the right of the child to protection from corporal punishment}, the Committee on the Rights of the Child noted that discussions with certain State Parties about eliminating the practice were met with suggestions “that some level of ‘reasonable’ or ‘moderate’ corporal punishment can be justified as in the ‘best interests’ of the child”.\textsuperscript{78} Rejecting this rationale, the Committee explained that “interpretation of a child’s best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence […]; it cannot be used to justify practices […] which conflict with the child’s human dignity and right to physical integrity”.\textsuperscript{79}

\textit{Treating the best interests of the child as a ‘primary consideration’}

As expressed in Article 3(1), the best interests of the child are not the only factor to be considered, nor are they the overriding factor – they are \textit{a primary consideration}. This stands in contrast to other iterations of the best interests principle in respect of specific obligations to children in particular

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\begin{itemize}
\item 78 Committee on the Rights of the Child, \textit{General Comment No.8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)} (2 March 2007) para 26.
\item 79 Ibid. See also Committee on the Rights of the Child: \textit{General Comment No. 13 (2011): The right of the child to freedom from all forms of violence}, 18 April 2011, CRC/GC/13, para 29 which defines traditional harmful practices, as including, but not being limited to “(a) Corporal punishment and other cruel or degrading forms of punishment; (b) Female genital mutilation; (c) Amputations, binding, scarring, burning and branding; (d) Violent and degrading initiation rites; force-feeding of girls; fattening; virginity testing (inspecting girls’ genitalia); (e) Forced marriage and early marriage; (f) “Honour” crimes; “retribution” acts of violence (where disputes between different groups are taken out on children of the parties involved); dowry-related death and violence; (g) Accusations of “witchcraft” and related harmful practices such as “exorcism”; (h) Uvulectomy and teeth extraction.
\end{itemize}
circumstances. For example, a child may not be forcibly separated from his or her parents *except* when such separation is “necessary for the best interests of the child”\(^80\); a child separated from one or both parents is entitled to maintain regular contact with both parents “*except if it is contrary to the child’s best interests*”\(^81\); during the exercise of parents’ child-rearing responsibilities, “the best interests of the child will be their basic concern”\(^82\); in determinations of child adoption, “the best interests of the child shall be the *paramount consideration*”\(^83\); a child deprived of his or her liberty shall be separated from adult detainees “*unless it is in the child’s best interest not to do so*”\(^84\); parents should be present during their child’s criminal hearing “*unless it is considered not to be in the best interest of the child*”\(^85\).

In each of these situations (with the exception of parental responsibilities), the best interests of the child are determinative: the contemplated action cannot be taken if it is contrary to the child’s best interests.\(^86\) In Article 3(1), however, the best interests of the child may be outweighed by interests that are of equal or greater value because the child’s best interests are neither exclusive (they are *a* – not *the* – primary consideration), nor supreme (they are a *primary* – not a *paramount* – consideration).\(^87\) As Parker rightly notes, whilst Article 3(1) is more widely applicable and binds a broader group of decision-makers (it covers “all actions concerning children”), it actually accords lesser priority to the best interests of the child than the context-

\(^{80}\) CRC, above n 73, art 9(1).

\(^{81}\) Ibid art 9(3).

\(^{82}\) Ibid art 18(1).

\(^{83}\) Ibid art 21.

\(^{84}\) Ibid art 37(c).

\(^{85}\) Ibid art 40(2)(b)(iii).

\(^{86}\) Freeman, ‘Article 3’, above n 54, 60.

\(^{87}\) Committee on the Rights of the Child: General Comment No.14 (2013), on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art.3, Para 1), above n 57, para 71; Cantwell, above n 4, 49.
specific formulations cited above: “Clearly ‘a’ is weaker than ‘the’ and, […] ‘primary’ is weaker than ‘paramount’”. 88

In their recent General Comment on the right of the child to have his or her best interests taken as a primary consideration, the Committee on the Rights of the Child dedicated one section (comprised of five short paragraphs) to deconstructing the phrase “shall be a primary consideration”. 89 The Committee confirmed that Article 3 does not require decision-makers to prioritise the best interests of the child above all other interests. 90 Nonetheless, the expression ‘primary consideration’ must be construed as meaning that “the child’s best interests may not be considered on the same level as all other considerations”. 91 Once this condition has been met, the best interests of the child may be outweighed by other considerations of equal or greater value.

One of the limitations of the General Comment is that it leaves unanswered questions about how competing considerations are to be prioritised, the threshold required for other considerations to outrank the best interests of the child, and where the burden of proof lies. The Committee simply reiterates that “viewing the best interests of the child as ‘primary’ requires a consciousness about the place that children’s interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on

88 Parker, above n 68, 28. See also Freeman, ‘Article 3’, above n 54, 60: “If a child’s interests are paramount, it is difficult to see any other consideration being taken seriously into account.”
89 Committee on the Rights of the Child: General Comment No.14 (2013), on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art 3, para 1), above n 57, paras 36-40.
90 Ibid para 36.
91 Ibid para 37.
the children concerned”. Thus, rather than offer substantive guidance, the Comment confuses obligation (the requirement to treat the best interests of the child as a primary consideration), rationale (why the best interests of the child accorded such primacy) and definition (what this actually means in practice).

Balancing competing interests

Much of the literature on the best interests of the child analyses the principle in respect of the care and upbringing of individual children. Application is further complicated in the context of development assistance and humanitarian response, where decisions are made on a much larger scale. The interests of children as a social group often differ from the interests of adults as a social group, just as the impacts of social policies and norms will vary as between the two social groups. Interests may also diverge between different (groups of) children. In such situations, if the best interests of all parties cannot be secured, determining whose interests should prevail depends upon how the obligation to treat the best interests of the child as a ‘primary consideration’ is interpreted.

In its General Comment on Article 3, the Committee on the Rights of the Child recognised the potential for conflict between the best interests of the

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92 Ibid para 40.
94 Berry Mayall, 'Introduction’ in Leena Alanen and Berry Mayall (eds), Conceptualizing Child-Adult Relations (Routledge Farmer, 2001) 2.
child and the rights or interests of others, recommending that, in the first instant, an attempt be made to “carefully [balance] the interests of all parties and [find] a suitable compromise”. No instructions are provided as to how the various interests are to be balanced, what outcomes might constitute a ‘suitable compromise’, or, more fundamentally, how the search for a ‘suitable compromises’ is conceptually reconcilable with the obligation to treat the ‘best interests’ of the child as a primary consideration. After all, ‘best’ is superlative, while a compromise is, by definition, less than ideal.

The Committee next explained that, in the event that harmonisation between the best interests of the child and the rights and interests of others is not possible (i.e.: the search for a suitable compromise proves unsuccessful), “authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child’s interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best”. This instruction is largely unhelpful, since a directive to accord the best interests of the child “high priority” or “larger weight” provides little clarity to the obligation to treat them as a “primary consideration”. It does not explain how, and according to what criteria, competing rights or interests to be “balanced”, “analysed” and “weighed”; nor does it give any indication as to when other rights or interests may deemed so critical as to trump the best interests of the child.

95 Committee on the Rights of the Child: General Comment No.14 (2013), on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art.3, Para 1), above n 57, para 39.
96 Ibid, emphasis added.
The role of value systems

Decision-makers are obliged to treat the best interests of the child as a primary consideration. Yet once consideration of the best interests of the child is lodged in the decision-maker’s mind, the best interests principle provides no inherent basis for preferring the best interests of the child above competing interests of equal or greater value. The decision reached will vary from decision-maker to decision-maker, depending on the value system used to weigh the conflicting interests. As Parker explains within the framework of different theories of justice:

“If the choice is between building a school or sheltered housing for old people then a deserts-based argument might be invoked in favour of the latter. They have contributed to society all their lives and deserve now to be looked after. If the choice is between different categories of children, such as between medical resources to children with very rare illnesses or to general vaccination programmes, different local theories of justice could tend one way or another.”

In its current iteration, the best interests principle does not offer a clear formula for determining which interests ought to prevail, and why. This does not negate the value of the best interests principle; it merely underlines the fact that organisations engaging with a human rights-based approach to matters involving children will need to take into consideration, and justify, value systems and the allocation of resources.

Best interests and participation

A further conceptual challenge that arises with respect to the best interests

97 Parker, above n 68, 38-39. See also Freeman, ‘Article 3’, above n 54, 64.
principle is its relationship with the participation principle. Despite the near universal ratification of the Convention on the Rights of the Child, children are still regarded in many parts of the world as the property of their parents or immediate guardians; their voices often silenced, suppressed or ignored.\footnote{Allison James, 'Giving voice to children's voices: practices and problems, pitfalls and potentials' (2007) 109(2) American anthropologist 261, 261-262.}

Rather than being encouraged to share their views and being listened to, children’s role within society “is to listen, obey, and learn from their parents and other adults who are charged with the responsibility of managing their growth and development, and integrating them into the established structures of the adult world”.\footnote{Richard Maclure, 'The Dynamics of Youth Participation: Insights from Research Fieldwork with Female Youth in Senegal' in Myriam Denov, Richard Maclure and Kathryn Campbell (eds), Children's Rights and International Development: Lessons and Challenges from the Field (Palgrave Macmillan, 2011) 155, 155.} Concurrently, disproportionate emphasis is placed on protecting children’s supposed best interests rather than engaging children in discussions about what they believe their best interests to be.\footnote{Van Bueren, 'Balancing traditional values,' above n 47, 19; Jo Boyden and Gillian Mann, 'Children's Risk, Resilience and Coping in Extreme Situations' in Michael Ungar (ed), Handbook for Working with Children and Youth: Pathways to Resilience across Cultures and Contexts (SAGE Publications, 2005) 11.}

Children’s wellbeing cannot, and should not, rely solely on adult perspectives of what their best interests are.\footnote{Fottrell, above n 47, 171; Freeman, Michael, 'Taking Children's Rights More Seriously' (1992) 6 International Journal of Law and the Family 52, 55.} Engaging children in decision-making processes affords children the opportunity to “[identify] alternatives to their current circumstances and [devise] creative solutions” to problems.\footnote{Boyden and Mann, above n 99, 7.} This in turn enhances the range of options available to protect and promote their best interests:

“Although adults have a duty to protect children from ill-treatment, children are protected not only by giving the state [and] adults greater powers of intervention,
but also by giving children power to consent to and challenge decisions which affect
their lives.” ¹⁰³

What remains unclear, however, is how children’s expressed preferences should be weighed against their best interests in the event that the two conflict. This dilemma is addressed in the final section of this chapter, following a discussion of the participation principle.

2.4. Translating principles into practice: Participation

Participation is a guiding principle expressly included in the Common Understanding as a prerequisite for human rights-based programming; it is also considered a foundational principle of the Convention on the Rights of the Child. Participation is not, however, a self-evident or static term; it is “an infinitely malleable concept”¹⁰⁴ that can be used to evoke and signify a range of ideas, philosophies and practices, which are themselves subject to geographical, institutional and contextual variations.¹⁰⁵ Thus calls for ‘participation’, when used in the abstract and sans context, in fact have little

meaning.106

In order for the participation principle to effectively guide practice, it is necessary to clarify issues such as: who participates and why; whose voices, experiences and interests the participants represent; what purpose their participation serves; who sets the agenda and how much time is allocated for participation; whether participation actively facilitated or passively received; and to what extent participation results in changes to the content or delivery of programs.107 These issues are more pronounced in respect of children, due to the “considerable ambiguity concerning the ways that young people are engaged as participants, particularly in processes that have hitherto been initiated and managed by adults”.

In addition to negotiating decision-making power with implementing organisations, children must also negotiate decision-making power with adults.108 This includes adults within the implementing organisations, and

108 Maclure, above n 98, 169. See also James, Giving Voice, above n 97, 261-262; Gerison Lansdown, 'The realisation of children’s participation rights' in Barry Percy-Smith and Nigel Thomas (eds), A handbook of children and young people’s participation (Routledge, 2010) 11, 11.
also adults within the wider community of beneficiaries. The ascription of rights to children affirms that children do not ‘belong to’ their parents, but are in fact individual persons “whose personality and identity should enjoy universal recognition and respect”.\textsuperscript{110} It also signifies a radical break from the long-held assumption that children’s rights can be subsumed within and adequately represented by the rights of their parents.\textsuperscript{111} Consequently, one of the most challenging aspects of participatory approaches with children is not whether children are able to participate, but “whether they can do so actively and effectively rather than partially and tokenistically”.\textsuperscript{112}

\textit{Defining children’s participation rights}

Children’s entitlement to participate in all aspects of the design and implementation of all interventions is guaranteed under both the generic participation principle, which refers to \textit{all persons}, and Article 12 of the CRC, which provides that “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.”\textsuperscript{113} The Convention on the Rights of the Child is unique in this regard, as it is the only legally binding international human rights instrument that provides rights-holders with the entitlement to express their views, and places a concomitant

\textsuperscript{110} Lapotka, above n 37, 49.
\textsuperscript{111} Fottrell, above n 47, 171.
\textsuperscript{113} CRC, above n 73, art 12(1).
obligation on duty-bearers to provide opportunities for those views to be expressed and to take those views into account. Nonetheless, the notion of children’s participation remains poorly understood and inconsistently implemented.\textsuperscript{114}

**Matters affecting children**

Theis and O’Kane argue persuasively that “there are few areas of family, community, regional, national or international decision-making that do not affect children” and that, as such, it is almost impossible for an intervention to fall outside these parameters.\textsuperscript{115} Nor need the intervention be expressly envisaged by the CRC, since Article 12 “applies in all questions, even those that might not be specifically covered by the Convention, whenever those same questions have a particular interest for the child or may affect his or her life...”\textsuperscript{116} In this regard, humanitarian assistance and emergency response; disaster risk reduction; peacekeeping; economic and social development, including environmental protection and natural resource exploitation, debt management and the loans and policy prescriptions of international finance institutions have all recognised as matters which in


\textsuperscript{115} Theis and O’Kane, above n 7, 155, 16, emphasis added. See also Rachel Hodgkin and Peter Newell, _Implementation handbook for the convention on the rights of the child, Third Edition_ (UNICEF, 2007) 155; Lansdown, ‘The realisation of children’s participation rights,’ above n 107, 12. Cf. Cantwell, above n 4, 55: “The ‘matters’ [Article 12] refers to are clearly meant to be those that are directly pertinent to the life of the child concerned, not general issues that may have ramifications for children...”

some way affect children’s lives.\textsuperscript{117}

While noting that the reference to matters affecting \textit{the child} (singular) indicates that no general political mandate was intended, the Committee on the Rights of the Children has also supported a broad view of Article 12, arguing that, “a wide interpretation of matters affecting the child and children helps to include children in the social processes of their community and society”.\textsuperscript{118} The Committee’s emphasis on inclusion is important because it underscores the fact that ‘the community’ is not a homogenous group of people with interchangeable strengths, vulnerabilities, opinions and characteristics. Instead, it “encompasses a host of divergent points of view, significant cleavages, competing vested interests, and splintered subgroups”.\textsuperscript{119}

The right to express those views

An important consideration with respect to child community members is that their needs, perspectives and experiences are not always coterminous with those of adults.\textsuperscript{120} Interventions shaped predominantly by the language and thought processes of adult participation may not concurrently benefit

\textsuperscript{117} Gerison Lansdown, \textit{Promoting children’s participation in democratic decision-making}, UNICEF Innocenti Research Centre, 2001, 2; Congress of Local and Regional Authorities of Europe, \textit{Council of Europe: Revised European Charter on the Participation of Young People in Local and Regional Life}, 21 May 2003; Hammarberg, above n 32, 104.


\textsuperscript{119} Arnstein, above n 106, 216-224. See also Cornwall, ‘Unpacking Participation’ above n 103, 277-278; Andrea Cornwall and John Gaventa, \textit{From users and choosers to makers and shapers: repositioning participation in social policy} (Institute of Development Studies Brighton, 2001) vol 127, 10; White, ‘Depoliticising development,’ above n 106, 7; Nici Nelson and Susan Wright, \textit{Power and participatory development: theory and practice} (Intermediate Technology Publications Ltd (ITP), 1995), 15; VeneKlasen et all, above n 104, 12.

\textsuperscript{120} Fottrell, above n 47, 171; Van Bueren, ‘Balancing traditional values,’ above n 47, 20; Hammarberg, above n 32, 99.
According children’s views ‘due weight’

Article 12 does not confer on the child an automatic right to determine the outcomes of relevant decision-making processes, but rather a right to have his or her views “given due weight” in accordance with his or her “age and maturity”. No clear guidelines are provided on how such determinations are to be made, especially where the child’s views conflict with the views of others.

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Children’s views in development policies and practices

The wide range of matters affecting children, and the practical challenges involved with determining who participates and on whose behalf, give rise to further confusion around how to accord children’s views due weight in large scale decision-making processes. There are both logistical and philosophical issues associated with according children’s views due weight in development or humanitarian contexts, where entire communities are affected. In such situations, the beneficiary cohort includes but does not solely comprise children. Yet Article 12 does not indicate how the conflicting views of different children, expressed on the same topic, or that involve implications in respect of allocation of scarce resources, should be weighted vis-à-vis each other. Nor does it address divergences of opinion between children and adults.

In such situations, the weight accorded to each child’s views cannot depend exclusively on the age and maturity of the children involved; the views of other affected rights-holders must also be taken into account. Human rights-based approaches do not currently provide a ready formula for determining how competing views should be prioritised in these settings. Decisions could, for example, be based on the percentage of children vis-à-vis the larger beneficiary group; how deeply children will be affected by the outcome; or the specific mandate of the implementing organisation. These issues, while beyond the scope of this thesis, require further analysis and elaboration.

Children’s views and their evolving capacities

In their General Comment on the right of the child to be heard, the Committee on
the Rights of the Child emphasised the inter-relatedness between Articles 12 and 5 of the Convention on the Rights of the Child. The former is concerned with giving the child’s views due weight in accordance with his or her maturity; the latter is concerned with the child receiving direction and guidance in the exercise of his or her rights, proportional to his or her evolving capacities:

“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.”

The Committee explained that children initially require the direction and guidance of adults to compensate for their “lack of knowledge, experience and understanding,” however as children’s’ capacities evolve, this direction and guidance should transition into “reminders and advice and later to an exchange on an equal footing”. The Committee concluded that, in light of the Article 12 stipulation that children’s views be given due weight in accordance with their age and maturity, this means that “as children acquire capacities, so they are entitled to an increasing level of responsibility for the regulation of matters affecting them”.

The General Comment did not contain any discussion on the precise mechanics and thresholds involved; nor did it address the potential for adults to interfere in the expression and evaluation of children’s views. The

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125 Committee on the Rights of the Child: General Comment No. 12 (2009), above n 121, para 84.
126 Ibid para 85.
range of adults entitled, and indeed obliged, under Article 5 to provide children with appropriate direction and guidance in the exercise of their rights, is exceptionally wide, providing ample opportunity for children’s views to be influenced or suppressed by the persons entrusted with their care. However a more conceptually coherent interpretation of Articles 12 and 5 must be geared toward facilitating, rather than hindering, children’s abilities to contribute to decisions that affect them.

Lansdown, for instance, argues that the obligations in Article 5 for any direction and guidance provided to (a) be “in accordance with the child’s evolving capacities” and (b) support the “exercise by the child of his or her rights” emphasises that it is the child who exercises his or her rights, including the rights of participation reflected in Article 12. Lansdown also draws attention to the proviso that the direction and guidance be appropriate, suggesting that, “by inserting the word ‘appropriate’, Article 5 removes the possibility that parents or other carers have carte blanche to provide, or fail to provide, whatever guidance and support they deem suitable”. Others, however, have questioned whether this qualifier will have any real impact, since evaluations of a child’s ‘capacities’ and ‘maturity’, together with the ‘due weight’ that these will be given, tend to be conducted by adults – often the same adults with whom the child is negotiating decision-making power – and according to adult-centric standards.

127 Lansdown, ‘The realisation of children’s participation rights,’ above n 107, 13. See also Garton Kamchedzera, Article 5: The Child’s Right to Appropriate Direction and Guidance (Martinus Nijhoff Publishers, 2012) who at p.14 emphasises the child’s role “as a holder and exerciser of the right”, with parents participating in, but not directing, the child’s life.


Assessing children’s maturity: the dangers of adult-centrism

A plausible theory of rights must recognise that all persons – a class that “emphatically” includes children – have “a set of capacities that enables them to make independent decisions regarding life choices.”130 Too often, however, deviations from adult ways of participating, or of making choices, are considered deficient, when in fact they are merely different.131 In this context, concerns have been raised about the implicit judgements involved in determining children’s maturity, and the basis upon which these decisions are made.132 Van Bueren, for example, notes that the standards by which children are judged as mature risk being “dictated by a history of adult choice”, with children “expected to adopt adult patterns of reasoning, and if they do they are considered sufficiently mature.”133 Conversely, “there is often an unspoken assumption that, where children use different criteria for making choices, those are necessarily defective or at least inferior to adult criteria.”134 These expectations and assumptions go directly to the heart of what it means to be a rights-holder, since if children are unable to define themselves, and be recognised, as mature and competent beings, they risk

134 Thomas and O’Kane, above n 68, 150-151.
having their views discounted.  

There are at least three safeguards that can help to ensure that children’s capacities and maturity are fairly and objectively determined. First, rather than expecting children to fit into adult conceptualisations of participation and judging their capacities accordingly, decision-makers must recognise that “[children] have different criteria for what it means to participate, and that simply mimicking adults is not always the most authentic, empowering or beneficial type of participation”. Second, a clear distinction must be maintained between assessments of the child’s maturity and the merits of the views he or she expresses. Third, children should not be held to higher standards of competence and maturity than those applying to adults, and if double standards are to be applied, they must be justified. As scholars have noted, it is difficult to find justification for evaluating children’s maturity and competence against standards that even most adults would fail. Thus, any reasons put forward for doubting a child’s maturity must be subjected to an honest appraisal as to whether an adult in comparable circumstances, who expressed the same views as the child, 

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136 Malone and Hartung, above n 130, 26.  
137 Archard and Skivenes, above n 123, 10.  
139 See Michael Freeman, ‘Why It Remains Important to Take Children’s Rights Seriously’ (2007) 15 International Journal of Children’s Rights 5), at p.12. Describing seven stages of competence – (1) The ability to evidence a preference or a choice; (2) The ability to understand one's situation or relevantly similar situations; (3) The ability to understand disclosed information; (4) The ability to give a reason; (5) The ability to give a rational reason; (6) The ability to give reasons where risk and benefit have been weighed; (7) The ability to reach a reasonable decision, as judged, for example, by a reasonable person standard. – Freeman notes: “Even small children can show a preference, and most children can ‘understand’ a situation. Many can ‘understand’ disclosed information, and many can give reasons, though we might not be convinced by them. But how many adults get any further?” See also Archard and Skivenes, above n 123, 10-11; Freeman, ‘Value and Values,’ above n 129, 31; Breen, above n 137, xii.
would also be ruled immature or incompetent. In the event of a negative response, the principles of universality, equality and non-discrimination dictate that the child’s views be accorded the same weight and respect as those of an adult.

2.5. Reconciling children’s views and their best interests

The inherent tension between the demands of Article 3 and Article 12 has been the subject of considerable scholarly analysis, much of it expressing concerns not only with how the two can be reconciled, but also, and more fundamentally, about the seemingly contradictory conceptualisations of children that these articles present. Article 12 provides children with a voice and confirms their entitlement to actively participate in decision-making about matters that affect their lives; Article 3 vests authority with adults to make decisions for children based on their understanding of what is in the child’s best interests. As White observes, the former appears to confer rights on children as if they were competent legal subjects, while the latter seems to undermine this competence by providing for these rights to be exercised on their behalf by others. Other commentators have challenged this dichotomy, although their arguments vary in calibre, ranging from blunt dismissal to more carefully considered analysis.

142 White, above n 2, 1101.
Challenging the dichotomy

General Comments of the Committee on the Rights of the Child

The Committee on the Rights of the Child, in its General Comments on Article 12 and Article 3, expressly rejected any notion of tension between the best interests and the participation principles, instead describing them as “complementary” and “inextricably linked”.

Yet the precise nature of the relationship was barely addressed – the General Comment on Article 12 devoted only five short paragraphs to the link between Article 3 and Article 12, while the General Comment on Article 3 contained just three. The Committee simply stated that assessment and determination of a child’s best interests “requires the participation of the child” and “must include respect for the child’s right to express his or her views freely and due weight given to said views”.

The General Comment is problematic for a number of reasons. First, as the quote below illustrates, the analysis amounts to little more than recognition

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143 Committee on the Rights of the Child: General Comment No.12 (2009): The right of the child to be heard, above n 117, para 74; Committee on the Rights of the Child: General Comment No.14 (2013): The right of the child to have his or her best interests taken as a primary consideration (Art.3, Para 1), above n 57, para 44.

144 Ibid 70-74.

145 Committee on the Rights of the Child, General Comment No.14 (2013): The right of the child to have his or her best interests taken as a primary consideration (Art.3, Para 1), above n 57, paras 43-45.

146 Ibid para 47. See also Ibid General Comment No.12 (2009): The right of the child to be heard, above n 117, para 70: “The Convention obliges States parties to assure that those responsible for [best interest determinations] hear the child as stipulated in art 12. This step is mandatory;” and para 74: “There can be no correct application of art 3 if the components of art 12 are not respected.”

147 Ibid General Comment No.14 (2013): The right of the child to have his or her best interests taken as a primary consideration (Art.3, Para 1), above n 57, para 43.
of the rather obvious fact that assessment of his or her best interests is a matter affecting the child. Second, also evidenced in the quote below, it seems to suggest that children’s views are of instrumental rather than normative value:

“[Article 3] aims to realize the child’s best interests, and [Article 12] provides the methodology for bearing the views of the child or children and their inclusion in all matters affecting the child, including the assessment of his or her best interests.”

Thus the child’s views are not elicited and listened to because the child has a right to express them, but because the child’s views may help adults reach a decision about what is in that child’s best interests.

Third, the General Comment fails to analyse, and attempt to resolve, the conceptual confusion relating to potential conflicts between the child’s wishes and his or her perceived best interests; the power imbalances between the child and the (adult) decision-maker; or the extent to which the child’s views would ultimately determine outcomes. The closest acknowledgement of these issues comes in the form of an instruction that “the evolving capacities of the child must be taken into consideration when the child's best interests and right to be heard are at stake”.149 Thus, “as the child matures, his or her views shall have increasing weight in the assessment of his or her best interests”.150 No further clarification was provided as to how this process might work in practice.

148 Ibid para 43. See also Ibid General Comment No.12 (2009): The right of the child to be heard, above n 117, para 74.
149 Ibid General Comment No. 14 (2013): The right of the child to have his or her best interests taken as a primary consideration, U.N.Doc. CRC/GC/14, 29 May 2013, para 44.
150 Ibid.
The absence of detailed exposition and practical guidance about how the best interests and participation principles fit together is a significant shortcoming by the Committee on the Rights of the Child, particularly given their designation as foundational principles of the Convention on the Rights of the Child. The Committee’s General Comments on Articles 3 and 12 may be contrasted with the more nuanced, theoretically grounded efforts at reconciling the demands of the best interests and participation principles offered by Freeman and Eekelaar, both of whom seek to accord children a meaningful role, as rights-holders, in the determination of their own best interests, while simultaneously shielding them from choices that would impede their life chances.

**Eekelaar’s “dynamic self-determinism”**

Eekelaar proposes that these seemingly incompatible objectives can be met via a process-oriented strategy of “dynamic self-determinism”, which reconceptualises the best interests principle as a vehicle for “[extending] the possible range of outcomes for children and [enhancing] their capability of choosing between them”. The strategy is dynamic, as it “appreciates that the optimal course for a child cannot always be mapped out in advance at the time of the decisions, and may need to be revised as the child grows up”. At the same time, it involves self-determinism “because the child is given scope to influence the outcomes”.

The extent to which the child’s views should determine the outcome, however, is strictly contingent upon his or her competence, which

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151 Eekelaar, above n 68, 50.
152 Ibid 48.
153 Ibid 54.
Eekelaar defines in terms of realism and consistency. Thus a child demonstrates competency with respect to a particular decision if his or her wishes are realistic (in that it can be realistically implemented or realised in the time frame contemplated by the child)\textsuperscript{154} and are intentionally consistent with his or her other beliefs, values and aspirations.\textsuperscript{155} Should these prerequisites be met, Eekelaar suggests that the child’s wishes should determine the outcome, \textit{subject to two constraints}: first, the child’s decision be lawful, and not interfere with the rights of others; second the child’s decision must not jeopardise his or her physical and mental wellbeing and integrity.\textsuperscript{156} In other words, Eekelaar suggests that even where children demonstrate the requisite competence, they should be prevented from pursuing their chosen courses of action on the grounds of risk to life or health.\textsuperscript{157}

\textbf{Freeman’s “liberal paternalism”}

A similar resolution of the tension between the best interest and participation principles is found in Freeman’s theory of “liberal paternalism” – liberal insofar as it endorses children’s rights to make decisions about their lives, but paternalistic nonetheless, since it allows adults to intervene in order to protect children against irrational decisions that would cause them irreparable harm.\textsuperscript{158} Freeman contends that a coherent theory of children’s rights must recognise children as persons entitled to autonomy and self-determination, while at the same time safeguard them from choices that

\textsuperscript{154}Ibid 55.
\textsuperscript{155}Ibid 56.
\textsuperscript{156}Ibid 57.
\textsuperscript{157}Ibid 53.
would harm their future autonomy. Adults cannot, however, simply substitute their decisions for those of the child based on a subjective view of the child’s best interests. Indeed, liberal paternalism maximises children’s present day autonomy by its insistence on three stringent limitations on the exercise of paternalism: (i) value-neutrality, (ii) minimal intrusiveness into autonomous decision-making, (iii) and confinement to the prevention of irreversible harm.

As Freeman explains, what is ‘irrational’ cannot be subjectively determined, but must be defined in value neutral terms capable of accommodating diverse visions of the good life. Thus a decision should not be judged irrational unless it would undermine future life choices and impair interests in a serious, permanent and irreversible way.\(^1\)\(^5\)\(^9\) Secondly, the right to take risks and make mistakes must be tolerated. Respecting autonomy means respecting people’s rights to make decisions that are wrong for them, as long as they do not seriously and permanently impair their future interests.\(^1\)\(^6\)\(^0\) Thirdly, the intervention must be directly proportionate to the risk at hand, confined “only to the extent necessary to obviate the immediate harm”.\(^1\)\(^6\)\(^1\)

**A competency-based approach**

Liberal paternalism and dynamic self-determinism are commendable strategies for reconciling the seemingly competing demands of the participation and the best interests principles. While they recognise that children require a degree of protection, both approaches aim to widen the

\(^{1\)\(^5\)\(^9\)}\) Ibid 310.
\(^{1\)\(^6\)\(^0\)}\) Ibid 310; Freeman, ‘Value and Values,’ above n 129, 32
\(^{1\)\(^6\)\(^1\)}\) Freeman, ‘Taking children’s rights seriously,’ above n 157, 310; Freeman, ‘Value and Values,’ above n 129, 32.
sphere of possibility for children to direct their own lives. They do this by carefully circumscribing the situations in which adults can intervene to substitute their decisions for those of the children concerned, and by emphasising children’s evolving capacities to determine their own best interests. A common shortcoming, however, is the disproportionate weight given to protective outcomes at the expense of children’s competency to engage in rational decision-making – although, as noted below, Freeman later revised his stance on this topic.

In outlining the limits of dynamic self-determinism, Eekelaar expressly acknowledges the conceivability of a child competently taking a decision that is contrary to his or her best interests, narrowly defined in terms of life and health, and suggests that, the child’s competence notwithstanding, self-determinism should on these occasions be disallowed.¹⁶² His position in this regard is absolute, indifferent to distinctions between socially ‘acceptable’ and socially ‘unacceptable’ desires. Thus a child may take a fully competent decision, in that the decision can be realistically implemented and coheres with the child’s values and life-goals, in pursuit of a perfectly noble end, such as exploration, war service or helping others. Nonetheless, preservation of life and health as the overriding consideration would equally prohibit the child from engaging in these activities as from pursuing ignoble ends, such as illicit drug use.¹⁶³

There is an inconsistency to Eekelaar’s conclusion. Competent adults are free to exercise their autonomy in ways that harm their interests, because they are adults, but competent children are not, because they are children. However if the basis for according children special protection is, as Eekelaar proposes,

¹⁶² Eekelaar, above n 68, 57.
¹⁶³ Ibid 53.
their reduced capacity to engage in competent decision-making, denying the autonomy of a child who demonstrates competence equivalent to that of an adult becomes a morally unsustainable proposition. As Tobin cogently observes:

“Where the evidence supports a finding that a child is competent or has the capacity to understand an issue […] there is no longer a moral justification to treat the child differently to an adult. The special vulnerability that provided the justification for special protection ceases to exist.”

The suggestion that children’s competence, rather than their age, is the relevant factor in delineating children’s decision-making powers is not only conceptually coherent; it is also consistent with the text of the Convention on the Rights of the Child – the international instrument from which the participation and best interests principles are derived. Much of the critical discussion on Article 12 has focused on the extent to which adults are prepared to interpret (and apply) its terms, thereby promoting or curbing children’s influence over decisions that affect them. Some scholars, for example, have proposed that the ambiguous qualifications surrounding children’s participation rights, together with the bias toward adult veto, create a real possibility that children’s views may ultimately “be disregarded as intrinsically of little account… Children may have rights, but adults still know best”. Yet as Tobin rightly notes, although these fears “may well be

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164 Archard and Skivenes, above n 125, 19.
167 Thomas and O’Kane, above n 68, 138.
aligned with the reality that many contemporary practices that seek to promote children’s participation and autonomy in decision-making remain tokenistic [...] such an outcome is neither necessary nor compatible with a contextual interpretation of Article 12 of the CRC…”

The direction to grant children’s views due weight in accordance with their age and maturity is mandatory, not permissive:

“There is no ‘may’ in the text of Article 12 to qualify the obligation to give children’s views due weight. It simply refers to ‘the views of the child being given due weight’.”

Consequently, Article 12 can be interpreted “to require that a child’s views must be given due weight, in which case the CRC anticipates that the views of a child of sufficient maturity and understanding will be determinative of his or her best interests”. This would include situations in which an adult deems the child’s views to be contrary to his or her best interests, since once the maturity and competency criteria have been fulfilled, the child is entitled to determine his or her own best interests in the same way as an adult. Children may have valid, well thought through reasons for making dangerous, potentially life-threatening choices, and these cannot be dismissed solely by reference to their age. On the contrary, the CRC envisages that once the maturity and competency thresholds have been crossed, age becomes irrelevant, and is no longer a plausible excuse for third party intervention.

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168 Tobin, above n 164, 429.
169 Ibid 432.
170 Ibid 432.
171 Ibid 428.
172 Archard and Skivenes, above n 125, 17.
Freeman, in his subsequent works on children’s rights, expressed a similar view, revising his theory of liberal paternalism to reflect an agency-driven conceptualisation of childhood that reflects a functional, rather than status-based, approach to best interests determinations. Within this framework, a child’s competence is not inferred from the prudence of the child’s views; nor is it displaced by the risk of harm. Instead, greater emphasis is placed on children’s experiential knowledge of their own best interests; that is, “on how the decision they have reached furthers their goals and coheres with their system of values”. As a result, empirical, third-party considerations about the impact of a child’s decision on his or her life may be outweighed by subjective, normative considerations regarding what kind of life – as lived and experienced by that child – is best for that child.

_A process-oriented model_

Resolution of the relationship between a child’s views and his or her best interests does not clarify all of the confusion about what it means to give a child’s views “due weight”. This is because even if a child is deemed competent and mature – and thus able to determine his or her own best interests – the child’s views must still be balanced against the views and interests of other rights-holders. Likewise, resolution of the relationship between a child’s views and his or her best interests does not address the question of what it means to treat the best interests of the child as “a

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174 Ibid 211.
175 Michael Freeman, 'Why It Remains Important to Take Children’s Rights Seriously' (2007), above n 138, 15. See also Freeman, ‘Rethinking Gillick’, above n 172, 213.
176 Freeman, ‘Why It Remains Important to Take Children’s Rights Seriously,’ Ibid, 13; Archard and Skivenes, above n 125, 9; Arce, above n 165, 367; Thomas and O’Kane, above n 68, 150-151.
primary consideration”, since regardless of how mature or competent the child is, his or her best interests may be outweighed by interests of equal or greater value. And, as noted earlier in this chapter, such assessments are largely dependent on the value system favoured by the decision-maker.

While it is beyond the scope of this thesis to fully address these issues, it is clear that, in order to provide effective guidance, the best interests and participation principles must be applied in practical, actionable and conceptually coherent manner. This demands a greater shift in focus from “getting it right” to reflective practice; one that is process-oriented practice and grounded in the fundamental recognition of children as active subjects of human rights. At the core of this maxim is the requirement that children be seen and be heard. Thus decision-makers must expressly consider the best interests of the child in all matters affecting children, and facilitate children’s meaningful participation in those same matters, ensuring that children’s views are actively solicited, genuinely listened to, and duly taken into account. One may never know with complete certainty that the decision reached is “the best” one, but the same is true of most decisions in life. More important than arriving at the correct outcome is guaranteeing that the decision-making process recognises, and treats, children as full rights-holders, who are capable of participating in decisions that affect them, and entitled to do so. By logical extension, children must be involved in such determinations to the greatest extent possible, and not only as far as is comfortable for the decision-maker.

Facilitating children’s participation in a way that makes sense for them implies significant changes to the political, social, institutional and cultural structures that govern decision-making in the public and private spheres.177

177 Committee on the Rights of the Child, Day of general discussion on the right of the
At a practical level, approaching participation from a child’s perspective requires a willingness to adopt child-friendly methods and innovative communication techniques, adapted to the specific context in which that child is living. Scholars have drawn attention, for example, to the importance of ensuring that discussions focus on topics that children wish to consider, use words that children understand, and take place in environments familiar to children.\textsuperscript{178} Such mechanisms for levelling the playing field between child participants and adult decision-makers provide greater opportunity for children to express their views, and reinforce the notion of children as human rights-holders, entitled to dignity and respect.

2.6. Conclusions

A defining feature of human rights-based approaches is that interventions are guided by human rights standards contained in, and principles derived from, international human rights instruments. The first part of this chapter highlighted the lack of specificity about how the human rights of children fit into human rights-based approaches, and the general reluctance to conceptualise children’s rights broadly and consider them automatically and as a matter of course in project design and implementation. Contrary to this trend, this chapter has argued that a conceptually coherent understanding of human rights requires principles deriving from the CRC to be recognised as an inherent aspect of human rights-based approaches.

Treating human rights-based approaches and child rights-based approaches as two separate enterprises is conceptually incoherent, as it reinforces the

\textsuperscript{178} Harriot Beazley et al, 'How are the human rights of children related to research methodology?' in Antonella Invernizzi and Jane Williams (eds), The human rights of children: From visions to implementation (Ashgate, 2011) 169.
idea that human rights are not children’s rights. Such compartmentalisation not only ignores the fact that children, as human beings, are always rights-holders, it is also increasingly untenable in the face of convincing evidence that children’s rights may be impacted by a wide range of activities across all sectors, whether or not children are the primary (intended) beneficiaries. Unless human rights standards and principles deriving from the CRC are used to guide the design and implementation of all projects, interventions may not promote – and may well violate – children’s rights. Thus the human rights standards contained in, and principles derived from, the CRC should guide all interventions, in all sectors, whether or not children are the primary beneficiaries of such interventions.179 This does not mean that children’s rights trump the rights of others. As Tobin correctly points out, the mainstreaming of children’s rights does not require elevation of children to a superior level, but rather the addressing of their rights in conjunction with the rights of other groups of people within a society.180

Two CRC principles that are especially important to increasing children’s visibility within human rights-based approaches are participation and the best interests of the child. Participation is an already accepted component of human rights-based approaches, while an inclusive reading of human rights would recognise that the “best interests of the child” is an essential guiding principle of human rights-based approaches to matters involving children. Yet it is far from clear how these principles should be interpreted and operationalised. Acknowledging that a workable model of a human rights-based approach to matters involving children requires a deeper understanding “of the philosophical principles involved and how they apply

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179 Overseas Development Institute, above n 7; Theis and O’Kane, above n 7, 167; Tobin, Beyond the Supermarket Shelf, above n 40, 278; Alston and Tobin, above n 7, 46.

180 Tobin, Ibid 278.
Regarding the best interests principle, there is a gap in the literature regarding its application in development and humanitarian contexts, where interventions affect entire communities. In these situations, the best interests of one child may conflict with the best interests of another child, or with the best interests of other community members. In the continuing absence of guidance from the Committee on the Rights of the Child, how such conflicts are resolved will ultimately depend on the values and philosophical framework adopted by the decision-maker. Conceptual confusion also persists about the relationship between the best interests of the child and the child’s right to participate in decisions that affect his or her life. Clearly, determining what is in a child’s best interests is a matter affecting that child. However, the weight to be accorded the child’s views vis-à-vis his or her best interests remains a matter of debate.

Similar limitations affect the participation principle. For example, there is insufficient guidance about what it means to give children’s views due weight in large-scale decision-making processes, such as humanitarian and development operations, where the views of one child may conflict with the views of other children, or where the views of a group of children may conflict with the views of other community members. There is also a lack of conceptual clarity about what part the child’s own characteristics play in the assessment of his or her views. This relates both to the qualification, in Article 12 of the CRC, that the child’s views be given due weight in accordance with his or her age and maturity, and to the evolving capacities principle, as stipulated in Article 5. The main concern raised in this regard

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181 Offenheiser and Holcombe, above n 61, 274.
was that a child’s maturity and capacity are often assessed by adults, and according to adult-centric criteria. Although full resolution of these issues is beyond the scope of this thesis, the chapter suggested that a conceptually coherent, principled interpretation of the CRC would ensure that determinations regarding a child’s capacities and maturity are independently rendered, according to the same methods and criteria as would be applied to adults in comparable situations.

The fourth and final part of the chapter analysed the potential conflict between the participation and best interests principles, and the seemingly incompatible visions of children that they present. This chapter argued in favour of a competency-based approach, since this is both conceptually coherent and consistent with a contextual reading of the Convention on the Rights of the Child. It concluded by positing some ideas about what a conceptually coherent, workable model of a human rights-based approach to matters involving children might look like. Building on the principle of inherent and inalienable human dignity, it proposed a more concerted shift in focus from outcomes (“getting it right”) to processes (ensuring that children’s views are actively solicited, genuinely listened to, and duly taken into account.
CHAPTER THREE: Institutional engagement with the idea of human rights-based approaches at UNICEF and the World Bank

3.1. Introduction

Having established an understanding of the idea of human rights-based approaches to matters involving children in chapters one and two, the aim of this chapter is to explore the different ways in which UNICEF and the World Bank engage with their model of a human rights-based approach to matters involving children. Drawing on organisational documents and interviews with informants, it identifies their formal and informal institutional commitments to human rights-based approaches to matters involving children, and examines how coherently these commitments are formulated, interpreted, understood and implemented.

The first part of this chapter describes the evolution of human rights-based approaches at UNICEF and identifies some of the challenges the organisation has faced, and continues to face, in ensuring that executive level commitments are understood and operationalized in a coherent manner by field staff in different socio-political contexts and across a range of sectors. Although UNICEF has a clearly documented official position with regards to a human rights-based approach, the organisation faces challenges in consolidating conceptualisations and actualisations amongst its staff. The dominant theme arising from interviews with UNICEF research participants is that, having adopted a human rights-based approach, the organisation’s next priority is to harmonise and mainstream this commitment (that is, to ensure that all staff have the same understanding of what a human rights-based approach is and how to do it). Yet recent
developments have cast doubt on the urgency of this project. While the formal commitments remain in place, UNICEF appears to have pulled back from a human rights-based approach, with its current strategic plan promoting an “equity focus”.

The second part of this chapter examines the World Bank’s engagement with human rights. The Bank has not adopted a formal commitment to human rights, and remains averse to doing so. Nonetheless, its mission and activities have progressively expanded into human rights territory, and high-ranking officials have publically promoted an image of the World Bank as a human rights-realizing organisation. The research demonstrates that this ad hoc approach has created confusion amongst staff about what human rights are and how they should be implemented. Many research participants struggled to clearly define human rights and human rights-based approaches, or to make any distinction between the two concepts, but strongly asserted that the World Bank does in fact use a human rights-based approach, and that all of its activities contribute to the realisation of human rights. At the same time, they were generally reluctant to use explicit human rights language, preferring to employ surrogate terms and claiming it was just a matter of labelling. While these inconsistences reveal a tendency to assign subjective meanings to human rights, they also draw attention to the potential for human rights-based approaches to be implemented without being expressly identified as such.

The chapter concludes that the idea of human rights-based approaches to matters involving children are understood, expressed, justified and implemented in vastly different ways – not only across, but also within, the two organisations. These inconsistencies breed confusion and uncertainty about what a human rights-based approach is and entails. They also reveal a
need for organisations to more closely analyse the implications of engaging (or claiming to engage) with human rights-based approaches, and the mechanisms that would render this engagement coherent and effective. Some of this guidance may be found in returning to first principles and considering the model introduced in chapters one and two of this thesis.

3.2. PART ONE: The ebb and flow of human rights-based approaches at UNICEF

UNICEF has an explicitly articulated global commitment to advancing the human rights of women and children, and has formally adopted a human rights-based approach as its operational framework.\(^1\) Complementing these internal institutional measures, UNICEF is recognised as a leader in the field. Not only was it was one of the first United Nations agencies to actively embrace a human rights-based approach, its work is consistently singled out as an exception to the lack of conceptual rigour and poor systemisation of practice generally associated with the adoption of human rights-based approaches.\(^2\) Darrow and Tomas, for example, cite UNICEF “as an exception among UN agencies”,\(^3\) while the Swiss Development Agency considers UNICEF “the most advanced UN agency” in relation to formal adoption of human rights-based approaches.\(^4\)


At the same time, the fact that UNICEF has a formal, institutional commitment to a human rights-based approach has not rendered the organization immune to inconsistencies in how this commitment is understood and implemented. On the contrary, as the analysis in this chapter demonstrates, the term ‘human rights-based approach’ is subject to different interpretations amongst UNICEF staff, contributing to a gap between institutional policy and field level practice.

Drawing on internal reports, secondary literature and interviews with research participants, the first part of this chapter presents UNICEF’s transition to a human rights-based approach as a work in process, focusing on (1) UNICEF’s journey from a service-provision model to a human rights-based approach; (2) Institutional measures to consolidate UNICEF’s human rights-based approach; (3) A stronger uptake of the language than the practice of human rights-based approaches; (4) Confusion about what a global policy means for different people and in different contexts; and (5) Doubts about the effectiveness of human rights-based approaches.

**UNICEF’s journey from a service provision model to a human rights-based approach**

The United Nations International Children’s Emergency Fund, known by the acronym UNICEF, was established in December 1946 as a subsidiary of and successor to the post-World War II United Nations Relief and Rehabilitation

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The primary purposes for which the Fund was to be utilised and administered were:

1. “For the benefit children and adolescents of countries which were the victims of aggression and in order to assist in their rehabilitation,
2. For the benefit of children and adolescents of countries which are at present receiving assistance from the United Nations Relief and Rehabilitation Administration,
3. For child health purposes generally, giving high priority to the children of countries victims of aggression.”

Although intended as a temporary organisation to assist war-torn countries in Europe, UNICEF lobbied exhaustively and successfully for the Fund’s continuance. In 1950, the General Assembly extended UNICEF’s mandate by a further three years, with a view to continuing the Fund on a permanent basis; it also shifted the primary emphasis of the Fund’s programs from assisting children in post-war Europe to more generalised support for children in underdeveloped countries. In 1953, the General Assembly reaffirmed UNICEF’s mandate as detailed in the resolutions of 1946 and 1950 save for any references to time limits, thereby effectively establishing UNICEF as a permanent organisation of the United Nations. While the organisation’s name was shortened to United Nations Children’s Fund, the

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5 Establishment of an international children’s fund, (GA Res 57 (I), UN GAOR, 56th plen mtg, UN Doc A/RES/57(I), 11 December 1946).
6 Ibid.
7 Continuing needs of children: United Nations International Children’s Emergency Fund, (GA Res 417 (V), UN GAOR, 314th plen mtg, Agenda Item 64, UN Doc A/RES/417(V), 1 December 1950). The preamble to the resolution recognised “the necessity for continued action to relieve the sufferings of children, particularly in under-developed countries and countries that have been subjected to the devastation of war and other calamities,” while Article 1 approved the devotion of “a greater share of the Fund’s resources to the development of programmes outside Europe”.
well-known acronym UNICEF was retained. These geographical, temporal
and titular modifications notwithstanding, however, UNICEF’s mandate has
remained largely unchanged since its inception. What has changed is the
ways in which the mandate has been interpreted and evidenced through
UNICEF’s mission, policy objectives and field practices, particularly in
relation to human rights.

The preamble to the 1946 General Assembly resolution that established
UNICEF recognized “the desirability of establishing such a Fund in
accordance with Article 55 of the Charter of the United Nations”. Under
Article 55, Member States pledge to take joint and separate action in co-
operation with the United Nations organisation to promote inter alia
“universal respect for, and observance of, human rights and fundamental
freedoms for all”. This preambular reference to Article 55 of the Charter
arguably opened the door to a more inclusive interpretation of UNICEF’s
mandate encompassing the full gamut of children’s human rights and
fundamental freedoms. Nonetheless, for almost four decades, the areas of
need addressed remained narrowly defined, with programs almost
exclusively aimed at the provision of services in primary health care,
nutrition, basic education and safe water and sanitation to the developing
world.⁹ Against this background, UNICEF’s recent claims that, over the
fifteen years following its establishment (1946-1961), it evolved from an
emergency fund to a development agency, “advocating for the rights of
children all over the world”¹⁰ are somewhat misleading. Not only were
children’s rights as we know them today not extant at that time, they were –
more importantly – not formally embraced by UNICEF until four decades
after the Fund’s establishment.

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¹⁰ Ibid 4.
UNICEF’s transition to a human rights-based approach began in the mid-1980s, when UNICEF began to focus on, and develop policy responses to, children in especially difficult circumstances (CEDC). At the same time, international pressure for the creation of an international convention to advance the non-binding 1959 Declaration of the Rights of the Child was mounting. Today, UNICEF’s Mission Statement proudly proclaims that UNICEF “is guided by the Convention on the Rights of the Child and strives to establish children’s rights as enduring ethical principles and international standards of behaviour towards children”. Yet while the Convention on the Rights of the Child (1989) has taken a central role in the way that UNICEF perceives and pursues its mission, the Convention itself was not originally UNICEF’s idea. On the contrary, the CRC was originally viewed with indifference, fear and suspicion by the UNICEF leadership, who declined to participate in its drafting – despite the complementarity


12 In the wake of the 1977 International Year of the Child.

between children’s rights and UNICEF’s expanded scope of operations (particularly in relation to CEDC) – on the grounds that engaging in human rights would be too political and too controversial.\(^{14}\) This is a quite ironic given that, in their explanations for resisting greater human rights engagement, the World Bank currently cites the same grounds.

It was only in 1986, when it became clear that the CRC would proceed with or without UNICEF’s participation, that UNICEF’s Executive Board requested the organisation to participate in the drafting of the Convention.\(^{15}\) At the same time, advocacy by the NGO community had prompted a growing recognition by some rank-and-file staff that the concept of ‘children’s rights’ could help advance UNICEF’s agenda – a \textit{volte face} described by Oestreich as “an important example of how [an agency] can come to see the language of human rights as an important tool and a source of both guidance and power in the pursuit of its interests”.\(^{16}\) Thus, over the subsequent two years, UNICEF assumed an increasingly prominent role in advancing the CRC, responding to a request by the Executive Board to provide support to the technical review of the text prior to its adoption by the General Assembly\(^{17}\) and carving out a role as the only specifically named entity to provide expert advice on the implementation of the CRC.\(^{18}\)

\(^{18}\) See \textit{Convention on the Rights of the Child} (opened for signature 29 November 1989, 1577 UNTS 3, entered into force 2 September 1990) art 45 (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
Institutional measures to consolidate UNICEF’s human rights-based approach

Building on its successful entry into children’s rights, UNICEF took a number of clear steps at the policy level to institutionalise a human rights-based approach. In 1996, the Executive Board approved the amendment of UNICEF’s Mission Statement to expressly identify the CRC as a governing framework for all operations. This shift was underpinned by normative rather than instrumental concerns, with the CRC described as providing UNICEF “with the legal foundation for the ethical and moral principles that have always guided its work for children.”

The Executive Directive

In 1998, then Executive Director, Carol Bellamy, issued an Executive Directive mandating the institution-wide move to a human rights-based approach and detailing the guiding principles, programme implications and suggested methodology to be applied. Entitled Guidelines for Human Rights-Based Programming, the Executive Directive situated UNICEF’s move to a human rights-based approach within the responsibilities of all United

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Nations agencies to support the realisation of human rights generally, and the commitment of UNICEF to contribute specifically to the realisation of children’s and women’s rights.\textsuperscript{22}

The \textit{Guidelines} are significant for a number of reasons: they affirm that children and women are subjects of rights rather than objects of charity; they shift the primary legal and moral responsibility for meeting the needs of, and realising the rights of, children and women from welfare institutions to the State; they establish the empowerment of women and children as active participants in both the realisation and the enjoyment of their rights as a distinct and necessary objective of interventions; and they emphasise the importance of identifying and addressing the \textit{underlying} factors – such as laws, social norms, traditional practices and institutional responses – that contribute to the situation of children and women.\textsuperscript{23} At only 28 pages, however, the \textit{Guidelines} are expressed in very basic terms, and although key principles are identified there is little concrete operational guidance as to how a human rights-based approach should work in practice. Thus efforts to clarify what a human rights-based approach means for UNICEF and how it ought be implemented continued, albeit through other mechanisms.

\textbf{The Medium Term Strategic Plan}

One such mechanism is UNICEF’s Medium Term Strategic Plan (MTSP), a fixed-term corporate plan that “provides the framework for UNICEF activities in programmes, partnerships, alliances, advocacy and internal operations at headquarters and in regional and country offices” during the

\textsuperscript{22} Ibid Introduction.

specified period. In May 2003, partway through implementation of the MTSP (2002-2005), UNICEF participated in the Stamford inter-agency workshop on Implementing a Human Rights-Based Approach to Development in the Context of UN Reform. The resulting Common Understanding was expressly incorporated into subsequent MTSPs. Thus while the MTSP (2002-2005) designated the human rights-based approach as a “supporting and cross-cutting” strategy in the design and delivery of all UNICEF country programmes, the MTSP (2006-2013) obliged the organisation to “support and promote the use of a human rights-based approach, based on the United Nations agencies’ Stamford Consensus”.

Each of these MTSPs emphasise different objectives and organisational priorities, based on the global context at the time. The MTSP (2002-2005), for example, outlines UNICEF’s role in and contribution to the General Assembly Special Session on Children and the long-term development agenda of the Millennium Declaration and the International Development Targets. Meanwhile, the MTSP (2006-2013) is concerned with poverty


25 Ibid paras 102-104.


reduction and UNICEF’s contributions to achieving the commitments of the Millennium Summit and the Millennium Development Goals. ²⁸ A common theme, however, is the requirement that all actions by UNICEF, at all phases of the programme process and in all sectors, must focus on the respect, protection and fulfilment of the rights of children and women, and reflect human rights and child rights principles. ²⁹

It is noteworthy that the MTSPs for 2002-2005 and 2006-2013 go beyond the general description of a human rights-based approach contained in the Guidelines and instead make an effort to explain how a human rights-based approach might be applied in specific focus areas. These include young child survival and development, basic education and gender equality, combatting HIV/AIDS, child protection, and prioritising children in national policies, laws and budgets. ³⁰ This is a laudable development in progressing the integration of human rights-based programming for UNICEF. Unfortunately, however, the discussion for each focus area is very brief; giving only a vague idea of how programmatic responses should be designed and implemented. This creates a challenge for implementation in practice – an observation that is supported by interviews with UNICEF research participants and more fully discussed in chapter four.

The Programme Policy and Procedure Manual

Further, albeit it non-sector specific, guidance on human rights-based programming is provided by UNICEF’s Programme Policy and Procedure Manual (PPPM), a regularly-updated document first issued in January 2000 that

consolidates all relevant Executive Directives, Programme Directives, and Executive Board Decisions. By bringing together these disparate sources, the PPPM seeks to ensure that UNICEF interventions are undertaken in a manner consistent with the standards set by the Executive Board and UNICEF management. In 2004, one year after the Stamford workshop, the PPPM was revised to align UNICEF’s definition of a human rights-based approach with the Statement of Common Understanding among United Nations Agencies on the Human Rights-Based Approach to Development Cooperation. The result is an almost verbatim restatement of the Common Understanding:

1. “The aim of all Country Programmes of Cooperation is to further the realisation of the rights of all children and women;
2. Human rights and child rights principles guide programming in all sectors at all phases of the programme process; and
3. Programmes of Cooperation focus on developing the capacities of duty-bearers, at all levels, to meet their obligations to respect, protect and fulfil rights; as well as on developing the capacities of rights-holders to claim their rights.”

At the same time, there are three notable deviations from the UN Common Understanding: first, the express reference to furthering the realisation of the rights of women and children, which is consistent with UNICEF’s specific mandate and focus areas; second, the omission of the explicit requirement that the ‘rights’ to be furthered are the legal standards laid out in international human rights instruments (although these are emphasised in UNICEF’s Mission Statement and CCCs, with special mention of the CRC.

32 Ibid.
33 Ibid.
and CEDAW); and third, the addition of child rights principles alongside the human rights principles that guide human rights-based programing. The latter qualification is of particular interest to this thesis, as it suggests a (mis)conceptualisation of human rights as not automatically including children’s rights, and an understanding of human rights principles as not automatically including principles deriving from the CRC. Yet as discussed in chapter two, this is both conceptually unsustainable, since human rights are universal and apply to all persons without distinction of any kind, and counter-productive, as it undermines efforts to mainstream children’s rights into the broader human rights agenda.34

The PPPM explains that human rights, and more specifically, the rights of women and children, “provide the conceptual and operational framework for the development of a UNICEF Country Programme of Cooperation”.35 As with the 1998 Guidelines, however, the exposition on the human rights and child rights principles relevant to a human rights-based approach (and the suggestions on how these principles should be applied) are expressed in quite broad terms, providing an indication rather than a clear instruction of how they should be operationalised.36

For example, the PPPM devotes only two paragraphs to children’s participation, which is problematic, given the vast challenges associated with this concept, as discussed in chapter three. The first paragraph, citing “the principle of respect for the views of the child”, simply restates the content of

34 Gerison Lansdown, Benchmarking Progress in Adopting and Implementing Child Rights Programming, International Save the Children Alliance (2005) 56. See also Caroline Moser and Annalise Moser, Moving Ahead with Human Rights – Assessment of the Operationalization of the Human Rights Based Approach in UNICEF Programming: 2002, UNICEF (August 2003) whose evaluation concluded that while UNICEF claims to give equal weight to both the CRC and CEDAW, it was increasingly rare for any emphasis to be given to the latter.
36 Ibid paras 2.23 to 2.37.
Article 12, emphasises that “Children should be given the opportunity to participate in decisions that affect them, in a manner appropriate to their age and evolving capacity”, and suggests staff “see Guidance Note on Promoting Participation of Children and Young People”.  

The second paragraph confirms “the principle of participation [as] an important consideration in programming at all levels and in all aspects of the programming cycle”, proposes that “the situation of deprived children, and the structural causes of exclusion and poverty, cannot be addressed without providing those children with a voice and space to participate in decisions affecting them”, and concludes that “the appropriate participation of children and young people is not only desirable for increased ownership and sustainability of programme outcomes, but has consequences for the design and implementation of programmes and development activities”.

As discussed in greater detail in chapters four and five, the PPPM’s reliance on these rhetorical statements rather than practice-oriented guidance is a key reason why UNICEF officials are struggling to understand and implement a human rights-based approach to matters involving children. There is simply no direction as to how children’s participation should actually take place and inform organisational decision-making.

**The Core Commitments to Children in Humanitarian Action**

The applicable scope of human rights-based approaches was expanded in light of global and institutional developments, with relevant documents updated accordingly. For example, the MTSP 2006-2013 identified the

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37 Ibid para 2.32.
imperative for UNICEF to strengthen capacities in the area of emergency response,\textsuperscript{39} while the 2007 revision of the PPPM confirmed the applicability of human rights-based programming in humanitarian as well as in development operations. Thus the first paragraph of UNICEF’s definition of a human rights-based approach, the 2004 version of which is cited above, was amended to read: “The aim of all Country Programmes of Cooperation, including in humanitarian situations, is to further the realisation of the rights of all children and women.”\textsuperscript{40} However the emphasis remained on producing more policy documents, at the same level of abstraction, without detailing the practical consequences for implementation.

The attempts to extend integration of a human rights-based approach into contexts of instability and crisis continued throughout 2008, when UNICEF began an organisation-wide process to revise their \textit{Core Commitments to Children in Humanitarian Action (CCCs)} with explicit reference to a human rights-based approach. Released in 2010, the revised document affirms UNICEF’s commitment “to further the realization of human rights through the framework of the human rights-based approach to programming” in all humanitarian action.\textsuperscript{41} It stresses that the CCCs are guided by and grounded in international human rights law, in particular the Convention on the Rights of the Child, and human rights principles, including those derived from the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).\textsuperscript{42} Nevertheless, as with the PPPM and the human rights-based approach to development, the policies for using a human rights-based

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{39} MTSP (2006-2013), above n 26, para 33.
\item\textsuperscript{40} UNICEF, \textit{Programme Policy and Procedure Manual}, above n 31, para 5, emphasis added.
\item\textsuperscript{41} UNICEF, \textit{Core Commitments for Children in Humanitarian Action}, UNICEF (2010), Section 1.7 (“Human Rights-Based Approach to Programming”) 6.
\item\textsuperscript{42} Ibid 2, 4.
\end{itemize}
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approach in other contexts have advanced at a more rapid rate than the development of effective guidance and implementation tools.

The measures described above evidence a strong executive level commitment to consolidating UNICEF’s move from a service provision model to a human rights-based approach. Yet as one UNICEF official remarked, even in an organisation where the directives are clear and the stated commitments relatively unequivocal, their conceptualisation and implementation is still subject to great divergence in practice.\(^{43}\) Indeed, interviews with research participants in the New York headquarters and the East Timor field office confirm that despite the integration of a human rights-based approach in UNICEF’s policy and programming documents, assimilation at the operational level remains a work in progress. In particular, the data suggests that while UNICEF employees have largely accepted the language of human rights, notions of what a human rights-based approach means in practice varies from staff member to staff member, geographic region and programming sector.

\textit{A stronger uptake of language than practice}

A common theme to emerge from the research is that while the goal of adopting a human rights-based approach is widely acknowledged across the organisation, the language has been embraced more strongly than the practice. Indeed, a 2010 unpublished report by Dr. Urban Jonsson, a former Senior Adviser to the Executive Director of UNICEF on Human Rights-Based Approach to Programming, noted that, “like many other UN agencies UNICEF seems to refer to children’s rights in high-level speeches and global meetings, while the practical use of a [Human Rights-Based

\(^{43}\text{UNICEF official, New York, 2007.}\)
Approach] in country-level work is increasingly neglected”.

To the organisation’s credit, UNICEF has conducted a number of studies, consultations and evaluations aimed at assessing and strengthening the integration of a human rights-based approach into its global programming. The most recent, and comprehensive, is the Global Evaluation of the Application of the Human Rights-Based Approach to UNICEF Programming (March 2012), focused on three broad sets of issues:

“(1) The conceptual basis of UNICEF HRBAP work, and specifically the extent to which there is a common understanding of HRBAP in UNICEF;
(2) The integration of HRBAP in UNICEF programming, specifically the extent to which UNICEF has implemented its global programming using a human rights-based approach;
(3) The enabling environment for HRBAP, specifically the extent to which UNICEF as an organisation supports the implementation of a human rights-based approach to programming.”

The Evaluation found that there was strong coherence across UNICEF documents, policies and strategies with regard to human rights-based

approaches, and that the majority of UNICEF staff members perceive human rights as the foundation of their work.\textsuperscript{47} It also confirmed that, despite the deep commitment amongst staff members to human rights-based programming, “there is considerable variation in their familiarity with, and understanding of” the concept, which in turn affected its implementation in practice.\textsuperscript{48}

A number of research participants, both at headquarters in New York and at the East Timor field office, confirmed that UNICEF’s human rights-based approach was more easily identified at the policy level than in practice. They were unsure, however, whether the problem lay with the human rights-based approach itself or was related to other issues. Officials in New York noted that despite efforts undertaken at the institutional level, UNICEF faced ongoing difficulties in ensuring that the human rights-based approach adopted at headquarters was consistently implemented in the various country offices:

“I’m not claiming that we have even to this day systematically mainstreamed [a human rights-based approach] across UNICEF. If you look in our policies, if you look in our Medium-Term Strategic Plan, it is there, [but] the understanding in the field and the levels of adherence to the human rights-based approach are extremely variable – that’s a given.”\textsuperscript{49}

In UNICEF’s East Timor office, the general consensus amongst research participants was that despite institutional measures undertaken at UNICEF headquarters, their field office was “still along way off implementation”.\textsuperscript{50}

\textsuperscript{47} Ibid 38 (Finding 1).
\textsuperscript{48} Ibid 39–40 (Finding 3).
\textsuperscript{49} UNICEF official, New York, 2008.
\textsuperscript{50} UNICEF official, East Timor, 2009.
Senior staff observed that although many of their colleagues had become adept at using terminology associated with a human rights-based approach, their conceptual and operational understanding of operationalizing the approach was very weak. Consequently, references to children’s rights and a human rights-based approach featured prominently in country documents and promotional materials, but these were not matched at the programming level.\textsuperscript{51} A comparison between participation on paper and in practice provides an example of this tendency.

**Participation on paper**

Participation is deeply embedded in UNICEF’s core policy documents. UNICEF’s Mission Statement (1996) explicitly mentions participation as an overarching goal of its interventions: “UNICEF aims, through its country programmes, to promote the equal rights of women and girls and to support their full participation in the political, social, and economic development of their communities.” The Medium Term Strategic Plan (2006-2013) specifically addresses children participation as an aspect of “Policy advocacy and partnerships for children’s rights”, and commits UNICEF to “support[ing] partners to enable the views of girls and boys to be taken into account in the design and implementation of policies and programmes that affect their lives, and in accordance with their evolving capacities, including during conflict and crises”.\textsuperscript{52}

The MTSP (2006-2013) reinforces the relationship between participation and human rights-based programming through its statement that “promoting opportunities for children, adolescents and young people to

\textsuperscript{51} Four UNICEF officials, East Timor, 2009.  
\textsuperscript{52} UNICEF MTSP (2006-2013), above n 26, para 95.
express their views and participate in all matters affecting them, and ensuring that their views are given due weight according to their gender, age, level of knowledge and maturity, is a key element of a rights-based approach”.

Similar linkages are underscored in UNICEF’s Programme Policy and Procedure Manual, which “proposes a systematic approach based on the understanding of participation as a Human Right” and seeks to broaden implementation strategies from event-based participation to more institutional approaches.

Somewhat surprisingly, however, the MTSP (2006-2013) end of cycle review does not contain any detailed reflection on the extent to which these aspirations were realised. There is a generic reference to how, “using the human rights-based approach to cooperation, greater emphasis has been placed on the participation of both duty bearers and rights holders in capacity development processes,” yet no example, let alone sustained analysis, of how this strategy was implemented, its successes and shortfalls, its resulting impacts. Moreover, while UNICEF’s current Strategic Plan (2014-2017) also emphasises children’s participation, there is a shift away from participation as a guiding principle of human rights-based approaches. Instead, participation is cloaked in the language of social inclusion:

“As a contribution to social inclusion as well as to other outcomes, the meaningful participation of children, including adolescents, in processes that relate to them will be emphasized, including through strengthening their own decision-making and

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53 UNICEF MTSP (2006-2013), above n 26, para 112.
54 UNICEF, Programme Policy and Procedure Manual, above n 31, Section 15: Guidance note on promoting participation of children and young people, pp.242-259, at p.242. The Guidance Note covers such topics as (a) the case for more and better managed participation, (b) principles and ethics of promoting participation of children and young people, (c) a human rights based approach to participation, (d) strategies for promoting meaningful participation in local national development, and (e) identification of entry points for increased participation.
communication capacities.”  

The commitments expressed in these formal policy documents are elaborated on in a series of UNICEF-supported reports, working papers and handbooks that explain in greater detail what participation means, and what it entails.\textsuperscript{57} One of the earliest, a 1992 Essay on Children’s participation: from tokenism to citizenship, defines participation as “the process of sharing decisions which affect one’s life and the life of the community in which one lives” \textsuperscript{58} and differentiates between tokenistic and genuine forms of participation; while a 2001 Working Paper on The participation rights of adolescents adopts a developmental (rather than issue-based) approach to participation, defining it as goal directed toward enhancement of “the capabilities, opportunities and supportive environments necessary to participate effectively and meaningfully in as enlarged a space as possible…”\textsuperscript{59}

A distinctly principled definition is espoused in the more recent 2010 Handbook on Children as advocates: Strengthening child and young people’s participation in advocacy fora, which defines participation as “a basic human

\textsuperscript{56} UNICEF MTSP (2014-2017) para 19(g).
\textsuperscript{58} Hart, Ibid 5.
\textsuperscript{59} Rajani, above n 57, 18.
right, and as such, it is not a gift or privilege bestowed by adults on children, but […] a fundamental right for all children”.

It emphasises that meaningful participation involves, inter alia, treating children as partners; enabling children to negotiate their participation in accordance with their own preferences and working methods; and providing children “with a genuine opportunity to influence decision-making while being based upon honesty and clarity about the extent of, and limits to, that influence”.

Nonetheless, none of these policies concretely address the challenges raised in the previous chapter regarding Article 12 of the CRC and the level of deference paid to children’s views. Moreover, interviews with UNICEF officials demonstrate that the organisation’s commitment to participation is understood and implemented in different ways.

**Participation in practice**

One UNICEF official, based in East Timor, believed that what was happening in East Timor was “revolutionary”. The official explained: “This isn’t just about getting children together in a room. The government is really open to listening to the views of children, and UNICEF incorporates their suggestions and perspectives into the reports and proposals that we submit to the government.”

Asked what was meant by the term ‘incorporation’ the official explained that children were not only consulted;
their opinions strongly influenced the design of projects. This seems to suggest that evidence of good practice an organic understanding of participation by individual staff members and government counterparts. At the same time, the official granted that the manner and scope of participation, and its ultimate impact, would depend on the nature and purpose of the project.\textsuperscript{64}

Another official from UNICEF East Timor was initially confident that “every project that happens has children’s participation”, but upon further consideration expressed some doubts about how meaningful this participation actually was. The official stated that all staff “thought about” how to involve children at the project planning stage, but that the execution of these plans was highly variable due to difference in the way ‘participation’ is understood and uncertainty about how to operationalize the concept:

“We talk about it a lot, it’s in all the strategies and plans […] but in terms of actually making it happen, the actual implementation… I’ve seen good and bad examples, sometimes a little bit more tokenistic, as in ‘we want children to be involved… maybe later on we’ll get their opinion’, but I’ve definitely seen the other way around as well…”\textsuperscript{65}

The official was uncertain, however, as to whether the mixed results were an inevitable aspect of working in contexts where institutional resources are scarce and cultural change takes time, or whether they were linked with different understandings of the concept itself. By contrast, two other UNICEF officials in East Timor were emphatic in describing the tokenistic nature of children’s participation. One official felt that the level of

\textsuperscript{64} UNICEF official, East Timor, 2009.
\textsuperscript{65} UNICEF official, East Timor, 2009.
children’s participation in East Timor fell vastly short of any genuine definition of the term. In the opinion of this respondent, children remain largely excluded from decision-making processes because of the added complications involved: “UNICEF may advocate for children, but children cannot be a part of what’s going on – they might make a mess, they might make noise…” 66 Instead, children’s participation consisted of more superficial displays, such as attending or performing at events celebrating children’s rights.

Another official insisted that it was UNICEF staff, not the children themselves, who made the critical decisions about what it is that children need. According to this official, children’s participation in UNICEF activities, at least in East Timor, is limited to consultations held later in the process, after projects have already been approved. The official explained that children did not – and did not need to – participate directly in the planning and design of projects, because staff already had children’s views in mind and drew on their prior experiences of working with children:

“That’s what I’m saying. Children are not involved in this process. All the programs that are set up by UNICEF staff are a reflection of their daily work with children or young people, but we do not involve [children] in the planning process.” 67

It is worth recalling that these respondents worked in different sections of UNICEF, on different programmes, and at different professional levels; thus their experiences with child participation would have varied considerably. Nonetheless, the range of perspectives they proffered on

what participation is and how it is implemented in their organisation demonstrates the conceptual confusion that staff experience in relation to children’s ‘participation’.

Similar conclusions were reached in UNICEF’s Global Evaluation (2012), which found “mixed application with regard to participation” in country offices, in large part due to a lack of understanding and of a common position as to what participation means in practice, “especially regarding the involvement of children”. The Evaluation was particularly critical of the general inability to describe how meaningful participation, “understood to mean that the participation of rights holders [...] had a clear impact on the design, implementation and monitoring of UNICEF programming”, took place and the absence of any “concrete evidence that such impact had occurred”. Instead, the Evaluation noted that in many instances, UNICEF staff “considered that participation consisted mostly of having children attend government planning meetings, workshop or events”. This falls vastly short of the Article 12 stipulation that children’s views be actively solicited, heard and given due weight in all matters affecting them.

**Human rights in country programme documents**

Further evidence of the stronger uptake of human rights language than practice at UNICEF is the number of country offices that have implemented the policy commitments adopted at the institutional level. This has been recognised in a number of UNICEF studies, dating back over a decade. A 2005 evaluation on UNICEF Country Programmes, for

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69 Ibid 62-63 (Finding 15).
70 Ibid 63 (Finding 15).
example, noted that despite the policy directives emanating from UNICEF headquarters, application of the human rights-based approach in the field is largely uneven and in many places incomplete.\footnote{Freeman, above n 45, 25.} Statistics for subsequent years reinforce this conclusion. Since 2006, UNICEF has conducted an annual independent review of the extent to which activities in the field offices meets organizational standards for application of a human rights-based approach to programming, with the final outcomes included in the Annual Report of the Executive Director. The Annual Reports for the years 2006 to 2011 indicate that roughly 80 per cent of Country Programme Documents (CPDs) approved by the Executive Board during this period “sufficiently and explicitly reflected the human rights-based approach according to organizational standards”,\footnote{73 per cent in 2007; 80 per cent in 2008; 84 per cent in 2009; 82 per cent in 2010; 82 per cent in 2011. See UNICEF Executive Board, Annual Report of the Executive Director: Progress and Achievements against the Medium-Term Strategic Plan (Annual session 2009, 8-10 June 2009, UN Docs E/ICEF/2009/9 and Corr.1, 13 April 2009) table 1; UNICEF Executive Board, Annual Report of the Executive Director: Progress and Achievements in 2009 and Report on the In-Depth Review of the Medium-Term Strategic Plan 2006-2013 (UN ESCOR, Annual session 2010, 1-4 June 2010, Agenda Item 3, UN Doc. E/ICEF/2010/9, 25 March 2010), table 1; UNICEF Executive Board, Annual Report of the Executive Director: Progress and Achievements against the Medium-Term Strategic Plan (19 April 2011, E/ICEF/2011/9) para 64; UNICEF Executive Board, Annual Report of the Executive Director, Progress and Achievements against the Medium-Term Strategic Plan (Annual session 2012, 5-8 June 2012, Agenda Item 3, UN Doc E/ICEF/2012/10, 12 April 2012), table 1.} while roughly 70 per cent UNICEF-sponsored thematic studies or analyses on the situation of the rights of children and women rights carried out between 2008 and 2010 “explicitly used a human rights framework”\footnote{“Only two-thirds” in 2008; “roughly two-thirds” in 2009; 80 per cent in 2010. See UNICEF Executive Board, Annual Report of the Executive Director: Progress and Achievements against the Medium-Term Strategic Plan (13 April 2009, E/ICEF/2009/9) para 177; UNICEF Executive Board, Progress and Achievements in 2009 and Report on the in-depth review of the Medium-Term Strategic Plan 2006-2013, ibid, para 152; UNICEF Executive Board, Annual Report 2011, ibid, para 51.}

Read consecutively, these Annual Reports suggest that country offices are at least ostensibly committed to utilising a human rights-based approach to
However objectively assessing this possibility is problematic, since the independent reviews referred to in the Annual Reports are not publicly available; the Annual Reports do not specify what UNICEF’s organisational standards for a human rights-based approach are, and nor do they elaborate on the methodology used in conducting the evaluation or the criteria against which compliance by the country offices is measured. Given these significant omissions, it is difficult to know what value to assign the achievements cited in the Annual Reports.

This uncertainty is compounded by the inconsistent and often unclear nature of UNICEF Country Programmes Documents. In this regard, the current Programme Policy and Procedure Manual notes that “although there has been a trend over the past years to adopt [Human Rights-Based Approach to Programming] and [Results-Based Management] principles […] the quality of programme documents is still rather uneven in terms of logic [and] ‘SMARTness’ of objectives and indicators…”\textsuperscript{74} The PPPM concludes that this unevenness not only poses challenges in evaluating Country Programme Documents; in many cases it also renders it difficult to understand what results a Country Programme has actually achieved.\textsuperscript{75}

\textbf{Confusion about what a global policy means}

The 1998 Guidelines for Human Rights-Based Programming indicated that while adoption of this approach would entail some new activities consistent with the broader human rights agenda and the paying of greater attention to areas already being addressed by UNICEF, only limited modification of the status quo was required:

\textsuperscript{74} UNICEF, Programme Policy and Procedure Manual, above n 31, 199. S.M.A.R.T. is an acronym for “Specific, Measurable, Achievable, Realistic and Timebound.”
\textsuperscript{75} Ibid 199.
“For UNICEF [...] rights-based programming does not mean that everything we do must change. In fact, the policies and programmes of co-operation supported over the last 20 to 30 years are very largely consistent with what the CRC and CEDAW mandate. Adopting a human rights approach simply means that we look for the ‘value-added’ that the general principles and specific standards of the Conventions can provide.”

This rather optimistic pronouncement stands in contrast to the challenges UNICEF subsequently faced, and indeed continues to face, in ensuring consistent and coherent application of a global human rights-based approach. A 2002 study revealed that operationalising a human rights-based approach has different meanings for different country offices, and which retain “considerable autonomy in the overall strategies adopted, the language used and the programming priorities”.

Three years later, an internal evaluation noted that since a human rights-based approach became corporate policy in 1998, “the majority of Country Programmes have adopted the approach in one way or another”.

The most recent assessment, the 2012 Global Evaluation, found few cases in which a specific model of human rights-based programming had emerged across the different country offices. Instead, the nature of UNICEF’s engagement has been largely determined by the circumstances and contexts in each country, with country offices adopting a flexible and pragmatic approach involving adaptation of human rights principles to suit the

76 UNICEF Executive Director, above n 1, 3.
77 Moser and Moser, above n 34.
situation on the ground. In other words, although most UNICEF country offices have adopted a human rights-based approach, they have not done so in the same way. This is not necessarily problematic, since, as discussed in chapter five, rights-based approaches must be adaptable to different operational contexts. Other internal reviews suggest that while uptake of a human rights-based approach in country offices has generally improved over the years, performance tends to vary not only by country but also by focus area. Thus achieving comparable understanding and application of the human rights-based approach in all country offices and across all focus areas remains a priority.

**Context-specific interpretations of what a human rights-based approach means**

A number of research participants from the New York headquarters and the East Timor field office concurred with these conclusions, commenting that more than a decade after UNICEF’s adoption of a human rights-based approach, different levels of understanding, different uses of terminology, and different practices are still apparent within and between different offices. These variations were generally ascribed to the fact that UNICEF operates across a range of sectors and in diverse social, political, and economic situations, with staff still trying to understand what a human rights-based approach means in a practical way in each of these situations, and making assumptions about what a human rights-based approach must mean in order to be practical:

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“The challenges in health are different from challenges in education; challenges in emergency situations are different from the challenges in development contexts; challenges in poor countries are different from challenges in peaceful middle income countries... So between those you would have to see how does a human rights-based approach change the way you do things, the way you think about things, the way you understand things.”

One result of accommodating and adapting to these context-specific peculiarities, however, is the potential of a human rights-based approach being conceptualised and implemented in vastly disparate ways by the same organisation. This point is well made by another official, who described how the different social contexts in Latin America and Southern Africa, together with the methodological biases of the responsible UNICEF representative in each location, resulted in the 1998 Guidelines being interpreted and operationalized in divergent manners in these two regions:

"Now in the late 1990's [...] the world looked pretty different if you were sitting in Santiago to if you were sitting in Maputo. There was a guy in the Latin America region who really saw rights in the context of the Convention [on the Rights of the Child], legal structures, obligations of government and the empowerment of civil society movements... Then you had the guy in eastern-south Africa dealing with programs in countries where often the majority of the population are out of the reach of government anyway... And they come up with very different perspectives, not incompatible per se, but very different perspectives, with the Latin American perspective being more philosophical, more about social mobilisation, and the Southern African model being quite mechanical in terms of

“the set of steps you take and how you spend your money for the programmes.”

Another outcome of UNICEF staff making assumptions about what a human rights-based approach means in a practical sense is arrival at the conclusion that, in certain programming sectors, use of a human rights-based approach may be unfeasible. They also commented that certain key aspects of a human rights-based approach – particularly those relying on external actors – simply could not be operationalized because the context did not permit it.\(^84\) While the latter (country context) can be explained as an intractable operational constraint, the former (sector-specific implementation of a human rights-based approach) result from deliberate decisions. Such decisions, however genuinely held, are clearly inconsistent with UNICEF’s global institutional commitment that all actions by UNICEF in all country programmes, at all phases of the programme process and in all sectors must reflect human rights and child rights principles.\(^85\) They do, however, support the findings of an earlier internal report which noted that uptake of a human rights-based approach is impeded by the persisting lack of clarity and misconceptions about the concept in many UNICEF country offices.\(^86\) These issues are further elaborated on in chapters four and five.

The fact that UNICEF’s commitment to a human rights-based approach is understood and implemented in diverse ways raises other questions – such as whether there can truly be said to be “a” human rights-based approach. Indeed, some research participants expressed scepticism about the

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\(^83\) UNICEF official, New York, 2008.

\(^84\) Two UNICEF officials, East Timor, 2009.

\(^85\) MTSP (2002-2005), above n 27, paras 28 and 102; MTSP (2006-2013), above n 26, 15 (table 1), 17 (table 2).

\(^86\) Moser and Moser, above n 34, xx.
desirability or practicality of this proposition, arguing that different modus operandi – such as the perspectives pursued by the UNICEF offices in Latin America and southeast Africa – could be equally valid and congruent with a human rights-based approach. However, as outlined in chapters one and two, there are some core foundational features that underpin a human rights-based approach to matters involving children. At the same time, the situation described by staff in East Timor suggests that not all assumptions about how to operationalize a human rights-based approach will automatically be correct. Consequently, a plethora of different programming decisions could, in good faith, be described as consistent with a human rights-based approach, without necessarily being so.

This conundrum is particularly pertinent because the flexibility with which UNICEF representatives in different regions, sectors and contexts interpret a human rights-based approach merely serves to reinforce the imprecision with which the language of human rights-based approaches is employed across the organisation. Unless, however, it is in each case clear what the descriptor “human rights-based approach” refers to, there is potential for a diverse range of practices to be subsumed within the same term. Since misinterpretation can lead to gaps between commitment and practice, a key challenge in this regard is to identify which interpretations are, and which are not, congruent with a human rights-based approach. Otherwise, there is a risk of form and rhetoric superseding substance.

*Doubts about the effectiveness of human rights-based approaches*

In 2001, during preparation of the MTSP (2002-2005), some UNICEF Executive Board members raised concerns about how the commitment to a human rights-based approach could be effectively implemented, and the
impacts assessed. According to the official record:

“[One] delegation stressed that human rights needed to be translated into concrete programmes if they were to be realised; [...] others asked how the impacts or results of the rights-based approach could be measured and evaluated, and emphasised the need for specific indicators”. 87

These concerns were reflected in the final text of the MTSP (2002-2005), which recognised the need to define more clearly the goals and processes associated with a human rights-based approach along with the results this approach seeks to achieve. 88 The twin imperatives of defining the criteria for measuring success, and of doing so vis-à-vis a human rights-based approach, are clearly identified in the document:

“UNICEF must establish its organizational priorities, define objectives, define the criteria of success for its work, strive to achieve its objectives, systematically monitor progress (or the lack of it) and evaluate its work so it may learn how to maintain relevance, effectiveness and efficiency: this is results-based management. But results must be defined in terms of the sustained realization of the rights of children and women, and all actions by UNICEF at all phases of the programme process and in all sectors must focus on the respect, protection and fulfilment of the rights of children and women: this is the human rights-based approach to programming.” 89

Despite these aspirations, the research data suggests little progress in

89 Ibid para 28.
defining success criteria – an issue which may be partly linked with the failure to clarify the conceptual issues and practical implications of adopting a human rights-based approach to matters involving children.

The lack of a uniform assessment framework and common indicators of success

In 2004, an internal report by UNICEF’s Evaluation Office noted that, six years after having adopted a human rights-based approach, the organisation still did not have a uniform methodology to assess implementation, and emphasised the need to “develop an appropriate assessment framework depending on the programme/project and context”. The qualification is interesting, because it suggests recognition of some of the difficulties UNICEF faces in implementing a global commitment in such varied regions and sectors – that human rights-based approaches cannot be applied uniformly in these different situations, and thus cannot be uniformly assessed. The corollary, however, is the potential for different criteria and methodologies to be used in different operational contexts, leading to uncertainty about how comparable evaluations (and applications) of a human rights-based approach are across and within UNICEF’s country offices.

More broadly, the absence of a clear assessment framework and indicators for success compound the problems described earlier: the lack of rigour with which human rights terminology is used within and between UNICEF offices, the confusion between human rights norms and a human rights-based approach, the uneven quality of Country Programmes Documents, the tendency of field staff to “rights-wash” promotional materials and

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reports to headquarters, the diverse countries and sectors in which UNICEF operates, and the assumptions staff make about how a human rights-based approach can be practical in these situations. Individually and cumulatively, these factors contribute to – and are evidence of – the inconsistent ways in which UNICEF’s commitment to a human rights-based approach are understood and implemented.

The shift to an equity focus

Rather than tackle these issues, UNICEF seems to have moved on. Only ten months after releasing the 2012 Global Evaluation, UNICEF’s Report on the end of cycle review of the medium-term strategic plan 2001-2013 signalled an organisational retreat from the human rights-based approach, announcing UNICEF’s shift to an equity focus as its “core strategy for universal realisation of child rights”. 91 Although it had been foreshadowed in the 2012 Global Evaluation, which found that “many UNICEF staff noted the close conceptual relationship between equity and the rights-based approach, [and] some also pointed out that the concept of equity is more easily grasped than that of HRBAP,” 92 it is a surprising development for UNICEF, which was the first UN agency to have formally adopted a human rights-based approach.

The marginalisation of the human rights-based approach was further reinforced in the Strategic Plan 2014-2017. It reframes UNICEF’s approach in terms of an equity focus 93 and contains just a single cursory reference to

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93 UNICEF Executive Board, Decision 2013/16, on 06 September 2013 at Second Regular Session, adopted the UNICEF strategic plan, 2014-2017: Realizing the rights of every
human rights in the entire document, affirming the organisation’s obligation
to act “in accordance with the United Nations Development Group (UNDG) programming principles, based on the human rights-based approach to cooperation, gender equality, environmental sustainability, results-based management and capacity development”.94

It is unclear where this move leaves the human rights-based approach, especially since UNICEF’s formal commitments – such as the 1998 Executive directive – remain in place. It is also unclear what purpose and value the shift to an equity focus ultimately serves. The authors of the 2012 Global Evaluation suggested that the equity focus and the human rights-based approach were potentially compatible, since (a) both pay “attention to the most vulnerable and marginalised of beneficiaries”,95 and (b) “the human rights principles of non-discrimination, universality, participation and accountability are very clearly aimed at equitable opportunities and equitable results for all children”.96 Yet they also observed that the equity focus, unlike the human rights-based approach, “omits the language of duty bearers and rights holders when discussing capacities and participation”.97 Moreover, they noted that some UNICEF officials felt that the equity focus was poorly suited to tackling “the systemic underlying causes of marginalization”, such as high-level corruption and discrimination.98

A more significant concern, ironically reflective of the challenges UNICEF has faced with regard to the human rights-based approach, is that the

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95 UNICEF, Global Evaluation, above n 46, 38.
96 Ibid.
97 Ibid.
98 Ibid 46.
majority of officials who took part in the 2012 Global Evaluation reportedly struggled to define what an equity focus means in relation to the human rights-based approach. Apparently, many expressed confusion as to whether the equity focus meant business as usual or implied a new way of doing business, and, if the latter what exactly that new way of doing business is. It is worth noting that equity is concerned with ensuring equal access to resources, while a human rights-based approach requires, as an international legal norm, the progressive realisation of all economic, social and cultural rights for all persons without distinction or discrimination of any kind. Additionally, the equity focus appears to be inconsistent with the procedural requirements of a human rights-based approach, especially the Article 12 right of every child to have his or her views heard and given due weight in all matters affecting children.

The cross-roads at which UNICEF finds itself recalls scholarly suggestions, dating back over a decade, that like other fashions, the human rights-based approach had become “the latest designer item to be seen wearing”, and merely reflected aid organisations’ “need to reinvent a new ideology periodically in an increasingly competitive and sceptical world”. This motivation may be contrasted with that of the World Bank, whose evolving engagement closely with a human rights-based approach seems more the product of external pressure by the development community than a superficial desire for institutional renaissance.

99 Ibid 47.
3.3. **PART TWO: The World Bank’s limited but evolving engagement with human rights-based approaches**

Unlike UNICEF, where human rights policies are institutionalised and easy to identify on paper (although challenges persist in operationalizing those commitments), the human rights landscape at the World Bank is constantly evolving and difficult to clearly define. The World Bank has neither formally adopted nor endorsed a human rights-based approach, nor does it have any explicit human rights policies. Nonetheless, the Bank’s position with regards to human rights-based approaches defies simple categorisation. This is because, despite an entrenched scepticism toward human rights and an oft-expressed view that engagement with human rights would violate its institutional prohibition on political activities, the World Bank concurrently promotes itself as a human rights-realizing organisation and does in fact engage in some practices that cohere with a human rights-based approach.  

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These inconsistencies present significant challenges to understanding where the Bank really stands, prompting some international scholars to comment on the organisation’s growing “identity crisis”. Sarfaty has commented that “the marginality of human rights stands in contrast to the Bank’s rhetoric in official reports and public speeches by its leadership, which have supported human rights…”. Similarly, Kinley has remarked that “one can detect within the Bank’s policy statements and public comments resistance to the notion of institutional engagement with human rights, albeit alongside substantial rhetoric that appears to embrace this very notion”.

Of course, rhetorical support for human rights by World Bank officials does not represent formal World Bank policy (insofar as it has not been endorsed by the Board of Directors). However, the fact that similar statements have been expressed by successive senior World Bank officials in public fora, at high profile international events, and in World Bank publications nevertheless gives the appearance that they are indeed communicating legitimate World Bank policy. In his 1995 Legal Opinion, then General Counsel Ibrahim Shihata noted that despite the disclaimer in publications with a World Bank logo that the views expressed therein are those of the author and not of the Bank, its Executive Directors or its members, such publications are “seen and often quoted by the outside world as Bank

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_Personal reflections_:

105 Brodnig, Ibid 3.


documents”. Moreover, as the data in this section illustrates, at least some World Bank employees have assumed the same discourse, with many research participants likewise confusing the Bank’s official and *de facto* commitments to human rights. Consequently, it is necessary to consider both the formal and the informal institutional positions.

This chapter builds on existing scholarly material through an analysis of publicly available documents and interviews with key informants. Together, these reveal some common factors underlying the Bank’s inconsistent engagement with human rights-based approaches. These are: (1) An increasingly purposive reading of the Bank’s Articles of Agreement to admit greater engagement with human rights; (2) The progressive expansion of the World Bank’s mandate and activities into human rights territory; (3) An aversion by World Bank officials to the explicit use of human rights terminology, even where the Bank’s policies and practices are clearly compatible with a human rights-based approach; and (4) The looseness with which the terms ‘human rights’ and ‘human rights-based approach’ are used at the World Bank.

*An increasingly purposive reading of the Bank’s Articles of Agreement*

The International Bank for Reconstruction and Development, better known as the World Bank, was established in 1944 as a vehicle for the reconstruction and development of countries ravaged by World War II, the transition from wartime to peacetime economies, and the stimulation of economic growth and productivity in less developed countries. These

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objectives are set out in the Bank’s founding document, its Articles of Agreement, Article 1 of which provides that the purposes of the Bank are *inter alia*:

“(i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries; [and]”

“(iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labour in their territories.”

The Articles of Agreement make no provision for human rights and, until recently, the Bank’s policy was to admit broader human rights considerations only where lending in such circumstances would breach a binding decision of the United Nations Security Council\(^\text{109}\) or were deemed to have clear economic effects\(^\text{110}\). The most frequently cited barrier to the Bank’s engagement with human rights is Article IV, Section 10, which provides:

\(^{109}\) As per the Agreement between the United Nations and the International Bank for Reconstruction and Development, 15 November 1947, 16 UNTS 346, Article VI(1), which requires the Bank to “have due regard for the decisions of the Security Council under Articles 41 and 42 of the UN Charter”. See Shihata, ‘Prohibition of Political Activities,’ above n 108, 235.

\(^{110}\) By, for example, compromising the capacities of the borrowing state to service the loan; hampering the abilities of World Bank staff to effectively appraise the project, supervise its implementation or evaluate its performance; or being so repugnant as to affect the country’s investment climate. See Shihata, ibid 234-235.
“The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.”

Scholars have described the Bank’s lack of engagement in political activities as fiction, noting that the Bank has been deeply enmeshed in the economic, social, and political life of borrowing countries since its founding. Nonetheless, the characterisation of human rights as a political matter, together with a strong emphasis on the Bank’s specialised mandate as an economic institution, formed the basis for the Bank’s limited and carefully circumscribed engagement with human rights: “The Bank recognizes the limits resulting from its specialised mandate […] and from the explicit provisions in its charter prohibiting it from interfering in the political affairs of its members and enjoining it to take only economic considerations into account”.

Shihata’s legal opinion: The Bank’s movement toward institutional elasticity

Despite his acknowledgement of human rights as matters regulated by international law (and hence not exclusively within states’ domestic jurisdiction), the position adopted by the Bank’s Senior Vice-President and General Counsel (1993-1998), Mr. Ibrahim Shihata, was that their


international legal status did not negate their inherent status as the ‘political affairs’ of member states.\textsuperscript{113} Indeed, Shihata maintained “the fact that political human rights’ protection has become a concern of international law does not by itself change its character as a ‘political consideration’ subject to the prohibition in the Bank’s Articles [of Agreement]”.\textsuperscript{114}

Shihata was cognisant of the need for the Bank to periodically elaborate on its mission and vision in order to “adapt itself to the changing needs of the world, if only to ensure its continued relevance”. He averred, however, that such adaptation must occur within the parameters of the Bank’s Articles of Agreement — and, pursuant to his restrictive interpretation of the terms “political affairs” and “economic considerations”, substantial amendments would be required to permit more explicit consideration of human rights in World Bank policy and practice.\textsuperscript{115}

Shihata’s constrained view of the Bank’s institutional elasticity – a term coined by Michael Reisman to describe “the extent to which institutions created and still used for other purposes can be 'stretched' in order to get them to perform human rights functions…”\textsuperscript{116} – along with his narrow reading of international law, were not, however, adopted by subsequent General Counsels. Indeed, in recent years, successive General Counsels have advocated a far more permissive reading of the Articles of Agreement – particularly Articles 1 (Purposes) and 4 (Prohibition on Political Activities)

\textsuperscript{113} Shihata, 'Prohibition of Political Activities,' above n 110, fn 39.
\textsuperscript{114} Ibid.
locating human rights *within* rather than *outside* the Bank’s legal framework.\(^{117}\)

**Dañino’s legal opinion: Human rights as an intrinsic part of the Bank’s mission**

On his final day in office, Mr. Roberto Dañino, Senior Vice President and General Counsel (2003-2006), released a *Legal Opinion on Human Rights and the Role of the World Bank*. Following a comprehensive analysis of the Bank’s constituent charter, Dañino concluded that “the Articles of Agreement permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities since it is now evident that human rights are an intrinsic part of the Bank’s mission”.\(^{118}\) More explicit in his retirement, Dañino expounded on his Legal Opinion in a special Human Rights Edition of the World Bank Institute’s *Development Outreach* Magazine, arguing that the prohibition on political activities did not extend to human rights:

“The [World Bank] *can and should take into account human rights because, given the way international law has evolved with respect to concepts of sovereignty and interference, the Bank would not fall foul of the political prohibitions of the Articles.*”\(^{119}\)

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In the same edition of *Development Outreach*, Dañino’s successor, Ms. Ana Palacio, Senior Vice-President and General Counsel (2006-2008), noted with approval that the *Legal Opinion (2006)* marked “a clear evolution from the pre-existing restrictive legal interpretation of the Bank’s explicit consideration of human rights”.120 In her opinion, although the Bank would not assume human rights obligations *per se*, the *Legal Opinion (2006)* paved the way for a more permissive reading of the Bank’s Articles of Agreement in accordance with the current international framework, “allowing, but not mandating, action on the part of the Bank in relation to human rights”.121 In a strong (but informal) endorsement of her predecessor, Palacio confirmed the advent of a purposive and contextual interpretation of the Articles of Agreement, which permitted wider scope for human rights considerations in the Bank’s policies and practices:

“The Articles of Agreement, like any legal text or treaty, must be interpreted purposefully and contextually, according to the demands and values of their times... It is now clear that the Bank can and sometimes should take human rights into consideration as part of its decision-making process.”122

This trend toward the legitimate consideration of human rights within the Articles of Agreement was complimented by two other innovations: first, a reconceptualisation of the Bank’s mandate in terms of poverty reduction rather than economic growth; and second, a broader interpretation of the “economic considerations” which the Bank could take into account in realising this re-envisioned mandate. Together, these three developments prompted a steady expansion of the Bank’s mission and activities into

121 Ibid.
122 Ibid.
human rights territory.

*The progressive expansion of the World Bank’s mission into human rights territory*

Despite the absence of a formal human rights policy, the World Bank’s rhetoric and activities have steadily expanded into human rights territory. In 1991, then World Bank President Lewis Preston released an Operational Directive proclaiming: “Sustainable poverty reduction is the Bank’s overarching objective.”[^123] This reconceptualization of the Bank’s mandate was accompanied by a strategic alignment by Bank officials of poverty reduction with human rights. A 1998 World Bank publication, for example, proclaimed that, “for the World Bank, protecting and promoting human rights means helping the world’s poorest people escape poverty.”[^124]

This alignment of poverty reduction and human rights was, to some extent, consistent with the conclusions of the World Conference on Human Rights (1993), which affirmed that “the existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights.”[^125] Yet whereas the World Conference took a broad view, citing a number of other preconditions (including democracy and development[^126] and impediments (such as toxic waste and terrorism[^127]) to the full enjoyment of human rights, the World Bank strove to foster a view of poverty reduction and human


[^126]: Ibid, para 8.

[^127]: Ibid, paras 11 and 17.
rights as virtually synonymous:

“In many ways, the greatest violator of human rights is to live in poverty and [the Bank’s] contribution to alleviating it is one of our major contributions to the realization of all human rights…” 128

Yet as the following analysis demonstrates, the Bank’s conflation of poverty reduction and human rights realisation is based on at least two questionable assumptions: (1) the misconception that all economic development automatically leads to the realisation of human rights; and (2) the artificial separation of economic and social rights from civil and political rights.

An exclusive focus on economic, social and cultural rights

The World Conference on Human Rights (1993) expressly rejected any distinction between economic and social rights on the one hand, and civil and political rights on the other; instead confirming that all human rights are “universal, indivisible, interdependent and interrelated” and should thus be treated by the international community “in a fair and equal manner, on the same footing, and with the same emphasis”. 129 Yet despite the increasingly explicit mention of human rights promotion as a legitimate World Bank activity – albeit through the lens, and in the terminology, of poverty reduction – the Bank’s restrictive reading of its Articles of Agreement and narrowly construed mandate continued to dictate a highly selective interpretation of which human rights the Bank pursued. In particular, the Bank largely ignored civil and political rights, choosing instead to limit its

128 Alfredo Sfeir-Younis, Senior Advisor to World Bank Managing Director Mamphela Ramphele, Transcript of interview marking International Human Rights Day (10 December 2003) Available at http://go.worldbank.org/8YTKB4H6E0
129 Vienna Declaration and Programme of Action, above n 125, para 5.
efforts in the area of human rights to what it deemed “those aspects […] that are relevant to its mandate […] as an international financial institution; [that is], to those rights that are economic and social in nature”.

Bank officials acknowledged that this myopic view of human rights was out of step with the prevailing international perspective; nonetheless, they justified the continued marginalisation of civil and political rights as a requirement of the Bank’s specialised mandate as an economic institution:

“The indivisibility of human rights and their relevance to human development […] cannot mean […] that the Bank, which is basically a financial and economic development institution, should ignore its specialised mandate and the limitations of its Articles. What is at stake is the specialisation of each international organisation.”

Divorcing civil and political rights from economic and social rights did not, however, dissuade senior personnel from proclaiming the Bank’s “very significant role” in human rights promotion:

“While there are limits on the possible extent to which the World Bank can become involved with human rights, especially those of civil and political nature, the Bank certainly can play, and has played, within the limits of its mandate, a very significant role in promoting various economic and social rights.”

In his statement before the World Conference on Human Rights (1993), for

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131 Shihata, ‘Prohibition of Political Activities,’ above n 110, 235.
instance, Mr. Ibrahim Shihata, then World Bank Senior Vice President and General Counsel, cited as examples of the “contribution of the World Bank to the promotion of human rights” the Bank’s support for education, health services, nutrition, housing, environmental protection, the role of women in development, and the participation of affected peoples in the design and implementation of projects.\textsuperscript{133} In his conclusion, Mr. Shihata sought to reinforce the position that, while economic and social rights could legitimately fall within the Bank’s purview, civil and political rights – conspicuous by their absence – could not:

“By covering these vast areas of economic and social development [...] the Bank has been contributing to the promotion and protection of human rights without violating the explicit provisions in its charter regarding the exclusion of political considerations. The Bank’s operations attempt in fact to help its borrowers to transform the economic and social rights proclaimed in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights from ideals into realities which can be enjoyed by every man, woman and child.”\textsuperscript{134}

Similarly, when the World Bank released a commemorative publication five years later to coincide with the fiftieth anniversary of the Universal Declaration of Human Rights (1948), Mr. James Wolfensohn, then President of the World Bank, proclaimed the Bank’s belief that “creating the conditions for the attainment of human rights is a central and irreducible goal of development”.\textsuperscript{135} Enumerating the Bank’s contributions to the “[direct] fulfilment of many rights articulated in the Universal Declaration

\textsuperscript{133} Shihata, 'The World Bank and human rights,' above n 112, 815
\textsuperscript{134} Ibid.
Wolfensohn suggested – much as Shihata had done five years earlier – that, “through its support of primary education, health care and nutrition, sanitation, housing, and the environment, the Bank [had] helped hundreds of millions of people attain crucial economic and social rights…”

Such conceptions of human rights are problematic because they confuse the fulfilment of basic needs with the realisation of human rights: the reference to human rights may be linguistically appealing, but it does not denote any genuine shift in approach. On the contrary, while some World Bank activities may impact or relate to human rights, they “are not properly characterised as human rights-based, or as automatically contributing to the realisation of human rights”. More generally, the Committee on Economic Social and Cultural Rights has cautioned against assumptions that development and human rights are coterminous, observing that at times the opposite is true:

“Development cooperation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights. Many activities undertaken in the name of ‘development’ have subsequently been recognized as ill-conceived and even counter-productive in human rights terms.”

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136 Ibid, 3.
137 John M Ackerman, Human rights and social accountability, (World Bank, May 2005) 6: “According to the World Bank, any action that leads to the fulfilment of basic necessities automatically also helps the realization of human rights precisely because it resolves basic necessities. This argument is circular and it folds economic development and human rights promotion into one. From this perspective, there is no value-added to incorporating human rights into economic development.”
Recognition of the interdependence of human rights

An opportunity to address these problems arose in 2004, when the Bank’s official interpretation of its poverty reduction mandate expanded markedly beyond narrow definitions of economic development to also acknowledge some of the underlying causes of poverty:

“The Bank’s mission is sustainable poverty reduction. Poverty encompasses lack of opportunities (including capabilities), lack of voice and representation, and vulnerability to shocks. The Bank’s support for poverty reduction is focused on actions, consistent with its mandate, to increase opportunity, enhance empowerment, and strengthen security.” 140

This evolution in the Bank’s mission, reflected in a growing concern for issues such as accountability, equity, human dignity, participation, curbing corruption and promoting good governance, is significant because it heralded a mandate-sanctioned expansion of the Bank’s activities into a broader range of human rights.141 By expanding the definition of poverty reduction to include such concerns and areas of intervention, the World Bank was able to redefine the human rights that were pertinent to its work as a financial institution. The reconfiguration had particular consequences for civil and political rights, which, unlike economic and social rights, had until this time largely failed to transcend the Bank’s prohibition on

141 Judith Edstrom, World Bank Sector Manager for Social Development, World Bank and Human Rights, Transcript of debate organised by the Advocacy Project, Georgetown University No (14 November 2002); World Bank Legal Vice Presidency, 'Initiatives in Legal and Judicial Reform' (World Bank, 2004), 1-2; Dañino, above n 118, paras 2 and 7.
interference in the political affairs of member states.  

Addressing lack of opportunities, access to justice, or insufficient voice and representation are not bricks and mortar economic and social rights, but areas of intervention with “self-evident political implications, which are linked to human rights as enumerated in international law”. These include Articles 2 (non-discrimination), 19 (freedom of expression), 21 (right of peaceful assembly), 25 (right and opportunity to participate in the conduct of public affairs), 26 (minority rights) of the International Covenant on Civil and Political Rights (1966). Moreover, as the Committee on Economic, Social and Cultural Rights has affirmed, many economic and social rights, such as articles 6 (right to work), 8 (right to form and to join trade unions) and 13 (right to education) of the International Covenant on Economic, Social and Cultural Rights (1966), also have a clear political dimension:

“Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination.

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142 Mac Darrow, ‘Between light and shadow,’ above n 117, 152: “The official interpretation [of the Bank’s Articles of Agreement] has evolved over time to reflect an incremental expansion of the Bank’s mandate and a multifaceted view of development, including not only its economic dimensions but also its political, social and cultural ones.”

143 Dañino, above n 118, para 7; Oestereich, above n 16, 94. See also John Stremlau and Francisco Sagasti, Preventing deadly conflict: does the World Bank have a role? (Carnegie Corporation of New York, 1998), available at http://www.wilsoncenter.org/subsites/ccpdc/pubs/world/frame.htm, who refer to these as “actions that can also be construed as political interference…”


Non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights."  

In his 2006 *Legal Opinion on Human Rights and the Work of the World Bank*, Mr. Roberto Dañino, then World Bank Senior Vice-President and General Counsel, expressly rejected the distinction made by his predecessor between the relevance of economic and social rights, on the one hand, and civil and political rights, on the other, to the Bank’s mandate as a financial institution. On the contrary, Dañino recognised that civil and political rights may constitute legitimate considerations for the World Bank, valid within the Bank’s Article of Agreement:

“The types of human rights that are relevant for the making of economic decisions will depend on the circumstances of each case. It is well understood that there exists an interconnection among economic, social and cultural rights on the one hand, and civil and political rights on the other. This is consistent with the widely supported international legal principles of indivisibility, interdependency and interrelatedness of all human rights. Therefore, from an analytical standpoint, the Bank should not make a distinction between different types of human rights. It may take any type of human right into account provided there is economic impact or relevance.”

By speaking about economic impacts in neutral terms, rather limiting his comments to the economic ramifications of human rights violations, Mr.

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147 Danino, above n 118, para 13.
Dañino went further than his predecessor, Mr. Shihata, who proposed only that the Bank may “take political human rights violations into account if they are so pervasive and repugnant to the point of clearly affecting the country’s investment climate and its economic performance”. And although it does not reflect an official World Bank position (because it was not endorsed by the Board of Directors), Dañino’s Legal Opinion was nonetheless significant in consolidating the integration of human rights into the Bank’s collective consciousness. This can be seen in the extent to which the same narrative has been taken up by other World Bank officials, including research participants in the present study. One official, based in East Timor, maintained that if development is considered a human right, then human rights are at the core of all World Bank projects. Another senior official, also based in East Timor, concurred, opining that human rights are at their core concerned with poverty reduction and sustainable economic growth; and since poverty reduction is the main objective of the World Bank, human rights are themselves an inherent part of the World Bank’s work and have been since the Bank’s establishment:

“For me poverty reduction is the basics of human rights; it’s people having the opportunities to get over the poverty trap... This is really the basis of [the World Bank’s] agenda, and that’s how I see that we have been engaging human rights since the very beginning.”

The same official explained that the World Bank’s definition of poverty reduction, and hence the scope of the World Bank’s activities, was not restricted to economic and social rights. On the contrary, the official explained:

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150 World Bank official, East Timor, 2009, emphasis added.
“Poverty is a lot broader than economic rights; it is also social rights and political rights and access to justice…”  

There is a high degree of reverse engineering involved in such conceptualisations of human rights: ‘human rights’ is not considered an independent concept, so much as euphemism for the World Bank’s activities. Thus as the Bank’s interpretation of its mandate has expanded and evolved, so too has its definition of ‘human rights’. This lack of definitional precision raises serious questions about what World Bank officials mean when they talk about human rights.

*Lost in translation? An ad hoc and ambivalent approach to human rights*

Despite the increasingly purposive reading of the Bank’s Articles of Agreement and the progressive expansion of the Bank’s mission into human rights territory, the World Bank has refrained from adopting any overarching operational policy or guidelines in relation to human rights or a human rights-based approach. As a result, human rights are neither systematically incorporated into the decision making of World Bank personnel nor consistently taken into consideration in projects. Existing incorporation of human rights norms and standards is *ad hoc*, either left to the discretion of individual departments and employees, or co-opted by the partisan politics of member states.  

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Participation on paper

In 1994, the World Bank’s Board of Executive Directors endorsed a report prepared by the Bank’s Participatory Development Learning Group, entitled *The World Bank and Participation*. The report, which defines participation as “a process through which stakeholders influence and share control over development initiatives and the decisions and resources which affect them,” identified six participatory mechanisms, each incrementally increasing the degree of participation: (1) Information-sharing, (2) Consultation, (3) Joint assessment, (4) Shared decision-making, (5) Collaboration, (6) Empowerment; it also included a plan of action aimed at developing staff capacity in participatory practices with a view to mainstreaming participation into the Bank’s work.

Two years later, the Bank released *The World Bank Participation Sourcebook*, a tool designed to support World Bank employees in better understanding how the Bank’s commitment to participatory approaches could be implemented. The Sourcebook is significant for its definition of stakeholders, who, in the context of World Bank–supported activities “are those affected by the outcome—negatively or positively—or those who can affect the outcome of a proposed intervention”. The Sourcebook recognizes the diversity of potential stakeholders in any given World Bank project, ranging from directly affected parties to individuals or institutions with indirect interests; somewhat confusingly however, it also states that “not all parties […] can automatically be assumed to be relevant”, because relevance is in

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154 Ibid 12.
each instance depends on “the situation and type of activity to be supported”. The list of factors to be taken into consideration in determining the relevance of stakeholders demonstrates the breadth of the term: included are not only those affected by the proposed intervention, but also those likely to mobilize for or against it, those able to increase the intervention’s effectiveness through their participation or reduce it through their non-participation, and those in a position to contribute financial or technical resources to its realization.

The Bank further elaborated on the normative content of participation in a 2005 report entitled *Empowering People by Transforming Institutions*. Endorsed by the Board of Executive Directors, it recommended “promoting participation of groups otherwise excluded because of age, ethnicity or gender” and “expanding participatory efforts beyond preparation [of projects] to implementation, monitoring and evaluation”. Critically for the purposes of this thesis, children remain invisible since, despite the reference to age, there is no explicit mention of children in the report as an often excluded demographic, or to Article 12 of the CRC. Indeed, although it was released just two years after the Common Understanding, the report does not cite articles or standards from *any* international human rights instrument.

The report provides little direction as to how these recommendations can or should be implemented. The general exhortation to promote the participation of otherwise marginalised groups is therefore not particularly helpful in guiding practice. Moreover, the generic reference to “age,

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157 Ibid 125-126.
158 Ibid 127.
ethnicity or gender” fails to recognise that groups excluded from participatory processes may have little in common other than their shared exclusion; hence different strategies to promote their inclusion may be required. With respect to children, this gap was highlighted in a 2013 advocacy document prepared by the Bank Information Centre, “part of a growing campaign to include child rights measures in the World Bank operational policies”.

Entitled *Children’s Voices on World Bank Safeguards*, the document details the outcomes of consultations with children in Peru, Yemen, India, Uganda, Cambodia and the Philippines. Key recommendations from the consultation include ensuring that: (a) the Bank “take[s] into account the rights of boys, girls and adolescents and begin[s] to work with them to solve their problems”; (b) “that in the new safeguards, particular protections for children are included and their interests and needs made a high priority”; (c) “the principles of the Convention on the Rights of the Child, especially non-discrimination, [are included] in the execution of World Bank projects”.

Specific reference was made to the issue of participation, with children recommending that the “World Bank should consult with children before engaging in projects that will impact them and should consider their input seriously [and that] these consultations should include the voices of all children regardless of age, gender, or disability”.

**Participation in practice**

During the present research, many World Bank officials identified the
institution’s stringent rules about participation as an example of the Bank’s commitment to a human rights-based approach. When probed more deeply, however, they also revealed that the term was inconsistently used and the practice unevenly applied. As one official noted: “At the operational level, community level involvement is taken more or less seriously in different ways.”163 Another official described a broad lack of consensus within the World Bank about how participation is understood and implemented, with definitions ranging from informing the community about a proposed project or eliciting community feedback about a project that has already been designed, to consulting with local institutions (but not community members) or directly involving community members in project design.164 This diversity accords with, and perhaps derives from the typology of participatory approaches contained in the 1994 report on The World Bank and Participation, (cited above). The official explained that the type of participation employed “depends on who’s the one designing the project and what their conception is,” but felt that most World Bank staff considered presenting a pre-planned project to a focus group as sufficient community participation.165

One research participant, from the Bank’s Legal Team, suggested that the lack of consensus was a deliberate strategy designed to avoid intra-Bank conflict. The official maintained that because the Bank’s members represent, and conduct projects in, different countries that have different concerns, World Bank personnel are more comfortable using terms like

‘participation’ in a purposefully imprecise manner. Strict definitions are avoided, because issues such as who participates, at what stages of the project cycle, how participation is facilitated, and to what extent participants’ views are taken into account, can be highly contentious within the Bank:

“That’s why if you call it ‘participation’ it’s much easier to gloss over that and do it on a context specific case-by-case basis… [Participation] means everything and anything and nothing. But if you were to pin it down more, then you might get huge pushback.”

Such experiences are consistent with Cornwall’s analysis of development discourse, and her observation that aspirational language is kept deliberately abstract in order to attract the widest possible range of actors:

“Policies depend on a measure of ambiguity to secure the endorsement of diverse potential actors and audiences.Buzzwords aid this process, by providing concepts that can float free of concrete referents, to be filled with meaning by their users. In the struggles for interpretive power that characterise the negotiation of the language of policy, buzzwords shelter multiple agendas, providing room for manoeuvre and space for contestation.”

When asked questions about the role of children in World Bank decision-making, a number of respondents cited child immunisation campaigns and the construction of schools as examples of their human rights-based approach to working with children – in other words, a welfare approach. None, however, could conceive of children’s perspectives being taken into

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166 World Bank official, DC, 2008.
account in the design or implementation of these projects.\textsuperscript{168} This falls vastly short of the international standards guiding human rights-based approaches, especially in light of the fact that Article 12 requires decision-makers to (a) provide children with an opportunity to express their views in respect of all matters affecting children, and (b) accord due weight to those views.

One Bank Official agreed that involving children and incorporating their ideas was “a good idea”\textsuperscript{169} – as opposed to an international human rights norm. However other World Bank research participants strongly rejected any need for children to participate, as they believed that others could adequately represent children’s views:

“We don’t put the kids around the table and ask ‘is this project that the Bank is going to do with the government the right one?’ It doesn’t work that way. In our programs, if we’re building a dam [for example], it’s the community we’re asking if this is correct and whether it benefits the community. But I don’t think we’re seeking out whether it benefits the five-year old or the fifty-year old.”\textsuperscript{170}

The idea of putting people – adults or children – around a table and asking for feedback on a project that has already been agreed with the government is a particularly weak, disempowering form of participation. Moreover, the suggestion that it is unnecessary to assess and analyse the qualitative differences in conceptions of benefits and vulnerabilities to risk between five-year olds and a fifty-year olds indicates a very narrow and adult-centric view of participation. Besides running contrary to the Bank’s expressly stated commitment to facilitating the participation of marginalised

\textsuperscript{168} Five World Bank officials, DC, 2008.
\textsuperscript{169} World Bank official, DC, 2008.
\textsuperscript{170} Interview with three World Bank officials, DC, 2008.
demographics, it ignores the fact that ‘the community’ is not a homogenous group of individuals with identical needs.

Against this background, it is also notable that the examples World Bank officials provided about children’s participation focused on children as beneficiaries of the Bank’s health and education interventions – sectors “traditionally viewed as relevant to children”.171 Children were not, however, considered a demographic whose needs and interests, as persons, were mainstreamed into other sectors. In this regard, the Committee on the Rights of the Child’s recent General Comment on the impacts of business on children’s rights notes:

“There may be instances when business consults with communities that may be affected by a potential business project. In such circumstances, it can be critical for business to seek the views of children and consider them in decisions that affect them.”172

At this juncture, it may be helpful to consider three types of scenarios: first, where children are the intended beneficiaries of a given intervention; second, where children constitute members of a broader group of beneficiaries (i.e.: ‘the community’) whom the intervention aims to support; and third, where children are not considered members of the target group at

172 Committee on the Rights of the Child, General Comment No.16 (2013) on State obligations regarding the impact of the business sector on children’s rights (17 April 2013), U.N.Doc. CRC/GC/16, 7 February 2009, para 23. Importantly, para 3 of the General Comment defines ‘business’ broadly to include “all business enterprises, both national and transnational, regardless of size, sector, location, ownership and structure [and] not for profit organisations that play a role in the provision of services that are critical to the enjoyment of children’s rights”, while para 47 emphasises that, in the context of ‘business activities’, the obligations set out in the General Comment are incumbent on all international organisations, including “international development, finance and trade institutions, such as the World Bank Group...”
all, but may nonetheless be affected by that intervention because of their relationships with the intended beneficiaries or the logistics involved. During interviews with World Bank officials, scenarios two and three above were not initially considered as interventions that concerned children; hence, there was no need to consider application of child rights principles.

Upon further reflection, however, (and in response to some examples that I offered) one official agreed that establishing income generating projects for women could affect children if no thought were given to childcare arrangements, as could the construction of a road that inadvertently cuts children off from their recreational spaces.\footnote{173 World Bank official, Washington DC, 2008.} It was unclear, however, to what extent children’s interests should be taken into account in these types of programmes, and how expressly child rights principles would apply. One official stated that the Bank’s policy with respect to guiding principles was to draw on existing standards, including the Convention on the Rights of the Child, and apply them “as needed, on a case-by-case basis”.\footnote{174 World Bank official, Washington DC, 2008.}

Other World Bank officials raised concerns about the Bank’s technical expertise with regard to children’s rights. One official, for example, was very receptive to the idea of incorporating considerations about the impacts of adult-focused projects on children into future Bank projects, but noted that the Bank had little expertise in this area – categorising the issue as one of capacity rather than mandate.\footnote{175 World Bank official, Washington DC, 2008.} Another official agreed, stating that this was not an area where the World Bank has any comparative advantage or observable function:

“The type of work that we do is the ability to impact [the] policy and operations of...”
development actors […] but we don’t have any expertise in the area of […] children’s rights or on any kind of programs of that nature.”

In developing countries, the confusion and lack of expertise surrounding children’s rights may effectively exclude 50 per cent of the population from the participatory processes that would ensure their views, needs and interests are taken into consideration. It also runs counter to the World Bank’s general instrumentalist approach, which, as the following chapter notes, promotes engagement with children and youth as a cost-saving investment.

Different meanings for different people

The Bank’s reluctance to adopt a formal, institutional approach to human rights has rendered human rights futile as a common discourse, both within the Bank and in conversation with other actors. This obstacle was recognised by some officials. One senior manager, for example, initially stated that he did not believe his views on the definition and centrality of human rights were in any way unique or progressive: “I would assume that my colleagues, overall, they all share this sort of thinking. The Bank is a visionary sort of institution, you know…” He later equivocated, expressing uncertainty as to how representative his views actually were: “If we all had the same understanding […] I’m not sure; we are all different

individuals…”

Other staff members in the East Timor office were more confident in their conclusions, asserting categorically that there is no common human rights language at the World Bank, nor any sense that people are on the same page when discussing projects in these terms. Colleagues may speak about ‘human rights’, ‘participation’ or ‘accountability’ in meetings, or refer to these principles in official documents, but there was no explicit agreement as to their substantive content or their implications for practice. One official was “fairly certain” that when her peers spoke about ‘human rights’ they weren’t necessarily referring to “what’s written in international human rights law [or] the rights that are listed in the conventions”. Another respondent imagined that such conversations would be held on a sector-by-sector basis:

“I would think for example in health sector programming they would talk about, you know, the right to good health or women’s rights and, you know, reproductive health and the language would come up in relation to the specific work that people are doing… I have absolutely no idea. I think [these terms are] understood in very different ways.”

The only research participants who cited international human rights treaties as a guiding definitional source were members of the World Bank legal team, and they self-identified as being in the minority. These findings are confirmed by Sarfaty, whose in-depth study of organisational culture at the

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World Bank notes that, of those Bank employees who define human rights as legal obligations that derive their legitimacy from the international human rights regime and, in particular, the Universal Declaration of Human Rights, many are lawyers.\(^{184}\) This result raises questions about the extent to which people’s educational and professional backgrounds influence their conceptions of human rights – a matter analysed further in chapter four, within the context of institutional factors affecting how human rights are understood and implemented. Aside from members of the legal team, however, World Bank research participants uniformly gave the impression that any socially or economically beneficial objective could be called a human right: “human rights is everything, it’s so inclusive”.\(^{185}\) Perhaps it was a well-established aspect of the World Bank’s work, perhaps an emerging area; nonetheless, there was little ‘good’ that does not (or cannot) fall within the institution’s mandate – it was just a matter of aligning that ‘good’ with existing World Bank terminology.\(^{186}\)

The conflation of ‘human rights’ and ‘human rights-based approaches’

The majority of World Bank officials interviewed did not draw any


\(^{186}\) Three World Bank officials, Washington, 2008; and one World Bank official, East Timor, 2009. For a critique of this practice, see Uvin, Peter, ‘On High Moral Ground: The Incorporation of Human Rights by the Development Enterprise’ (2002) 17 *Praxis: The Fletcher Journal of Development Studies* 1, 2: “Essentially, these statements colonize the human rights discourse, arguing – as Molière’s character, who discovered he had always been speaking prose – that human rights has been the focus of these development agencies all along. Case closed; high moral ground safely established...” See also Nyamu-Musembi and Cornwall, ‘What is the rights-based approach?’, above n 2, at 14: “The lack of precision with which the term rights-based approach is used makes it easy for [...] international organisations simply to repackage what they have always done in the new language.”
distinction between ‘human rights’ and ‘human rights-based approaches’. For many, the latter was simply the term used for a project that contributes to the realisation of a concrete human right. Thus one official described the building of courts as an “obviously human rights-based activity”, while another noted that the Bank’s funding of programs on gender-based violence in conflict affected countries “could just as well be seen as [examples of] a rights-based approach – it’s basically the rights of women in this case, but we don’t say it’s a rights-based approach…”

These non-specific and sometimes competing conceptualisations render it difficult to measure the coherence between rhetoric and practice, because it is often unclear precisely what World Bank officials mean when they assert that the Bank “promotes human rights” or “conducts human rights-based activities”. Further complicating the picture is the fact that several of the same informants who emphasised the centrality of human rights to the World Bank’s raison d’être were simultaneously averse to using human rights language in relation to the Bank’s work. Interestingly, as the following discussion demonstrates, this remains true even in instances where the activities described are clearly compatible with a human rights-based approach.

187 Again, research participants from the legal team were the dominant exceptions.
Are human rights just a matter of labelling?

Senior World Bank officials have perpetuated the belief that the World Bank practices a human rights-based approach without calling it such. In an interview commemorating international human rights day, Alfredo Sfeir-Younis, then Senior Advisor to the World Bank Managing Director, stated:

“While we do not articulate our mission and what we do in the language of rights, it does not follow at all that we ignore human rights principles and practices… In my view, the Bank has been doing and will continue to do a tremendous amount in the area of human rights. Perhaps we are the most human rights-based development institution.”

Then President of the World Bank Group, James Wolfensohn was even more explicit in his characterization of the World Bank’s activities as human rights promoting. At a joint World Bank and OHCHR Staff Learning Seminar on Human Rights and Development (2002), for example, he commented:

“I believe […] that in terms of intent and values and objectives, there’s not a lot that separates [the Office of the High Commissioner for Human Rights] and the World Bank… While the language that we use may be different, the sort of people in our organizations and the fundamentals I think are quite similar.”


Two years later, at a conference entitled *Human Rights and Development: Towards Mutual Reinforcement* organised by Mary Robinson, former United Nations High Commissioner for Human Rights, and Philip Alston, New York University law professor, Mr. Wolfensohn again proclaimed:

“I think that there’s a tremendous coalescence between what we do every day in our institution – perhaps not speaking as much about rights as we should – but where in fact we are giving effect to the agenda of the human rights community.” 193

This narrative was very strongly reflected in the views of research participants, many of whom also maintained that, the avoidance of express references to human rights notwithstanding, the World Bank was an inherently human rights promoting organisation. According to one official:

“In terms of our work we are formally not a rights-based organisation, we work on our goals of poverty reduction. Now there are obviously lots of areas where those two things coincide, [where] there’s complete consistency, we just don’t use that language.” 194

Another respondent, a ten-year Washington-based veteran explained:

“I think everything we do is contributing to the advancement of human rights… We really didn’t want to use the words ‘human rights’ like the Office of High Commissioner for Human Rights, but all the things we do, we have the same sort


Indeed, although the majority of respondents believed that human rights are at the core of the World Bank’s work, many evidenced a reluctance to proactively use human rights language. Instead, they preferred to mask human rights concepts behind proxy terms. As one research participant noted:

“We use much vaguer terms and you’ve probably seen them: ‘cohesion’, ‘accountability’ and… what’s the third one? Anyway, those kinds of vague and elastic terms I think compared to ‘rights’, and they seem to suit us pretty well…”

Other research participants concurred. One Senior Advisor in the legal team maintained that just because the World Bank doesn’t have a human rights-based system does not mean that issues like accountability and governance are not concerns. The official cited the Bank’s “rigorous rules on consultation, […] best practice guidelines on active participation, […] and proactive work on gender” as examples of “human rights-based issues that are not presented as such”. Another official referenced the Bank’s

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196 For a discussion of the reasons why surrogate terms (or “by-words”) are preferred to explicit mention of human rights, see Chapter 5.

197 Anthropologist, World Bank, Washington, 2008. See also Devesh Kapur, John P Lewis and Richard Webb, The World Bank: Its First Half Century (Brookings Institution, 1997) who at 29 note that following its emergence as a World Bank concern in the late 1980s “‘governance’ soon became a code word for quite varied agendas ranging from defense expenditures by borrowing countries to human rights and political and administrative reform” and Judith Edstrom, World Bank Sector Manager for Social Development, World Bank and Human Rights, Transcript of debate organised by the Advocacy Project, Georgetown University (14 November 2002) available at http://advocacynet.org/resource/903: “I would say that we are very much in alignment with other agencies in terms of looking at what might be a rights-based approach but which we might call ‘ethical public policy’.”

198 David Freestone, Senior Advisor in the Office of the General Counsel, World Bank, DC,
commitment to “inclusion, accountability and cohesion… it’s all about human rights”.\footnote{World Bank, DC, 2008.}

**A preference for surrogate terms**

These differing perspectives raise important questions about the nature of human rights. Are human rights just a matter of labelling, capable of being conveyed in alternative vocabularies? Or are human rights a unique concept that suffers a loss in value when buried beneath other discourses? As Sarfaty notes, there are problems associated with adhering to human rights principles but framing them in surrogate terms, since these “do not carry the same legal and rhetorical weight as human rights”.\footnote{Sarfaty, ‘Measuring Justice,’ above n 152, 139} Euphemistic substitutions suffer legal inaccuracy, and fail to set out the hierarchy of relevant norms and standards.\footnote{Brigitte I Hamm, 'A human rights approach to development' (2001) 23(4) Human Rights Quarterly 1005, 1022.} As a result, “international treaty obligations risk being undermined by a lack of clarity that the political commitments of development policies are subject to the pre-existing binding legal obligations”.\footnote{International Human Rights Network, *Human Rights-Based Approaches and European Union Development Aid Policies* (2008) 21.}

The majority of World Bank respondents, all of them non-lawyers, did not believe anything would change if the organization formally adopted a human rights-based approach. One official maintained that, since human rights “has been at the core of our business since the Bank’s inception sixty years ago, it’s nothing really new”, the emergence of human rights-based

\footnote{2008.}
approaches has affected neither the Bank’s priorities nor its *modus operandi.*\(^{203}\) Another official distinguished human rights and poverty reduction as two different domains, but felt that the same outcomes were reached regardless of which model was used:

“Even though we don’t come at it from a rights-based approach, we come at it from a poverty reduction perspective, we end up at the same place.”\(^ {204}\)

Similarly, two other officials stated that, in their opinions, nothing about the Bank’s work would be different if it expressly committed to a human rights-based approach, because “it’s just a matter of labelling... it’s just terminology in the end.”\(^ {205}\) Surprisingly, however, none of the respondents cited above were in favour of the World Bank formally adopting a human rights-based approach. Although research participants provided no further reasons for this reluctance, the fact that most Bank officials predominantly conceive of human rights in instrumental rather than normative terms may provide some insight. Thus, where human rights principles are employed, it is because they are regarded as part of good development practice and not because they are accepted as binding legal standards.\(^ {206}\)

**An instrumentalist idea of human rights**

During the present research, respondents provided numerous unsolicited examples of World Bank practices that are *prima facie* compatible with a

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\(^{203}\) World Bank, East Timor, 2009.

\(^{204}\) World Bank, DC, 2008.

\(^{205}\) World Bank, DC, 2008. This is a particularly strong endorsement from one of the officials, who prior to joining the World Bank, had worked with UNICEF for ten years. See also joint interview with two World Bank officials from Washington DC, 2008.

\(^{206}\) World Bank, 'Nordic Trust Fund Progress Report, November 2010 to October 2011’ above n 190, 2.
human rights-based approach without being referred to in those terms. The key difference, however, is that the Bank employs human rights principles — whether masked behind surrogate terms or openly acknowledged — only insofar as they coincide with or augment the institution’s financial goals. The following exchange encapsulates the Bank’s thinking on this point. During a discussion of World Bank policies that are consistent with a human rights-based approach but not presented as such, one Washington-based Director highlighted the Bank’s commitment to local ownership and community participation:

“...We much too often come with our expert advice and bring in all these fancy outside people, us included, and go in and try and help [communities]. Whereas we forget to ask the basic question that we would want to be asked: ‘what do you need, what solutions can you think of’... That’s the whole point of starting with voice, starting with having people themselves express what is needed here... We need to work with them, provide some alternative suggestions maybe, but unless they own it it’s not going to be sustainable.”

When I pointed out that his views on voice and local ownership sounded much like a human rights-based approach, the Director laughed and replied: “I know. That’s what my friends at UNICEF keep telling me.” The difference, in his opinion, is that the World Bank values these principles “primarily from an instrumental perspective, because you get better development outcomes.” Another Washington-based official concurred, noting that while staff members’ personal views might differ from the Bank’s official position, the organisational motivation for engaging in

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208 Ibid.
209 Ibid.
human rights was strictly utilitarian:

“There are many people around the corridors who would say empowerment, whatever they mean by that, is an end-in-itself; or that women not being beaten is a good thing, whether or not they or their husbands end up earning more money because of that… But [for the World Bank], the rails on which the whole thing runs tend to be utilitarian in a particular economic sense…”

This perspective treats human rights as valuable only to the extent that they improve outcomes; the normative significance of human rights is entirely overlooked. A number of research participants were convinced that the same results were achieved regardless of whether human rights principles were employed for inherent or for instrumental reasons. However in an unequivocal declaration about the ultimate priority of economic considerations, two informants from the Human Development Network emphasised that the World Bank is a bank, and as such only engages in activities that promote solid economic benefits. They concluded that, human rights standards aside, if investments in education or vaccination were proven to have a negligible impact on economic growth or poverty reduction, then the World Bank – as a financial institution – would need to be honest with their clients about the best return for their investment dollars.

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210 World Bank official, Washington DC, 2008. Another Washington DC-based World Bank official explained that the reason the Bank funds programs on gender-based violence is because “it’s terrible for development to have this kind of violence…”

211 Sigrun Skogly, 'The role of the international financial institutions in a rights-based approach to the process of development' in Bård A. Andreassen and Stephen P. Marks (eds), Development as a human rights: Legal, political and economic dimensions (Harvard School of Public Health, 2006) 284.

212 Two World Bank officials, DC, 2008.

213 Two World Bank officials, DC, 2008.
This purely instrumental engagement with human rights strongly undermines the contention made by some Bank officials that, in terms of goals and objectives, not much separates the World Bank and the Office of the High Commissioner for Human Rights (OHCHR). It is also inconsistent with the mandate of OHCHR, which is normatively based on human rights as international legal norms and the concept of inherent universal dignity.

The minority perspective: human rights as international legal norms

The OHCHR is the principle human rights office of the United Nations, mandated to prevent human rights violations, promote universal respect for and observance of all human rights for all people, and improve the efficiency and effectiveness of the United Nations in the field of human rights. In carrying out these responsibilities, the OHCHR is obliged to function within normative the framework of the Charter of the United Nations, the Universal Declaration of Human Rights, and other international human rights instruments, including the obligations contained therein. The World Bank’s primary mission, on the other hand, is poverty reduction and economic development. Within this framework, human rights are taken into account only to the extent that they are compatible with this mission. Such activities are not expressly conceived as human rights activities, nor are they overtly linked to the obligations outlined in international human rights instruments. Instead, the Bank’s preference has been to focus on the ways in which their projects and program areas coincide with human rights:

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215 Ibid, para 3(a).
216 McInerney-Lankford, above n 138, 244-245.
“There are wide zones of overlap between substantive areas covered by core human rights treaties and areas in which the Bank operates. The Bank contributes to the realization of human rights in these different areas, even though its policies, programs and projects have never been explicitly or deliberately aimed towards the realization of human rights.” 217

However, as some research participants pointed out, inadvertently contributing to the realisation of some human rights is not the same as consciously implementing a human rights-based approach. One official for example, expressed concern about the Bank’s failure to distinguish between “promoting human rights, as opposed to promoting the impact of World Bank activities and how human rights factor into them”. 218 As noted earlier, one reason for this appears to be that, for many research participants from the World Bank, ‘human rights’ is merely another name for economic development or poverty reduction; and because these activities are already at the core of the Bank’s work, nothing further is required. Another reason, also discussed above, is the popular tendency to treat human rights as purely instrumental considerations.

By contrast, research participants from the World Bank legal team uniformly referred to human rights as international legal norms and, on this basis, concluded that it would be “inaccurate and disingenuous” to say that the Bank’s work supports human rights. 219 According to one lawyer, the Bank may pay lip service to human rights, but there was little interest in deviating

217 Palacio, above n 120, 36.
from “business as usual”. The official characterised the Bank’s engagement with human rights as “superficial at best”; a product of the current international political climate, in which organizations “have to at least mention human rights to be considered credible”.

Another Bank lawyer agreed, asserting that while the Bank was happy to cite human rights when it considered it favourable to do so, there was “a lot of watering down and wooliness… at most it is rhetorical repackaging and re-branding”. This is evident in the fact that, despite the compatibility of some of its activities with the tenets of a human rights-based approach, the Bank’s priorities continue to be guided solely by economic development and poverty reduction objectives. As Merry observes, the new idea – ‘human rights’ – has been folded into the World Bank’s pre-existing structure, thus creating a hybrid discourse, but has not been allowed to dictate any change in organisational values or practices. At the same time, parallel developments indicate that the mood may be shifting.

*A closer (but still largely instrumental) engagement with human rights*

**The Social Guarantees Approach**

Although the World Bank has not formally adopted a human rights-based approach, it was represented at the inter-agency UN workshop that drafted

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220 Ibid.
221 Ibid.
222 Ibid.
224 Ibid.
223 Ibid.

224 Sally Engle Merry, 'Transnational human rights and local activism: Mapping the middle' (2006) 108(1) *American anthropologist* 38, 39-51, 40. See also Kapur, Lewis, Webb (eds), above n 195, 54: “The Bank's day-to-day business has followed a steadier course than its rhetoric. Much of what appears to be a change in ends has perhaps been a change in instruments.”
the Common Understanding, and its website continues to cite the Common Understanding as one of the “recent developments […] relevant to the Bank position on human rights”. In 2008, the World Bank released a *Policy Note on Increasing Social Inclusion through Social Guarantees*. The Policy Note was based on a recently concluded study of human rights-based approaches to social policy that cited the Common Understanding as part of its “conceptual background”, and sought to provide a concrete framework within which the socio-economic rights defined in international human rights conventions could be effectively implemented, claimed and enforced.

Described by the Bank as “distinctly rights-based”, the Social Guarantees Approach (SGA) defines social guarantees in terms strongly evocative of the core features of the Common Understanding:

“Social guarantees are sets of legal or administrative mechanisms that determine specific entitlements and obligations, related to certain rights, and ensure the fulfilment of those obligations on the part of the state. They have a legal expression that results in an explicit state responsibility; they are constructed in reference to a specific rights-holder; and they involve mechanisms of access and

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228 World Bank, Ibid para 27(b).
Moreover, with its designation of individuals as rights-holders rather than beneficiaries of services, its emphasis on processes – in particular the active participation of rights-holders – as well as outcomes, its promotion of transparency and accountability, and its focus – within a framework of universality – on empowering the most vulnerable, the concept encompasses some of the core human rights principles underlying human rights-based approaches. However SGA publications stopped short of expressly acknowledging these as human rights principles, and the SGA policy note was not endorsed by the World Bank Board of Executives; thus it does not constitute a formal World Bank policy.

The Nordic Trust Fund

The following year, in September 2009, with the support of Denmark, Finland, Iceland, Norway, and Sweden, the World Bank launched the Nordic Trust Fund (NTF), aimed at helping the World Bank “develop an informed view on how human rights relate to the Bank’s core mission”. Through a combination of research, capacity building, pilot projects, and knowledge sharing with other development partners, “the NTF explores how the consideration of human rights in addressing poverty reduction can make the Bank’s analytic and operational work more effective”. It is, in other words, a predominantly instrumentalist venture, with human rights

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229 Ibid para 1 (box 1).
230 Ibid paras 20, 33, 49.
231 Ibid paras 49, 60.
234 Ibid.
standards and principles evaluated on the basis of their efficacy in improving development outcomes rather than their intrinsic normative value.\textsuperscript{235}

Nonetheless, the promotional material (while highlighting that the NTF “is consistent with the Bank’s mandate and Articles of Agreement)\textsuperscript{236} does recognise the normative human rights framework, explaining that the human rights content of NTF activities is based on three sources:

\begin{enumerate}
\item “The Universal Declaration on Human Rights and the human rights treaty obligations enshrined in the nine core human rights treaties adopted by the United Nations;
\item The widely endorsed human rights principles (non-discrimination, accountability, participation and transparency) commonly used in human rights oriented development programs; and
\item Good practices in the UN and broader donor community on how to design and implement human rights-based operations.”\textsuperscript{237}
\end{enumerate}

These rather confusing parameters provide ample opportunity for World Bank staff to engage more deeply with the idea of human rights-based approaches. It appears that at least some World Bank staff have taken up this challenge. During its four-year term, the NTF has held approximately 150 learning seminars and provided 55 grants to task teams across the World Bank Group.\textsuperscript{238} The workshops, research and pilot projects have covered a range of topics relating to civil, political, economic, social and cultural rights; governance; and discrimination and vulnerable groups.

\textsuperscript{235} World Bank, 'Nordic Trust Fund Progress Report, November 2010 to October 2011', above n 190, 3.
\textsuperscript{236} Above n 231.
\textsuperscript{237} Ibid.
\textsuperscript{238} World Bank, 'Nordic Trust Fund Progress Report, January to December 2013' (World Bank, no date).
These include: implementing human rights in the health sector; using a human rights-based approach to improve the impact of natural resource investment on communities; supporting integration of minority groups and facilitating inclusion and non-discrimination through mobile technologies; human rights and women’s empowerment, voice and agency; and how working with human rights-based approaches in a post-conflict setting can add value to development programs.  

Whether and how these initiatives affect the Bank’s engagement with human rights-based approaches in the long term, and at the institutional level, remains to be seen, particularly as the NTF has employed a cautious persuasive / investigative style that hews closely to the Bank’s traditional stance. For example, the 2010-2011 NTF Progress Report found that the World Bank frequently draws on human rights principles such as “non-discrimination, accountability, participation and transparency”, and proposed that the main methodological differences between the World Bank and organisations that had formally adopted a human rights-based approach were more a matter of terminology than substance, relating to “the degree of reliance on explicit human rights discourse and legal standards, [and] the place of human rights in the definition of the agencies’ goals and mandate”. However not every intervention that is aimed at enhancing accountability, or that employs participatory methods, can accurately be described as human rights-based. In this context, the Bank’s continued failure to distinguish “operational principles that might be

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240 World Bank, ‘Nordic Trust Fund Progress Report, November 2010 to October 2011’, above n 190, 7  
tangentially related to human rights from interventions specifically grounded in the human rights framework” seems more reflective of rhetorical repackaging than substantial change.

Nonetheless, when viewed against the backdrop of the Bank’s historical resistance to the idea of engaging in human rights-based approaches, the very fact that the NTF came to fruition is, in itself, a tremendous achievement – a point which is elaborated on in chapter four’s discussion of the World Bank’s organisational culture. It signifies a willingness by the World Bank to move beyond public proclamations that its mandate and methodology are already human rights-based, and to actually examine the merits of such claims. And it offers the possibility of deeper, more consistent, and better-defined engagement with human rights-based approaches by providing sceptics with evidence of their value, and by functioning “as something of a Trojan horse for those who really mean what they say about human rights”.

3.4. Conclusions

This chapter has examined the different ways in which UNICEF and the World Bank engage with the idea of human rights-based approaches to matters involving children. As the research data confirms, formulation, interpretation and implementation varies both within and across organizations, regardless of whether or not a human rights-based approach has been formally adopted.

242 Ibid.
UNICEF research participants uniformly defined human rights in terms of the legal norms embodied in international human rights treaties, and observed that the commitment to human rights-based programming has prompted a reconfiguration of the manner in which projects are conceptualised, articulated, designed and implemented. Many also commented that while human rights now ostensibly shape every aspect of the UNICEF’s operations, the organization is struggling to ensure that staff members – particularly those in the country offices – understand and operationalise human rights-based approaches to matters involving children in a consistent manner.

Meanwhile, despite consistent claims that all of its work already advances human rights and is virtually indistinguishable from a human rights-based approach, the World Bank remains reluctant to formally adopt any human rights policies or officially commit to a human rights-based approach. Interviews with research participants confirm that aspects of what might be considered a human rights-based approach are indeed employed by the World Bank; however explicit human rights language is largely avoided, with surrogate terms employed in their stead. This clandestine internal strategy is somewhat at odds with the Bank’s proud and public declarations of support for human rights.

Another feature of the Bank’s engagement with human rights-based approaches is that it is predominantly instrumentalist: the human rights standards and principles that are incorporated into the Bank’s operations are justified on the basis of their effectiveness in contributing to poverty reduction. Consequently, there is little appreciation amongst World Bank staff for the normative value of human rights-based approaches, and limited understanding of the international human rights legal framework from
which these standards and principles derive. Nonetheless, initiatives such as the social guarantees approach and the Nordic Trust Fund provide indications that the Bank’s stance toward human rights-based approaches may be shifting.

With regard to human rights-based approaches to matters involving children, and the participation principle in particular, the varying perspectives of World Bank research do not differ markedly from those of their UNICEF counterparts. Indeed, interviews with World Bank and UNICEF respondents revealed a diversity of views across and within the two organisations about what participation means, the range of matters that affect children, how necessary it is for children to directly participate in those discussions, and the difficulties involved in ensuring this in practice. This suggests that having a specific child rights mandate is no guarantee that children’s rights will always be taken into account. It also confirms that organisations without an explicit child rights mandate still tend to conceptualise human rights in an adult-centric manner. At both organisations, the research revealed that insufficient consideration had been given to the theory and practice of adapting human rights-based approaches to matters involving children.

Perhaps the most significant finding, however, is the fluid nature of institutional engagement with human rights-based approaches. As noted above, UNICEF and the World Bank have responded very differently to the challenges and opportunities presented by the idea of human rights-based approaches to matters involving children. Having struggled to understand and effectively implement a human rights-based approach, UNICEF appears to be pulling away from the idea and moving on to a new strategy – the equity focus – although its formal commitments to human rights-based
programming remain in place. Meanwhile, even as the World Bank continues to resist any binding human rights obligations, it seems to be trending toward deeper engagement with human rights-based approaches through the piece-meal adoption of the constituent aspects of a human rights-based approach in service of its poverty reduction objectives.
CHAPTER FOUR: The enabling environment: Institutional factors

4.1. Introduction

While chapter three explored the different ways in which UNICEF and the World Bank engage with human rights-based approaches to matters involving children in chapter three, chapter four considers some of the underlying reasons for these differences. It does so by examining the institutional factors (inside the organisation) that influence how organisations, and their staff, engage with human rights-based approaches to matters involving children. Drawing on interviews with UNICEF and World Bank staff, at their respective headquarters and in East Timor, it demonstrates the importance of the internal enabling environment, and reveals that the relevant actors must be willing and able to engage.

The chapter begins with a brief overview of organisational culture and its significance in shaping staff attitudes and behaviour with respect to human rights-based approaches. The second part of the chapter examines organisational culture at the World Bank, which has been identified by number of scholars as a key driver of the marginalisation of the human rights at the World Bank.\(^1\) The present research confirms these observations, finding that more explicit engagement with the idea of human

rights-based approaches is hampered by perceptions of human rights as a ‘dirty term’; weak senior leadership on the issue; an overwhelmingly economic mindset; and a preference for practical, evidence-based tools above appeals to international norms. Nonetheless, the business case for more explicit engagement with human rights-based approaches is slowly gaining ground, with initiatives such as the Nordic Trust Fund offering potential for a radical reassessment of the Bank’s long-held reluctance to formally adopt a human rights-based approach.

The third part of the chapter focuses on UNICEF, with the research revealing that organisational culture has perpetuated an assumption amongst many staff that, because UNICEF has adopted a formal commitment to the human rights-based approach, everything they do is *ipso facto* human rights-based. Upon closer interrogation, however, this assumption is unsupported by the experiences of research participants, many of whom noted that the structural aspects of institutional culture actually undermined their ability, and their confidence, to actually implement a human rights-based approach to matters involving children. They identified in particular insufficient staff training on what a human rights-based approach is and how to operationalise it; time and resource constraints; and a perception gap between headquarters and country offices. These findings are significant because they show that formal adoption by an organisation of a human rights-based approach does not necessarily ensure that its organisational environment is human rights enabling.

### 4.2. Organisational culture and human rights-based approaches

On face value, the meaning of the term “organisational culture” seems self-explanatory: it refers to the culture of an organisation. In a sense this is
true. Yet it is also too simplistic an explanation to capture the full significance of what organisational culture is, and the power it exerts. As Wilson clarifies:

“Every organisation has a culture, that is, a persistent, patterned way of thinking about the central tasks of and human relationships within an organization. Culture is to the organisation what personality is to the individual. Like human cultures generally, it is passed from one generation to the next. It changes slowly, if at all.”

In the context of an organisation, culture not only comprises its overtly expressed history, tradition and formal goals, but also includes the stories of “how things are done around here”. This second aspect of organisational culture is generally unspoken, however it is often deeply ingrained, reflecting and dictating an implicit set of beliefs, expectations, values, ideologies, rules, norms and practices that foster cohesion and shape staff behaviour. Concurrently, the language and symbols used within the organisation act as indicators and re-enforces its culture, perpetuating “systems of shared meaning and frameworks of interpretation that create and recreate these meanings”.

The nexus between organisational culture and human rights-based

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approaches is that the latter depends on an organisation adopting, 
internalising, or adapting to, new ideas, while the former plays a 
determinative role in its ability and willingness to do so.\textsuperscript{6} As an internal 
assessment by the Office of the High Commissioner for Human Rights 
explains:

“Organizations usually do not change the way they do business simply because 
someone tells them to. People do not necessarily resist change, but they do resist 
being forced to change. Individuals must see that change is needed, that the 
specified change makes a positive difference to their work and that such change can 
be sustained. They must see an improvement in the personal results of their work, 
that a network of like-minded committed people exists, who support the change 
and that the overall results for the agency are enhanced.”\textsuperscript{7}

United Nations agencies in particular have been criticised as lacking the 
“internal incentives, accountability systems, and support structures” that 
encourage institutional change.\textsuperscript{8} Consequently, deeper engagement with 
human rights-based approaches to matters involving children has, to some 
extent, been stymied by a culture that favours maintenance of the status 
quo. As the following analysis demonstrates, this criticism applies equally, 
albeit in different ways, to UNICEF and the World Bank.

\textsuperscript{6} Organisation For Economic Co-Operation And Development and World Bank, 
\textit{Integrating Human Rights into Development: Donor Approaches, Experiences, and 

\textsuperscript{7} William O’Neill and Vegard Bye, \textit{From high principles to operational practice: 
Strengthening OHCHR Capacity to Support UN Country Teams to Integrate Human Rights 
in Development Programming}, (Report Commissioned by OHCHR, March 2002) 5

\textsuperscript{8} Mac Darrow and Louise Arbour, ‘The pillar of glass: Human rights in the development 
operations of the United Nations’ (2009) \textit{American journal of international law} 446, 452.
4.3. **World Bank: Resistance to adopting a human rights-based approach**

Many World Bank research participants noted that the lack of a conducive ‘implementation environment’ made it difficult to get human rights ‘off the ground’. One official, from the legal team, lamented: “What’s our role within the Bank? It’s a drop in the bucket; we’re not in the mainstream, we’re not in the core…”

Commenting on the scrapping of a proposed institution-wide survey to gauge staff perceptions about human rights, the same official illustrated just how low a priority human rights are: “Bank-wide, they survey you on the quality of food in the cafeteria but [human rights] is not seen as important enough to pitch it to the whole Bank.”

Another official, responding to the question of how valuable or important human rights are to the World Bank, replied: “The answer is ‘not very’. It’s not really there.”

**The perception of human rights as a ‘dirty term’**

Two research participants felt that at least some Bank members and constituents are “interested [in] and sympathetic [to]” human rights, while a third stated that the Bank’s agenda with respect to human rights was changing. Nonetheless, the overwhelming conclusion, particularly amongst members of the Bank’s legal team in Washington DC was that, despite the “rebranding”, human rights remains a sensitive issue within the

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World Bank and a controversial topic amongst Board members. They noted that many staff considering human rights to be a “dirty term” – a view consistent with Sarafty’s finding that many Bank employees have been socialized to adopt a set of attitudes and beliefs about human rights and its relationship to the Bank, and “consider it taboo to discuss the topic in conversation and to include references to it in their project documents…” Management and staff alike are hesitant to openly speak about human rights, or to advocate for deeper institutional engagement with human rights-based approaches.

Consequently, some World Bank officials have adopted a circumspect strategy, applying human rights principles “clandestinely and under the radar” without directly acknowledging them as such. Illustrating this point, one senior member of the legal team recalled a project where a government asked for help in implementing a human rights project for indigenous people. Apparently, another senior World Bank official removed the term ‘human rights’ from all project documents and substituted ‘good governance’ all the way through. The project itself remained the same; it was simply reframed in more ‘acceptable’ language:

“It didn’t affect the project at all, but it was kind of obsessive, and that’s the culture we come from… It’s almost a bit doctrinaire… [Human rights] is really offside, so it takes a bit of time for people to get more comfortable talking about it.”

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15 Sarafty, ‘Measuring justice,’ above n 1, 133.
Another instructive example of the Bank’s ambivalence toward human rights is the Nordic Trust Fund, a knowledge and learning programme launched in September 2009 and aimed at developing “a more informed view among Bank staff on how human rights relates to the Bank’s core work and mission of promoting economic growth and poverty reduction”.\(^1\)

Proposed in 2006 as the Human Rights and Justice Trust Fund,\(^2\) it was reportedly renamed in order to obtain Board approval, which was withheld due to the explicit reference to human rights, its inauguration indefinitely postponed.\(^3\) Indeed, at the time interviews were conducted, in early 2008, research participants were unsure whether the initiative would proceed at all.\(^4\)

Other World Bank research participants, however, both in headquarters and in East Timor, disagreed that human rights was taboo. Instead, they framed the discourse in terms of limited human rights expertise. One senior official stated: “I think our colleagues aren’t sophisticated enough in human rights issues to actually be able to implement the rights-based approach in a way that others perhaps have, not yet anyway.”\(^5\) Another senior official, who initially suggested that the Bank’s resistance stemmed from “an irrational fear of the term ‘human rights’”, concluded that the problem is not so much that World Bank staff are against or afraid of human rights, as that many of them simply don’t think that way.\(^6\)

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\(^1\) World Bank, ‘Nordic Trust Fund Progress Report, November 2010 to October 2011’ (World Bank, no date) 32.
Non-supportive senior leadership

The Third Inter-Agency Workshop on Human Rights-Based Approaches, in 2008, noted that much of the progress to date amongst United Nations agencies has depended on the commitment and leadership of senior staff, and emphasised the need for leaders to be clear and supportive in facilitating a human rights enabling environment.\(^{25}\) Even in organisations that have formally adopted a human rights-based approach, “leaders need to invest significant time and intellectual capital in articulating the rights vision and building consensus among staff, board, and other stakeholders...”\(^{26}\) The World Bank experience confirms that these challenges are exacerbated in organisations where human rights are predominantly viewed with scepticism.\(^{27}\)

A number of respondents, all from the Bank’s legal team, stated that while there had been a brief blossoming of support for human rights during James Wolfensohn’s presidency (1995-2005), subsequent administrations had been less receptive.\(^{28}\) One official explained:

“I’m not sure that [current World Bank President Robert] Zoellick is committed to this, I think he’s – he’s a financier, very good, but in the way that he doesn’t see [human rights] as a central issue in the way that [James] Wolfensohn did.


\(^{27}\) Kirk Herbertson et al, above n 16, 9.

And [Paul] Wolfowitz didn’t, he was just interested in governance, so I think we’ve been set back a bit now.”

Research participants felt that, in this context, it would take tremendous courage to champion human rights at the World Bank, and considerable political weight to do so successfully. Indeed, according to some respondents, the current leadership was simply not in a position to advance a human rights agenda. As one senior official described:

“I think we’ve had three General Counsels in the last six years and until Roberto Dañino came [in 2003] no one was prepared to take [human rights] on… The current General Counsel [Ana Palacio] is supportive, but she is not in a position to influence the human rights agenda, as the Board is against her. I don’t know how long she will stay…”

These officials believed that pursuing a more explicit human rights policy in this environment could be counter-productive. They considered that operating in a “grey area” gave them some leeway to quietly promote human rights, but that if the issue were put to the Executive Board it faced the prospect of a formal, binding rejection: “Frankly right now we wouldn’t necessarily want to go to the Board because the reaction could be quite the opposite, which is ‘no this is not the institution we want’.”

An overwhelmingly economic mindset

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31 World Bank Official, Washington DC, 2008. (Note: Ana Palacio resigned two months after the interview was conducted, effective 15 April 2008).
The World Bank was described by many respondents – economists and non-economists alike – as “very much an economist driven institution”.\(^\text{33}\)
As scholars have observed, the hierarchical valuing of economic ways of thinking shapes the Bank’s internal culture and policy-making processes, influencing how development is defined, how success is measured, and how these goals should be pursued.\(^\text{34}\) One research participant, an anthropologist, explained that the overwhelmingly economist environment is challenging for the Bank’s non-economists, especially if they continue asserting the norms and methodologies of more qualitative disciplines:

“We operate within an intellectual culture which is not particularly understanding or sympathetic to what we do methodologically or epistemologically, because most of the people here are either trained as economists or trained into thinking as economists. And in terms of the organisational politics we don’t sit in important places. So that kind of intellectual bias is also reflected in the way that decisions are made…”\(^\text{35}\)

Another research participant, from the legal team, concurred, describing the Bank’s approach to human rights:

“The Bank is quick to come and say ‘don’t worry, we’re helping support human rights’, but the priorities and the criteria for determining the priorities are guided

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by economic thought, not human rights law.”

The dominance of economic norms was evidenced, and justified, by other research participants. One official – an economist – was unsure what adoption of a human rights-based approach would add, opining that econometrics could solve any problem in the world,\textsuperscript{37} while four others – all social scientists – argued there was no need to justify interventions in moral or legal terms because economic arguments are just as strong if not more compelling.\textsuperscript{38} Some have questioned whether this is an inherently bad tactic. MacKay, for instance, argues that it is not strictly necessary for the policies of International Financial Institutions to explicitly refer to ‘human rights’ or to specific norms: “They can and should [...] translate these norms into operational policy language suited to [their particular] activities.”\textsuperscript{39}

Conversely, legitimate concerns may be raised about whether economic language is the best medium for capturing and communicating human rights goals since other discourses “do not carry the same legal and rhetorical weight as human rights”.\textsuperscript{40} A stark example can be found in the Bank’s \textit{Children and Youth: A Framework for Action} (2005), which professes a commitment “to continuing and deepening its investments in children and youth”.\textsuperscript{41} In language more befitting of commodities and stock markets than rights-holders, the publication explains the urgency of this commitment:

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\textsuperscript{36} World Bank official, Washington DC, 2008.
\textsuperscript{37} World Bank official, East Timor, 2008.
\textsuperscript{38} Four World Bank officials, Washington DC, 2008.
\textsuperscript{40} Sarfaty, 'Measuring justice,' above n 1, 143.
“Children represent the highest leverage point for investments to build human and social capital; the earlier investment, the longer the benefits and, usually, the lower the costs. Investments in youth preserve the benefits of investments in children [and] have the added value of immediate intergenerational effects as youth become new parents. Moreover, evidence is increasingly demonstrating that the costs of not investing in youth are staggering both politically and economically.”

A 2011 briefing note by the Bank’s Children & Youth Unit reveals that little has changed on this front, with the publication stating that “Allocating sufficient public resources to child and youth development, […] is a sine qua non for a country’s development and competitiveness,” and declaring that “Since abilities and qualities built during childhood and youth largely determine their adult lives, effective investments in young people provide important returns not only to people themselves and their immediate families—but to societies as a whole.” The quotes are astounding in their dehumanisation of children, whose rights are subjected to a financial cost benefit analysis. Yet they are also valuable illustration of the Bank’s attempts to reframe human rights in a way that “resonates with the economists and economic thinking that are dominant within the institution”.

The Bank’s non-economists recognised this challenge, highlighting the

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42 Ibid 11-12. Ironically, the report recognises that their lack of formal voice leaves youth “susceptible to disruptive activities which are costly to society and economic growth”.


44 Ibid 2. See also The World Bank Children & Youth Unit, Human Development Network, 'Investing in Your Country’s Children and Youth Today: Good Policy, Smart Economics' (Volume IV, Number 1, World Bank, August 2010) 1.

45 Sarfaty, 'Measuring justice,' above n 1, 144.
difficulties involved for them in trying to advocate values like human rights in ways that fit with the Bank’s economic mindset, but without losing the core of what human rights are and represent:

“We need to be relevant to what the Bank does, but then the question [becomes] to what extent do we tailor our methods and approach and even our thinking towards the existing operational and intellectual system, or to what extent do we try to modify [that system]. It’s genuinely a difficult one because if we don’t feed into the consensus then no one will listen to us, [but] if we totally feed into the consensus we’re not adding anything new.” 46

Indeed, some research participants felt that one of the most significant barriers to promoting greater acceptance of human rights within the World Bank was that their colleagues were unlikely to be receptive unless they were “already on board”. 47

A preference for practical, evidence-based tools

When asked how human rights could gain greater acceptance in such an economist driven institution, research participants cited a preference amongst World Bank staff for practical, evidence-based tools. One senior official emphasised the importance of demonstrating how a human rights framework could advance the World Bank’s mandate:

“We pride ourselves on being a very technocratic institution, so I think that getting some of the evidence out on when human rights is complementary, when it’s not, when can it help us meet our mandate, when does it not, would just be enormously

46 World Bank official, DC, 2008.
47 World Bank official, DC, 2008.
Another official stressed the need for human rights norms, standards and principles to be distilled into predictable, concrete terms that could effectively guiding practice:

“There is a general awareness of human rights, but how they translate into practice or how that’s useful to people, people don’t necessarily know, they want tools, checklists, matrices, and that’s all fair because these are very practical people.”

Some of the empirical evidence linking respect for human rights with strong economic performance has been in existence for almost two decades. For example, research conducted in 1997 by the World Bank Institute found that “the extent of a country’s civil liberties has a substantial impact on the successful implementation of government investment projects financed by the World Bank”. The study revealed that the Bank’s investments in countries where rights such as freedom of speech and freedom of association were more strongly protected had a significantly higher economic rate of return – between eight and 22 percentage points – than in countries with the weakest protections.

While the study examined the role of human rights in improving project returns, it is notable that the three authors, two of them World Bank officials, concluded by pointing out “the most important aspects of civil

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51 Ibid 219.
liberties and political regimes go beyond whether they promote or discourage economic outcomes”.\(^{52}\) The final sentence of the study provides an important reminder that engaging in human rights-based approaches is intrinsically worthwhile: “Although we have focused on the instrumental value, we want to emphasise that we believe government respect for civil liberties is valuable regardless of its instrumental economic value.”\(^{53}\)

**The Nordic Trust Fund**

A more recent attempt to explore the evidence base for greater engagement with human rights-based approaches is the Nordic Trust Fund (NTF), introduced in chapter three. The NTF expressly addresses some of the same questions raised by World Bank research participants, such as “how human rights could be applied in their work… how the core human rights treaties could be relevant to their work… [and] how human rights can help provide better concrete answers to the hard questions facing development practitioners about how to set priorities and ‘what actually works’”.\(^{54}\) Annual Progress Reports throughout its four-year operational period indicated that Bank employees remained “interested in learning how human rights relate to both their particular work as well as the Bank’s overall work”.\(^{55}\) They also found that learning took place “mainly through staff exploring the overlap between good development practices and human rights principles in various sector contexts”,\(^{56}\) confirming research participants’ suggestions that greater acceptance of the idea human rights-
based approaches at the World Bank would require evidential analysis.

The NTF faces some significant limitations. First, its engagement with human rights remains instrumental, and focused on establishing a business case for human rights integration. Yet human rights, and the concept of human dignity they seek to uphold, are not easily monetised: “It is difficult, for example, to place an economic value on a person’s right to life, health, food, or culture.” Moreover, empirical evidence demonstrating the instrumental value of human rights-based approaches cannot and should not displace their normative value. As Darrow and Arbour note, “we should be careful about yielding uncritically to the search for the added value of human rights for development, as if human rights were mere inputs or tools that policymakers and development workers could feel free to use or discard at their discretion, or, worse still, presumptive or accidental outputs of development…”

Second, very few of the Bank’s more than 12,000 employees worldwide have actually been exposed to the NTF. According to the 2013 Progress Report, an internal survey conducted earlier that year found that, after four years of operation, only “45 per cent of staff working in Washington and 24 per cent of country office staff had heard about the NTF. Twelve per cent of respondents had participated in at least one NTF activity and 6 per cent reported that they worked on/with a team that had received a NTF grant”. The raw figures are even less heartening, with previous Progress Reports indicating that, in the 2009-2010 period, around 200 staff participated in

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57 Kirk Herbertson et al, above n 16, 13.
58 Darrow and Arbour, above n 8, 494.
59 World Bank, Corporate Responsibility <https://crinfo.worldbank.org/wbcrinfo/node/19>
60 World Bank, ‘Nordic Trust Fund Progress Report, January to December 2013’, above n 54, 16. Note however that there was no mention of either the sample size or the response rate.
training and capacity-building activities; in the 2010-2011 period, an estimated 500 staff were directly reached through NTF-sponsored activities, which included 50 studies and about 40 workshops delivered across the World Bank Group; while in 2012, “a ‘core’ group of about 200 Bank staff benefitted from extensive human rights on-the-job learning, mainly staff in the grant supported teams, and about 1,000 Bank staff attended at least one of the 75 NTF events organized [that year].”

These limitations notwithstanding, the NTF’s potential to challenge the prevailing organisational culture should not be discounted. Almost a decade ago, Alston suggested that, with regard to strengthening of the human rights-based approach, “incremental change is far more likely to succeed than is an approach assuming that a paradigm shift can be achieved almost overnight”. A gradualist approach, he maintained, “[would] be more easily incorporated into existing development paradigms, [would] be less threatening and thus meet less resistance, [would] be better able to emphasize the benefits of taking some aspects of human rights on board, and [would be] better able to be monitored and evaluated” than a demand for the adoption of a fundamentally different methodology. In the case of the World Bank’s experience with the NTF, these predictions appear to be on course.

The 2013 Progress Report cited an independent review of the NTF, which

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61 World Bank, 'Nordic Trust Fund Progress Report, September 2009 – October 2010' (World Bank, no date) 3
62 World Bank, 'Nordic Trust Fund Progress Report, November 2010 – October 2011' (World Bank, no date) 2, 6
63 World Bank, 'Nordic Trust Fund Progress Report, November 2011–December 2012' (World Bank, no date) 2
65 Ibid 808.
concluded that the fund “has worked well [...] and is relevant for the future work of the Bank”. 66 Significantly, the Report acknowledged that World Bank officials still tend to draw on human rights principles in isolation and with limited regard for the international human rights framework, and suggested that, if the NTF were extended, its “grants and events should be more focused on human rights conventions, instruments, and organizations” 67:

“A future NTF should build on the ongoing adoption of human rights ideas and concepts into good development practice, and strengthen and guide that process through better staff knowledge of the formal architecture of human rights.” 68

Should this occur, it could potentially increase appreciation amongst World Bank employees of the normative value of human rights-based approaches. At minimum, it will provide opportunities to identify further causative linkages between engaging in human rights-based approaches and better development outcomes. As Uvin notes, “major change always starts small, and even rhetorical gains sometimes turn out to be the snowballs that set in motion fresh avalanches.” 69 The World Bank’s current attitude toward human rights is to appropriate and incorporate into its policy those norms that are empirically demonstrated to enhance development outcomes. Although this instrumental strategy overlooks the intrinsic value of human rights, it has resulted in an increasing number of human rights standards, principles and processes being brought within the Bank’s ambit as evidence of their effectiveness accrues. Coupled with a second NTF phase whose

66 World Bank, ‘Nordic Trust Fund Progress Report, January to December 2013’ (World Bank, no date), above n 54, 34.
67 Ibid 35.
68 Ibid.
curriculum places greater emphasis on the international human rights legal framework, this approach may ultimately prove more robust than UNICEF’s more principled stance, which has to date paid insufficient attention to the practical aspects of implementing human rights-based approaches to matters involving children.

4.4. UNICEF: Difficulties in implementing a human rights-based approach

The Third Inter-Agency Workshop on Human Rights-Based Approaches emphasised that while many organizations had adopted formal commitments to human rights-based programming, “effective and sustainable capacity building efforts would require a more institutionalised approach […] as well as dedicated capacities and resources that are available within the UN system on a continuing basis”. UNICEF research participants noted that, despite the organisation’s formal adoption of a human rights-based approach, implementation was in part hindered by weak institutional arrangements. Some of the particular challenges UNICEF faces in engaging more deeply with a human rights-based approach to matters involving children include ensuring that staff members, particularly those in the country offices, are adequately trained, resourced, incentivised and supported to implement the commitments expressed in UNICEF’s policies and guidelines.

Inadequate staff training

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All UNICEF staff members in East Timor have received training in UNICEF’s Policies, Practices and Procedures Manual (the PPPM) along with relevant Inter-Agency Guidelines;\textsuperscript{71} they also receive mandatory training in human rights-based programming.\textsuperscript{72} The training schedule, however, appears to be quite rigid. Unless new standards emerge, all trainings occur once only.\textsuperscript{73} Moreover, new staff members reportedly do not receive training in child rights or human rights-based approaches upon commencement of employment with UNICEF – they must wait for the next scheduled training and are informed that, in the interim, all materials are available on the intranet and should be studied as required.\textsuperscript{74}

Consequently, UNICEF research participants based in East Timor felt that many staff – particularly those working in administrative areas – were not familiar enough with the concepts underlying human rights-based approaches and the Convention on the Rights of the Child, and did not fully understand the applicability of these frameworks and principles to their work.\textsuperscript{75} They also noted that the principles associated with a human rights-based approach were more likely to be considered relevant – and thus more likely to be implemented – by those working in child protection, education and youth participation than in the other programme sectors (such as health and nutrition, water, sanitation and hygiene) or in the support departments (such as administration and logistics).\textsuperscript{76}


\textsuperscript{72} UNICEF official, East Timor, 2009.

\textsuperscript{73} UNICEF official, East Timor, 2009.

\textsuperscript{74} UNICEF official, East Timor, 2009.

\textsuperscript{75} Three UNICEF officials, East Timor, 2009.

\textsuperscript{76} Two UNICEF officials, East Timor, 2009.
A belief that all UNICEF activities are inherently human rights-based

Interestingly, although they felt that the training provided was insufficient, many research participants also expressed a belief that, because UNICEF is officially constituted as a human rights-based organization, and because UNICEF’s projects aim exclusively at fulfilling children’s rights, all of UNICEF’s projects were *ipso facto* human rights-based and automatically furthered the rights of children. This was regarded as true whether or not the project was described in human rights terms. One East Timor-based official stated that all UNICEF projects are inherently human rights-based, even if they not explicitly expressed as such, because “that’s the nature of the work.” Another official further explained that people who work with UNICEF are ‘as of fact’ child rights oriented, and that this is automatically apparent in their work, regardless of whether it is consciously considered:

“For example, for one project [the objective] can be […] providing children with access to social service and protection, and that is a direct right […] in terms of [a child’s rights to] protection from exploitation and harm and abuse… I don’t think it’s probably explicit in terms of people thinking I’m working in a human rights-based approach or a child rights-based approach, but I think because of the nature of this work that’s how it turns out.”

This circular reasoning echoes the pronouncement, made 15 years earlier by then Director of Evaluation, Policy and Planning, Ms. Marta Santos Pais that, “for UNICEF, unlike other UN bodies, children’s rights are not just one concern among many. They represent the essential value of UNICEF’s

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mandate and, in fact, of the identity of the organization itself.”80 It is also indicative of the strong internalisation of organisational discourse unsupported by any deeper reflection about what that discourse actually means. For instance, when asked what the key elements of a human rights-based approach are, and how adopting a human rights-based approach affected the design and delivery of UNICEF projects, one of the official cited simply reiterated a belief in the value of these concepts rather than providing any definition or example of their use. The official also equivocated between rights being an implicit part of UNICEF’s work, and questioning the extent to which they are observed within the organisation:

“How it should work maybe is [...] that children’s rights and human rights should be both the end point and kind of considered at each step along the way. In practice how that… I know it’s definitely the end point and I think that’s kind of recognized by everyone, but whether it’s considered in every step along the way is maybe more up in the air.” 81

Many research participants assumed that because this is UNICEF – an organisation universally associated with and known for its child rights advocacy – all projects inevitably promoted children’s rights, rights-based approaches and psychosocial support. Upon further discussion, however, it became clear that while participants were extremely familiar with the terminology, they also found it difficult to explain what the terms mean or how they influenced programming: the words were used, but the concepts were taken for granted. As one official commented, staff members had adopted the language of rights, and were “strong on knowing the text of human rights and children’s rights,” but there was “not as much

understanding of human rights-based approaches” and what they actually mean in practice.  

Resource constraints: time, finances and staffing

All UNICEF research participants – both those in New York and those in East Timor – commented that UNICEF struggled to meet organisational demands with inadequate resources, and that this in turn affected the organisation’s ability to effectively implement a human rights-based approach. These findings are consistent with the conclusions of UNICEF’s 2012 Global Evaluation, which noted three aspects that impeded UNICEF’s application of a human rights-based approach: 

- **time constraints**, which placed staff “under pressure to deliver results quickly, [limiting] the time available for the breadth of analysis, data collection and assessment that [they] felt to be necessary” under human rights-based programming;

- **financial pressure**, with insufficient funds available “to carry out the breadth of analysis, assessment and participation that may be warranted for a fully rights-based programme”; and

- **donor priority on aid effectiveness**, since most donors “are more interested in how the money is being spent rather than in how human rights standards and principles are being applied in the programming that it is funding”. 

Research participants in New York explained that UNICEF headquarters manages approximately 150 country offices, each of which produces and reports against various work plans. For them, the sheer number of country offices and projects relative to the few staff at headquarters makes it

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difficult to ensure that all of the organisation’s policies are consistently implemented, and that field staff are adequately supported. One official explained: “It takes such a long time to advocate on a particular issue, so when you’ve finally mobilised the international community on that issue you realise ‘Oh my goodness, there’s all these other things that we’re dropping’…” Another noted: “It’s difficult to see sometimes how you could actually support staff to do their work better when there are so many staff offices, and you are one person…”

The sense of having limited time and resources to meet organisational demands was, for some respondents, exacerbated by having taken on additional responsibilities to fill staffing gaps: “There are a number of things that should be being pursued at a higher level than mine, but because of the burdens on the level up from mine I’m being pulled into doing them.” These additional tasks made it more difficult for staff to invest the time needed in supporting their colleagues in the field. While respondents in New York highlighted the lack of staff to oversee policy implementation, respondents in East Timor focused on the impacts at the project level. They uniformly felt that UNICEF was overly bureaucratic, and complained that disproportionate time was spent on internal administrative issues, often at the expense of their programs:

“In UNICEF we have a lot of mandatory requirements to fulfil, a lot of bureaucracy. We tick a box saying we have done this, we have done that, but it doesn’t really have function or make any difference to the community. It just costs

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“us a lot of time.”

One official explained that UNICEF staff members are obliged to visit the field two and a half days per month, in order to ascertain first-hand what the community is thinking and how effective UNICEF programs are. Yet because of the numerous committee meetings, planning meetings, program meetings, and report deadlines, this target was rarely met. The official was concerned that the prioritisation of internal meetings and reports over community engagement was compromising UNICEF’s abilities to effectively engage with rights-holders:

“UNICEF staff need to work more in the field [...] to really feel that what we are doing really touches the community… If we have less meetings and do more in the field, spend more time with the community, maybe the results will be better than if we keep spending time in front of a computer.”

Yet, despite their misgivings, staff felt unable to adjust their workloads in favour of greater interaction with local communities, as the demands did not come from the country office, but were determined at the international headquarters. This was an interesting point of difference between respondents based in East Timor, and those working in headquarters. It also merits further consideration by UNICEF as a whole, in terms of the consequences for their engagement with human rights-based approaches to matters involving children – accepting that the process takes time and adjusting expectations and work schedules accordingly, continuing with a superficial compliance-based model, or abandoning the endeavour entirely.

89 Two UNICEF officials, East Timor, 2009.
Officials at UNICEF’s international headquarters maintained that, despite UNICEF’s official commitments to children’s rights and human rights-based programming, what happens in country offices ultimately depends on the skills, beliefs, and priorities of the people there. As one official explained: “Even if we have a policy, it’s a big hit and miss in the extent to which it is implemented on the ground…” Another official, speaking about UNICEF’s commitment to a human rights-based approach, described the prevention of “policy evaporation” as a constant challenge:

“If you look at the top end, at high level planning documents, they talk the talk, [but] you get down to where the money is spent [and] there’s no clear reflection of what was put at the top.”

Many respondents, however, felt that their abilities to enforce greater compliance were constrained due to UNICEF’s decentralised structure.

“UNICEF is enormously decentralised, so if you happen to be a good old school person who thinks rights is a load of nonsense with no practical benefit and simply distracts people, and you’re sitting in a country office, wherever that might be, there’s not a lot to stop you ignoring it…”

At the same time, officials at headquarters emphasised a commitment to staying grounded in the experiences of staff in UNICEF’s country offices,

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because “often some of the best things are emerging from the ground, from the practice”.\textsuperscript{97} Consequently, in their opinions, many of UNICEF policies are driven by the field rather than by headquarters:

“We respond to their priorities and try to push them forward. We’re a very decentralised organization and that makes it easier for us to do that, just to draw on best practices and what people [in the field] feel are the priority and then bring it up to a higher level…”\textsuperscript{98}

The sentiment at UNICEF headquarters, however, stands in stark contrast to the perceptions of UNICEF field staff, all of whom cited a reluctance to convey their suggestions or concerns to headquarters because they believed UNICEF’s traditional way of operating was for strategies and reforms to be delivered from the senior level.\textsuperscript{99} One respondent, a senior consultant based in East Timor, agreed, explaining that the further down on the ground people are, the more they are locked in to delivery or programs:

“They don’t have the luxury of devising their own response to the situation, as they are so stretched. There are also large disincentives to following one’s own ideas – if it doesn’t work, you are in trouble. If you take the prevailing approach you can’t be blamed for any failures.”\textsuperscript{100}

Perhaps of greater concern, however, was the tendency of local staff to under-report human rights problems to headquarters, in order to “avoid rocking the boat”.\textsuperscript{101} One senior official, based in East Timor, commented

\textsuperscript{97} UNICEF official, New York, 2008.
\textsuperscript{98} UNICEF official, New York, 2008.
\textsuperscript{100} UNICEF official, East Timor, 2009.
that colleagues are afraid to write honest assessments of their projects, especially in relation to problems and limitations, because they believe it will affect their funding; instead, they tell headquarters what they think headquarters wants to hear.\textsuperscript{102} This fear is bolstered by a perception that, for headquarters, the account matters more than the actual outcome:

\textit{“International headquarters is only interested in receiving sugar-coated reports. So long as you write a good report and deliver it to your counterparts, headquarters don’t care about the results in the field.”}\textsuperscript{103}

In response to this perceived pressure to present their activities in a good light in reports to headquarters, UNICEF research participants in East Timor sometimes over-stated their achievements in internal and public communications.\textsuperscript{104} The UNICEF organised International Children’s Day celebration of 2008 provides a poignant example. One expatriate described how children sat all day on the ground in the hot sun while the ‘important people’ were seated on chairs under shade. There was a heavy police presence, and many officers were physically and verbally abusing the children to “keep them under control”. The mood worsened when the Prime Minister bought tangerines from child street vendors and distributed them to the children who had gathered for the celebration. Fights erupted as young East Timorese vied for the tangerines. Police moved in, screaming and pointing guns at the children, smacking them with backhands, batons and rifle butts. Acknowledged locally as a “debacle”, the event was nonetheless officially documented as “a great success. There was lots of child participation; it was a wonderful celebration”\textsuperscript{105}.

\begin{flushleft}
\textsuperscript{102} UNICEF official, East Timor, 2009.  \\
\textsuperscript{103} UNICEF official, East Timor, 2009.  \\
\textsuperscript{104} UNICEF official, East Timor, 2008; UNICEF official, East Timor, 2009.  \\
\textsuperscript{105} UNICEF official, East Timor, 2008.
\end{flushleft}
The situation described by UNICEF staff in East Timor is consistent with the findings of a series of evaluations, dating from the early 2000s, which indicated that although all UNICEF country offices acknowledged the human rights-based approach as their operational framework and explicitly state that their objectives are directed toward the realisation of children’s rights, few were genuinely human rights-based in their actions.\(^{106}\) A more recent 2010 report noted “there has always been a great discrepancy between UNICEF Country Offices own assessment about how far they have come in adopting a [Human Rights-Based Approach] and the reality on the ground…”\(^{107}\), suggesting minimal change over the subsequent decade, while the 2012 Global Evaluation omitted any mention of the issue.

It is unclear whether every exaggerated account of adherence to a human rights-based approach reflects the genuinely held beliefs of the authors or is instead a conscious misrepresentation aimed at assuaging headquarters. What is clear is that the strategy of “sugar-coating reports” decouples human rights-based approaches from their normative grounding in human dignity, resulting in compliance models where implementation is reduced to a checklist devoid of substantive content. This phenomenon of ‘report fetishization’ – a preoccupation with reports as ends-in-themselves at the

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expense of the veracity of their content or their wider impacts – evidences insufficient consideration to how information from country offices is “communicated to, received by, and acted on by others”. More importantly, sanitised accounts deprive UNICEF of the opportunity to learn from experience, and to examine the institutional and operational barriers it faces in implementing human rights-based approaches to matters involving children.

4.5. Conclusions

This chapter has examined some of the institutional factors that influence institutional engagement with human rights-based approaches to matters involving children.

The first part of the chapter provided a brief overview of organisational culture, which is comprised not only the formal goals of the organisation, but also of the implicit (and often unspoken) beliefs, expectations, values, ideologies, rules, norms and practices that foster organisational cohesion. The research confirms that these considerations do indeed influence how UNICEF and World Bank officials engage with human rights-based approaches, and the extent to which they feel comfortable doing so.

The second part of this chapter considered the role of organisational culture in shaping attitudes toward human rights at the World Bank. This issue was raised by a number of research participants, who noted how the dominant economic mindset, combined with a fear of human rights and an absence of strong leadership to drive the agenda forward, have contributed to the

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marginalisation of human rights within the institution. Consequently, there is a prevailing culture of scepticism toward explicit human rights language, and resistance to the idea of human rights as a normative (as opposed to instrumental) concept. At the same time, the Bank’s preference for practical, evidence-based tools has contributed to a growing business case for deeper engagement with human rights-based approaches.

The third part of this chapter focused on UNICEF, whose organisational culture has propagated a belief amongst some staff that, because UNICEF has adopted a human rights-based approach, everything they do is by definition human rights-based. The research reveals that this belief is not always reflected in their day-to-day operations, in part due to insufficient staff training, limited resources, and a dysfunctional relationship between headquarters and country offices. These observations lead to another key finding: that formal adoption by an organisation of a human rights-based approach does not necessarily ensure that its culture is human rights-based approach enabling.

UNICEF’s experience confirms that human rights-based approaches are complex undertakings that “cannot simply be decreed and implemented.” Indeed, while statements of principle and commitment are vital, they “will achieve little without significant organisational backing to translate them into meaningful change”. Instead, organisations that are serious about implementing a human rights-based approach must “fundamentally rethink every aspect of their operations” and radically change their internal

109 Offenheiser and Holcombe, above n 25, 269, 274.
management systems.\textsuperscript{111} The data suggests that, at minimum, these efforts must include adequate investment in staff technical skills, the allocation of sufficient human and financial resources, and a facilitative relationship between headquarters and country offices.

CHAPTER FIVE: The enabling environment: Operational factors

5.1. Introduction

Chapter five continues the investigation of the enabling environment in influencing organisational engagement with human rights-based approaches to matters involving children at UNICEF and the World Bank. Yet unlike chapter four, which focused on internal factors such as organisational culture, chapter five considers operational factors related to the external development context.

Both UNICEF and the World Bank research participants identified the country context as a major determinant of the success of their interventions. In 2008-2009, when research for this thesis was conducted, decades of human rights violations and instability had left East Timor with deep economic, social and emotional scars. Having achieved independence less than a decade earlier, the nation was still transitioning from extreme poverty and violence towards peace building and development. In this context, research participants cited three main factors that limited the range and parameters of choices available to them in implementing human rights-based approaches to matters involving children: first, social dynamics and expectations deriving from the legacy of trauma; second, cultural attitudes toward children’s rights; and third, the weak human resource capacities of local stakeholders, including national staff, government counterparts, and local partners.
5.2. Why context matters

By encouraging analysis based on human rights norms, standards and principles, human rights-based approaches are said to direct attention to intra-state power dynamics, exposing the hidden priorities and structures behind violations, and providing aggrieved rights-holders with a basis for challenging the conditions that create and tolerate them.¹ Human rights make it clear that instances of extreme poverty, malnutrition, torture and arbitrary detention “are neither inevitable nor natural, but arise from deliberate decisions and policies”.² Nonetheless, identifying the immediate and underlying reasons for the non-realisation of rights is a controversial, political, and context-specific process.

Most human rights violations are subject to diverse and heavily contested causal explanations.³ Additionally, many countries face obstacles including social stratification, tribalism, wide inequality in the wealth and income distribution, demographic pressures, material and human capital scarcity, 

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² Jochnick, Ibid 60.

and patriarchal socio-political institutions. These factors are not only potential causes of the non-realisation of human rights; they arguably also “limit the range and parameters of choices available to the local policy makers”. Human rights “exist in a complex network of relationships involving entitlements and responsibilities”. In order to fulfil their human rights obligations, duty bearers must not only accept their responsibilities to carry out this obligation; they must also “have the authority to carry out the duty, and have access to and control of the necessary resources”. Similarly, rights-holders must be willing and able to claim their rights.

Human rights-based approaches are said to empower rights-holders by enabling those who may otherwise be perceived as victims or as beneficiaries to “know and present themselves as rightful and dignified people who can make just demands of power and spell out the duties of power in terms of moral and political goods”. There is a danger, however, in over-stating these claims to social transformation, particularly in light of the manifold challenges poor and marginalised people face in seeking to enjoy their rights or secure redress for violations. Knowledge of human

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4 Philip Alston and Mary Robinson, 'The Challenges of Ensuring the Mutuality of Human Rights and Development Endeavours' in Alston and Robinson, Towards mutual reinforcement, above n 1, who note at 36 that in large areas of the world not only are many people poor, but their governments lack resources as well.

5 Monshipouri, above n 3, 25.


rights is an important pre-requisite to claiming one’s rights, yet even those who know about their human rights may lack the financial resources, the time, the means of travel, the relative social power or the confidence in the system necessary to pursue effective enforcement. As discussed later in this chapter, this is especially true for children.

Such observations do not constitute a rejection of human rights analyses, but rather a call for acknowledgement that human rights-based approaches may not provide easy solutions to contentious, deeply ingrained problems. As one UNICEF official observed:

“There are problems with the human rights-based approach story of simplifying and codifying social interactions and relationships. It is not the case that you can feed your program into the human rights-based approach sausage machine and it will come out in neatly packaged human rights-based approach sausages. It doesn’t work that way.”

Another UNICEF official concurred, explaining that it was impossible to have a coherent methodology for implementing human rights-based approaches since “the social dynamics, the issues and the local capacities are contextually dependent”, and different in every country. Consequently,

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despite guiding organisational documents such as the Executive Directive, the Policy Programme and Procedures Manual, and the Medium Term Strategic Plans emanating from headquarters, each UNICEF country office faces a unique set of constraints and opportunities related to “the peculiarities of circumstances on the ground [and] the peculiarities of the relationship with government” that influences what it is able to do.\textsuperscript{13} This was confirmed in the 2012 Global Evaluation, which found that interviewed staff “consistently referred to country context issues as being either enabling or constraining elements for the successful or unsuccessful application of [human rights-based approach] principles”.\textsuperscript{14}

5.3. Implementing human rights-based approaches in East Timor

In 2008-2009, when field research for this thesis was conducted, República Democrática de Timor Leste (East Timor) was a nation transitioning from extreme poverty and violence towards peace building and development.\textsuperscript{15} East Timor was ranked 162 out of 182 countries in the Human Development Index, making it one of the poorest countries in the world, and the poorest in the Asia Pacific region.\textsuperscript{16} Approximately 40 per cent of the population was living below the national poverty line of $0.55 per day.\textsuperscript{17}

\textsuperscript{13} UNICEF official, New York, 2008.
Thirty-three per cent of persons aged 15 to 64 were unemployed, and of those who were working, 63 per cent were living on less than $1.25 per day.\textsuperscript{18} Because of the high birth rate and a relatively low life expectancy, East Timor’s population is exceptionally young population.\textsuperscript{19} One in five East Timorese were under 5 years of age, and 54 per cent under 18 years of age.\textsuperscript{20} Together, children and youth (persons under 29 years of age) comprised some 77 per cent of East Timor’s 1,000,000 citizens.\textsuperscript{21}

East Timor achieved statehood on 20 May 2002, following a hard fought struggle against four centuries of Portuguese colonisation, a three-year period of Japanese occupation during World War II, and 24 years of brutal Indonesian rule.\textsuperscript{22} Its early years of independence were beset by a series of political, security and humanitarian crises, from which the country, and its citizens, were still recovering. Indeed, the United Nations Development Assistance Framework for East Timor (2009-2013) characterised human security as “fragile, with chronic vulnerabilities not only to conflict between communities and individuals, but also to poverty, malnutrition, unsustainable livelihoods, human rights abuses, poor health, and recurrent natural disasters”.\textsuperscript{23}

\textit{The political context:}

\textsuperscript{21} Timor-Leste National Statistics Directorate, Ibid 12
On 7 December 1975, nine days after East Timor unilaterally declared independence, Indonesia illegally invaded and annexed East Timor. The ensuing years were characterised by extreme human rights abuses, including rape, torture, abduction, beatings, destruction of crops, forced flight and migration, forced military service, and denial of reproductive freedoms. Up to 200,000 East Timorese – one-third of the pre-invasion population – were killed in summary executions and public massacres, including the infamous 1991 Santa Cruz Massacre, or were forcibly disappeared. Renewed international attention on the situation in East Timor led to an agreement with Indonesia for the East Timorese to hold a “popular consultation” to determine the nation’s future: autonomy within Indonesia or full independence.

The ballot was held on 30 August 1999, with a clear majority of East Timorese – 78.5 per cent of the electorate – rejected greater autonomy in favour of national sovereignty. Within hours of the announcement of results, the Indonesian military and pro-Indonesia militias launched an orchestrated campaign of violent retribution across the country. Between 1,000 and 2,000 pro-independence supporters were killed, and more than half of the population displaced due to mass deportation, forced dislocation, abduction and attempts to avoid the rampant murders, tortures, and sexual

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assaults. Approximately three-quarters of homes and private property were destroyed, together with an estimated 70 per cent of essential infrastructure, including roads, bridges, utilities and telecommunications. Additionally, around 90 per cent of schools and 75 per cent of health care facilities were ruined, many of them burnt to the ground.

During the first years of statehood, amidst the celebrations, social and political divisions were intensifying, and frustrations were building due to “widespread, and in some areas deepening, poverty and the marked failure of independence to improve material life. The high rates of unemployment, limited access to education, and sense of hopelessness about the future, particularly amongst male youth, began manifesting in increasing clashes between martial arts groups, gang warfare, land and property disputes, and the re-emergence of political rivalries from the pre-1999 resistance movement. Feelings of discontent and allegations of favouritism and corruption amongst former resistance leaders and their followers, many of who were left feeling excluded and disenfranchised in the allocation of limited resources in the state building process, compounded these tensions. These sentiments also spread through nation’s defence and security institutions, which were comprised

29 Ibid 6
35 Scambary, above n 34, 268.
predominantly of demobilized resistance fighters.\footnote{Ibid 268.} 

By February 2006, escalating tensions within the *Falintil-Forças de Defesa de Timor Leste* (F-FDTL), East Timor’s Armed Forces, sparked a major political and humanitarian crisis. Almost 600 soldiers (out of a total force of 1,500) from the western part of East Timor abandoned their posts, alleging mismanagement and discrimination by the military leadership, who came predominantly from the country’s east.\footnote{Report of the Independent Special Commission of Inquiry for Timor-Leste, (UN SCOR, UN Doc S/2006/822, 18 October 2006, Annex, 2006) 33-34.} This discord mirrored the deepening social and political divisions, and there were suggestions that some members of government exploited the soldiers’ grievances to advance their own agendas.\footnote{Ibid 88-90.} When the soldiers were dismissed in mid-March, these factors coalesced to plunge the fledgling nation into chaos.\footnote{Ibid 35.} Throughout April and May, the country was beset by roving armed gangs; street violence; gunfights between deserters, military and police; the large-scale destruction of homes and businesses; widespread looting; and the killing of civilians, including a family of six, four of them children, burned alive in their home.\footnote{Ibid 40-87.}

Although public order had been largely restored by mid-June, the political and humanitarian crises would take years to resolve. Approximately fifteen per cent of the population (150,000 people) had been displaced by the extensive property damage,\footnote{Ibid 101.} and they spent the next three years in makeshift emergency accommodation, entirely dependent on government

\footnote{36 Ibid 268.} 
\footnote{38 Ibid 88-90.} 
\footnote{39 Ibid 35.} 
\footnote{40 Ibid 40-87.} 
\footnote{41 Ibid 101.}
and international aid. Many East Timorese were still traumatised by the extreme violence they experienced under Indonesian rule, and mourning the loss of family members murdered in the lead-up to and aftermath of the 1999 public consultation. Now they had another series of crises from which to recover. Against this backdrop, research participants based in East Timor cited three main challenges to implementing human rights-based approaches: first, the legacy of the country’s violent past; second, local attitudes toward children; and third, weak national human resource capacities. These factors are of particular relevance to human rights-based approaches to matters involving children, since “both the formal politics of a town, province, country or region and the informal politics of families, schools and neighbourhoods profoundly affect children’s ability to realise their rights”.

The social context: A legacy of trauma

Recognising and addressing the impacts of trauma

All East Timor-based research participants, from UNICEF and the World Bank, believed that the decades of oppression, abuse, destruction and wilful

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44 Joan Duncan and Laura Arntson, Children In Crisis: Good Practices In Evaluating Psychosocial Programming (Save the Children Federation, Inc, 2004) 5; Richard Curtain, Crisis in Timor Leste: Looking beyond the surface reality for causes and solutions (State Society and Governance in Melanesia Project, Division of Pacific and Asian History, Research School for Pacific and Asian Studies, The Australian National University, 2006) 4.
neglect had had profound social and psychological impacts. They identified the period of Indonesian occupation as especially damaging, stating that it had adversely affected people’s psychosocial wellbeing, disrupted social relationships, and embedded a present-day culture of violence. These conclusions are supported by studies conducted in the aftermath of the 1999 popular consultation.

A national survey in 2000 revealed that virtually every East Timorese citizen (97%) had experienced at least one traumatic event during the Indonesian period. The five most common traumatic events were: direct exposure to a combat situation (76%), lack of shelter (64%), ill health with no access to medical care (60%), torture (57%) and death of a loved one. Thirty-one per cent respondents reported death of a father, 24 per cent reported death of a mother, and 14 per cent reported death of a spouse. Twenty-two per cent of respondents recounted that their children had been separated from the family, injured and/or assaulted; an additional 12 per cent stated that their children had been killed. Overall, 22 per cent of respondents had directly witnessed the murder of a family member or friend. Twenty per cent of respondents thought they would never recover from these experiences, while a further 40 per cent felt they could only recover with specialist support.

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46 UNICEF official, East Timor, 2009; World Bank official, East Timor, 2008
48 Ibid 1763.
49 Ibid 1763.
50 Ibid 1763. Additionally, a similar study conducted in 2004 found that 36.2% of respondents had experienced the disappearance of a family member, and 12.4% had witnessed the murder of a stranger. See D. Silove et al, 'Social and trauma-related pathways leading to psychological distress and functional limitations four years after the humanitarian emergency in Timor-Leste' (2010) 23(1) Journal of traumatic stress 151, 155.
51 Modvig et al, above n 47, 1763.
The Final Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR), released in 2006, concluded: “trauma is widespread among East Timorese who grew up under the Indonesian occupation.”\(^{52}\) The Report also found that the incidence of trauma amongst those recruited by the pro-Indonesian militia – who were involved in the commission of grave human rights violations including killings, physical assault and rape as well as in the widespread destruction of property\(^{53}\) – to be more acute, “due not only to their exposure to extreme violence, but also to the psychological impact of forced recruitment, divided loyalties and the shame of ending up on the wrong side”\(^{54}\).

One senior World Bank observed that for most East Timorese, their entire lives had, until very recently, been characterized by the struggle for independence. The official felt that many were struggling to come to terms with the past and reconcile it with the present:

“For many of the generations in the country, reality is occupation, reality is fighting for your freedom and fighting for your rights and fighting for your culture and nation… A lot of people are going to be tormented by war they have seen which they shouldn’t, things in which they have participated and possibly they shouldn’t have…”\(^{55}\)

A UNICEF official, who had worked in East Timor for more than a decade, described the Indonesian period and its violent aftermath as having created


\(^{53}\) Ibid 10.

\(^{54}\) Ibid 10.

\(^{55}\) World Bank official, East Timor, 2008.
“deep psychosocial problems” for adults and children alike.\textsuperscript{56} The official was extremely concerned about the inter-generational transmission of trauma, since for many East Timorese children, violence was a normal part of life.\textsuperscript{57} This was apparent not only during times of conflict, but manifested every day in the high rates of gender-based violence\textsuperscript{58} and the widespread use of corporal punishment.\textsuperscript{59}

The official believed that people’s repeated exposure to violence under Indonesian rule and in the early years of statehood had triggered a negative feedback loop that threatened to affect the next generation as well:

\begin{quote}
\textquote{The whole of your life it just happens, all this violence. At home you face violence, you see your parents, they… all these things at home. And then if you go to school your teacher will beat you, and then you and your friends beat each other. One day if you’re married you will do the same things to your family because these things are already in your mind. You get used to this. You live in that kind of}
\end{quote}

\textsuperscript{56} UNICEF official, East Timor, 2008.

\textsuperscript{57} UNICEF official, East Timor, 2008.

\textsuperscript{58} UN Integrated Mission in Timor-Leste, \textit{The security sector and access to justice 1 September 2007 – 30 June 2008} (2008) 41-42; Timor-Leste Armed Violence Assessment, \textit{After the Guns Fall Silent: Sexual and Gender-based Violence in Timor-Leste} (TLAVA, Issue Brief Number 5, 2009) 2; Susan Harris Rimmer, 'Sexual and Gender-based Violence' in Robert Muggah and Emile LeBrun (eds), \textit{Timor-Leste Armed Violence Assessment Final Report} (Small Arms Survey, Graduate Institute of International and Development Studies, 2010) 37-47, 39. For example, a 2009-2010 \textit{Demographic and Health Survey} revealed that approximately 38 per cent of women aged 15-49 years, and 30.8 per cent of women aged 15-19 years, had experienced physical violence since the age of 15. See Timor-Leste National Statistics Directorate, above n 20, 229

According to this official, it was important that UNICEF address trauma at the individual, family, communal and institutional levels, in part to break these cycles of violence.\textsuperscript{61} However neither this official, nor any other UNICEF or World Bank officials interviewed in East Timor, mentioned Article 39 of the CRC, which requires the taking of 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”.\textsuperscript{62}

One World Bank official, who had spent many years in East Timor, suggested that every World Bank project in the country should contain elements of peace building and psychosocial support, even if these were not the project’s direct objectives.\textsuperscript{63} Moreover, the official stated that, if one knew what to look for, most World Bank projects did in fact support healing and reconciliation. The official described a recent project to create a community garden. It had tangible benefits that people immediately recognized, such as providing food security and income generation, but “it was also about turning minds away from distressing issues, and getting people to share their experiences and concerns, and to work together as a community on a common enterprise”.\textsuperscript{64} The official believed that this indirect approach allowed people to heal themselves and their relationships

\textsuperscript{60} UNICEF official, East Timor, 2008.
\textsuperscript{61} UNICEF official, East Timor, 2008.
\textsuperscript{63} World Bank official, East Timor, 2009.
\textsuperscript{64} World Bank official, East Timor, 2009.
in a manner consistent with the East Timorese social context.\textsuperscript{65}

\section*{Acknowledging limitations}

The complicated socio-political context led UNICEF and World Bank official based in East Timor to conclude that a deep understanding social dynamics, political relationships and power structures was vital to the success of their interventions:

\begin{quote}
“When we’re trying to understand what it is that people demand of the state and why, I think there’s a lot to be said about the experiences that people have had with power systems and with state organisations, and the power dynamics within communities. That impacts how people view the state and what they’re willing to claim and how willing they are to come forward with their grievances. To that extent it’s important to understand those dynamics in our work.”\textsuperscript{66}
\end{quote}

One World Bank warned that, in a context as complicated as East Timor, it was necessary to keep expectations realistic. The official emphasized the importance of acquiring a good understanding of the shifting social and political landscape, and of maintaining constructive dialogue with and amongst stakeholders\textsuperscript{67}:

\begin{quote}
“It’s critical to keep everyone engaged in the [peace] process and be cautious with expectations. It’s really very difficult to build a country, and coming from a conflict is even more difficult than many other cases.”\textsuperscript{68}
\end{quote}

\textsuperscript{65} World Bank official, East Timor, 2009.
\textsuperscript{66} World Bank official, East Timor, 2009.
\textsuperscript{67} World Bank official, East Timor, 2009.
\textsuperscript{68} World Bank official, East Timor, 2009.
According to this official, creation of the social and political conditions required for a successful poverty reduction strategy relied heavily on the abilities of East Timorese leaders to communicate with each other and to overcome old vendettas.\(^{69}\) It was difficult for the World Bank, the official explained, to deliver on its economic and social objectives in the absence of political stability\(^{70}\) – yet this was largely beyond the Bank’s control:

“There are areas on the political agenda mostly which are totally outside of our scope.” \(^{71}\)

The official felt explained that these factors placed real limits on what the Bank could be expected to achieve, no matter the resources at their disposal.\(^{72}\) While the Bank could work closely with East Timorese leaders and institutions, the effectiveness of outcomes would ultimately depend on a strong bi-partisan cooperation, and a robust determination to prioritise national peace and development above factionalist interests.\(^{73}\) Another Bank official stated that it was critical to ensure that whatever they were trying to do in East Timor is what the East Timorese want; otherwise outcomes would be neither effective nor sustainable.\(^{74}\) These findings reinforce some of the observations made in chapter two, regarding the importance of the participation principle, and the requirement that interventions be determined by those whose lives will be most affected by those decisions. In particular, it underscores the fact that participation has both normative and instrumentalist value, and is a crucial aspect of a human rights-based approach.

\(^{69}\) World Bank official, East Timor, 2009.  
\(^{70}\) World Bank official, East Timor, 2009.  
\(^{71}\) World Bank official, East Timor, 2009.  
\(^{73}\) World Bank official, East Timor, 2009.  
\(^{74}\) World Bank official, East Timor, 2009.
The cultural context: Local attitudes toward children

The difficulties involved in claiming rights and challenging unequal power dynamics are particularly pronounced for children, who face both intrinsic and socially constructed barriers to claiming their rights. Not only are children physically smaller and weaker than most adults, “cultural determinants, political mechanisms and discourses about childhood [...] work to construct childhood and therefore control or constrain what children do”. Thus the extent to which children are able to make just demands of power depends in large part on social attitudes toward children.

Low awareness, and acceptance, of children’s rights

UNICEF research participants in East Timor stated that, although the

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government had ratified the CRC, there was still low awareness, and acceptance, of children’s rights.\textsuperscript{78} One UNICEF official noticed while that many community members and State officials have adopted the rhetoric of child rights, their behaviours toward children remain largely unchanged.\textsuperscript{79} According to this official, adults are willing to listen to child rights advocacy messages on radio and television; to participate in awareness-raising workshops; and to attend musical, theatrical, sporting and commemorative community events that promote children’s rights (especially when meals are provided free of charge), but children’s rights are not better respected in practice.\textsuperscript{80}

Another UNICEF official added that many older East Timorese are still against the notion of children having rights: they fear that promoting the rights of the child will turn children against adults or cause them to become delinquents. Instead, they prefer to focus on children’s obligations.\textsuperscript{81} The same official suggested that changing these perceptions and the accompanying behaviours was one of the biggest challenges for UNICEF in creating a society safe for children.\textsuperscript{82} These findings are consistent with UNICEF’s 2012 Global Evaluation, which noted that “taking the views of children into consideration is difficult in cultures where children are not considered to be fully developed, independent beings that are bearers of rights”\textsuperscript{83}.  

\textsuperscript{78} UNICEF official, East Timor, 2008.  
\textsuperscript{79} UNICEF official, East Timor, 2008.  
\textsuperscript{80} UNICEF official, East Timor, 2008.  
\textsuperscript{81} UNICEF official, East Timor, 2009.  
\textsuperscript{82} UNICEF official, East Timor, 2009.  
\textsuperscript{83} UNICEF, 'Global Evaluation 2012', above n 14, 63.
Cultural conceptions of the best interests of the child

Traditional ideas about childhood were also reflected in local conceptions of the best interests of the child, not all of which were consistent with international human rights norms. As noted in chapter two, the ‘best interests’ principle should protect children from harmful practices, even if attempts are made to justify them in terms of culture and tradition. Some scholars, however, suggest that insufficient regard has been paid “to the socio-cultural and economic context, to the rationale underlying these practices, and to who is designating what is harmful or protective for children”. The two most striking findings in East Timor concerned resource allocation, and physical punishment.

For the best interests principle to be meaningful, it must be grounded in the reality and lived experience of the actual children whose rights it seeks to promote, rather than an idealised or utopian view of “the child” or of the world in which he or she lives. As Penn correctly observes, the life of each child is shaped to a large extent by the opportunities and limitations inherent in his or her environment:

"For [the majority of the world's children], the services in the minority world [ie: America - 5% of the world’s population; Europe - 12% of the world's population] we take for granted and think of as a right in education and healthcare, sanitation and transport, fuel and power supply and food security, either do not exist or are too costly to purchase. Self-reliance and subsistence are

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A similar point was emphasised by one UNICEF East Timor official, who explained that it was difficult to separate children’s rights from the broader economic, political and social contexts:

“If you talk about rights, you also need to consider the economy. If parents have money, of course they will give good food to their children. But if they don’t have money, and if they don’t know how to prepare healthy meals, how can you talk about nutrition? It all comes back to financial resources and education.”

Thus, although UNICEF staff felt that it was in the best interests of the child for their parents to send their children to child friendly spaces, parents were more concerned with income generation and poverty mitigation strategies. Consequently, many children were supporting their parents in household chores and street vending rather than being provided with psychosocial support and socio-educational activities.

Meanwhile, another UNICEF research participant, based in East Timor, expressed frustration at community resistance toward UNICEF’s non-violent discipline campaign. Indeed, a number of East Timor-based UNICEF research participants stated that older community members would often point to the achievements of Xanana Gusmao and Jose Ramos Horta – men who were allegedly beaten as children – as successful indicators of the merits of physical punishment. The belief is apparently so pervasive,

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87 UNICEF official, East Timor, 2008

88 Ibid.

89 Two UNICEF officials, East Timor, 2008; one UNICEF official, East Timor, 2009
and the practice so culturally entrenched, that local police continued to ignore reported cases of child abuse and themselves employ violent means of dealing with children in conflict with the law.\textsuperscript{90}

However local beliefs, no matter how pervasive and culturally entrenched, cannot be used to justify practices incompatible with international human rights norms.\textsuperscript{91} As Falk rightly notes: “one objective of normative standards is the protection of vulnerable individuals and groups from harsh forms of local prejudice that have hardened over time into custom and tradition and thereby achieved a kind of provincial legitimacy…”\textsuperscript{92} Thus cultural practices, including violence against children, must be tested against the norms of international human rights to guard against any cruel, brutal or exploitative aspects.\textsuperscript{93}

UNICEF officials found these tensions difficult to resolve. One New York-based official spoke of the sensitivities involved in assessing the best interests of the child within the context of the traditions, skills and knowledge valued by the community in which a given project is being conducted. Even if those values are not shared or prioritised by the implementing organisation, they must be acknowledged in order to facilitate community acceptance:

\textsuperscript{90} Ibid.
\textsuperscript{91} See for example Costas Douzinas, \textit{The end of human rights: Critical legal thought at the turn of the century} (Hart, 2000) 138: “Too often respect for cultural difference, a necessary corrective to the arrogance of universalism, has turned into a shield protecting appalling local practices.”
“There is a need to work within culture, but also to challenge and change those values and beliefs that run counter to the best interests of the child.”  

This observation confirms that human rights-based approaches to matters involving children are not merely about implementing organisations working with children; they also depend heavily on implementing organisations deepening their engagement with local authorities, and with the child’s family and community, and convincing these actors of the value of children’s rights. These relationships take time to develop, and must be factored into programing timelines.

**Moving from legal standards to change on the ground**

UNICEF research participants based in East Timor offered differing perspectives on the value of legal standards in changing local attitudes and behaviours toward children. Three officials pointed to the introduction of new laws and government policies protecting children’s rights as success stories in-and-of themselves. However another official, also based in East Timor, was concerned that focusing on formal structures alone was not the best strategy for changing the reality of children’s lives, and could in fact prove counter-productive, as it resonated with people’s memories with the culture of arbitrary “justice” and human rights violations perpetrated under the brutal Indonesian occupation.

The official cited a newly adopted “zero tolerance” policy on violence against children, which at the time was pervasive in homes, schools and

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childcare institutions across East Timor. Although the policy had been widely publicised, teachers and parents had not received any theoretical grounding in the benefits of non-violent discipline methods, or any practical training in the use of such methods. The official found this problematic, explaining: “prohibitions and sanctions won’t educate people. They need to understand the rationale, and learn alternatives.” This observation underscores the fact that ratification of the Convention on the Rights of the Child is merely the first step in securing the rights of the child, one that must be reinforced by a broad range of subsequent measures.

Realising the vision articulated in the Convention is a “major long-term undertaking” that cannot rely on legal formalities alone. Noting that “few people actually like being told that they must behave in a certain way”, Bonwick rejects as fundamentally weak assertions that “you need to do this because the law says you need to do it or because you have agreed to do it in the past by becoming party to a treaty that says you will act in a particular way”. Instead, he suggests, “when we are using the law as an argument, we need to be able to complement it with political arguments (it is in your interest to do this) or moral arguments (it is the right thing to do)”.

101 Mary John, Children in our charge: The child’s right to resources (Jessica Kingsley Publishers, 1996) 2.
Local human resource capacity

The majority of educated East Timorese fled when Indonesia invaded, and the level of skills development during the 24 years of Indonesian rule was extremely limited.\textsuperscript{103} At the same time, discriminatory policies during Indonesian rule ensured that almost all mid- to high-level professionals and civil servants were Indonesian citizens. When Indonesia withdrew in the wake of the 1999 independence referendum, East Timor was left with a severe shortage of skilled and qualified professionals.\textsuperscript{104} Government institutions “ceased to function as the Indonesian officials who occupied virtually all key positions in the country departed”,\textsuperscript{105} and the education, healthcare, primary services and justice sectors effectively collapsed.\textsuperscript{106} The country found itself with “only two power engineers, 20 per cent of its secondary school teachers, 23 medical doctors of which one surgeon, and not a single qualified pharmacist.”\textsuperscript{107} There were no judges, approximately 70 persons with some degree of legal training, and a solitary senior police officer.\textsuperscript{108} Three years later, when East Timor became a sovereign state, only 43 per cent of East Timorese aged 15 years and older were literate.\textsuperscript{109}

\textsuperscript{103}\textsuperscript{104}\textsuperscript{105}\textsuperscript{106}\textsuperscript{107}\textsuperscript{108}\textsuperscript{109}
Some East Timorese had been employed as junior civil servants in the Indonesian administration. However they had been poorly paid, worked short hours, and were given little real responsibility. These conditions discouraged the inculcation of a strong work ethic, and fostered a culture of dependence in which “few civil servants had the incentive or confidence to do anything other than wait for orders from above”. Consequently, post-independence, “the vast majority of civil servants [were] neither adequately experienced, nor trained for the roles they [would] have to undertake”.

The capacity shortfalls presented enormous, long-term development challenges. In 2008-2009, when this research was conducted, state institutions were still weak, and the pool of skilled and trained human resources was insufficient to meet demand. For UNICEF and World Bank officials based in East Timor, these constraints significantly impeded their abilities to effectively implement their projects. One senior UNICEF official, who had worked in over 30 developing countries before taking up a position in East Timor, considered East Timor to be the least developed in terms of social capacity, social institutions and government. Consequently, UNICEF had been forced to directly implement many of their programs in East Timor because no suitable local partners could be found. Meanwhile, a World Bank official stated that few East Timorese

110 Ibid 36.
111 Ibid 33.
had the education or the skills to fully participate in civic life, which adversely impacted the Bank’s operations.\textsuperscript{117}

The limited technical capacities amongst national staff within UNICEF and the World Bank, government and institutional counterparts, and civil society partners, placed additional burdens on some staff to fill the gaps, exacerbating the feeling that there were too few of them trying to do too much work.\textsuperscript{118} A common concern was how they could meet the needs of their beneficiaries whilst developing the capacities of, rather than standing in for, their national counterparts.\textsuperscript{119}

**National staff**

One international UNICEF staff member expressed surprise at the level of “hand-holding” required with national staff.\textsuperscript{120} The official explained that every task, “even things like booking a meeting space, organising the chairs”, needed to be done with an international counterpart.\textsuperscript{121} The official ascribed this largely to limited professional experience, but also identified psychological factors deriving from the Indonesian occupation and subsequent crises, in particular a cultural lack of confidence, fear of upsetting “superiors”, and an over-reliance on aid.\textsuperscript{122} Overall, international UNICEF staff felt that, because little work could be delegated, they were busier than usual with hands on day-to-day tasks, and were not

\begin{flushleft}
\textsuperscript{117} World Bank official, East Timor, 2009.
\textsuperscript{118} World Bank official, East Timor, 2009; two UNICEF officials, East Timor, 2009.
\textsuperscript{119} World Bank official, East Timor, 2009; two UNICEF officials, East Timor, 2009.
\textsuperscript{120} UNICEF official, East Timor, 2009.
\textsuperscript{121} UNICEF official, East Timor, 2009.
\textsuperscript{122} UNICEF official, East Timor, 2009.
\end{flushleft}
accomplishing enough of their program objectives.\textsuperscript{123}

International World Bank staff had similar concerns. One official explained that the shortage of skills and confidence amongst locals made it difficult for the Bank to hire suitable national staff:

“It’s the mid-range, with people who would’ve been caught up in the years of conflict who don’t have many of the skills that they need. And as the senior people transition out, they are not going to be able to fill those roles in an effective way, at least as it stands at the moment.” \textsuperscript{124}

Another international World Bank employee recounted the frustration encountered during recent efforts to recruit high-level nationals, who would be trained to take over the running of programs in later years:

“Even when drafting the [terms of reference] for the senior positions, what we heard from other staff and from East Timorese colleagues and friends is ‘you’re not going to have anybody apply for that, it’s too senior, Timorese won’t feel that they’re able to do that job, etcetera, etcetera,’ which I ignored and posted a job anyway. I got zero applications for it.” \textsuperscript{125}

The official noted that this was not only a human resources issue; it also related to program sustainability and validity: “It’s important obviously to have East Timorese staff on board to make the program run effectively and be legitimate.” \textsuperscript{126}

\textsuperscript{123} Two UNICEF officials, East Timor, 2009.
\textsuperscript{124} World Bank official, East Timor, 2009.
\textsuperscript{125} World Bank official, East Timor, 2009.
\textsuperscript{126} World Bank official, East Timor, 2009.
Government and institutional counterparts

The government of East Timor evidenced an early commitment to human rights, ratifying many of the core international human rights conventions in its first term. These include the International Covenant on Civil and Political Rights (ICCPR)\textsuperscript{127}, the International Covenant on Economic, Social and Cultural Rights (ICESCR)\textsuperscript{128}, the Convention on the Rights of the Child (CRC)\textsuperscript{129}, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)\textsuperscript{130}, the Convention on the Elimination of All Forms of Racial Discrimination (CERD)\textsuperscript{131}, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)\textsuperscript{132}. Nonetheless, East Timor’s government and state institutions face significant constraints in implementing these human rights obligations.

As an example, one World Bank official described a project with the East Timorese Ministry of Finance, aimed at making financial systems stronger, more efficient, more transparent and more accountable.\textsuperscript{133} The project included capacity building and professional development components for every Ministry of Finance employee. According to the official, a baseline census of language and numeracy skills conducted by the World Bank revealed an extremely low proficiency amongst Ministry employees, who had a median numeracy level of grade 3 (8 to 9 years of age).\textsuperscript{134} The official

\textsuperscript{127} On 18 September, 2003.
\textsuperscript{128} On 16 April, 2003.
\textsuperscript{129} On 16 April, 2003.
\textsuperscript{130} On 16 April, 2003.
\textsuperscript{131} On 16 April, 2003.
\textsuperscript{132} On 16 April, 2003.
\textsuperscript{133} World Bank official, East Timor, 2009.
\textsuperscript{134} World Bank official, East Timor, 2009.
was concerned about how long it would take to develop professional capacity, and how the Ministry would function in the meantime.\footnote{World Bank official, East Timor, 2009.}

UNICEF officials stated that the East Timorese government was very open to adopting measures in favour of children, but that operationalising the measures was a problem:

“In terms of making policy and endorsing it in the Council of Ministers, [East Timor] is the fastest government on child protection in the world. But it does not always have the budget, the mechanisms or the staff to implement policies.”\footnote{UNICEF official, East Timor, 2009.}

At the time the research was conducted, institutional partners such as the Ministry for Social Solidarity Office for the Protection of Children and the National Police Vulnerable Person’s Unit had only recently been created. Their offices were short-staffed, and lacking basic equipment such as vehicles, computers, telephones and Internet access.\footnote{Two UNICEF officials, East Timor, 2009.} Many employees had limited prior work experience, and were still receiving training in human rights standards and case management.\footnote{Two UNICEF officials, East Timor, 2009.} There was also a high turnover rate, which meant workshops often had to be repeated with the same institutions, albeit with different participants.\footnote{Two UNICEF officials, East Timor, 2009.} Cumulatively, these factors hampered the capacity of institutional duty-bearers to respond quickly and effectively to human rights violations.

One UNICEF official referred to the national child protection system as
“very dysfunctional”.\textsuperscript{140} The official explained that in many parts of the country, there simply were no social workers, police or judicial actors, and that in those villages where they were present, they were often inadequately trained and under resourced.\textsuperscript{141} Another UNICEF official blamed the difficult working conditions of government child protection officers on poor planning:

“The budget [was not] planned well enough by the Ministry of Social Solidarity to give them desks, tables, pens, pieces of paper to write case reports on… They mostly have the skills now [to identify incidents] but they don’t have [telephone credit] to call [their superiors] and tell them about a case, or any kind of communication or petrol to go and pick up a child or talk to a child… If they don’t use their own initiative they can be confined to the office because they […] just don’t have that support…”\textsuperscript{142}

When asked to what extent the project could be considered a success – since, although they did not having the resources to perform their functions, most child protection officers had at least some knowledge of child rights and child protection – the official explained that strengthening technical skills was only part of the objective:

“The bigger picture of that project is building the capacity at national level [to plan budgets and implement policy], to make it sustainable and for them to own the project. It’s been slower than we would like and […] it’s definitely something that hasn’t worked out so well so far. It’s definitely a challenge, but I think […] it would also not be a successful project if we said ‘here’s the money for the tables and the equipment, go and buy it, there you go’… I think it’s also […] a fine line to

\textsuperscript{140} UNICEF official, East Timor, 2009.
\textsuperscript{141} UNICEF official, East Timor, 2009.
\textsuperscript{142} UNICEF official, East Timor, 2009.
tread… You can’t tell the government ‘you need to manage this better’. You need to [...] obliquely go around the subject. We get a lot of results but I think there’s still a long way to go.”

UNICEF officials expressed different views on UNICEF’s approach to strengthening institutional capacity. One UNICEF official explained that they were assisting the government to increase and improve the quality of its child protection services through training and secretarial support. Another official, however, felt that, because of the extreme circumstances, UNICEF’s contributions often went beyond support and assistance:

“What I see happening a bit is that because MSS doesn’t have the capacity or the people to do it [...] sometimes it ends up being UNICEF staff doing things and getting MSS signatures…”

To some extent, the official accepted this strategy as a necessary compromise between long-term institutional capacity development and present-day child protection in a resource-poor environment:

“I think in an ideal world it would all happen at once… it would all be magical and we would have a system where we would be able to be talking to government all the time about incorporating these ideas… I mean, even incorporating children’s participation more, even talking about that all the time is something that… We’re adding a lot of things to a very overloaded system or a non-existent, barely existent system.”

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This situation required UNICEF to have realistic expectations about their rate of progress, to understand the limitations state duty-bearers were facing, and to prioritise issues and address them one at a time.\textsuperscript{147}

\textbf{Civil society partners}

UNICEF officials explained that their role is to coordinate projects and provide technical expertise, while local partner organisations implement activities, monitor children’s rights and respond to violations. Consequently, it is imperative that staff from these partner organisations understand child rights and child protection issues; can identify, document and report serious violations; and are able to manage, and if necessary refer, cases to the relevant state authorities.\textsuperscript{148} One of the operational challenges that UNICEF officials in East Timor identified was that insufficient experience, weak technical skills and a lack of professionalism meant that few partner organisations were able to adequately fulfil their responsibilities.\textsuperscript{149}

The senior UNICEF official cited earlier, who had worked in over 30 developing countries before taking up a position in East Timor, had never before had to conduct such intensive capacity development with implementing partners: “Maybe on new and emerging issues, but not on the minimum standards and the basics of children’s rights.”\textsuperscript{150} The official noted that, even after having participated in numerous training workshops, local implementing partners remained confused about the distinctions between child rights and child protection, and uncertain about what human

\textsuperscript{147} UNICEF official, East Timor, 2009.
\textsuperscript{148} Two UNICEF officials, East Timor, 2009.
\textsuperscript{149} Four UNICEF officials, East Timor, 2009.
\textsuperscript{150} UNICEF official, East Timor, 2009.
The official also voiced doubts about the extent to which local implementing partners accepted children’s rights as human rights, noting that for many East Timorese, the language of human rights was still predominantly associated with the fight for independence.\textsuperscript{152} Other UNICEF officials expressed frustration that even after having participated in so many workshops on children’s rights, many implementing partners had not internalised the concept, and did not demonstrate significant changes in their attitudes and behaviours toward children.\textsuperscript{153} On the contrary, all UNICEF officials interviewed stated that they had witnessed, and/or received reports about, local partners disregarding children’s rights.\textsuperscript{154} This included instances of violence against children.\textsuperscript{155} Two UNICEF officials felt that these problems related not only to limited technical skills and knowledge, but also to a general lack of professionalism.\textsuperscript{156} Reflecting on a recent child rights and child protection training workshop UNICEF had delivered to local NGO partners, one official described participants’ conduct as “appalling”\textsuperscript{157}:

“They smoke in the trainings, talk on the phone during trainings, swear at the trainers… No-one here has the capacity to work in the child protection field… they are not at the level of having the basic qualifications.”\textsuperscript{158}  

\textsuperscript{151} UNICEF official, East Timor, 2009.  
\textsuperscript{152} UNICEF official, East Timor, 2009.  
\textsuperscript{153} Five UNICEF officials, East Timor, 2009.  
\textsuperscript{154} Five UNICEF officials, East Timor, 2009.  
\textsuperscript{155} Three UNICEF officials, East Timor, 2009.  
\textsuperscript{156} Two UNICEF officials, East Timor, 2009.  
\textsuperscript{157} UNICEF official, East Timor, 2009.  
\textsuperscript{158} UNICEF official, East Timor, 2009.
UNICEF officials explained that, because of these constraints, they were sometimes forced to directly implement programmes themselves.\textsuperscript{159} For example, when the 2006 crisis rendered 150,000 East Timorese homeless, UNICEF staff spent months managing and working in child friendly spaces in the internally displaced persons’ camps until they could identify a suitable local partner to take over.\textsuperscript{160} This was a big change for an organisation whose operations had, until then, focused on support and advocacy rather than service delivery.\textsuperscript{161} Yet the alternative was for children’s needs, and rights, to go unmet.

5.4. Conclusions

This chapter has examined some of the external enabling factors that influence organisational engagement with human rights-based approaches to matters involving children, drawing on the experiences of UNICEF and the World Bank in East Timor. Souillac has observed that the work of implementing human rights-based approaches in transitional societies “occurs in the gap between the abstract, generalised nature of human rights norms, and the concrete, context-dependent level of institutionalisation.”\textsuperscript{162} It is a complex process, requiring consultation between different groups; consensus building; clarification of the specific needs of that particular context; and an understanding of which norms, institutional approaches, and strategies will be most effective.\textsuperscript{163}

The situation in East Timor during the research period highlights that

\textsuperscript{159} Two UNICEF officials, East Timor, 2009.
\textsuperscript{160} UNICEF official, East Timor, 2009.
\textsuperscript{161} UNICEF official, East Timor, 2009.
\textsuperscript{162} Souillac, above n 6, 77.
\textsuperscript{163} Ibid 78.
factors such as the absence of functioning infrastructure, an inexperienced government, limited professional expertise, the ongoing psychosocial impacts of war, and mixed local attitudes toward children’s rights, can render implementation of human rights-based approaches difficult. A common challenge for UNICEF and the World Bank in this context is how to maximise results within these operational limits while concurrently working to expand them. Despite the differing natures of their engagement with a human rights-based approach, research participants from both organisations expressed concerns about implementing global policies, determined in their respective headquarters, in countries where local actors – national staff, the host government, NGO and civil society partners – are unwilling or unable to support those endeavours.

Human rights principles such as participation, universality and accountability are not easily imposed from above. As Tomasevski has rightly noted, treaty ratification notwithstanding, “no government can be legally obliged to do the impossible”. The same is true of national staff, institutional counterparts, and civil society partners. Consequently, a delicate balance must be struck between devoting time to understanding social dynamics and investing in the capacity development of national actors, while also ensuring that the immediate needs and rights of project beneficiaries are not neglected. This requires a higher degree of flexibility, self-awareness, and self-reflection on the part of implementing organisations.

Cumulatively, the findings in this chapter demonstrate that translating

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human rights-based approaches to matters involving children from policy to practice involves navigating a series of complex external factors, many of which may impede, or at least delay, program implementation. Thus two pre-conditions for organisations wishing to engage in such approaches are, first, to have an awareness of these obstacles, and second, to develop strategies for over-coming them.
CONCLUSION: Toward a coherent model of human rights-based approaches to matters involving children

I. Introduction

Drawing on the experiences of UNICEF and the World Bank, this thesis has examined some of the different modes of engagement with the idea of human rights-based approaches to matters involving children, and has analysed some of the reasons for these differences. It considered three main challenges: conceptual confusion regarding the normative content of human rights-based approaches, both generally and in matters involving children; institutional culture and the extent to which this is human rights-enabling; and operational factors linked with the external environment in which programmes are being implemented. Against these challenges, this thesis has sought to contribute to the development of a conceptually coherent, workable model of a human rights-based approach to matters involving children.

Chapters one and two focused on creating a conceptual model for analysis. They considered the core features of a human rights-based approach, proposed a set of guiding principles normatively based on international human rights standards, and analysed how children are situated within human rights-based approaches. This established the framework for analysis, in chapter three, of how UNICEF and the World Bank engage with the idea of human rights-based approaches to matters involving children. Chapters four and five focused on the enabling environment, both at the institutional and operational levels, and aimed to better understand the reasons for the different types of engagement with human rights-based approaches to matters involving children at UNICEF and the World Bank.
II. Some observations about the World Bank’s engagement with human rights-based approaches

The World Bank consistently claims that all of its work already advances human rights; but remains reluctant to formally adopt any policies that would constitute an official commitment to a human rights-based approach. The Bank’s claim is further complicated by the multiple understandings of human rights-based approaches amongst World Bank officials, many of whom relied on subjective interpretations that seemed more concerned with describing their work in human rights terms than with ensuring it in fact. The Bank cannot have it both ways. If it wishes these representations to be taken seriously, it must move beyond a rhetorical repackaging of the work it already does.

Despite the scepticism with which many staff view human rights, the Bank has in place a series of safeguards relating to community participation, social inclusion, empowerment and good governance – all of which are, prima facie, compatible with a human rights-based approach. Thus at the institutional level, the data reveals a need for greater staff awareness and sensitisation about human rights to debunk common misconceptions, strong leadership to nurture an enabling environment, and a willingness to think outside econometric parameters. Indeed, one of the key challenges to fostering a human rights-enabling culture at the World Bank is how to ‘sell’ human rights in so strongly an econocentric, technocentric and commodocentric environment.¹

Research participants noted that use of surrogate terms (such as ‘voice’, ‘inclusion’, ‘participation’, ‘gender’, ‘accountability’, and ‘governance’) is a common tactic at the Bank. Because human rights currently occupy such an ambiguous position at the Bank, these are as frequently employed by human rights proponents forced to work ‘under the radar’ in a non-human rights supportive environment as they are by human rights sceptics seeking to emphasise the compatibility of the Bank’s work with human rights while simultaneously sidestepping any discussion of the normative obligations a commitment to international human rights entail. In other words, human rights are equally talked up and played down.

The current strategy – a rhetorical repackaging of what the Bank already does without any significant change in practice – merely confuses the issue. Amongst those interviewed, even strong proponents of a human rights-based approach qualified their support by explaining that, from an institutional perspective, greater engagement would necessarily depend on compatibility with the Bank’s traditional economic imperatives. This raises difficult questions about how far the concept of a human rights-based approach can be stretched, appropriated, adapted and reinterpreted before it loses its essential core. Moreover, if human rights-based approaches are presented as compatible with existing ways of thinking and doing, they will not induce change. Instead, there must be some willingness to challenge,


4 Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108(1) American anthropologist 38, 41.
and transform, the status quo. At the same time, if they are not presented as compatible they may be rejected. It is a difficult balance to strike, requiring constant assessment by human rights advocates of the extent to which they can challenge existing modes of thinking, and the extent to which they must conceal radical ideals in familiar packages.

III. Some observations about UNICEF’s engagement with human rights-based approaches

UNICEF has adopted a formal, structured, institution-wide human rights-based approach, emanating from an Executive Directive and reinforced in subsequent policy documents. Nonetheless, as evidenced in the present research and multiple external evaluations, UNICEF faces considerable challenges in its implementation. These challenges are evident at the conceptual, institutional and operational levels.

One of the key findings from the research, particularly from UNICEF staff based in East Timor, is the importance of engaging in critical reflection to ensure that formal commitments to human rights-based approaches are integrated beyond the superficial levels. As revealed during interviews, while some staff were concerned about understanding the conceptual foundations and practical implications of human rights-based approaches, many had embraced the language of human rights-based approaches and children’s rights without actively contemplating what this language means in practice. Instead, they assumed that because the organisation has formally adopted a human rights-based approach, everything they did was, by definition, human rights-based, and automatically promoted the rights of children.
A contributing factor in this regard is an organisational culture that conflates the official commitment to a human rights-based approach, and the use of associated language, with the organisation’s day-to-day operations. This is a false premise. As noted in a 2002 OHCHR-commissioned assessment, published seven years before the present research was conducted, an inspiring vocabulary is no substitute for tangible, conceptually coherent programming tools:

“UN agencies, especially those doing program work outside headquarters, need more than theoretical references to human rights standards and treaties or the constant recitation of the virtues of participation, accountability, empowerment and legislation. They need concrete information, analysis, data, and examples of how to include human rights in their programs and then how to assess the impact of this programming on the human rights situation in their country…” 5

Compounding the conceptual challenges, the abilities of UNICEF staff to implement a human rights-based approach to matters involving children are undermined by institutional deficiencies such as insufficient staff training, limited resources, and a dysfunctional relationship between headquarters and country offices. In particular, the data reveals a need for more robust support from headquarters to country offices, especially in the areas of human rights training and program evaluation, the allocation of realistic budgets and timeframes, and a demonstrated receptivity to critical feedback.

These challenges are not unassailable, especially if the will exists to overcome them. Indeed, many informants viewed UNICEF’s engagement with a human rights-based approach as a work in progress. Unfortunately,

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their efforts risk being significantly undermined by the organisation’s recent shift toward an equity focus as its core strategy for realisation of children’s rights. One reason for this is that although UNICEF’s formal commitments – such as the 1998 Executive Directive – remain in place, UNICEF’s Strategic Plan 2014-2017 contains only a single, cursory reference to the human rights-based approach. This not only weakens the credibility of these formal commitments; it also lends the impression that UNICEF’s solution to overcoming the conceptual, institutional and operational challenges associated with human rights-based approach is to abandon the human rights-based approach altogether in favour of the latest trend.

Yet the equity focus is not a panacea. On the contrary, uncertainty about the relationship between the new equity focus and the pre-existing human rights-based approach fosters greater conceptual confusion precisely when greater clarity is required. If it does indeed imply a new way of doing business, exactly how must be explained; internal management systems, operations and programming processes will need to be rethought and redesigned; and a new vocabulary and modus operandi learned. A more fundamental and critical concern, however, is what the equity focus means for children. UNICEF’s equity focus replaces international human rights norms with references to “equitable opportunities” and “equitable results”, and omits the language of duty bearers and rights holders embedded in the human rights-based approach. In so doing, it may imperil children’s recognition as full rights holders, entitled to participate actively and meaningfully in all matters which affect them. As the United Nations only dedicated child rights organisation, UNICEF might consider reflecting more deeply about what sort of organisation it is, and what sort of organisation it wishes to become.
IV. Human rights-based approaches to matters involving children: Toward a workable model

Engagement with human rights-based approaches, both generally and in respect of children, is at the conceptual level, contingent on how human rights-based approaches are formulated, interpreted and understood. This thesis has proposed a model identifying the core features of a human rights-based approach, and the basis upon which guiding principles are designated. With respect to children, rather than relegating them to a separate category of “child rights-based programming”, a more conceptually coherent strategy is to embrace the notion of a human rights-based approach to matters involving children. Particular attention must be paid to the two principles that are central to such an approach – the best interests principle and the participation principle – which must be rendered practical, reconcilable, and conceptually coherent.

In addition to conceptual clarity, the manner of engagement with human rights-based approaches to matters involving children also depends on some more concrete factors. At the institutional level, these factors relate primarily to the establishment and maintenance of an enabling organisational culture, including an incentive system that encourages compliance, the availability of sufficient human and material resources, and investment in staff development to ensure that policies and implementation strategies are universally embraced and uniformly understood. At the operational level, the research revealed that institutional engagement with human rights-based approaches is to a large extent influenced by, and dependent on, the external environment. In particular, the country context must be conducive to implementation of a human rights-based approach to matters involving children, the scope of which includes social dynamics and
power structures, attitudes toward children and the idea of children’s rights, and the human resource capacities of local partners.

Consequently, this thesis has argued that, alongside deeper conceptual analysis to clarify the normative content of human rights-based approaches, organisations wishing to engage with a human rights-based approach to matters involving children must encourage a human rights-enabling institutional culture, and be flexible enough to adapt implementation to different country contexts. This is true both for organisations which, like UNICEF, have expressly adopted a human rights-based approach, and also organisations which, like the World Bank, have by-passed a formal commitment in favour of using surrogate terms associated with human rights-based approaches.

Concurrently, a fundamental shift is required in how children, and their rights, are conceptualised. Roche astutely observes that “once we genuinely allow children to exercise their right to speak and be heard, we might have to participate in different conversations…”6 The present research, however, reveals a tendency by both the World Bank and UNICEF to speak on behalf of, rather than with, children. Interventions – such as schools and health clinics – may be conceived for children’s benefit, but they are often designed and delivered without children’s active participation. A frequent justification was that children’s input was unnecessary. One UNICEF research participant, for example, explained that UNICEF staff drew on their prior experiences of working with children, and thus did not need to involve children directly: “all the programs that are set up by UNICEF staff are a reflection from their daily work with the children”.7 A World Bank

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official maintained that divining children’s needs in World Bank projects is simply a matter of sound reasoning:

“If you’re doing an education program you have a huge gender issue: if there’s no toilets then girls don’t go to school. It’s not that every girl has a right to go to school therefore we must have toilets, [it’s] common sense…”

Such thinking is clearly inconsistent with the participation principle that underlies human rights-based approaches. It also threatens to undermine the accuracy and appropriateness of interventions. AsBoyden and Levinson note, adults are poor interpreters of children’s lives because understanding of childhood is rendered inaccurate by time:

“Human memories are selective… Adult experiences change our understanding of what happened in childhood… For adults to better understand children’s problems and needs, they require children to explain and interpret their childhoods: only children can provide real insight into their feelings and experiences.”

There are, moreover, inherent tensions associated with the rights of children being advocated for by powerful, well-resourced, knowledge-rich, politically connected and adult-dominated organizations. If discussions and actions to advance the human rights of children do not involve children (alone or in partnership with adults), but are instead conducted by adults on behalf of children, this sends a powerful message about how seriously children’s rights, and their standing as human rights-holders, are taken.

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8 World Bank official, DC, 2008
The creation of a culture in which children are genuine social actors able to “influence, organise, coordinate and control events taking place in their everyday worlds” \(^\text{11}\) requires a rethinking of how projects are designed and implemented. Key amongst these is a reconfiguring of power relations and hierarchies in favour of children’s social and political agency. \(^\text{12}\) The Committee on the Rights of the Child, for example, has proposed moving beyond functional definitions of participation in favour of a deeper meaning that envisages participation as “a new social contract. One by which children are fully recognised as rights-holders who are not only entitled to receive protection but also have the right to participate in all matters affecting them, a right which can be considered as the symbol for their recognition as rights-holders”. \(^\text{13}\) Similarly, adults – both those in the beneficiary communities and those in the organizations designing and delivering assistance – must be willing to cede some of their own social and political power. \(^\text{14}\)

\(^\text{11}\) Leena Alanen, ‘Childhood as a generational condition’ in Leena Alanen and Berry Mayall (eds), *Conceptualizing child-adult relations* (Routledge Farmer, 2001) 131.


Unless such considerations are taken into account, the transformative potential of human rights-based approaches, particularly for children, will remain an unrealised ideal.\textsuperscript{15} Greater resources may need to be expended in order to facilitate children’s participation, reaching decisions may take longer, and the outcomes may be contrary to the organisation’s initial plans and expectations. Yet an organisation genuinely committed to a human rights-based approach must respect the rights of children, as rights-holders, to “know and present themselves as rightful and dignified people who can make just demands of power”,\textsuperscript{16} and hence be prepared to accommodate such possibilities.

Against this background, both UNICEF and the World Bank would benefit from further self-reflection on how children are conceptualised and what this means for their engagement with human rights-based approaches. UNICEF cannot assume that just because it is constituted as a child rights organisation all of its activities are by definition human rights-based and necessarily further the realisation of children’s rights. Dedicated attention is required to realise genuine, meaningful participation by children and to ensure that children are considered holistically, not only as subjects of protection but also as capable social actors. Meanwhile, the World Bank’s claim that it advances human rights is significantly undermined if their engagement with young people is confined solely to mitigating social risks and fostering social capital. Children and youth have intrinsic value beyond their impacts on the community, and are equally entitled to have their views heard and their unique perspectives taken into account in respect of all Bank activities, in all areas of intervention.


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