

C16

## Article 16. The right to Protection of Privacy, Family, Home, Correspondence, Honour, and Reputation

- C16.P2 1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. 2. The child has the right to the protection of the law against such interference or attacks.

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## I. Introduction

## A. A Flexible and Expanding Right

The right to privacy and respect for home, family, correspondence, honour, and reputation, like other traditional civil and political rights, is a common feature within many international,<sup>1</sup> regional,<sup>2</sup> and domestic human rights instruments,<sup>3</sup> albeit in different incarnations. For its part, the formulation under article 16 is essentially a restatement of the formulation adopted under article 17 of the International Covenant on Civil and Political Rights ('ICCPR'), which itself is based on article 12 of the Universal Declaration on Human Rights ('UDHR'). However, while the appearance of the right to privacy and its related dimensions within human rights instruments may be constant and predictable, its meaning is most certainly not. Indeed, it has been noted that '[p]rivacy related rights have extended beyond their original concern—threats to private space, particularly the home—to encompass personal security, self-fulfilment, and identity, including the organization of family life and relationships, sexual mores and some business activities'.<sup>4</sup> Such is the flexibility of the right to privacy that it is often referred to as the 'filler' right for its capacity to be invoked when no other right appears relevant or appropriate.

Critically, this expansion in the scope of the right to privacy and the related rights under article 16 has largely been fashioned from the experience of adults. This is despite the fact that the enumeration of these rights under international instruments has always extended to children albeit in theory rather than practice. With the inclusion of article 16 in the Convention on the Rights of the Child ('CRC', 'the Convention'), there is now an explicit invitation to explore those dimensions of these rights that are of particular relevance to children with respect to issues such as corporal punishment, information about

<sup>1</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) ('UDHR'); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR'); International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3, art 14; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, arts 22, 31(a). See also: UNGA, 'United Nations Rules for the Protection of Juveniles Deprived of their Liberty' (14 December 1990) A/RES/45/113 ('Rules for the Protection of Juveniles Deprived of their Liberty' ('Havana Rules') rules 18(a), 32, 34, 35, 60 and 87(e); UNGA, 'United Nations Standard Minimum Rules for the Administration of Juvenile Justice' (29 November 1985) A/RES/40/33 ('Beijing Rules') rule 8.

<sup>2</sup> See: European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') art 8; American Declaration on the Rights and Duties of Man OAS Res XXX adopted by the Ninth International Conference of American States (1948) PEA/SER/L V/II.82 Doc 6 Rev 1 at 17 (1992), art V; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36 (1969) ('IACHR'), art 11; African Charter on the Rights and Welfare of the Child (adopted 1990, entered into force 29 November 1999) ('ACRWC'), art 10. Note that the African Charter on Human and People's Rights does not include privacy as a right.

<sup>3</sup> See eg Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (2nd edn, OUP 2009) vol I paras 12.370–12.506 (outlining, inter alia, UK, Scottish, and South African cases on right to privacy, the Canadian Charter of Rights, New Zealand Bill of Rights Act). See also Megan Richardson, *The Right to Privacy: Origins and Influence of a Nineteenth Century Idea* (CUP 2017) (arguing that right had emerged as an important legal concept across a number of jurisdictions by the end of the nineteenth century, providing a basis for its recognition as a universal human right in later centuries).

<sup>4</sup> David Feldman, 'The Developing Scope of Article 8 of the European Convention on Human Rights' (1997) 3 European Human Rights Law Review 265, 266. cf James Griffin, 'The Human Rights to Privacy' (2007) 44 San Diego Law Review 697 (arguing that the right to privacy is construed too widely in the US context).

the identify of a child's biological parents, anonymity in court proceedings,<sup>5</sup> parental tracking devices,<sup>6</sup> access to a student's school locker, and increasingly, access to a child's text messages or Facebook posts.<sup>7</sup>

## B. The Relationship between Article 16 and Other Provisions of the Convention

When seeking to map out an understanding of article 16, the principle of internal context sensitivity<sup>8</sup> requires that consideration be given to the relationship between this provision and other articles under the Convention. In this regard, it is important to note that some articles *overlap with and duplicate* the scope of article 16 whereas others *constrain and inform* the way in which children are to enjoy this right. For example, provisions which protect children against a violation of their physical and mental integrity, such as the prohibition against violence under article 19 and the prohibition against torture and other forms of ill treatment under article 37, will *overlap* with the right to privacy, which includes protection of a child's physical and mental integrity. Similarly, a child's right to know and be cared for by his or her parents, to an identity, and to maintain family relations under articles 7 and 8 will *overlap* with the protection of a child's right to privacy and family under article 16. Moreover, the right of a child to avoid separation from his or her parents (unless this is necessary in his or her best interests) and maintain contact in the event of a separation under articles 9 and 10 of the Convention, are aligned with a child's right to respect for family under article 16.

A more challenging issue arises at the intersection between a child's right to privacy and his or her parents' right to privacy and respect for family under human rights instruments. Not surprisingly, concern was expressed during drafting about the potential for a child's right to privacy to usurp the rights of parents and legal guardians.<sup>9</sup> Such concerns however did not thwart the inclusion of article 16 and support for its inclusion was garnered by a statement that 'if parents should be protected from States, the child should be protected from parents'.<sup>10</sup> At the same time, the point was clearly made that children might need direction and guidance from parents or legal guardians in the exercise of their

<sup>5</sup> See eg Niamh Joyce, 'An Analysis of the Extent of the Juvenile Offender's Right to Privacy: Is the Child's Right to Privacy Circumvented by Public Interest?' (2011) 19 *European Journal of Crime, Criminal Law and Criminal Justice* 113.

<sup>6</sup> See eg Terri Dowty, 'Pixie-dust and Privacy: What's Happening to Children's Rights in England?' (2008) 22 *Children and Society* 393.

<sup>7</sup> See eg Mary Leary, 'Reasonable Expectations of Privacy for Youth in a Digital Age' (2010–11) 80 *Mississippi Law Journal* 1035, 1045 (noting that young people hold 'a different definition of privacy' which is defined 'without regard to the types of information revealed, but rather, regarding control over who learns the information'). These issues are to be contrasted with the themes that are to inform the work of the UN Special Rapporteur on Privacy who was appointed by the Human Rights Council in 2015. See Statement by Mr Joseph A Cannataci, Special Rapporteur on the right to privacy, at the 31st session of the Human Rights Council A/HRC/31/64 (9 March 2016) (listing the following areas of concern for his mandate: Privacy and Personality across cultures; corporate on-line business models and personal data use; Security, surveillance, proportionality and cyberpeace; Open data and Big Data analytics: the impact on privacy; genetics and privacy; Privacy, dignity, and reputation; and biometrics and privacy).

<sup>8</sup> John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 *Harvard Human Rights Journal* 1, 37–39.

<sup>9</sup> E/CN.4/1988/28 paras 35–37, 59 in OHCHR, *Legislative History of the Convention on the Rights of the Child* (UN 2007) vol I, 477 ('*Legislative History*').

<sup>10</sup> *ibid* para 38.

right to privacy although this was not to affect the content of the right itself.<sup>11</sup> This sentiment ultimately found expression in article 5 of the Convention, which adds the requirement that the direction and guidance offered by parents or other relevant persons in the exercise of a child's right to privacy must remain subject to the evolving capacities of the child. Hence the exercise of a child's right to privacy remains encumbered by the direction and guidance of his or her parents or other relevant persons. At the same time, such guidance and direction remains precisely that; article 5 does not provide parents and other relevant persons with the right to exercise complete control over a child's right to privacy.

C16.P46 In terms of rights that *enable and inform* the implementation of a child's right to privacy, article 12 is critical. It demands that children's views be given due weight in accordance with their age and maturity when developing an understanding of how children as individuals, and not merely as a cohort, seek to enjoy their right to privacy under article 16. The significance of this requirement must not be overlooked, as it presents children with the opportunity to identify issues which interfere with their understanding of the right to privacy which adults may well overlook.

### C. Key Issues

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Any attempt to understand article 16 must address three broad questions. First, what is the scope of the right to privacy and the other rights which are protected under article 16, namely, family, home, correspondence, honour, and reputation? Second, when will an interference with these rights be arbitrary and unlawful? Third, what is required of states to ensure protection of these rights by law against attacks or interference with these rights? This chapter is arranged around these three broad issues. For its part, the Committee on the Rights of the Child ('CRC Committee', 'the Committee') is yet to issue a general comment on article 16 and its concluding observations are typically so general as to offer only limited insight with respect to these interpretative issues. There is, however, a vast body of jurisprudence produced by bodies such as the Human Rights Committee ('HR Committee') which has issued a specific general comment<sup>12</sup> and the European Court of Human Rights ('ECtHR')<sup>13</sup> on the right to respect for privacy, family, home, correspondence, honour, and reputation. This jurisprudence is informative, albeit not determinative, when examining the meaning of article 16. Indeed, care must be taken

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<sup>11</sup> *ibid* para 36. It is worth noting that the equivalent of art 16 under the ACRWC (n 2) art 10 provides that a child's right to privacy is subject to parents' right to exercise reasonable supervision over their children's conduct.

<sup>12</sup> HR Committee, 'CCPR General Comment No 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) HRI/GEN/1/Rev.1 ('HRC GC 16'). For an overview of the HR Committee jurisprudence on art 17 of the ICCPR see Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, OUP 2013) ch 16. See also: M Nowak, *Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel 2005) 377–405; Walter Kalin and Jorg Kunzli, *The Law of International Human Rights Protection* (OUP 2009) 381–402; Michael O'Flaherty, 'Sexual Orientation and Gender Identity' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris (eds), *International Human Rights Law* (OUP 2014) ch 15.

<sup>13</sup> For an overview of the European Court of Human Rights ('ECtHR') jurisprudence on art 8 of the ECHR see: David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley, *Law of the European Convention on Human Rights* (3rd edn, OUP 2014) ch 9; Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *The European Convention on Human Rights* (6th edn, OUP 2014) ch 16; Mark Janis, Richard Kay, and Anthony Bradley, *European Human Rights Law: Text and Materials* (3rd edn, OUP 2009) ch 8; Clayton and Tomlinson (n 3) ch 12.

to ensure that the interpretation of this provision remains child-centred and reflects the distinctive ways in which children experience this right relative to adults.<sup>14</sup>

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Critically, this chapter offers several broad observations with respect to the meaning of article 16. First, the scope of the rights protected under article 16 must be interpreted broadly and generously in a way that seeks to accommodate the experiences of children. Second, the right to privacy, which is the most expansive of the rights under article 16, consists of at least five discrete dimensions: physical and mental integrity; decisional autonomy; personal identity; informational privacy; and physical/spacial privacy.

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Third, an interference with any of the rights under article 16 will only be justified where it is lawful and non-arbitrary. Critically, the requirement of lawfulness includes a *procedural dimension*, namely that the law is valid and accessible, and a *substantive dimension*, namely that the law is consistent with the principles under the Convention and international human rights law. With respect to the issue of arbitrariness, this requires that any interference must be reasonable if it is to be justified. In practice, this will be the case where the interference pursues a legitimate aim and the measures used to achieve that aim are necessary and proportionate. Fourth, a child's right to privacy is not the same as an adult's right to privacy. This is because the Convention provides a state (via its agents) and a child's parents with the capacity, and indeed obligation, to restrict a child's enjoyment of his or her article 16 rights in line with a child's evolving capacity (art 5) where this is necessary to secure the best interests of the child (art 3).

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Finally, the obligation of states to provide children with protection of the law against any interference or attack on their rights under article 16, affirms that states have a positive obligation to take all appropriate measures within the scope of their available resources to ensure children enjoy their article 16 rights. Although states enjoy a level of discretion in determining which measures they take for this purpose they remain subject to the overarching caveat that such measures must be effective and consistent with the other provisions of the Convention.

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## II. The Protection against Arbitrary and Unlawful Interference

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The rights that are the subject of protection under article 16 are not absolute and can be subject to interference provided the interference is not arbitrary or unlawful.<sup>15</sup> This in turn demands a consideration as to the meaning of each of these terms.

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<sup>14</sup> For a discussion of art 16 and a child's right to privacy see: Tait, Gordon and Mallihai Tambyah, 'Rights without a Remedy? Children's Privacy, Social Governance and the UNCRC' in Jenna Gillett-Swan and Vicki Coppock (eds), *Children's Rights, Educational Research and the UNCRC: Past, Present and Future* (Symposium Books, 2016) 121; Alistair MacDonald, *The Rights of the Child: Law and Practice* (Jordan Publishing 2011) chs 8 and 9; Geraldine Van Bueren, 'The Right of the Child to Freedom of Expression' in Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff 1998) ch 5; Sharon Detrick, *A Commentary on the Convention on the Rights of the Child* (Martinus Nijhoff Dordrecht 2000) 269–82; UNICEF, *Implementation Handbook on the Convention on the Rights of the Child* (3rd edn, UNICEF 2007) 203–16.

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<sup>15</sup> By way of comparison, art 8 of the ECHR provides that an inference with art 8 must be 'in accordance with the law and ... necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.



## A. Arbitrary

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The term ‘arbitrary’ does not appear elsewhere in the Convention<sup>16</sup> and has not been the subject of comment by the CRC Committee. During drafting it was actually proposed that it should be deleted on the grounds that it was vague and subjective.<sup>17</sup> However the phrase was ultimately retained, largely because of its use in the equivalent provision under the ICCPR.<sup>18</sup> Interestingly, the use of the word ‘arbitrary’ was also queried during the drafting of both the UDHR<sup>19</sup> and the ICCPR. At one stage in the latter process it was at least noted that “‘arbitrarily’ should be taken to mean “fixed or done capriciously or at pleasure; without adequate determining principle; depending on the will alone; tyrannical; despotic; without cause upon law; not governed by any fixed rule or standard”’.<sup>20</sup> Thus, the prevailing view in the drafting of article 17 of the ICCPR was that the notion of arbitrariness was central to the definition of the conduct that was to be prohibited<sup>21</sup> and ‘that regardless of its lawfulness, arbitrary interference contains an element of injustice, unpredictability and unreasonableness’.<sup>22</sup>

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This sentiment is reflected in the General Comment of the Human Rights Committee on article 17 of the ICCPR, in which it stated that:

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the expression ‘arbitrary interference’ can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, *reasonable in the particular circumstances* (emphasis added).<sup>23</sup>

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Moreover, in *Toonen v Australia*, the HR Committee declared that it ‘interprets the requirement of *reasonableness* to imply that any interference with privacy must be *proportional* to the end sought and be necessary in the circumstances of any given case (emphasis added)’.<sup>24</sup>

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This coupling of *reasonableness* and *proportionality* to develop an understanding of the concept of arbitrariness allows for a coherent approach to the question of when an interference with a child’s right to privacy will be justified. It does so by aligning the test used

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<sup>16</sup> The term ‘*arbitrarily*’ is used in art 37(b).

<sup>17</sup> E/CN.4/1988/28 para 56; *Legislative History* (n 9) 477.

<sup>18</sup> E/CN.4/1988/28 paras 56–58; *Legislative History* (n 9) 477.

<sup>19</sup> See generally Parvez Hassan, ‘The Word “Arbitrary” As Used in the Universal Declaration of Human Rights: “Illegal” or “Unjust”’ (1969) 10 *Harvard International Law Journal* 225. See also: Joseph and Castan (n 12) paras 16.10–16.14.

<sup>20</sup> UNGA, ‘Draft International Covenants on Human Rights: Report of the Third Committee’ (5 December 1957) A/3764 para 114.

<sup>21</sup> UNGA, ‘Draft International Covenants on Human Rights: Annotations prepared by the Secretary-General’ (1 July 1955) A/2929 (‘Annotations’) ch VI para 102.

<sup>22</sup> Nowak (n 12) 383.

<sup>23</sup> HRC GC 16 (n 12) para 4. See also Joseph and Castan, (n 12) 535–40. For a discussion of the Committee’s approach to the word ‘arbitrary’ in the context of art 9(1) of ICCPR see: Nowak (n 12) 383–84; Reed Brody, ‘The United Nations Creates a Working Group on Arbitrary Detention’ (1991) 85 *American Journal of International Law* 709, 713. See also HR Committee, ‘General Comment No 27: Article 12 (Freedom of movement)’ (2 November 1999) CCPR/C/21/Rev.1/Add.9 para 21: ‘The reference to the concept of arbitrariness in this context is intended to emphasise that it applies to all State action, legislative, administrative and judicial: it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances’; HR Committee, ‘Draft General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life Revised Draft Prepared by the Rapporteur’ available at: <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx> accessed 28 March 2018 para 18.

<sup>24</sup> *Toonen v Australia* Comm No 488/1992 (4 April 1994) CCPR/C/50/D/488/1992 para 8.3.

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to answer this question in the context of article 16 with the test used to assess whether there has been an interference with other civil and political rights under the Convention such as freedom of expression or freedom of religion. Under this test there are two broad considerations. First, if an interference with a right is to be considered *reasonable* it must pursue not only a legitimate aim, but also adopt measures that are *proportionate* to achieve that aim.<sup>25</sup> Second, when assessing the proportionality of these measures it will be necessary to consider (a) whether there is objective evidence that establishes a nexus between the measure and aim (the rational connection test) and (b) if so, whether there is a reasonably available alternative which would have minimized the interference with the child's right (the minimal impairment principle/least intrusive option available).<sup>26</sup> Moreover, 'any limitation to the right ... must not render the essence of the right meaningless and must be consistent with other human rights'.<sup>27</sup>

C16.P57 Unlike other articles under the Convention, such as articles 13 and 15, article 16 does not restrict the grounds on which an interference with a child's right to privacy will be justified to specific aims such as the rights of others, public health, and/or public order.<sup>28</sup> Thus it has been suggested with respect to the formulation under article 17 of the ICCPR that:

C16.P58 A State is therefore in principle free to interfere by law with the privacy of individuals on any discretionary grounds not just on grounds related to public safety, order, health, morals or the fundamental rights and freedoms of others, as spelled out in other provisions of the Covenant.<sup>29</sup>

C16.P59 However, the significance of this discretion must not be overstated. This is because the additional requirement under article 16 that any interference with a child's right to privacy must *also be lawful* demands, as discussed below, that the law which legitimizes the interference must be consistent with the principles and provisions of international law. In practical terms this means that the aim of any interference with a child's right to privacy must be consistent with the aims of the Convention or another relevant international human rights treaty. Thus, if a state seeks to establish a legitimate aim upon which to restrict a child's right to privacy its aim will invariably have to fall within the scope of the legitimate considerations listed in the limitation clauses of other provisions in the Convention which include, for example, the rights of others, public health, and public order.<sup>30</sup>

C16.N25 <sup>25</sup> ECOSOC, 'Siracusa Principles on the Limitation and Derogation provisions in the International Covenant on Civil and Political Rights (28 September 1984) UN doc E/CN.4/1985/4 ('Siracusa Principles') Annex, Section I.A. 'General Interpretative Principles Relating to the Justification of Limitations'. See also Report of the Office of the United Nations High Commissioner for Human Rights 'The Right to Privacy in the Digital Age' A/HRC/27/37 (30 June 2014) paras 21–24 ('OHCHR Report on Privacy in the Digital Age').

C16.N26 <sup>26</sup> See Chapter 4 of this Commentary; Siracusa Principles (n 25) s I.A.10.

C16.N27 <sup>27</sup> Siracusa Principles (n 25) s I.A.2; 'OHCHR Report on Privacy in the Digital Age' (n 25) para 23.

C16.N28 <sup>28</sup> In contrast, art 8(2) of the ECHR provides that the right to respect for private life can be subject to limitation where such limitation is 'in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

C16.N29 <sup>29</sup> *Toonen v Australia* (n 24) Mr Wennergren (dissenting opinion) para 5.

C16.N30 <sup>30</sup> For a discussion as to the meaning of these terms see Chapter 13 and Chapter 14 of this Commentary. See also Siracusa Principles (n 25) ss I.B.iii, iv, viii.

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**B. Unlawful**

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**1. A Procedural and Substantive Requirement**

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The prohibition against unlawful interference with a child's rights under article 16 implies that for any interference to be justified it must not only be non-arbitrary, it must also be *lawful*. It is for this reason that the HR Committee has explained, in the context of article 17 of the ICCPR, that:

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no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.<sup>31</sup>

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Moreover, according to the HR Committee, 'relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law and on a case by case basis'.<sup>32</sup> This is consistent with the view that for a 'norm to be characterized as a "law"' it 'must be formulated with sufficient precision to enable an individual to regulate his or her conduct and it must be made accessible to the public'.<sup>33</sup> Thus the requirement that an interference with a child's rights under article 16 must be lawful includes a formal dimension (namely, the existence of a valid law which is accessible) and a substantive dimension (namely, the existence of a law that is sufficiently precise *and* compatible with other provisions under the Convention). Critically, it is the state that bears the burden of establishing that an interference with a child's right to privacy is provided for by a valid law.<sup>34</sup>

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**2. Accommodating Parental Rights**

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Article 5 of the Convention requires that states respect the rights of parents and other persons responsible for the care of a child to provide direction and guidance to a child in the exercise of the child's rights under article 16. Thus, the Convention provides an additional basis upon which to *lawfully* regulate children's right to privacy relative to adults. It effectively provides parents, and other persons who care for a child, with a capacity to restrict a child's rights under article 16 in ways that may be peculiar to an individual child. This is because the Convention provides parents with a wide level of discretion in their assessment of how to provide direction and guidance to a child in the enjoyment of their rights under article 16.<sup>35</sup>

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However, this discretion, which is examined in the commentary on article 5, is not without limits. First, the requirement to provide *direction and guidance* is quite distinct from traditional (and indeed many contemporary) notions of parenting which empower parents to *control* their children. Article 5 effectively requires parents to act in a trustee type role whereby their actions are motivated by and directed towards enabling children to effectively enjoy their article 16 rights. This is confirmed by article 18 of the Convention,

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<sup>31</sup> HRC GC 16 (n 12) para 3. <sup>32</sup> *ibid* para 8.

<sup>33</sup> HR Committee, 'General Comment No 34 (2011): Article 19: Freedoms of Opinion and Expression' (12 September 2011) CCPR/C/GC/34 ('HRC GC 34') para 25. See also: Siracusa Principles (n 25) s I.B.17; OHCHR Report on Privacy and the Digital Age (n 25) para 28; Harris and others (n 13) 637–38, 640–41.

<sup>34</sup> HRC GC 34 (n 33) para 27; Siracusa Principles (n 25) s I.A.12.

<sup>35</sup> See in particular the equivalent of art 16 of the Convention under the ACRWC (n 2) art 10, which provides that 'parents and legal guardians shall have the right to exercise reasonable supervision over the conduct of their children'.



which requires that parents must make a child's best interests, rather than their own, their basic concern. Second, the right of parents to regulate their child's right to privacy remains subject to a child's evolving capacity. Thus, as a child moves from dependency to independence (or more accurately, a more mutual level of interdependence),<sup>36</sup> the right of parents to exercise influence over a child's right to privacy will gradually diminish.<sup>37</sup>

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### 3. *Protecting Children's Best Interests*

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In addition to the capacity for parents to legitimately restrict a child's rights under article 16, a state also has an obligation to take measures which may interfere with these rights where this is necessary to secure a child's best interests and/or survival and development, consistent with articles 3 and 6 of the Convention. This protective capacity provides a further illustration of the extent to which a child's rights under article 16 are not the same as adults. Whereas international law assumes that adults have the capacity to exercise these rights autonomously, international law takes the view that the necessary implication of children's evolving capacities is that their enjoyment of these rights must be tempered and constrained to protect their best interests and development.

C16.P66

At the same time, the Convention does not tolerate forms of state paternalism that are based on assumptions and speculation as to when children's exercise of their rights will be harmful to their best interests. Instead it demands the careful application of the general principles when determining if an interference with a child's rights is justifiable. First, the rational connection test requires that assessments regarding the harm of a particular manifestation of a child's rights is not based on assumptions and/or prejudices about children's capacity. Instead, where available, such assessments should be based on relevant evidence regarding the impact of the relevant activity on children. Although the absence of evidence is not fatal, there must be still be a reasonable basis upon which to suggest that there is a real risk that the relevant activity will be harmful to the child (or children's) best interests and development.<sup>38</sup>

C16.P67

Importantly when assessing the evidence as to the impact of an activity on a child's best interests and development, a state must seek the views of children (or a child) in accordance with article 12. These views, when they are capable of being provided by a child, will not be determinative (unless the child has reached a level of maturity and understanding that is commensurate with an adult in the same circumstances).<sup>39</sup> However the process of engaging in a dialogue with children is critical from a rights-based perspective, even where a state can still justify paternalist restrictions on their rights. This is because it allows children to be viewed as subjects with entitlements, rather than objects whose views are irrelevant. It also demands that adults explain and justify why a restriction is placed on a child's rights under article 16. In the event that protective measures are warranted, the principle of minimal impairment further demands that states must adopt those measures which are reasonably available to minimize the interference with a child's rights.

C16.N36

<sup>36</sup> John Tobin, 'Understanding Children's Rights: A Vision beyond Vulnerability' (2015) 84 *Nordic Journal of International Law* 155.

C16.N38

<sup>37</sup> See Chapter 5 of this Commentary.

<sup>38</sup> See chapter 3 of this Commentary.

C16.N39

<sup>39</sup> See chapter 12 of this Commentary.

C16.S11

## II. The Scope of the Interests Protected under Article 16

C16.S12

### A. A Multidimensional Right

C16.P68

Article 16 lists six specific interests which are to be protected against unlawful interference or attack—privacy, family, home, correspondence, honour, and reputation. There is a tendency within the literature to subsume each of these interests under the rubric of privacy. Arguably, this is justified given the expansion in the meaning of privacy. At the same time caution should be exercised to ensure that there is an understanding as to the parameters of each discrete term. Moreover, there is merit in recognizing that honour and reputation are concepts which are concerned with the *public standing* of a child as opposed to the more intimate and private nature of concepts such as privacy, family, home, and correspondence. The discussion that follows seeks to outline the scope of each of the rights protected under article 16.

C16.S13

### B. Privacy

C16.P69

Privacy is an oft-used but ill-defined term which has been the subject of significant commentary over an extended period.<sup>40</sup> Although concern was expressed during drafting as to the confusion surrounding its meaning, the drafters were not prepared to offer any clarification about its scope.<sup>41</sup> Moreover, neither the CRC Committee nor HR Committee<sup>42</sup> have ventured a comprehensive definition and it has been said that the treatment of the equivalent phrase under the European Convention, ‘private life’, has been ‘distinguished neither by its clarity nor by its discipline’.<sup>43</sup> That being said, the jurisprudence of international human rights bodies reveals that the right to privacy has at least five discrete dimensions which relate to the autonomy and normative agency of individuals (including children).<sup>44</sup> These dimensions are: physical and psychological integrity; decisional

C16.N48

<sup>40</sup> See: Samuel Warren and Louis Brandeis, ‘The Right to Privacy’ (1890) 4 Harvard Law Review 193 (considered the seminal article in shaping the understanding of the right within the US); Richardson (n 3) (examining the origins of the right to privacy); Richard Posner, ‘The Right to Privacy’ (1977–78) 12 Georgia Law Review 393, 393 (noting that privacy is elusive and ill-defined; offers an economic analysis of the concept); Judith Thomson, ‘The Right to Privacy’ (1975) 4 Philosophy and Public Affairs 295, 295 (noting that ‘nobody seems to have any very clear idea what it is’ and arguing that the right is unnecessary as other rights better capture the interests protected under privacy); Ken Gormley, ‘One Hundred Years of Privacy’ [1992] Wisconsin Law Review 1335, 1397 (examining the evolution of US privacy law since Warren and Brandeis, arguing that privacy law is actually comprised of five different types: tort privacy, Fourth Amendment privacy, First Amendment Privacy, individual decision-making privacy regarding one’s own person (Fourteenth Amendment), and privacy of citizens provided by state constitutions); Hilary Delany and others, *The Right to Privacy: A Doctrinal and Comparative Analysis* (Dublin Thomson Round Hall 2008) 4–11; Linda McClain, ‘Inviolability and Privacy: The Castle, the Sanctuary and the Body’ (1995) 7 Yale Journal of Law and the Humanities 195 (offering a model to understand the various interconnected dimensions of privacy).

<sup>41</sup> E/CN.4/1987/25 para 114; *Legislative History* (n 9) 475.

<sup>42</sup> Mr Herndl, in a dissenting opinion in *Coreil and Aurik v The Netherlands* Comm No 453/91 (31 October 1994) CCPR/C/52/D/453/1991) stated:

The Committee itself has not really clarified the notion of privacy either in its General Comment on article 17 where it refrains from defining that notion. In its General Comment the Committee attempts to define all the other terms used in article 17 such as ‘family’, ‘home’, ‘unlawful’ and ‘arbitrary’. It further refers to the protection of personal ‘honour’ and ‘reputation’ also mentioned in article 17, but it leaves open the definition of the main right enshrined in that article, ie: the right to ‘privacy’.

<sup>43</sup> Harris and others (n 13) 305. See also Nowak (n 12) 385 (explaining that ‘it may be assumed that “private life” under art 8 of the ECHR and “privacy” ... [the term used under art 16 of the Convention and art 17 of the ICCPR] basically mean the same thing’).

<sup>44</sup> See Nowak (n 12) 385–92 (listing the following interrelated dimensions of privacy: individual existence and autonomy; identity; integrity; intimacy; autonomy; communication; and sexuality).

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autonomy; personal identity; informational privacy; and physical/spatial privacy. The following commentary maps out the implications of these dimensions for children's right to privacy under article 16 which extend far beyond its humble origins as a right 'to be let alone'.<sup>45</sup> Critically, when doing so it highlights the additional considerations that arise by virtue of the capacity for parents and/or the state to restrict children's right to privacy for legitimate *protective reasons*.

### 1. Physical and Psychological Integrity

Article 19 of the Convention protects children against all forms of violence, neglect, and abuse; article 24(3) protects children against traditional practices that are prejudicial to a child's health; and article 37 protects children against torture and cruel, inhuman, and degrading treatment. Complementing these provisions is a child's right to privacy, which extends to the physical and psychological integrity of a child.<sup>46</sup> Importantly, violations of a child's bodily integrity that reach the threshold of torture or cruel inhuman degrading treatment will never be justifiable, given the absolute prohibition on such treatment. Thus, a violation of this prohibition will always constitute a violation of a child's right to privacy. However, the right to privacy has a residual application in those cases where there is an interference with a child's physical and/or psychological integrity that does not reach the threshold for torture or cruel, inhuman, and degrading treatment.<sup>47</sup> In such circumstances the question becomes whether the interference with a child's integrity is lawful and non-arbitrary.

#### (a) Corporal Punishment

Of particular relevance is the practice of corporal punishment. In the case of *Costello-Roberts v United Kingdom*<sup>48</sup> it was argued that corporal punishment was a violation of a

<sup>45</sup> Warren and Brandeis (n 40) 195.

<sup>46</sup> See eg: *X and Y v Netherlands* (1985) 8 EHRR 235 para 22 (holding that the rape of a young girl while in institutional care was a violation of her right to respect for private life under article 8 of the ECHR); *Costello-Roberts v UK* (1993) 19 EHRR 34 para 36 (concerning corporal punishment of a child, holding that there may be circumstances in which the protection of art 8 might extend beyond the protection afforded by the prohibition of torture under art 3); *Stubbings v UK* (1996) 23 EHRR 213 (affirming that art 8 applies to allegations of child sexual abuse, and that it may be the adoption of measures to secure the right to life in the sphere of relations between individuals; sexual abuse is a problem that entitles individuals to state protection in the form of effective deterrence). See also *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* app no 13178/03 (12 October 2006) (ECtHR) paras 82–83 (holding that the immigration detention of a 5-year-old daughter of a refugee which delayed reunification with the mother violated art 8; noting that the tie between a mother and child comes within the definition of family life; by implication, applicant's detention may have disrupted child's physical and mental integrity). Children's right to privacy is supplemented by general ECHR jurisprudence on the right to privacy. See eg: *Botta v Italy* (1998) 26 EHRR 97 para 32 (noting that art 8 is intended to ensure the development of each individual's personality in his/her relations with other human beings, but there is no state obligation to ensure disability access for the purpose of guaranteeing the possibility of experiencing every type of personal relationship); *Von Hannover v Germany* (2005) 40 EHRR 1 para 95 (affirming that a person's image is one of the chief attributes of their personality and the right to protection of one's image is an essential part of personal development; therefore the state has positive obligations to give effect to art 8); *Pretty v United Kingdom* (2002) 35 EHRR 1 para 61 (holding that legislation preventing applicant's from choosing an undignified end to life may constitute an interference with article 8, but concluding that a blanket ban on assisted suicide may be necessary in a democratic society for the protection of rights of others); *YF v Turkey* app no 24209/94 (22 October 2003) (ECtHR) (holding that gynaecological exam carried out against the will of a female detainee was a violation of art 8).

<sup>47</sup> See *Costello-Roberts* (n 46) paras 34, 36; *Raninen v Finland* (1997) 26 EHRR 563 para 63 (holding that violations of art 8 might extend to conditions during detention which do not attain the level of severity required by prohibition of torture).

<sup>48</sup> (1993) 19 EHRR 112.

student's right to respect for private life under article 8 of the ECHR. This argument was accepted by the European Commission but it was rejected by the ECtHR on the basis that in the case in question, the punishment did not entail adverse effects for the physical or moral integrity of the child which were sufficient to bring it within the scope of the prohibition contained in article 8.<sup>49</sup> However, the reasoning of the Court was flawed because it conflated the issue of whether there was an interference with the right to private life with the question of whether such an interference were necessary to achieve a legitimate aim (or pressing social need).

C16.P72 Under a substantive rights-based approach, these issues require separate consideration.<sup>50</sup> Moreover, when such an approach is adopted, the practice of corporal punishment will always be an unlawful and arbitrary interference with a child's right to privacy. This practice may well pursue a legitimate aim such as the discipline of children. However, it will always fail the test of necessity and proportionality. This is because even if it were possible to establish that corporal punishment is an effective method to discipline children,<sup>51</sup> and thereby satisfy the rational connection test, it does not satisfy the minimal impairment principle. It is now well accepted that there is a range of effective alternative disciplinary techniques for children that do not require an interference with their physical integrity.<sup>52</sup> As such, corporal punishment is not *necessary* to discipline children and less invasive techniques must be preferred. This is consistent with the view of Committee which has repeatedly condemned the practice of corporal punishment as a violation of several rights under the Convention including the right to respect for physical integrity.<sup>53</sup>

C16.N59

<sup>49</sup> cf *Raninen v Finland* (n 47) where the Court held that the right to physical and moral integrity guaranteed under art 8 of the European Convention is relevant even when the treatment is not so severe as to amount to inhuman treatment under art 3 of the European Convention.

<sup>50</sup> See John Tobin, 'Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?' (2009) 33 Melbourne University Law Review 580, 585–92 (outlining a four-tiered approach to recognize children as rights bearers).

<sup>51</sup> This issue is contested. Some psychologists and paediatricians insist that corporal punishment produces adverse, immediate, and long-lasting emotional, cognitive, and behavioural effects on children (American Society of Pediatrics, 'Guidance for Effective Discipline' (1998) 101 Pediatrics 723 (reaffirmed in (2014) 134 Pediatrics 1520); Murray Straus and others, 'Spanking by Parents and Subsequent Antisocial Behavior of Children' (1997) 151 Archives of Pediatrics and Adolescents Medicine 761; Irwin Hyman, 'Using Research to Change Public Policy: Reflections on 20 years of Effort To Eliminate Corporal Punishment in Schools' (1996) 98 Pediatrics 818). In contrast, others have argued that when use of force is reasonable and does not constitute abuse or neglect, it can be an effective and necessary practice (Diana Baumrind and others, 'Ordinary Physical Punishment: Is It Harmful?' (2002) 128 Psychological Bulletin 580; Canadian Pediatric Society, 'Statement: Effective Discipline for Children' (1996). For a meta-analysis of research, see eg: Christopher Ferguson, 'Spanking, Corporal Punishment and Negative Long-Term Outcomes: A Meta-analytic Review of Longitudinal Studies' (2013) 33 Clinical Psychology Review 196; Elizabeth Oddone Paolucci and Claudio Violato, 'A Meta-Analysis of the Published Research on the Affective, Cognitive, and Behavioral Effects of Corporal Punishment' (2004) 138 The Journal of Psychology: Interdisciplinary and Applied 197. For discussion of the legitimacy of corporal punishment under international human rights law, see generally Susan H Bitensky, *Corporal Punishment of Children: A Human Rights Violation* (Martinus Nijhoff 2006).

<sup>52</sup> See eg: Moyo George and others, 'Disciplinary Practices in Schools and Principles of Alternatives to Corporal Punishment Strategies' (2014) 34 South African Journal of Education' (2014) 34 South African Journal of Education 1; Thomas Diamantes, 'Alternatives to Corporal Punishment' (1992) 65 The Clearing House: A Journal of Educational Strategies, Issues and Ideas 233. See generally End Corporal Punishment, 'Resources' <https://endcorporalpunishment.org> accessed 14 November 2018.

<sup>53</sup> CRC Committee, 'General Comment No 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment' (2 March 2007) CRC/C/GC/8 ('CRC GC 8') para 21.

**(b) Other Invasive Practices**

From a practical perspective, the extension of a child's right to privacy to include a child's physical and psychological integrity means that this right will be engaged in a range of practices beyond corporal punishment including for example, medical experimentation without consent, non-consensual drug testing, body searches (both internal and external), and even the use of handcuffs, which interfere with a child's physical integrity.<sup>54</sup>

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Each of these practices will only be justified if they are lawful and not arbitrary: that is, they must be undertaken pursuant to a valid law; pursue a legitimate aim; and satisfy both the rational connection test and the minimal impairment principle.

With respect to the issue of *body searches* performed for criminal investigative reasons, the HR Committee has stated that the right to privacy requires effective measures to 'ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched'.<sup>55</sup> More specifically, persons 'being subjected to a body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex'.<sup>56</sup> However, such comments relate to internal body searches on adults and there remains a threshold consideration as to whether children could ever be subjected to such a practice at any age.<sup>57</sup> While it remains for the CRC Committee to comment on this issue, an exceptionally high threshold exists if a state were to justify the use of an internal body search on a child given that the Convention insists on protecting children against abuse (art 19) and ensuring their dignity within criminal justice settings (art 40).<sup>58</sup>

The Committee and other international human rights bodies have not yet had cause to consider the issue of *compulsory student drug testing*. The US Supreme Court, however, has upheld the constitutionality of school policies which require mandatory and random drug testing of student athletes on the basis that the state interest in testing athletes and curbing drug abuse outweighed what the Court identified as the 'diminished privacy expectations' of these students.<sup>59</sup> The Court has also used similar reasoning to uphold drug testing for students who participate in competitive extracurricular activities such as such

<sup>54</sup> See John Tobin, 'Time to Remove the Shackles: The Legality of Restraints on Children Deprived of Their Liberty under International Law' (2001) 9 International Journal of Children's rights 213.

<sup>55</sup> HRC GC 16 (n 12) para 8. <sup>56</sup> *ibid*.

<sup>57</sup> There is little literature on this point, but the literature on school drug testing might be applicable. It points to a general acceptance of the idea that there is a particular invasion of bodily autonomy—specifically, an invasion when authority figures seek evidence in body apertures or fluids—involved in the seizure of bodily fluids that is arguably not dissimilar to the invasion that would be felt by children with regard to an internal body search. See: Marjorie Heins, '“The Right to Be Let Alone”—Drug Testing and the Fourth Amendment' (1987) 21 Suffolk University Law Review 119. For general discussion of the issue in the US jurisdiction, see eg Caitlin Borgmann, 'The Constitutionality of Government-imposed Bodily Intrusions' (2014) University of Illinois Law Review 1059.

<sup>58</sup> See *X and Y v Argentina* Case 10.506 (15 October 1996, Report No 38/96) (Inter-American Commission on Human Rights) paras 78–79 (where 13-year-old girl and mother were routinely given vaginal inspections upon entering a prison, holding that vaginal inspections or searches may be acceptable under certain circumstances, where its application is guided by due process and safeguarding Convention rights; concluding that the 13-year-old girl was dependent on the decision taken by her mother regarding the vaginal inspections, and that no real consent was possible, therefore in the girl's case, the inspections were an 'absolutely inadequate and unreasonable method').

<sup>59</sup> *Vernonia School District 47J v Acton* 515 US 646 (1995) (USA S Ct) (the Court treated students' privacy claims with scepticism, noting that locker rooms and showers afford students little privacy, and the collection of urine samples is little different to the normal use of public restrooms: (657–58). For a discussion and critical evaluation of the case see: Julie Tappendorf, 'Vernonia Sch. Dist. v Acton: Now Children Must Shed their Constitutional Rights at the Schoolhouse Gate' (1996) 18 Hawaii Law Review 869.



as a marching band and choir.<sup>60</sup> Critically, these decisions have been subject to criticism on the ground that they do not adequately justify the nexus between the legitimate end sought, namely the reduction in drug use among students, and the means by which to achieve this aim.<sup>61</sup>

C16.P76

From the perspective of the Convention, the scope of students' right to privacy is not diminished simply by virtue of being a student and drug testing of students would only be tolerated if it were lawful and non-arbitrary. In practical terms this would require the state to establish on the balance of probabilities that the testing regime served a legitimate aim *and* was necessary and proportionate for the purpose of achieving that aim.<sup>62</sup> This in turn would require the state to produce the objective evidence necessary to satisfy the rational connection test and then demonstrate why there were no other reasonably available alternative measures that would minimize the interference with the children's right to privacy. Notably in the context of the US decisions it has been observed that the evidence presented by authorities relied on anecdotal reports and testimonials.<sup>63</sup> Such an approach is insufficient for the purposes of justifying an intervention with a child's right to privacy under article 16 of the Convention. Moreover, in a review of the available evidence by the American Academy of Pediatrics it was found that at present there is insufficient evidence to justify school-based drug testing.<sup>64</sup> If this remains the case, such a practice would represent an unjustified (or arbitrary) interference with children's right to privacy.

C16.P77

Significantly, the CRC Committee has condemned virginity tests on girls as a violation of their right to privacy.<sup>65</sup> Admittedly (and perhaps understandably) this assessment has not been accompanied by an explanation from the Committee as to why this practice is unlawful and arbitrary. However, such an analysis remains necessary because this practice

C16.N69

<sup>60</sup> *Board of Education v Earls* 38 US 822 (2002) (USA S Ct) (holding that students' privacy interest was 'limited in a public school environment' (853) and that it was outweighed by the state interest in preventing drug abuse: 834–38).

<sup>61</sup> Irene Merker Rosenberg, 'Public School Drug Testing: The Impact of Acton' (1996) 33 *American Criminal Law Review* 349, 351–52. See also: David Steinberg, 'High School Drug Testing and the Original Understanding of the Fourth Amendment' (2003) 30 *Hastings Constitutional Law Quarterly* 263; James Jolley, 'Reemphasizing Impracticability in the Special Needs Analysis in Response to Suspicionless Drug Testing of Welfare Recipients' (2014) 92 *North Carolina Law Review*, 948, 961–62.

<sup>62</sup> With respect to the decisions of the US Supreme Court, the evidence presented relied on anecdotal reports and testimonials: American Academy of Pediatrics, 'Technical Report: Adolescent Drug Testing Policies in Schools' (2015) 135 *Pediatrics* 1107, 1107. Such an approach is insufficient for the purposes of justifying the legitimacy of an intervention with a child's right to privacy under article 16 of the Convention.

<sup>63</sup> American Academy of Pediatrics, 'Technical Report: Adolescent Drug Testing Policies in Schools' (2015) 135 *Pediatrics* 1107, 1107.

<sup>64</sup> See: *ibid*; American Academy of Pediatrics, 'Policy Statement: Adolescent Drug Testing Policies in Schools' (2015) 135 *Pediatrics* 782.

<sup>65</sup> See eg: CRC Committee, CO Turkey, CRC/C/15/Add.152 para 46; CO South Africa, CRC/C/15/Add.122 para 33. See also: CEDAW Committee and CRC Committee, 'Joint General Recommendation No 31 of the Committee on the Elimination of Discrimination against Women/General Comment No 18 of the Committee on the Rights of the Child on Harmful Practices' (14 November 2014) CEDAW/C/GC/31-CRC/C/GC/18 ('CRC GC 18') para 8 (condemning virginity testing as an example of harmful practices which are prohibited under articles 2, 3, 6, 12, 19, 24(3), and 37(a) [para 31] without mentioning article 16). See: TW Bennett and others, 'Virginity Testing: A Crime, A Delict or A Genuine Cultural Tradition?' (2010) 2 *Journal of South African Law* 254; D Christopher Decker, 'A Broken Promise: The Continued Use of Virginity Control Examinations in Turkey' (1998) 1 *Buffalo Human Rights Law Review* 315 336 (condemns use of such practices in Turkey as a violation of a child's rights to privacy under article 16 of the Convention and a form of discrimination given that the sexual practices of boys are not subjected to any form of investigation); Sarah Lai and Regan Ralph, 'Female Sexual Autonomy and Human Rights' (1995) 8 *Harvard Human Rights Journal* 201 (examines practice of virginity testing in Turkey which is condemned as a violation of the prohibition against cruel, inhuman, and degrading treatment and the prohibition against discrimination).

brings into focus the potential for a range of claims to be used to justify such a practice which include: respect for cultural traditions and religious beliefs; parental expectations of what is considered to be in a child's best interests; the existence of domestic laws that tolerate such practices; and resort to parental rights to respect for their privacy and family life to justify practices that interfere with a child's physical integrity. Indeed, several of these arguments can, and often are, raised to justify a range of common but contested practices including corporal punishment, female genital cutting, male circumcision, and various initiation rites that involve interference with a child's physical integrity.

C16.P78

The legitimacy of several of these practices is examined in detail in other chapters in this commentary.<sup>66</sup> For the purposes of this chapter it is sufficient to make the following general observations. First, the Convention accommodates and protects parental rights with respect to the upbringing of their children (art 5) *and* the existence of diverse cultural practices and religious beliefs (art 30).<sup>67</sup> However, this deference to parental wishes, cultural traditions, and religious beliefs under the Convention is limited. Article 24(3) demands that where such practices are prejudicial to the health of a child that must be prohibited. Thus, it is clear that the Convention prioritizes the physical and bodily integrity of children over respect for traditional practices.<sup>68</sup> Moreover, the respect for cultural and religious practices under article 30 of the Convention is directed towards the *child's enjoyment* of such practices rather than empowering adults to impose such practices on children. Finally, the respect for parental rights under article 5 of the Convention is subject to the strict caveat that such rights are exercised for the purpose of providing guidance and assistance to a child. Thus, unless a parent can demonstrate on the basis of objective evidence that an interference with a child's bodily integrity is intended to benefit the health and development of a child *and* there is no less invasive measure reasonably available alternative to achieve such a benefit, the interference will not be justified.

C16.S17

## 2. Decisional Autonomy

C16.S18

### (a) An Evolving Entitlement

C16.P79

The right to privacy includes the capacity to make decisions regarding how an individual leads his or her private life. Indeed, the European Court has held that the right to privacy 'is primarily intended to ensure the development of ... the personality of each individual'<sup>69</sup> and 'that the notion of personal autonomy is an important principle underlying its interpretation'.<sup>70</sup> However, the idea of decisional autonomy and/or normative agency as a distinct dimension of the right to privacy presents a challenge for children, given their evolving capacities. It also creates the potential for conflict between a child and his or her parents. Indeed during drafting there was identifiable focus on the potentiality of privacy to 'impair the relationship between the parents and the child'.<sup>71</sup>

C16.N66

<sup>66</sup> See eg: Chapter 24 of this Commentary, which examines the legitimacy of female genital cutting; Chapter 14 which examines the legitimacy of male circumcision)

C16.N67

<sup>67</sup> See John Tobin, 'Justifying Children's Rights' (2013) 21 International Journal of Children's Rights 395 ('Justifying Children's Rights') 418–19.

C16.N68

<sup>68</sup> See commentary to art 24(3) (Chapter 24).

C16.N69

<sup>69</sup> *Botta v Italy* (n 46) para 32; *Von Hannover v Germany* (n 46) para 95.

C16.N70

<sup>70</sup> *Pretty v United Kingdom* (n 46) para 61. See also Lord Lester QC, Lord Pannick QC, and Herberg J, *Human Rights Law and Practice* (3rd edn, Lexis Nexis 2009) 359 (noting that 'the notion of privacy is a continuum starting from the inviolable core of personal autonomy').

C16.N71

<sup>71</sup> E/CN.4/1988/28 para 56; *Legislative History* (n 9) 477.

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C16.P80 The Convention is alert to each of these challenges which it seeks to accommodate and reconcile via the principle of evolving capacities. Parents retain the right to provide assistance and guidance to children under article 5 and children have a right to express their views in all matters affecting them under article 12. However, neither parental views nor the views of a child will automatically be determinative of what is ultimately in the best interests of a child. This assessment will depend on the age and maturity of the child. Thus, while the decisional autonomy of a child may be constrained under the Convention it remains a legitimate dimension of a child's right to privacy.

C16.S19 **(b) Relational Autonomy**

C16.P81 In *Niemietz v Germany*<sup>72</sup> the European Court of Human Rights declared that:

C16.P82 it would be too restrictive to limit the notion [of private life] to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.<sup>73</sup>

C16.P83 The fact that this comment applies to the nature of 'private life' under article 8 of the European Convention, whereas article 16 of the Convention prefers the term 'privacy', is irrelevant.<sup>74</sup> Indeed, the Human Rights Committee in *Coereil and Aurik v The Netherlands* clearly stated that '... the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone'.<sup>75</sup> Thus, privacy for the purposes of article 16 of the Convention must extend to the right of a child to establish and develop relationships with other human beings. It is therefore a broader concept than the 'narrower confines of the Anglo-American idea of privacy with its emphasis on the secrecy of personal information and seclusion'.<sup>76</sup>

C16.P84 Moreover, with respect to adults it is well established that this right to develop personal relationships extends to sexual relationships. In *Toonen v Australia* the HR Committee stated that '[i]nsomuch as article 17 [of the ICCPR] is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of "privacy"'.<sup>77</sup> Similar findings have also been made with respect to the right to respect for private life under the European Convention.<sup>78</sup> However, such comments leave open the question of whether consensual sexual relationships involving children will be protected under the right to privacy. Unlike adults who enjoy full autonomy when entering personal relationships,

C16.N75

<sup>72</sup> (1993) 16 EHRR 97.

<sup>73</sup> *ibid* para 29. See also *Botta v Italy* and *Von Hannover v Germany* (n 46) (both emphasizing that the right extends to the ability to develop 'relations with other human beings').

<sup>74</sup> Nowak (n 12) 385.

<sup>75</sup> Comm No 453/91 (9 December 1994) CCPR/C/52/D/453/1991 para 10.2.

<sup>76</sup> *X v Iceland* (1976) 5 DR 86 (ECommHR); Harris and others (n 13) 305–06.

<sup>77</sup> Comm No 488/92 (4 April 1994) CCPR/C/50/D/488/1992 para 8.2. See also *Joslin v New Zealand* Comm No 902/99 (2002) A/57/20 214 (affirming that right to privacy protects against all interferences and attacks on a person's expression of identity, but that unlike the criminal legislation in *Toonen*, the legislation at issue, which concerned the meaning of marriage, did not authorize intrusions into personal matters or interfere with the authors' privacy or family life or target the authors as members of a social group).

<sup>78</sup> See eg: *Dudgeon v United Kingdom* (1981) 4 EHRR 149 para 52 (ECtHR) (involved consensual homosexual activities between men in private and Court described sexual life as being 'a most intimate aspect' of private life); *Bruggeman and Scheuten v FRG* (1977) 10 DR 100 (ECmHR) (involved right of a woman to an abortion in the event of an unwanted contraception and Commission recognized the importance of untroubled sexual relations as part of private life).

whether of a sexual nature or otherwise, children remain subject to the protective influence of their parents *and* the state under articles 5 and 3 of the Convention.

C16.P85

This protective role certainly legitimizes parental and legislative restrictions on children's ability to enter personal relationships especially those of a sexual nature. However, as noted above, the Convention stipulates that this protective role must be exercised in light of a child's evolving capacities. It thus anticipates that where a child has reached sufficient maturity and understanding, parental and state regulation of a child's personal relationships will not be justified. Critically this possibility must not be interpreted to mean that the Convention seeks to drive a wedge between children and their families when it comes to the sensitive matter of personal and sexual relationships. What it does demand, however, is a shift from a protective, or indeed proprietary model, in which children are subject to the control and direction of their parents on such matters, in favour of a relationship based on dialogue and respect for a child's evolving capacities in which his or her views are taken seriously and given due weight.

C16.S20

### (c) Bodily Autonomy

C16.P86

Given that the right to privacy extends to protection against unjustified interferences with a child's bodily integrity, it must also include the right of a child to enjoy evolving autonomy over his or her body. Critically, unlike adults who are presumed to be competent, this does not mean that children have a right to get body piercings and tattoos or start drinking alcohol and smoke drugs at any age. This is because their right to evolving bodily autonomy remains subject to the imposition of reasonable constraints by parents and state agents for legitimate protective reasons. Within this context at least three issues highlight the tension between children's evolving autonomy and *protective interventions*: namely, access to contraception without parental consent; a child's right to seek an abortion; and denial of life saving medical treatment. Each of these issues is explored in detail in the commentary on the right to health under article 24.

C16.P87

For the purposes of this chapter it is sufficient to note that the protective capacity of parents, and indeed the state, cannot justify an intervention or restriction on a child's bodily autonomy when a child has reached a level of maturity whereby he or she properly understands the consequences of seeking a health intervention (such as access to contraception or an abortion)<sup>79</sup> or refusing assistance (such as a refusal to accept lifesaving medical treatment). This is because when a child's maturity and understanding reaches a level that would be equivalent to that expected of an adult with respect to the same procedure, there can be no legal or moral justification for adopting a paternalistic approach with respect to the treatment of that child's views which must be treated as being determinative of his or her best interests in such circumstances.<sup>80</sup>

C16.S21

### 3. Personal Identity

C16.P88

Article 8 of the Convention provides children with an express right to preserve their identity. However, the CRC Committee in its General Comment No 20 on the rights of adolescents has also explained that the right to privacy 'entitles adolescents to have

C16.N79

<sup>79</sup> See eg *Huamán v Peru* Comm No 1153/2003 (22 November 2005) CCPR/C/85/D/1153/2003 (holding that 'the refusal to act in accordance with the author's decision [a seventeen-year-old girl] to terminate her pregnancy was not justified and amounted to a violation of article 17'.)

C16.N80

<sup>80</sup> See Tobin, 'Justifying Children's Rights' (n 67) 428–29, 431–32. See also Chapter 3 of this Commentary.

access to their records held by educational, health care, childcare and protection services and justice systems'.<sup>81</sup> This approach is consistent with case law from ECtHR which suggests that the right to privacy also embraces 'aspects of an individual's physical and social identity'.<sup>82</sup> The concept of a child's identity is complex and explored in detail in the commentary to article 8. It includes, for example, the rights to a name, a nationality, to be registered immediately after birth,<sup>83</sup> as well as elements of a child's religious and cultural identity. Implicit within this rights-framework is the legal imperative of according recognition of each child as a subject of rights before the law.<sup>84</sup> These interdependent identity rights, therefore, are key to unlocking other rights. In a judgment that addresses the rights to a name, acquire a nationality, and juridical personality vis-à-vis two child applicants, the Inter-American Court explained:

C16.P89 the failure to recognise juridical personality harms human dignity, because it denies absolutely an individual's condition of being a subject of rights and renders him[/her] vulnerable to non-observance of his[/her] rights by the State or other individuals.<sup>85</sup>

C16.P90 Significantly, the ECtHR has endorsed the idea that 'the right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life'.<sup>86</sup> This principle is particularly relevant for children whose knowledge of their parents and social identity may have been shaped by, for example, having spent time in foster care, adoption, assisted reproductive technology, or a surrogacy arrangement. Indeed, in *Gaskin v United Kingdom*, the ECtHR held that the refusal to allow a young man access to information about the identity of those persons who cared for him while he was in the care of the state was a violation of his right to privacy. In arriving at this

C16.N89

<sup>81</sup> CRC Committee, 'General Comment No 20 on the implementation of the rights of the child during adolescence' (6 December 2016) CRC/C/GC/20 para 46.

<sup>82</sup> *Pretty v United Kingdom* (n 46) para 61. See also *Georgel and Georgeta Stoicescu v Romania* Application No 9718/03 (26 July 2011) (ECtHR) paras 48–49.

<sup>83</sup> CRC art 7 and 8. See also chapters 7 and 8 of this Commentary on these rights. cf ICCPR arts 24 (2) and (3); ACRWC art 6; ACHR arts 3, 18, and 20.

<sup>84</sup> Of the equivalent provision in the ICCPR (art 24 (2)), the HR Committee has noted the rights to a name and immediate registration after birth are 'designed to promote recognition of the child's legal personality'. See also: views expressed on the right to acquire a nationality (art 24 (3)) in HR Committee, 'General Comment No 17: Article 24 (Rights of the child)' (7 April 1989) HRI/GEN/1/Rev.9 (vol I) 193 ('HRC GC 17') paras 7–8. cf: ICCPR, art 26; ACHR, art 3; ACRWC, art 6.

<sup>85</sup> Inter-American Court of Human Rights, *Yean and Bosico v Dominican Republic* Series C No 130 (8 September 2005) para 179. Though the Court did not consider violations of children's right to privacy, it was argued that 'the right to a name is closely linked to identity of an individual and is associated with the rights to privacy and juridical personality'. See para 119.

<sup>86</sup> *Jaggi v Switzerland* App no 58757/00 (ECtHR, 13 July 2006) para 37. (The facts of this case involved an application for a DNA test of a deceased man who was suspected of being the applicant's biological father. The application, which required exhumation, was resisted by the state on grounds that among other things, it would violate the rights of the deceased man's family. The Court, however, upheld the application on the basis that the test was a necessary measure to secure the applicant's right to respect for private life under art 8 of the ECHR. It is important to note that the Court approached the issue on the basis that 'that the private life of a deceased person from whom a DNA sample was to be taken could not be adversely affected by a request to that effect made after his death': para 42. Thus the balancing exercise concerned the rights of the applicant and the family members of the deceased. See also: *Mikulic v Croatia* App no 53176/99 (ECtHR, 7 February 2002) cited in *Odièvre v France* App no 42326/98 (ECtHR, 13 February 2003) para 44 ('people have a right to know their origins, that right being derived from a wide interpretation of the scope of the notion of private life').



position, the Court affirmed the finding of the European Commission, which had declared that:

C16.P91 Respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that in principle they should not be obstructed by the authorities from such very basic information without specific justification.<sup>87</sup>

C16.P92 The Court also explained that ‘persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development’.<sup>88</sup>

C16.P93 Significantly, this principle has been applied in subsequent cases by the ECtHR<sup>89</sup> and was extended by the English High Court in a case in which donor-conceived individuals were seeking access to non-identifying information, to recognize a ‘right to obtain information about a biological parent who will inevitably have contributed to the identity of his child’.<sup>90</sup> This approach is convincing. Indeed, it would be somewhat incongruous to quarantine the biological aspect of a person’s identity from their social, physical, moral, and psychological identity. Thus, if it is accepted that an individual’s right to privacy includes a right to establish the details of their identity, it follows that the effective enjoyment of this right will depend upon the ability to have access to *any* information that is of significance to their self-identity including their genetic origins.<sup>91</sup>

C16.P94 Importantly, it does not follow from this proposition that adopted or donor-conceived individuals have a trump card they can play to automatically displace the corresponding right to privacy of those persons who placed the child for adoption or who acted as a surrogate or sperm donator. International law demands that the right to privacy of *all affected parties*, and not just the child, must be balanced in accordance with the methodology used to resolve conflicts between competing rights holders. The application of this methodology to balance the competing rights at play in such situations is detailed in the commentary to article 7.<sup>92</sup>

C16.N88 <sup>87</sup> (1989) 12 EHRR 36 para 39. <sup>88</sup> *ibid* para 49.

C16.N89 <sup>89</sup> See eg: *Mandet v France* App no 30955/12 (14 June 2016) (finding that an application by a biological father to have his paternity recognized in circumstances where he was not married to the child’s mother was justified because it was based on the child’s right to know the truth about his origins); *Mennesson and Others v France* Application no 65192/11 (26 June 2014) (holding that the refusal of the authorities to grant legal recognition of the parents of a child born under a lawful surrogacy arrangement was a violation of art 8 of the ECHR).

C16.N90 <sup>90</sup> *Regina (Rose and Another) v Secretary of State for Health and Human Fertilisation and Embryology Authority* [2002] EWHC 1593 (Admin) para 48 (the court was only required to determine whether the right to privacy had been engaged on the facts of the case and made no determination as to whether the refusal to release identifying information would constitute a violation of this right). See also *Bensaid v United Kingdom* (2001) 33 EHRR 10 para 47 (the ECtHR held that art 8 [the right to respect for private and family life] protects ‘a right to identity and personal development’).

C16.N91 <sup>91</sup> See Ruth McNair (Victorian Law Reform Commission), *Outcomes for Children Born of ART in a Diverse Range of Families* (Victorian Law Reform Commission 2004) 43 (argues that research indicates that ‘identity is related to genetic inheritance is some way’ and a fuller sense of identity for a donor conceived person may only be achieved through access to details about their donor). See also evidence of applicant, a donor-conceived individual, in *Regina (Rose and Another) v Secretary of State for Health and Human Fertilisation and Embryology Authority* [2002] EWHC 1593 (Admin) para 7.

C16.N92 <sup>92</sup> See also John Tobin, ‘Donor-conceived Individuals and Access to Information About Their Genetic Origins: The Relevance and Role of Rights’ (2012) 19 *Journal of Law and Medicine* 742.

C16.S22

**4. Information Privacy**

C16.S23

**(a) Protection of Information Created by a Child**

C16.P95

It has long been accepted that the right to privacy extends to the control of personal information.<sup>93</sup> This means that information that is *created by a person* for personal use cannot be accessed or disseminated without the consent of that person unless such access and dissemination is lawful and non-arbitrary. The application of this principle is relatively straightforward in the context of adults. However, it becomes more complex when applied to children because of the potential for parents and other adults who may be placed in a position of caring for children to have access to children's personal information in contexts such as personal diaries, information stored in school lockers, and increasingly, information stored and shared by children on social media such as text messages and/or Facebook posts. In each of these scenarios, the general principles regarding the legitimacy of the aim *and* the necessity of the measures used to achieve the aim must be applied to determine whether access to children's personal information will be justified. When applying these principles, legitimate protective concerns of parents or other persons caring for children will often provide a basis for accessing information that would not be justified for adults. However, as has been repeatedly stressed throughout this chapter, any protective concerns must still be valid and justified and children's views, evolving capacity, and status as rights holders remain critical in informing the process by which access to their personal information is undertaken.

C16.S24

**(b) Protection of Information about a Child**

C16.S25

**(i) A Rebuttable Presumption**

C16.P96

The right to information privacy also extends to protection of information *about a child* which is created by the various individuals and agencies, whether state or non-state, that gather, collect, hold, and have the capacity to disseminate information about children whether it be schools, medical professionals, police agencies, courts, social workers, banks, sporting clubs, and increasingly, telecommunications companies and social media providers. With respect to health professionals who have a relationship with children, the CRC Committee has stressed that states are 'encouraged to respect strictly their right to privacy and confidentiality, including with respect to advice and counselling on health matters'.<sup>94</sup> Moreover in the context of juvenile justice proceedings it is explained that 'the right to privacy requires all professionals involved in the implementation of the measures taken by the court ... to keep all information that may result in the identification of the child confidential in all their external contacts'.<sup>95</sup>

C16.P97

This emphasis on maintaining professional patient/client/consumer confidentiality is uncontroversial with respect to adults. However, it is more problematic with respect to children because of their evolving capacities and the obligation of a state to (a) protect

C16.N95

<sup>93</sup> Warren and Brandeis (n 40).

<sup>94</sup> CRC Committee, 'General Comment No 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child' (1 July 2003) CRC/GC/2003/4 para 11; CRC Committee, 'General Comment No 20 on the implementation of the rights of the child during adolescence' CRC/C/GC/20 (6 December 2016) para 46. See also Joan Loughrey, 'Medical Information, Confidentiality and a Child's Right to Privacy' (2003) 23 Legal Studies 510 (examining UK jurisprudence to assess the extent to which the duty of confidentiality extends to children given their evolving autonomy and relationship with their parents).

<sup>95</sup> CRC Committee, 'General Comment No 10 (2007): Children's rights in juvenile justice' (25 April 2007) CRC/C/GC/10 ('CRC GC 10') para 66.

the best interests of a child and to (b) respect parental rights with respect to the upbringing of their children. Thus, while international law creates a presumption in favour of maintaining confidentiality for children, this presumption is rebuttable where (a) protective considerations necessitate the disclosure of information by professionals who work with children and/or (b) parents are deemed to have a right to such information.

C16.P98

In relation to protective considerations, various professionals and agencies who work with children such as the police, medical professionals, teachers, and social workers are likely to receive information from a child that identifies him or her to be at risk of harm. In such circumstances, the Convention requires that this information be brought to the attention of those bodies responsible for protecting children from acts or omissions that would undermine their best interests (art 3), survival, and development (art 6) and rights to protection against violence and other forms of ill treatment (articles 16, 19, and 37).

C16.P99

Critically, however, child protection is not an automatic trump card when dealing with the collection and disclosure of information that will interfere with a child's right to privacy.<sup>96</sup> Instead the assessment of any relevant protective concerns must be informed by objective evidence rather than assumptions, *and* the views of children themselves must be taken into account in light of their age and maturity when deciding whether the disclosure of such information is necessary. As such, any professional dealing with a child should explain to the child their disclosure obligations and the extent to which their professional discussions will be confidential. This will enable a child to decide what information he or she wishes to disclose and avoid the scenario where information, which he or she had assumed would be confidential, is disclosed to other persons or authorities.

C16.P100

Moreover, where the disclosure of private information about a child is warranted, it must only be used for the limited purpose for which the disclosure was justified. In this respect, the Human Rights Committee has stressed that 'relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted'.<sup>97</sup> It has also stressed that a 'decision to make use of such authorised interference must be made only by the authority designated under the law, and on a case by case basis'.<sup>98</sup>

C16.P101

With respect to those circumstances when parents will be entitled to receive information from professionals who have had dealings with their children, this will be determined by an application of the principle of evolving capacities under article 5 of the Convention and the right of a child to have his or her views taken into account under article 12. In summary, where a child's level of maturity and understanding is sufficient to reach the level of competency and understanding expected of an adult in similar circumstances, there can be no justification for disclosing otherwise confidential information to the parents of a child in the absence of the child's consent.<sup>99</sup> Such a model anticipates that parents may be denied information about their children. Indeed, the CRC Committee has expressed concern about private individuals, specifically parents, violating their children's right to informational privacy. For example, the Committee recommended that the State Party of Norway 'mandate the Norwegian Data Inspectorate to prevent parents and others to reveal information about children which violates children's right to privacy

C16.N98

<sup>96</sup> Dowty (n 6) 397. <sup>97</sup> HRC GC 16 (n 12) para 8. <sup>98</sup> *ibid.*

C16.N99

<sup>99</sup> See generally: chapter 5 of this Commentary; Tobin, 'Justifying Children's Rights' (n 67) 428–29; *Gillick v West Norfolk and Wisbech Area Health Authority and DHSS* [1986] AC 112 (England, House of Lords); *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 ('*Re Marion*'); (Australia, High Court); *R (Axon) v Secretary of State for Health* [2006] 2 WLR 1130 para 64.

and is not in their best interests'.<sup>100</sup> At the same time, the deference given to children's right to privacy is not absolute and parents will be entitled to information about their children where it is necessary and relevant for the purpose of ensuring that they are able to perform their obligations with respect to the care and development of their children (articles 5, 18, and 27).

C16.S26

**(ii) Data Retention**

C16.P102

In addition to the information gathered about children in the context of specialized professional relationships, government agencies, and private commercial operators such as banks and telecommunications entities, increasingly collect and retain significant data about individuals including children. With respect to this development, the CRC Committee has, for example, urged the State Party of France to 'take all necessary measures to ensure that the gathering, storage and use of sensitive personal data are consistent with its obligations under article 16 of the Convention'.<sup>101</sup> More specifically, it recommended that:

C16.P103

Effective measures are adopted to ensure that such information does not reach the hands of persons who are not authorized by law to receive, possess or use it' [and that] '[c]hildren and parents under its jurisdiction have the right to access their data and to request rectification or elimination of information, when it is incorrect or has been collected against their will or processed contrary to the provisions of the law'.<sup>102</sup>

C16.P104

The Committee has also recommended that states guarantee children's right to privacy in relation to digital media and information communication technologies.<sup>103</sup> It has recommended further that states promote awareness-raising programmes for children's privacy risks related to digital media regarding self-generated content and provide children with information regarding how their data is gathered, stored, and used.<sup>104</sup>

C16.P105

These comments are consistent with the approach of the HR Committee, which has stressed that effective measures must be taken by the state to ensure that information about a person's private life 'does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the [International] Covenant [on Civil and Political Rights]'.<sup>105</sup> One way of promoting appropriate action is to accord to every individual 'the right to ascertain, in an intelligible form, whether, and if so, what personal data is stored in automatic data files and for what purposes'. The HR Committee has noted that this is closely linked to people's ability 'to ascertain which public authorities or private individuals or bodies control or may control their files'. 'If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law',<sup>106</sup> the implication of article 17 of the Covenant is that 'every individual should have the right to request rectification or elimination'.<sup>107</sup>

C16.N109

<sup>100</sup> CRC Committee, CO Norway, CRC/C/NOR/CO/4 para 29.

<sup>101</sup> CRC Committee, CO France, CRC/FRA/CO/4 para 51. See also: CO Kuwait, CRC/C/KWT/CO/2 para 18 (urging state party to 'develop and implement a policy to protect the privacy of all children who have been registered in the national database'); CO United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/4 paras 36–37. (recommending 'that children are protected against unlawful and arbitrary with their privacy including by introducing stronger regulations for data protection').

<sup>102</sup> CRC Committee, CO France, CRC/FRA/CO/4 para 51.

<sup>103</sup> CRC Committee, 'Report of the 2014 Day of General Discussion: "Digital media and children's rights"' [http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2014/DGD\\_report.pdf](http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2014/DGD_report.pdf) ('2014 Day of General Discussion') paras 102–03. See generally OHCHR Report on Privacy in the Digital Age (n 25).

<sup>104</sup> CRC Committee, '2014 Day of General Discussion' (n 103).

<sup>105</sup> HRC GC 16 (n 12) para 10.

<sup>106</sup> *ibid* para 9.

<sup>107</sup> *ibid* para 10.

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C16.P106 These principles have been developed in the Guidelines Concerning Computerized Personal Data Files, adopted by the General Assembly in 1990.<sup>108</sup> The Guidelines are said to be applicable ‘to all public and private computerized files’ and on an optional basis ‘subject to appropriate adjustments, to manual files’.<sup>109</sup> The Guidelines lay down certain principles including those of ‘lawfulness and fairness’, ‘accuracy’, ‘purpose-specification’, and ‘interested-person access’, departures from which may only be authorized if:

C16.P107 they are necessary to protect national security, public order, public health or morality, as well as, *inter alia*, the rights and freedoms of others, especially persons being persecuted (humanitarian clause) provided that such departures are expressly specified in a law or equivalent regulation promulgated in accordance with the internal legal system which expressly states their limits and sets forth appropriate safeguards.<sup>110</sup>

C16.P108 The Guidelines also establish a principle of non-discrimination, exceptions to which are subject to even more demanding requirements.<sup>111</sup>

C16.P109 The legal protection of informational privacy has been affirmed by the General Assembly in its resolution ‘The right to privacy in a digital age’,<sup>112</sup> the European Court of Justice in the ‘right to be forgotten’ case,<sup>113</sup> and the report of the OHCHR on ‘The Right to Privacy in the Digital Age’,<sup>114</sup> which provides a comprehensive discussion of the principles and standards required to promote and protect the privacy of individuals in the context of domestic and extraterritorial surveillance and/or the interception of digital communications and the collection of personal data, including on a mass scale.

C16.N108 <sup>108</sup> A/RES/45/95 (14 December 1990), adopting Commission on Human Rights, ‘Guidelines on the Use of Computerized Personal Files’ (6 March 1990) E/CN.4/RES/1990/42 and ECOSOC, ‘Guidelines on the Use of Computerized Personal Files’ (25 May 1990) E/RES/1990/38, and contained in ECOSOC, ‘Revised version of the Guidelines for the regulation of computerized personal data files prepared by Mr. Louis Joinet, Special Rapporteur’ (20 February 1990) E/CN.4/1990/72.

C16.N109 <sup>109</sup> A/RES/45/95 ‘Guidelines on the Use of Computerized Personal Files’ (n 108) principle 10.

C16.N110 <sup>110</sup> *ibid* principle 6.

C16.N111 <sup>111</sup> *ibid* principles 5 and 6. At the regional level, reference may also be made to the principles contained in the Council of Europe Convention for the Protection of Individuals With Regard to Automatic Processing of Personal Data, the purpose of which is stated to be to secure for each individual, ‘whatever his nationality or residence’, ‘respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him’: 108 European Treaty Series (1981) art 1.

C16.N112 <sup>112</sup> UNGA, ‘The Right to Privacy in a Digital Age’ A/RES/68/167 (21 January 2014) para 3.

C16.N113 <sup>113</sup> Case 131/12 *Google Spain v AEPD and Mario Costeja Gonzalez* (13 May 2014) (European Court of Justice, judgment of the Grand Chamber). (A Spanish citizen lodged a complaint against a Spanish newspaper and Google because an old auction notice of his repossessed home on Google’s search results infringed his privacy rights, as the proceedings against him had been resolved several years earlier. The complainant requested the removal of the pages in question so that his personal data no longer appeared in the newspaper, and second that Google remove personal data relating to him so that it no longer appeared in search results. The Court held that individuals have the right to ask search engines to remove links with inaccurate, inadequate, irrelevant, or excessive personal information; and that the right must be balanced against other fundamental rights on a case-by-case basis. The Court held that the factors to be balanced include the type of information, the sensitivity for the individual’s private life, public interest in having the information, and the role that the person plays in public life). See also *Wasmuth v Germany* App no 12884/03 (17 February 2011) (ECtHR) para 74 (establishing that art 8 rights are relevant where data is collected, recorded, or analysed and the person’s private life is thereby affected).

C16.N114 <sup>114</sup> OHCHR Report on Privacy in the Digital Age (n 25). See also Report of the Special Rapporteur on the Right to Privacy, Joseph Cannataci A/HRC/34/60 (24 February 2017) (focusing on the international standards that regulate governmental surveillance activities).



C16.S27 (iii) *Information Privacy for Children Involved in Criminal Proceedings*

C16.P110 The Committee has urged states to protect the identity of children involved in juvenile justice proceedings<sup>115</sup> on the basis that this is necessary to prevent such children being subjected to undue publicity and labelling.<sup>116</sup> This concern is informed by the requirements under international law that govern the use of information with respect to children deprived of their liberty or involved in the administration of juvenile justice. For example, article 40(2)(b)(vii) of the Convention specifically requires that a child involved in criminal law proceedings is to have his or her privacy fully respected *at all stages* of the proceedings.<sup>117</sup> Further clarification as to the meaning of this obligation can be found in rule 8 of the UN Standard Minimum Rules for the Administration of Juvenile Justice<sup>118</sup> which states:

C16.P111 (1) The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to him or her by undue publicity or by the process of labelling.

C16.P112 (2) In principle no information that may lead to the identification of a juvenile offender shall be published.

C16.P113 In a similar vein, rule 21, which was endorsed by the Committee in its General Comment No 10 on Juvenile Justice,<sup>119</sup> provides that:

C16.P114 (1) Records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand and other duly authorised persons.

C16.P115 (2) Records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender.

C16.P116 The Committee has also recommended that states 'introduce rules which would allow for an automatic removal from criminal records of the name of the child who committed an offence upon reaching the age of 18, or for certain limited serious offences where removal is possible at the request of the child, if necessary under certain conditions (eg: 'not having committed an offence within two years of the last conviction').<sup>120</sup> Rule 19 of the UN Rules for the Protection of Juveniles Deprived of their Liberty further state that:

C16.P117 All reports, including legal records, medical records and records of disciplinary proceedings and all other documents relating to the form, content and details of treatment should be placed in a confidential individual file, which should be kept up to date, accessible only to authorised persons and classified in such a way as to be easily understood. Where possible every juvenile should have the right to contest any fact or opinion in his or her file so as to permit rectification of inaccurate, unfounded or unfair statements. In order to exercise this right there should be procedures that

**C16.N13**

<sup>115</sup> CRC GC 10 (n 95) para 64. See also eg: CRC Committee, CO Tuvalu, CRC/C/TUV/CO/1 para 34; CO Australia, CRC/C/AUS/CO/4 para 41; CO Greece, CRC/C/GRC/CO/2-3 para 36.

<sup>116</sup> CRC GC 10 (n 95) para 64.

<sup>117</sup> *ibid* ('All stages of the proceedings' includes from the initial contact with law enforcement (eg a request for information and identification) up until the final decision by a competent authority, or release from supervision, custody or deprivation of liberty'). See also ICCPR art 14(1) (requiring that decisions in legal proceedings are made public except 'where the interests of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children'). For more detailed commentary on art 40(2)(b)(vii), see chapter 40 of this Commentary.

<sup>118</sup> Beijing Rules (n 1).

<sup>119</sup> CRC GC 10 (n 95) para 66.

<sup>120</sup> *ibid* para 67.

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allow an appropriate third party to have access to and consult the file on request. Upon release the records of juveniles shall be sealed and at an appropriate time expunged.<sup>121</sup>

C16.S28

*(iv) Information Privacy in Other Settings*

C16.P118

The obligation to protect the privacy of children is not confined to criminal proceedings. Indeed, the CRC Committee has been forthright in its comments on the need to protect a child's right to privacy in investigations and proceedings concerning allegations of physical or sexual abuse against children. In its observations for Andorra, for example, it recommended that the State Party 'investigate effectively all cases of domestic violence and ill treatment of children including sexual abuse within the family through a child sensitive inquiry and judicial procedure in order to ensure better protection of child victims including the protection of their right to privacy'.<sup>122</sup> Similarly, for Bahrain it recommended that the State Party 'investigate and prosecute instances of ill treatment ensuring that the abused child is not victimised in legal proceedings and his or her privacy is protected'.<sup>123</sup> In its report for Belize, the Committee added that 'sanctions be applied to perpetrators and publicity given to decisions taken in such cases with due regard for the privacy of the child'.<sup>124</sup>

C16.P119

Clearly states enjoy a level of discretion with respect to the measures they adopt to ensure the protection of children's privacy in such circumstances. However, the Committee has repeatedly stressed the need for effective measures to regulate the media within this context. A typical example is its recommendation to Nepal that it 'establish material mechanisms to ensure that all materials broadcast in Nepal respect the child's right to privacy such as code of conduct and/or self-regulation, and to ensure that appropriate human rights training is given to media professionals, paying particular attention to children's rights to privacy'.<sup>125</sup> It also recommended in its observations for Bosnia and Herzegovina that the 'State party consider enabling national legislation prohibiting disclosure of personal details of children by the media and/or journalists and ensuring commensurate penalties for such conduct'.<sup>126</sup> Indeed, in its observations for the United Kingdom of Great Britain and Northern Ireland, the Committee expressed its concern that 'children's appearances on TV reality shows may constitute an unlawful interference with their privacy' and recommended 'the regulation of children's participation in TV programmes ... to ensure that they do not violate their rights'.<sup>127</sup>

C16.N121

<sup>121</sup> Havana Rules (n 1).

C16.N122

<sup>122</sup> CRC Committee, CO Andorra, CRC/C/15/Add.176 para 40.

C16.N123

<sup>123</sup> CRC Committee, CO Bahrain, CRC/C/15/Add.175 para 38. See also: CRC Committee, CO Chile, CRC/C/15/Add.173 para 38; CO Latvia, CRC/C/15/Add.142 para 32; CO Benin, CRC/C/15/Add.106 para 23; CO Marshall Islands, CRC/C/15/Add.139 para 43; CO Lebanon, CRC/C/15/Add.169 para 39.

C16.N124

<sup>124</sup> CRC Committee, CO Belize, CRC/C/15/Add.99 para 22. See also: CRC Committee, CO Yemen, CRC/C/YEM/CO/4 para 46(d); CO Guyana, CRC/C/GUY/CO/2-4 para 19; CO Australia, CRC/C/AUT/CO/3-4 para 31; CO Republic of Korea, CRC/C/KOR/CO/3-4 paras 55–56. cf: CO Sri Lanka, CRC/C/15/Add.207 para 45; CO New Zealand, CRC/C/15/Add.216 para 27; CO Philippines, CRC/C/15/Add.258 para 39.

C16.N125

<sup>125</sup> CRC Committee, CO Nepal, CRC/C/15/Add.260 paras 45–46. See also: CRC Committee, CO Thailand, CRC/C/THA/CO/3-4 paras 45–46; CO Sri Lanka, CRC/C/LKA/CO/3-4 paras 38–39; CO Croatia, CRC/C/15/Add.243 para 33; CO Angola, CRC/C/15/Add.246 para 29; CO El Salvador, CRC/C/SLV/CO/3-4 para 40; CO Austria, CRC/C/AUT/CO/3-4 para 32(a); CO Andorra, CRC/C/AND/CO/2 para 29.

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<sup>126</sup> CRC Committee, CO Bosnia and Herzegovina, CRC/C/BIH/CO/2-4 paras 37–38.

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<sup>127</sup> CRC Committee, CO United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/4 paras 36–37.

TOBIN/FIELD

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The Committee's comments are clearly motivated by a desire to protect children's right to privacy. However, they remain problematic to the extent that they are unaccompanied by an acknowledgment that any restriction on the media will involve a limitation on the right to freedom of expression of media professionals. Given that any interference with a child's right to privacy must be justified, so too must any interference with the right to freedom of expression of a journalist or photographer, and indeed the right of others to have access to information that may be in the public interest. The issue of how best to balance these competing rights has been the subject of considerable commentary and judicial commentary.<sup>128</sup> However, under international law the principle of a child's best interests operates to create a presumption in favour of a children's right to privacy relative to an adult's right to freedom of expression where these rights are in conflict.<sup>129</sup> This presumption can be justified on the basis that the potential harm to the best interests and development of a child if information were to be disclosed about his or her identity should be accorded greater weight relative to any interference with an adult's freedom of expression or indeed the public interest associated with any disclosure of information about the child.<sup>130</sup> Such a presumption, however, could be displaced if there were no evidence that disclosure would present a real risk of harm to a child. In such circumstances, any interference with adults' right to freedom of expression would not be considered necessary or reasonable.

C16.S29

### 5. *Physical/Spacial Privacy*

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A final dimension of the right to privacy includes a child's right to *physical/spacial* privacy. This refers to the capacity of a child to enjoy a *physical space* to the exclusion of others. The significance of this entitlement is illustrated within the context of a child who is deprived of his or her liberty. Indeed, the UN Rules for the Protection of Juveniles Deprived of their Liberty<sup>131</sup> contain a number of rules detailing what is required to secure the right to privacy for children who have been deprived of their liberty. Rule 32, for example, requires that the design of facilities give due regard for the need of juveniles for privacy. Rule 34 requires that sanitary installations should be located and of a sufficient standard to enable every juvenile to comply as required with their physical needs in privacy and in a clean and decent manner. Rule 35 further states that the possession of personal effects is a basic element of the right to

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<sup>128</sup> See *Venables and Thompson v News Groups Newspapers Limited, Associated Newspapers Limited, MGM Limited* [2001] FAM 430 (Butler-Sloss LJ holding that an injunction against newspapers to withhold publication of certain details, based on the developing law of confidence and taking influence from the ECHR, was in accordance with the law, was necessary in a democratic society (otherwise the lives of the two men would be endangered, and it was likely that they might be subjected to torture or other inhuman treatment), and was proportionate to the aim pursued); Niamh Joyce, 'An Analysis of the Extent of the Juvenile Offender's Right to Privacy: Is the Child's Right to Privacy Circumvented by Public Interest?' (2011) 19 *European Journal of Crime, Criminal Law and Criminal Justice* 113 (criticizing domestic standards which allow for the disclosure of a child's identity in criminal cases where there are exceptional circumstances and disclosure is said to be in the public interest); Ursula Smartt, '“Why I Was Right to Name the Teacher's Teen Killer”: Naming Teenagers in Criminal Trials and Law Reform in the Internet Age' (2015) 20 *Communications Law* 5–14 (examining relevant jurisprudence under ECHR and UK); Helen Fenwick and Gavin Philipson, *Media Freedom under the Human Rights Act* (OUP 2006) ch 16.

<sup>129</sup> See chapter 3 of this Commentary. See also *Re S* [2003] 2 FCR 577 para 62 per Hale LJ (ruling that when the child's welfare is the *paramount consideration*, 'it rules on or determines the issue before the court. It is the trump card').

<sup>130</sup> See chapter 3 of this Commentary.

<sup>131</sup> Havana Rules (n 1).

privacy and essential to the psychological well-being of juveniles. Rule 60 requires that the circumstances for visits should respect the need of the juvenile for privacy, contact, and unrestricted communication with the family and the defence counsel.

Importantly, these rules are not only relevant to an understanding of children's right to *physical/spacial privacy* within a context where a child is deprived of his or her liberty. They are also relevant to children in other contexts such as refugee camps, boarding schools, residential institutions, and other protective care arrangements, and even school camps. Indeed, the Committee on Economic, Social and Cultural Rights has explained that the right to adequate shelter includes adequate privacy.<sup>132</sup>

## C. Protection of a Child's Family

### 1. *An Evolving Concept*

The concept of the 'family' has a special place within international human rights law where it is recognized as the 'natural and fundamental group unit of society'.<sup>133</sup> The requirement under article 16 of the Convention that a child be protected from unlawful and arbitrary interference with his or her family represents another illustration of the special protection accorded to the family under international law.<sup>134</sup> What is striking, however, is the absence of a definition of the family. With respect to this issue the HR Committee has observed that for the purposes of article 17 of the ICCPR, the term should 'be given a broad interpretation to include all those comprising the family as understood in the society of the [relevant] State party'.<sup>135</sup> It is questionable, however, whether this deference to particular cultural and social understandings of a family within a state is entirely appropriate. This is because in many jurisdictions, new and evolving family structures which result from *de facto* relationships, divorce and/or separation, single parenting, or same sex relationships are not always recognized and respected within a state.

For its part, the CRC Committee has adopted a robust approach to this issue and explained that, '[w]hen considering the family environment the Convention reflects

<sup>132</sup> Commission on Human Settlements and Global Strategy for Shelter to the Year 2000, cited in Committee on Economic, Social and Cultural Rights, 'General Comment No 4: The right to adequate housing' (1991) E/1992/23, annex III, 114 para 7.

<sup>133</sup> See eg: CRC preambular para 5; ICESCR art 10(1); UDHR art 16(3); ICCPR art 23(1); ACRWC art 18(1). See also MacDonald (n 14) 450–51 (noting that international law incorporates three overlapping concepts concerning the family, namely those of 'family', 'family life', and 'family environment'). In contrast to the CRC and ICCPR, art 8 of the European Convention on Human Rights offers protection for 'family life' as opposed to the 'family'. In practice, the CRC Committee has attached no significance to this difference and has treated art 16 as offering children a right to protection of 'family life' and a child's 'family environment'. See eg 'Joint General Comment No 4 (2017) of the Committee on the Protection of Migrant Workers and their Families and No 23 (2017) of the Committee on the Rights of the Child on State Obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return' CMW/C/GC/4-CRC/C/GC/23 (16 November 2017) ('CRC') para 27 ('Protection of the right to a family environment frequently requires that States must not only refrain from actions that could result in family separation or other arbitrary interference in the right to family life but also take positive measures to maintain the family unit, including reunion of separated family members').

<sup>134</sup> For a discussion of the treatment of the family under the Convention see: Tobin, 'Justifying Children's Rights' (n 67) 423–26; John Tobin, 'Fixed Concepts but Changing Conceptions: Understanding the Relationship between Children and Parents under the CRC' in M D Ruck, M Peterson-Badali, and M Freeman (eds), *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Taylor & Francis 2016) 53–67.

<sup>135</sup> HRC GC 16 (n 12) para 5. See also: *Ngambi and Nebol v France* CCPR/C/81/D/1179/2003 (16 July 2004) para 6.4; *Winata and Li v Australia* CCPR/C/72/D/930/2000 (16 August 2001) para 2.1.

different family structures arising from the various cultural patterns and emerging familial relationships. In this regard the Convention refers to the extended family and the community and applies to situations of nuclear family, separated parents, single parent family, common law family, and adoptive family.<sup>136</sup> The Committee has also affirmed ‘other traditional and modern community based arrangements provided they are consistent with children’s rights and best interests’.<sup>137</sup>

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Under this model, the meaning of ‘family’ must not be confined to the traditional nuclear family and should extend to the varied and evolving forms in which parents (including same-sex parents<sup>138</sup>) arrange for the care of their children *and* the concept of the extended family which includes grandparents and other relatives.<sup>139</sup> Critically, sexual orientation, marital status, biological relationship, or number of parents are irrelevant in determining whether the structure for the care of a child is a ‘family’ for the purposes of the Convention. This is consistent with a child-focused understanding of the concept of family which is concerned with the nature and/or existence of a *relationship* between a child and those persons whom he or she identifies as being part of his or her family.<sup>140</sup> The European Court of Human Rights<sup>141</sup> and the Inter-American Court<sup>142</sup> have also

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<sup>136</sup> See CRC Committee, ‘The Role of the Family the Promotion of the Rights of the Child’ (10 October 1994) CRC/C/24 para 2.1. See also: *Hendriks v Netherlands* (1982) 5 EHRR 223 (holding that divorce ‘cannot dissolve the bond uniting father—or mother—and child’); *Sommerfeld v Germany* (2004) 36 EHRR 565 (holding that notion of family is not confined to marriage-based relationships).

<sup>137</sup> See CRC Committee, ‘General Comment No 7 (2005): Implementing child rights in early childhood’ (20 September 2006) CRC/C/GC/7/Rev.1 para 15 (‘CRC GC 7’). See also *EM (Lebanon) v Secretary of State for the Home Department ALF intervening* [2008] UKHL 64 para 37 (holding that ‘Families differ widely in their composition and in the mutual relations which exist between the members’).

<sup>138</sup> See eg: *Gas and Dubois v France* Appl No 25951/07 ECtHR Admissibility Decision (31 August 2010) (ruling that relationship between two women who were living together with a child who had been conceived via assisted reproduction by one of the women constituted ‘family life’); *Caso Atala Riffó y Ninas v Chile* Inter-American Court of Human Rights Series C No 165 (24 February 2012) para 177 (holding that lesbian couple living with the children of one of the women was still ‘family life’ even though the children shared another ‘family life’ with their father).

<sup>139</sup> CRC art 5; CRC Committee, ‘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)’ (29 May 2013) CRC/C/GC/14 (‘CRC GC 14’) para 59; CRC GC 7 (n 137) para 19. See also: interpretations of the HR Committee, and Regional Courts, *inter alia*: HR Committee, ‘CCPR General Comment No 19: Art 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses’ (27 July 1990) HRI/GEN/1/Rev.6, 149 para 2; *Hendriks v The Netherlands* Comm No 201/1985 (27 July 1988) para 10.3 (HRC); *Tcholatch v Canada* Comm No 1052/2002 (20 March 2007) para 8.2 (HRC); *Atala Riffio and Daughters v Chile* (I-ACtHR) (n 138); *Price v United Kingdom* (1988) 55 DR 1988 (ECtHR) (child’s family life may include grandparents); *Boyle v United Kingdom* (1994) 19 EHRR 179 (ECtHR) (child’s family life may include aunts and uncles).

<sup>140</sup> The ECtHR has held that a father who has never had any contact with his child will have no right to respect for family life with that child: *Lebbink v Netherlands* App no 45582/99 (1 June 2004). However, the potential relationship between a child born out of wedlock and his or her father may amount to family life: *Nylund v Finland* App no 27110/95 (29 June 1999). See MacDonald (n 14) 454–55 and Frances Nicholson, ‘The “Essential Right” to Family Life and Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification’ (UNCHR Research Paper, November 2017) Provisional Draft prepared for UNHCR–Odysseus Network Expert Roundtable on The Right to Family Life and Family Unity in the Context of the Right to Family Reunification, Brussels 4 December 2017: see 35–57 for a discussion of the definition of family applied under international law and in domestic jurisdictions in the context of applications for family reunification).

<sup>141</sup> *K v United Kingdom* (1986) 50 DR 199. See MacDonald (n 14) 453–57 (discussing the definition of family life under the ECHR).

<sup>142</sup> Advisory Opinion OC-21/14: *Rights and Guarantees in the Context of Migration and/or in Need of International Protection* OC-21/14 (19 August 2014) (IACtHR) para 272 (‘the definition of family should not be restricted by the traditional notion of a couple and their children because other relatives may also be entitled



emphasized the importance of ‘close personal ties’ when identifying members of a child’s family. Moreover, the approach to family adopted by the UNHCR in the context of applications for family unity is to focus on the existence of a relationship of social, emotional, or economic dependency among close family members.<sup>143</sup> This relationship-based approach is consistent with the understanding of privacy outlined above which extends to a child’s right to form and develop personal relationships with other individuals. Thus, any measure which seeks to interfere with a child’s family relationships which would extend to siblings,<sup>144</sup> grandparents,<sup>145</sup> and other persons to whom a child is related either biologically or socially (eg in the case of children who are adopted<sup>146</sup> or have lived with foster parents<sup>147</sup>), such as aunts and uncles,<sup>148</sup> must be lawful and non-arbitrary.

## 2. *Not an Excuse for Non-intervention*

Feminist critiques of the right to privacy and its extension to family life have exposed its tendency to create a private sphere into which state intervention is prohibited.<sup>149</sup> A consequence of such an approach is that perpetrators of family violence, in which children are often victims or witnesses, tend to invoke their right to privacy to divert detection, silence victims, and deprive children (and women), who are overwhelmingly the victims of such violence, from assistance. The CRC Committee has expressed its concern at the extent to which respect for the privacy of a family may limit intervention within the family in circumstances where intervention may be required in the best interests of the child.<sup>150</sup> Thus, a principled interpretation of the right to protection of the family for a child *and an adult* (under article 17 of the ICCPR), can never condone such an approach.<sup>151</sup>

## 3. *A Contextual Interpretation*

Several rights in the Convention inform the content of a child’s right to protection of his or her family. Principal among these are the right of a child to know and be cared for by his/her parents (art 7); the right to maintain family relations (art 8); the presumption against separation of a child from his or her parents unless this is necessary to secure

to the right to family life such as uncles and aunts, cousins and grandparents to name but a few of the possible members of the extended family, provided they have *close personal ties* (emphasis added.))

<sup>143</sup> UNHCR, *UNHCR RSD Procedural Standards: Processing Claims Based on the Right to Family Unity* 2016 available at <http://www.refworld.org/docid/577e17944.html>; UNHCR *Protecting the Family: Challenges in Implementing Policy in the Resettlement Context* June 2001 available at <http://www.refworld.org/docid/4ae9aca12.html> para 1(c). See also Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Displaced Persons, ‘Position Paper on Family Reunification’ (2 February 2012) AS/Mig (2012) 01 (encouraging a broad interpretation of the term ‘family’).

<sup>144</sup> *Marckx v Belgium* (1979) 2 EHRR 33 para 31.

<sup>145</sup> *Price v United Kingdom* (n 139); *GHB v United Kingdom* App no 42455/98 (4 May 2000) (unreported).

<sup>146</sup> *X v France* App no 993/82 (1982); *X v Belgium and the Netherlands* App no 6482/74 (10 July 1975).

<sup>147</sup> See: dissenting opinion of Schermers J in *Eriksson v Sweden* (1989) 12 EHRR 183; *Gaskin v United Kingdom* (1989) 12 EHRR 36.

<sup>148</sup> *Boyle v United Kingdom* (n 139).

<sup>149</sup> See: Barbara Bennett Woodhouse, ‘Privacy and the Family: The Dark Side of Family Privacy’ (1999) 67 *George Washington Law Review* 1247, 1254–255 (‘When we adopt a theoretical framework that endows any ‘unit’ of persons with ‘autonomy’ or a ‘right’ to be free of state intervention, in practice we are conferring unregulated authority on the dominant member within this closed community of persons. We are suspending the usual norms for justice between persons’).

<sup>150</sup> CRC Committee, CO Marshall Islands, CRC/C/15/Add.139 para 26.

<sup>151</sup> Martha Fineman, ‘What Place for the Family Privacy?’ (1999) 67 *George Washington Law Review* 1207, 1219.

the child's best interests (art 9); the right to maintain contact when separated and to an expeditious process for reunification (art 10); the right to protection against illicit inter-country parental abduction (art 11); and the right to receive assistance to enable parents to fulfil their responsibility to promote children's development and wellbeing (arts 18 and 27).<sup>152</sup> Importantly, the principle of internal system coherence demands that each of these rights must play a role in informing the scope of a child's right to protection against unlawful and arbitrary interferences with his or her family. Thus, the commentary with respect to these articles is of relevance in understanding the meaning of the term family as it appears in article 16 of the Convention.

C16.P128 Indeed, in many respects those articles concerning a child's relationship with his or her parents and family that are specific to the Convention have meant that in practice the right to protection against unlawful and arbitrary interference with a child's family under article 16 has assumed a more residual role. Despite this, the parameters of this right are far from exhausted and it has a capacity to develop an independent sphere of meaning, which extends to the various dimensions that arise from the relationships between a child and those persons whom are identified as being a part of his or her family.

C16.P129 Within this context, the absence of special family related rights under the ICCPR and ECHR has meant that the right to family life has been repeatedly invoked within these jurisdictions in contexts such as protective care proceedings and immigration proceedings.<sup>153</sup> Moreover, an examination of this jurisprudence illustrates the extent to which a child's right to family can be invoked as a bulwark against family separation and the way in which competing rights must often be balanced within the context of protecting a child's family from unlawful or arbitrary interference.

#### C16.S34 (a) Protective Care Proceedings

C16.P130 The separation of a child from his or her parents is primarily governed by article 9 of the Convention which establishes an entitlement against separation unless this is necessary in the best interests of the child. Any separation however will also constitute an interference with a child's right to family under article 16 and must be lawful and non-arbitrary if it is to be justified. So too must any order that seeks to regulate contact between a child and members of his or her family. For its part, the CRC Committee has not had cause to address the relevance of the right to family life in the context of child protection proceedings. In contrast, the European Court of Human Rights, and the HR Committee (albeit to a lesser extent) have developed a significant body of jurisprudence with respect to this issue within the context of the right to respect for family life.<sup>154</sup>

C16.N154

<sup>152</sup> For children without parental care, the optimal form of alternative care is viewed as family-based care. See: HR Committee, 'Guidelines for the Alternative Care of Children' (15 June 2009) A/HRC/11/L.13 paras 20–02; UN Convention on the Rights of Persons with Disabilities (n 1) 3 art 7 and especially art 23(5).

<sup>153</sup> The other context in which the right to family life can be invoked is the detention and/or imprisonment of parents. See Stephanie Lagoutte, 'The Right to Respect for Family Life of Children of Imprisoned Parents' (2016) 24(1) International Journal of Children's Rights 204. This issue can also be dealt with under the best interests principle (art 3). See *S V M* (CCT 53/06) [2007] ZACC 18 (September 2007) (South Africa). Within the African context, art 30 of the ACRWC specifically deals with children's rights in the context of parental imprisonment, and the African Committee of Experts on the Rights and Welfare of the Child has adopted 'General Comment No 1' on 'Children of Incarcerated and Imprisoned Parents and Primary Caregivers' (8 November 2013).

<sup>154</sup> See generally: Christoph Grabenwarter, *European Convention on Human Rights: Commentary* (Hart 2014) 223–24, 225–27; Harris and others (n 13) 371–76; Clayton and Tomlinson (n 3) 13.129–13.131; Ursula Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate 2000) 170–74; *Eriksson v Sweden* (1989) 12 EHRR 183 (ECtHR) (failure to implement decision to return child to parents as soon

C16.P131

The ECtHR has established that the duty to respect family life may require positive measures,<sup>155</sup> and that because a decision to place a child into care is a positive ‘interference of a very serious order’,<sup>156</sup> the reasons to justify this interference must be ‘relevant and sufficient’.<sup>157</sup> Moreover, any measures of implementation must be consistent with the ultimate aim of reuniting a family.<sup>158</sup> The state must also desist from measures which have the effect of inhibiting such reunification, unless they can be justified as being ‘necessary in a democratic society’.<sup>159</sup> At the same time, the European Court has conceded that a state’s obligation to take reunification measures is not absolute and states are only required to make such ‘efforts to arrange the necessary preparations for reunion as can reasonably be demanded under the special circumstances for each case’.<sup>160</sup> Consideration

as possible amounted to violation of art 8); *Anderson v Sweden* (1992) 14 EHRR 615 (ECtHR) (restrictions on contact between parents and children in care not sufficient to justify interference). With regard to the HR Committee, see eg Joseph and Castan (n 12) ch 16.

C16.N155

<sup>155</sup> See eg: *Airey v Ireland* (1979) 2 EHRR 305 (ECtHR) para 32; *Abdulaziz Cabales and Balkandali v United Kingdom* App nos 9214/80; 9473/81; 9474/81 (28 May 1985) (ECtHR). See generally: ECtHR, *Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life* (31 December 2016). Positive obligations include the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individual’s rights. eg in the case of *X and Y v Netherlands* (1985) 8 EHRR 235 (ECtHR) a mentally handicapped girl was raped by an adult male, but a gap in Dutch law meant that it was impossible to bring a criminal charge against the man. The ECtHR acknowledged that the girl could pursue a civil remedy, but found that the absence of effective criminal remedy constituted a failure to respect the girl’s right to private life. States are also under a positive obligation to facilitate contact between children who have been separated from their parents: eg *Aneva and Others v Bulgaria* App nos 66997/13, 77760/14, 50240/15 6 (April 2017) (ECtHR).

C16.N156

<sup>156</sup> *Olsson v Sweden (No 1)* (1988) 11 EHRR 259 para 72 (ECtHR).

C16.N157

<sup>157</sup> Determining whether an interference or decision is ‘relevant’ and ‘sufficient’ requires a consideration not only of the impugned decision, but also the facts of the case as a whole. Thus, in *Olsson v Sweden (No 1)*, the ECtHR took into account the overall aim of family, the great distance at which the children were placed from their parents, and restrictions on parental access. The Court also added the requirement that ‘the parents must have been involved in the decision making process ... to a degree sufficient to provide them with the requisite protection of their interests’: paras 68, 71. In *Mihailova v Bulgaria*, a case regarding the breaking of an agreement between a divorced couple that custody would be transferred to the applicant by a certain date, the Court affirmed that a decision by a Bulgarian Court to adjourn reunification proceedings was relevant and sufficient because it was based on ample material including expert opinions that indicated that any custody transfer at the relevant time would have been premature and harmful to the child, who had psychological difficulties resulting from her parents’ separation (App no 35978/02 (12 April 2006)). In certain circumstances, such as where children may be taken out of a country, sufficiency may be evaluated by the expeditiousness of implementation, as the swiftness of measures may have irremediable consequences for relations between children and the parent who does not live with them (*Ignaccolo-Zenide v Romania* App no 31679/96 (25 January 2000) para 102). If such matters were to be considered under the Convention, art 12 mandates that similar attention be given the involvement of the child the subject of the order.

C16.N158

<sup>158</sup> *Olsson v Sweden (No 1)* (n 156) para 81 (on the facts of the case, the Court held there was a violation of art 8 as the placement of the children a great distance from their parents undermined their ability to maintain contact and hence their prospects of reunification). See also: *Olsson v Sweden (No 2)* App no 74/1991/326/398 (27 November 1992) (holding that parents have a right to have measures taken with a view to reunification in cases where children have been taken into public care: para 90); *Hokkanen v Finland* (1994) 19 EHRR 130 (ECtHR), holding that the art 8 right for the parent to have measures taken with a view to being reunited with the child and the corresponding positive obligation on the part of state, extends to cases where the transfer of care is made under a private agreement: para 55).

C16.N159

<sup>159</sup> *Andersson v Sweden* (n 154) paras 88–97. See also *Hokkanen v Finland* (n 158), in which the Court affirmed the domestic court’s judgment that a transfer of custody of a girl from her father to her grandparents was ‘necessary in a democratic society’, because it was based on expert opinion that had regard to the length of the girl’s stay with the grandparents, her strong attachment to them and her feeling that their home was her own: para 64.

C16.N160

<sup>160</sup> *Olsson v Sweden (No 2)* (n 158); *Mihailova v Bulgaria* App no 35978/02 (12 January 2006) (ECtHR) para 82ff (holding that as the applicant and her daughter had been separated for ten months, the enforcement of the custody agreement required preparation and therefore immediate transfer of custody could not be expected). cf *Ignaccolo-Zenide v Romania* App no 31679/96 (25 January 2000) (holding that preparatory contact

must also be had as to whether a fair balance has been struck between the competing interests of the individual, community, and other concerned third parties involved.<sup>161</sup> Thus, the integrity of the family unit is not inviolable and where the rights and best interests of a child necessitate his or her separation from his or her parents (or indeed other family members), such separation will be justified under article 16. Critically, however, it is the state that must still provide the objective evidence to justify removal of a child from his or her family (the rational connection test) and it is the state that must prove that it has exhausted all reasonably available alternatives (the minimal impairment principle).<sup>162</sup>

C16.P132

For its part, the HR Committee has held that the removal of a child from her mother ‘without a judge having assessed the situation’ amongst other process deficits to be an arbitrary interference with their right to privacy.<sup>163</sup> In the HR Committee’s view, ‘arbitrary interferences’ can encompass interferences provided for under the law; the concept is intended to introduce an element of reasonableness under which to evaluate any measures.<sup>164</sup> The Inter-American Court of Human Rights has also held the separation of two

C16.N163

may be insufficient if child psychiatrists or psychologists have not been contacted for assistance, if social services only carry out purely descriptive inquiry reports, no attempt has been made by the relevant authorities to meet with the parents and children even after applications have been lodged, and, in the case of international transfer of custody, the authorities do not take measures to secure the return of children under the Hague Convention: para 112ff).

<sup>161</sup> *Keegan v Ireland* App no 16969/90 (26 May 1994) para 49.

<sup>162</sup> In *Olsson v Sweden (No 1)* (n 156), the ECtHR held that administrative difficulties that partly promoted the decision to place the children in foster care far from their biological parents could not take on more than a secondary importance because of the fundamental nature of the duty to respect family life: para 81ff. In *YC v UK* App no 4547/10 (13 March 2012), the ECtHR affirmed that the domestic court’s decision to make an order for a protective care placement did not violate the adult applicant’s right to family life, and in doing so affirmed that the state’s efforts to provide alcohol abuse support, opportunities for parenting assistance, and provision of information regarding domestic violence services were sufficient to discharge the state’s obligation to exhaust all remedies with regard to the applicant’s right to maintain contact with her child and to justify the making of a protective care placement order (majority opinion para 134). See also dissent of de Gaetano J, stating that safeguards against arbitrary interference would require the provision of clear and detailed reasoning demonstrating that the child’s best interests and other factors have been given weight, and also that the domestic criteria for the making of the order were carefully applied; according to de Gaetano J, the domestic judge did not demonstrate consideration of domestic law, the rights conferred on the relevant parties by the relevant Convention, nor the principle of proportionality. In *K and T v Finland* App no 25702/94 (12 July 2001), a baby was taken from his mother, who suffered mental illness, under an emergency care order at birth. The state argued that the baby’s protection could not be guaranteed after birth, and she was the sole person who had custody of the baby, and the other parent could not be relied upon to safeguard the well-being of the baby. The parents had not been involved in the state’s decision-making process because of their close relationship and the likelihood that they would share information. The ECtHR found that these reasons were relevant but not sufficient, as it was ‘incumbent on the competent national authorities to examine whether some less intrusive interference into family life, at such a critical point in the lives of the parents and child, was not possible’: para 168.

<sup>163</sup> HR Committee, *Tcholatch v Canada* (n 139) paras 8.6, 8.8, 8.13. cf HR Committee, *Buckle v New Zealand* Comm no 858/1999 (25 October 2000). See also: ECtHR, *B v Romania (No 2)* App no 1285/03 (19 February 2013); and ECtHR, *BB and FB v Germany* App nos 18734/09 and 9424/11 (14 March 2013).

<sup>164</sup> Joseph and Castan (n 12) 537. See also: *Toonen v Australia* (n 24). In cases of imminent family separation, the HR Committee has observed that the relevant criteria for assessing whether an interference with family life can be justified must be considered in light of the significance of the state’s reasons for removal of the person concerned, and the degree of hardship suffered by the family as a consequence of such removal. Thus eg in a communication in which a child of illegal residents was entitled to remain in a country, but the child’s parents faced deportation, the HR Committee held that the deportation decision was arbitrary because the child had been born in Australia and had been socialized as an ordinary Australian child over 13 years: *Winata and Li v Australia* (n 135) para 7.3. See also: *Bakhtiyari v Australia* Comm No 1069/2002 (29 October 2003) para 9.6; *Madafferi v Australia* Comm No 1011/2001 (26 August 2004) para 9.8.



children from their mother on the basis of her sexual orientation was an *arbitrary interference* with their right to privacy, as expressed within article 11 of the IACHR.<sup>165</sup> For its part the CRC Committee has added that '[e]conomic reasons cannot be justification for separating a child from his/her parents'<sup>166</sup>—a position that has been affirmed by the European Court of Human Rights and European Committee on Social Rights,<sup>167</sup> and is consistent with the obligation of a state under articles 18 and 27 of the Convention to assist and support parents in the fulfilment of their child rearing responsibilities.

### (b) Immigration and Deportation Proceedings

The extent to which a child's right to protection against unlawful or arbitrary interference with their family requires a state to depart from its power to control the entry and exit of persons remains contentious. The ECtHR<sup>168</sup> and their HR Committee<sup>169</sup> have considered this issue carefully over a long period of time and their principles provide some guidance with respect to its resolution under article 16 of the Convention.

First, the European Court of Human Rights has recognized the right of states, 'as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens'.<sup>170</sup> It has added that '[a]rticle 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise a family reunion in its territory'.<sup>171</sup> Nor does it provide a right to 'choose the most suitable place to develop family life'.<sup>172</sup> As such, there are limits on the capacity of children to invoke the right to respect for family life to demand entry to a state or resist deportation proceedings in order to avoid separation from their parents.

At the same time, states do not have an unfettered right to refuse such demands. On the contrary, they must demonstrate that any refusal is lawful and not arbitrary. Thus the European Court has indicated that any situations that involve interference in family life must be shown to be 'justified by a pressing social need and, in particular, proportionate to the legitimate aim, pursued'.<sup>173</sup> Thus it will be question to be determined in light of the circumstances of each case as to whether a particular deportation or refusal to allow a

<sup>165</sup> The IACtHR ruled that the state violated art 11(2) (privacy) and art 17(1) (family) in conjunction with art 1(1) (non-discrimination). See IACtHR, *Case of Atala Riffio and Daughters v Chile* (n 137) para 178. cf ECtHR, *Vojnity v Hungary* App no 29617/07 (12 May 2013); ECtHR, *PV v Spain* App no 35159/09 (30 November 2010).

<sup>166</sup> CRC GC 14 (n 139) para 61. Further, the HR Committee requires reports by States Parties to 'indicate how society, social institutions and the State are discharging their responsibility to assist the family in ensuring the protection of the child'. See HR GC 17 (n 84) para 6.

<sup>167</sup> See, inter alia: *RMS v Spain* App no 28775/12 (18 September 2013) (ECtHR) para 93; *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v France* Complaint no 82/2012 (19 March 2013) (European Committee of Social Rights) para 42.

<sup>168</sup> See generally: Grabenwarter (n 154) 229–31; Harris and others (n 13) 747–48; Clayton and Tomlinson (n 3) paras 13.121–13.125; Kilkelly (n 154) ch 10.

<sup>169</sup> See generally: Nowak (n 12) 395–98; Joseph and Castan (n 12) 535–40.

<sup>170</sup> *Abdulaziz, Cabales, and Balkandali v United Kingdom* (1985) 7 EHRR 471 (ECtHR) para 67; *Berrehab v The Netherlands* (1988) 11 EHRR 332 (ECtHR); *Moustaquim v Belgium* (1991) 13 EHRR 802 (ECtHR). See also *Maaouia v France* (2000) 33 EHRR 107 (ECtHR) paras 38, 40 (holding that decisions regarding the entry, stay, and deportation of aliens do not concern the determination of an applicant's civil rights, even if the decision 'incidentally' has 'major repercussions on the applicant's private and family life').

<sup>171</sup> *Gul v Switzerland* (1996) 22 EHRR 93 (ECtHR) para 114.

<sup>172</sup> *Ahmut v The Netherlands* (1997) 24 EHRR 62 (ECtHR) para 80.

<sup>173</sup> See eg *Moustaquim v Belgium* (n 170) para 43. Under the ICCPR, limitations on art 17 are not limited to those 'necessary' but must be reasonable and not arbitrary: *Winata and Li v Australia* (n 135) para 4.6.



child or family member to enter a state for the purposes of reunification is a violation of the right to respect for family life.

Cr6.P136 That said, the decisions of the ECtHR<sup>174</sup> and HR Committee remain instructive as to the type of factors that may be relevant in assessing whether there has been a violation under article 16 of the Convention. For example, in *Berrehab v The Netherlands*<sup>175</sup> the only way a father deported to Morocco could maintain contact with his daughter who was residing in the Netherlands with her mother was by way of visits on short-term visas. The European Court held that as regular contact between a child and her father was essential there had been a violation of the father's right to family life. In *Moustaquim v Belgium*,<sup>176</sup> a Moroccan national who had lived in Belgium for seven years committed numerous offences as a juvenile and was to be deported. The Court accepted that the deportation was in pursuit of a legitimate aim and lawful, but held that it was not necessary in a democratic society having regard to the child's family circumstances and the age of the child at the time of the commission of the offences. Thus, the deportation did not show sufficient respect for the boy's right to family life.<sup>177</sup>

Cr6.P137 The European Court has also stressed that the best interests and well-being of any child must be considered in expulsion cases concerning children.<sup>178</sup> Indeed the best interests of a child are now considered to be of 'paramount importance' and although not determinative must be afforded significant weight.<sup>179</sup> Nicholson explains that the factors which the European Court of Human Rights takes into account when assessing the best interests include of a child include: the length and closeness of the bond between the parent or other family members; any custody proceedings; any disruption and stress already experienced; any special needs and care requirements; the severity of any crime and the age at which it was committed; whether the children were aware of the precarious stay of their parents; and any delay on the part of the authorities in seeking to expel the parent.<sup>180</sup>

Cr6.P138 A further issue which the European Court takes into account is what is sometimes referred to as the 'elsewhere approach'.<sup>181</sup> In summary, this approach involves a consideration of whether the family members including any children can effectively enjoy their family life elsewhere.<sup>182</sup> If so, there will be no violation of the right to respect for family life if a state refuses to allow reunification. This test, however, is not always applied in a strict sense in cases involving children and the jurisprudence of the ECtHR indicates that

Cr6.N199

<sup>174</sup> See generally: *Boultif v Switzerland* No 54273/00 (2 August 2001) (ECtHR) (outlining the factors to be considered when determining whether removal of a person who has committed a criminal offence is consistent with art 8 of the ECHR); C Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2016); European Migration Network ('EMN'), EMN Synthesis Report for the EMN Focussed Study 2016: Family Reunification of Third Country Nationals in the EU plus Norway: National Practices Migrapol EMN [Doc 382] April 2017 Annex 5, 90–95.

<sup>175</sup> (1988) 11 EHRR 322 (ECtHR). <sup>176</sup> *ibid*.

<sup>177</sup> *ibid* paras 36–46. See also *Lamguindaz v United Kingdom* (1994) 17 EHRR 213 (European Commission found a violation of art 8 where state was to deport a 19-year-old Moroccan who had difficulties speaking Arabic and no social support in the country of deportation, as he had lived in the UK since the age of 7).

<sup>178</sup> *Uner v The Netherlands* App no 46410/99 (18 October 2005) (ECtHR). See also: *Rodrigues de Silva and Hoogkamer v The Netherlands* App no 50435/99 (31 January 2006) (ECtHR); *Nunez v Norway* App no 55597/09 (28 June 2011) (ECtHR); *Butt v Norway* App No 470-17/09 (4 December 2012) (ECtHR); *Kaplan v Norway* (App No 32504/11) (24 July 2014) (ECtHR); and *Jeunesse v The Netherlands* App No 12738/10 (31 October 2014) (ECtHR). See: Jason Pobjoy, *The Child in International Refugee Law* (CUP 2017) 196–203.

<sup>179</sup> *Jeunesse v The Netherlands* (n 178) paras 109, 118. <sup>180</sup> Nicholson (n 140) 17–18.

<sup>181</sup> *ibid* 18. <sup>182</sup> See eg: *Gul v Switzerland* (n 171); *Abmut v The Netherlands* (n 172).

additional considerations may be taken into account, which may weigh the balance in favour of allowing reunification of a child with a parent residing in another country.<sup>183</sup>

C16.P139

Like the ECtHR, the HR Committee has observed that interferences in family life must be weighed against the significance of the state's concerns and that the sovereign discretion to enforce immigration policy must not be exercised arbitrarily. It has found on more than one occasion that in light of factors such as the length of time children have resided in the state, the state's interests in enforcing immigration legislation has not outweighed the child's or parent's right to respect for family life. This leads to the proposition that the close family ties of a child to a state should be maintained in a way that does not cause significant physical and psychological dislocation to the child.<sup>184</sup> Thus, for example, in *Winata and Li v Australia* the crucial factors for the majority became the length of time the authors' son had lived in Australia—fourteen years from the son's birth—and the detrimental effects upon the child of having either to leave the only state he had ties with or to stay in that state without his parents. These factors meant that Australia had a duty to demonstrate additional factors for deportation of the parents beyond the necessity of enforcing domestic immigration legislation.<sup>185</sup> Its failure to do so meant it was in violation of the right to respect for family under article 17 of the ICCPR.

C16.P140

The CRC Committee's General Comment No 23 on the human rights of children in the context of international migration affirms the work of other human rights bodies by maintaining a high standard on states when it comes to the right to family life under article 16 of the Convention. In the first instance the Committee has explained that:

C16.P141

Protection of the right to a family environment frequently requires that States must not only refrain from actions that could result in family separation or other arbitrary interference in the right to family life but also take positive measures to maintain the family unit, including reunion of separated family members.<sup>186</sup>

C16.P142

The Committee has conceded that 'the right to family unity for migrants may intersect with States' legitimate interests in making decisions on the entry or stay of

C16.N183

<sup>183</sup> Nicholson (n 140) 19–20. See also: *Sen v The Netherlands* Appl no 31465/96 (21 December 2001) (ECtHR) (finding violation of art 8 in circumstances where state disallowed 9 year old daughter residing in Turkey to join parents and other siblings who were living in The Netherlands on the basis that allowing the daughter admission was the most appropriate means of developing family life); *Tuquabo-Tekle v The Netherlands* Appl no 60665/00 (1 December 2005) (ECtHR) (holding that a 15-year-old daughter who had been removed from school and was at risk of being 'married off' should be allowed to join her mother who had fled Eritrea after the death of her first husband and was living with her second husband in The Netherlands with whom she had two more children).

C16.N184

<sup>184</sup> Joseph and Castan (n 12) para 20.32.

C16.N185

<sup>185</sup> *Winata and Li* (n 135) para 7.3. See also *Bhaktiyari v Australia* (n 164) (taking into account the number and age of the children—including a newborn—and the experiences of the main applicant and her children in long-term immigration detention in Australia, the difficulties that would be faced by the mother and her children if returned to Pakistan without the father, and the absence of Australia's justifications in relation to these factors) and *Madafferi v Australia* (n 164) (taking into account factors such as the main applicant's mental illness, the young age of his children, and the criminal record in question was old and had been incurred in another country).

C16.N186

<sup>186</sup> 'Joint General Comment No 4 (2017) of the Committee on the Protection of Migrant Workers and their Families and No 23 (2017) of the Committee on the Rights of the Child on State Obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return' CMW/C/GC/4-CRC/C/GC/23 (16 November 2017) ('CRC GC 23') para 27. See also eg: CRC Committee, 'General Comment No 6 (2005): Treatment of unaccompanied and separated children outside their country of origin' (1 September 2005) CRC/GC/2005/6 paras 64–78; Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (3rd edn, UNICEF 2002) ch 22.

non-nationals'.<sup>187</sup> However, it has warned states that 'separating a family by deporting or removing a family member... or refusing to allow a family member to enter or remain... may amount to arbitrary or unlawful interference with family life'.<sup>188</sup> Moreover, it has added that:

C16.P143 the rupture of the family unit by the expulsion of one or both parents based on a breach of migration laws related to entry or stay is disproportionate, as the sacrifice inherent in the restriction of family life and the impact on the life and development of the child is not outweighed by the advantages obtained by forcing the parents to leave the territory because of an immigration related offence.<sup>189</sup>

C16.P144 This is a particularly robust position which, like the HR Committee, prioritizes the interests and rights of a child over the interests of a state in simply enforcing migration laws as a justification for any disruption to the family unit.

#### C16.S36 D. Protection of a Child's Home

##### C16.S37 1. A Broad Concept Including Residence, School, and Workplace

C16.P145 Another discrete parameter of the right to privacy, expressly protected under article 16 of the Convention, is a child's home. If the bonded space of the family is the heart of private life, '*the home is the [physical] space in which private life evolves freely*'.<sup>190</sup> These two protected interests—family and home—are often therefore intrinsically connected: the physical space of the 'home' is where the 'family' resides and where children reside. However, they are not always intrinsically connected: sometimes children's home may not be with their biological or adopted family; they may live in an alternative form of family-based care (eg foster care), within non-family-based care (eg residential care),<sup>191</sup> or be placed in some form of detention where they are separated from their parents.

C16.P146 Of the equivalent provision within the ICCPR, the Human Rights Committee has interpreted home broadly to include '*the place where a person resides or carries out his usual occupation*'.<sup>192</sup> The ECtHR has also declared that 'home' is to be given a broad interpretation<sup>193</sup> and is generally taken to mean the place where a person lives on a settled basis.<sup>194</sup> The Court has also held that 'home' may extend to a place of intended rather than actual residence and a place of residence which has been unlawfully established.<sup>195</sup>

C16.P147 Interpreted from the perspective of children, 'home' would necessarily include all forms of alternative care including non-family-based care<sup>196</sup> and could also be viewed as extending to the personal property of children deprived of their liberty. Within the latter context, children's personal property could arguably be viewed as an expression of their

C16.N199

<sup>187</sup> CRC GC 23 (n 186) para 28.

<sup>188</sup> *ibid* para 28.

<sup>189</sup> *ibid* para 29.

<sup>190</sup> *Case of the Ituango Massacres v Columbia* Inter-American Court of Human Rights Series C No 148 (1 July 2006) para 194.21.

<sup>191</sup> CRC art 20. See also: 'Guidelines for the Alternative Care of Children' (n 152) paras 10–22, 79–13

<sup>192</sup> HR GC 16 (n 12) para 5. See also: 'Draft Revised General Comment' in American Civil Liberties Union (ACLU) (with Oxford Pro Bono Publico) *Privacy Rights in the Digital Age* (ACLU 2014) ('ACLU, Draft Revised General Comment') appendix 1 para 7.

<sup>193</sup> *Neimetz v Germany* (1992) 16 EHRR 97 (ECtHR).

<sup>194</sup> *Murray v United Kingdom* (1994) 19 EHRR 193 (ECtHR) paras 84–96.

<sup>195</sup> *Gillow v United Kingdom* (1986) 11 EHRR 335 (ECtHR).

<sup>196</sup> 'Guidelines for the Alternative Care of Children' (n 152) paras 79–135. Hodgkin and Newell state: 'moves from one "home" to another or closure of an institution *must not unreasonably* breach this right': Hodgkin and Newell (n 186) 210.

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home life as it has *home creating effects*. The Havana Rules on the Protection of Juveniles Deprived of their Liberty, for example, state:

C16.P148 The possession of personal effects is a basic element of the right to privacy and essential to ... psychological wellbeing. The right of every juvenile to possess personal effects and to have adequate storage for them should be fully recognised and respected.<sup>197</sup>

C16.P149 The interpretation of ‘home’ by the HR Committee to include ‘usual occupation’ is equally applicable to children engaged in employment. However, when applied to children, ‘usual occupation’ may be viewed as having even broader application, specifically as encompassing places of education.<sup>198</sup> Such an approach would accord with the vision of rights-based education within the Convention<sup>199</sup> and also the broader protection of education within international human rights<sup>200</sup> and humanitarian law.<sup>201</sup> Viewed through the lens of either legal paradigm, children’s have rights ‘to’, ‘in’, and ‘through’ education: the second group of rights—children’s rights ‘in’ education—necessarily includes feeling and being safe in their place of schooling or education.<sup>202</sup>

C16.P150 Thus, children’s right to privacy, as expressed by their home life, potentially includes the right *not* to be subjected to arbitrary or unlawful interference within their places of residence, schooling, and work. Further there is an evolving consensus that home is not restricted to the physical spaces of the home but extends to virtual spaces accessed within the broadly defined home. In a recent resolution, for example, the General Assembly affirmed ‘... that the same rights that people have offline must also be protected online, including the right to privacy’.<sup>203</sup>

C16.P151 Interference with children’s right to privacy, as expressed by their home life, may include, inter alia, searches of, and involuntary removal (or forced eviction)<sup>204</sup> from, their places of residence, schooling, or work. The CRC Committee has underscored a state’s obligation to ‘ensure full implementation of the right to privacy, including with respect to ... searching of personal effects’.<sup>205</sup> At extremes this may include demolition of,<sup>206</sup> or

C16.N198 <sup>197</sup> Havana Rules (n 1) para 35. <sup>198</sup> *ibid.*

C16.N199 <sup>199</sup> See CRC arts 28, 29; CRC Committee, ‘General Comment No 1 (2001) Article 29(1): The Aims of Education’ (17 April 2001) CRC/GC/2001/1.

C16.N200 <sup>200</sup> ICESCR art 13; ECOSOC, ‘General Comment No 13: The right to education (article 13 of the Covenant)’ (8 December 1999) E/C.12/1999/10 paras 6–7; Human Rights Commission, ‘Preliminary Report of the Special Rapporteur on the right to education, Ms Katarina Tomasevski’ (13 January 1999) E/CN.4/1999/49 paras 51–74.

C16.N201 <sup>201</sup> CRC art 38 (1), 38(4), in conjunction with the applicable provisions of international humanitarian law eg Protocol I Additional to the Geneva Conventions (adopted 8 June 1977, entered into force 7 December 1978) art 52. See also: UNSC Res 2143 (7 March 2014) S/RES/2143 paras 17–18; Global Coalition to Protect Education from Attack, ‘Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict’ (18 March 2014); and Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law—Volume I: Rules* (CUP 2009), Rule 9: Definition of Civilian Objects.

C16.N202 <sup>202</sup> Laura Lundy, ‘Mainstreaming Children’s Right in, to and through Education in a Society Emerging from Conflict’ (2006) 14 *International Journal of Children’s Rights* 339, 357.

C16.N203 <sup>203</sup> UNGA, ‘The Right to Privacy in a Digital Age’ (n 112) paras 3–4.

C16.N204 <sup>204</sup> CRC Committee, ‘General Comment No 21 (2017): Children in Street Situations’ (21 June 2017) CRC/C/GC/21, (‘CRC GC 21’) para 43. See also broader references to the right to privacy within the context of forced evictions, the connected due process rights, and disproportionate impact on children: Committee on Economic, Social and Cultural Rights, ‘General Comment No 7: The right to adequate housing (art. 11.1.): forced evictions’ (20 May 1997) E/1998/22 esp paras 4, 8, 10, 15. Further, the Committee on Economic, Social and Cultural Rights has observed that forced evictions ‘are not only an infringement of the right to adequate housing but also of the inhabitants right to privacy and security of the home’: CESCR, CO Panama, (1991) E/1992/23 para 135.

C16.N205 <sup>205</sup> CRC Committee, CO Japan, CRC/C/15/Add.231 paras 33–34. <sup>206</sup> *ibid.*

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attacks on, their places of residence, schooling, or work. On this the CRC Committee for example specifically recognizes forced evictions to be a violation of article 16.<sup>207</sup> Like the broader protected interests, if the interference is unlawful in terms of domestic or national law, the interference is a *prima facie* violation of article 16.<sup>208</sup> However, the interference may also violate article 16 if the interference is considered arbitrary with regard to the aims and objectives of the Convention. Or, in other words, *prima facie* lawful searches of the broadly defined home may be considered a violation of article 16. Upon considering the facts of the *Rojas García Case*, the Human Rights Committee stated of the equivalent provision in the ICCPR:

C16.P152 The Committee does not enter in any question the legality of the raid; however it considers that, under article 17 of the Covenant, it is necessary for any interference not only to be lawful but also not to be arbitrary.<sup>209</sup>

C16.P153 Further, the views of international treaty bodies suggest that arbitrary interferences with children's right to privacy as expressed by their broadly defined home life, together with their membership of the family unit, is viewed as seriously as that of the rights of adults.<sup>210</sup>

## C16.S38 2. Protection against Environmental Harm

C16.P154 The right to protection of a child's home extends to any noise and environmental interference that unlawfully and arbitrarily impedes a child's ability to enjoy his or her home, and can undermine one's private life and relationship to others.<sup>211</sup> In assessing whether such forms of interference are unlawful and arbitrary regard must be had to striking a fair balance between the competing needs of the child and the broader needs of the community. This is clear from the jurisprudence of the European Court. In *Powell and Rayner v United Kingdom*,<sup>212</sup> for example, the Court addressed the impact of aircraft noise and held there was no violation of the right to respect for the home as an appropriate balance

C16.N200

<sup>207</sup> CRC GC 21 (n 204) para 43.

<sup>208</sup> See views adopted by the HR Committee determining unlawful interference in the homes of the applicants in terms of ICCPR art 18: HR Committee, *Sultanova v Uzbekistan* Comm No 915/2000 (30 March 2006) para 7.9; *Coronel v Columbia* Comm No 778/1997 (24 October 2002) para 9.7.

<sup>209</sup> *Rojas García v Colombia* Comm No 687/1996 (3 April 2001) para 10.3. (armed men from the Public Prosecutor's Office raided applicant's house and verbally abused applicant's family, which included small children; a shot was also fired in front of the child). See also HR Committee, 'General Comment No 16: Article 17 (Right to privacy) The right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988).

<sup>210</sup> Cases in which the right to respect for privacy and home life of children has been violated, along with those of their parents or community, have been found to violate ICCPR art 17. See views adopted by HR Committee, regarding violations of family's rights under ICCPR art 17: *Chiti v Zambia* Comm No 1303/2004 (26 July 2012) paras 12.7-12.8 (Author's husband was detained and tortured as a suspect in an attempted coup d'état; during husband's detention, state authorities forcibly searched Chiti's apartment and stole or damaged property including important official documents; applicant and her children were prevented from returning to the flat. Subsequently, the applicant and her children were forcibly evicted from six separate dwellings; HR Committee held that evictions and destruction of belongings were a violation of art 17); *Peiris v Sri Lanka* Comm No 1862/2009 (26 October 2011) para 7.6 (police officers harassed applicant and her two minor children through threatening phone calls and visits; subsequently the family were forced into hiding; HR Committee also taking note of ongoing harm from state's failure to take action with regard to protection of the family; holding that there was violation of art 17); *Georgopoulos v Greece* Comm no 1799/2008 (14 September 2010) para 7.3 (Roma family was evicted and housing was demolished; application brought by parents and seven children, HR Committee held that eviction and demolition of authors' dwelling, and that they had been prevented from constructing a new home in a Roma settlement constituted violation of art 17); *Rojas García v Colombia* (n 208) para 10.3.

<sup>211</sup> Grabenwarter (n 154) 192.

<sup>212</sup> (1990) 12 EHRR 355 (ECtHR).



had been struck between the needs of the individual and those of the community in the operation of an international airport. The same test was used in *Lopez Ostra v Spain*<sup>213</sup> to assess the failure of a local authority to use its powers to prevent a waste treatment plant releasing fumes which impaired the ability of the applicant to enjoy her home. On this occasion, however the Court decided that there had been a breach of the right to respect for a person's home under article 8 of the European Convention.<sup>214</sup>

## E. Protection of a Child's Correspondence

### 1. *The Need for a Contemporary Approach*

A child's *correspondence* is also listed as a discrete interest which must be protected against unlawful and arbitrary interference. Such a term, which is generally associated with 'communication by exchanging letters'<sup>215</sup> is antiquated, given the rapid development in contemporary forms of communication. Indeed, it is unsurprising that the equivalent provisions under the more recent Convention on the Rights of Persons with Disabilities and Convention for the Protection of Migrant Workers and their Families protect 'correspondence or other types of communication' (emphasis added).<sup>216</sup> It is also unsurprising that human rights bodies and regional courts have interpreted the right to privacy, as expressed by correspondence, in light of evolving developments in information and communications technology. Thus, it has been interpreted to include multifarious forms of communication from letters<sup>217</sup> to telephonic and electronic conversations.<sup>218</sup> The Inter-American Court of Human Rights has explained that technological advancements should not place the individual 'in a situation of vulnerability when dealing with the State or other individuals'. From this perspective, the obligation is on 'the State [to] increase its commitment to adapt the traditional forms of protecting the right to privacy to the current times'.<sup>219</sup> Indeed, the General Assembly, for example, has called upon states 'to respect and protect the right to privacy, including in the context of digital

C16.N213 <sup>213</sup> (1994) 20 EHRR 277 (ECtHR).

C16.N214 <sup>214</sup> See also: *Guerra v Italy* (1998) 26 EHRR 375 (ECtHR) (failure of authorities to reduce risk of pollution from a chemical factory was a violation of art 8); *Fadayeve v Russia* App no 5573/00 (9 June 2005) (ECtHR) paras 128ff (finding a violation of art 8 where the pollution created by a factory situated in a densely populated town required the state to take measures to find effective solutions for moving away for the applicant, and obliged the state to design or apply measures to take into account the interests of the local population affected by the pollution); *Giacomelli v Italy* App no 59909/00 (2007) (finding a violation of art 8 where the authorities failed to undertake an assessment of the environmental impact associated with a proposal to increase emissions from an hazardous waste storage facility). cf *Hatton v UK* App no 36022/97 (8 July 2003) (ECtHR) paras 10, 129ff (finding no violation of art 8 where government policy on night flights at Heathrow had given the applicant persistent sleeping problems).

C16.N215 <sup>215</sup> The Oxford English Dictionary, <http://www.oxforddictionaries.com/definition/english/correspondence?q=correspondence> accessed 18 November 2018.

C16.N216 <sup>216</sup> Convention on the Rights of Persons with Disabilities (n 1) art 22(1); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 art 14.

C16.N217 <sup>217</sup> See inter alia *Pinkney v Canada* Comm No 27/1978 (29 October 1981) (HRC) para 34.

C16.N218 <sup>218</sup> 'While acknowledging the importance of protecting the confidentiality of communication, in particular that relating to communication between lawyer and client, the Committee must also weigh the need for States parties to take effective measures for the prevention and investigation of criminal offences': HRC GC 16 (n 12) para 8; HRC, *Van Hultz v Netherlands* Comm No 903/1999 (1 November 2004) (ECtHR) paras 6.7, 7.6; Nowak (n 12) 204 paras 36–38. See also HR Committee, CO Bulgaria, (19 August 2011) CCPR/C/BGR/CO/3 para 22.

C16.N219 <sup>219</sup> *Escher et al Brazil* Inter-American Court of Human Rights Series C No 6 (6 July 2009) para 115.

communication'.<sup>220</sup> Thus for the purposes of article 16 the principle of dynamic interpretation<sup>221</sup> would justify an interpretation of correspondence that extends beyond written letters to include all contemporary forms of a communication by a child.

C16.P156

Moreover, the protection against unlawful and arbitrary interference with a child's correspondence extends to *all* communication, irrespective of the standing of the communicators, the place or subject of the communication. The right to privacy as expressed by communication protects communication between, inter alia, family members,<sup>222</sup> friends, school, or work colleagues.<sup>223</sup> These communications may intersect with the other expressly protected interests of family and home. However, they may also extend beyond these spaces. For example, children deprived of their liberty also have the right to privacy in their communications with others.<sup>224</sup> Two forms of communication are expressly protected: communication between a legal representative and his/her client<sup>225</sup> and physician and his/her patient.<sup>226</sup> Further, the protection extends beyond the substance to connected information, for example, the identity and location of the sender; this necessarily includes meta-data connected with digital communication.<sup>227</sup>

C16.S41

## 2. The Need for Effective Protection

C16.P157

The CRC Committee has paid limited attention to a child's right to correspondence, beyond, for example, noting that this takes on increasing importance for adolescents.<sup>228</sup> In contrast, the Human Rights Committee has expressly stated that:

C16.P158

C16.N229

Compliance with article 17 [of the ICCPR] requires that the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*. Correspondence should be delivered to the

<sup>220</sup> UNGA, 'The Right to Privacy in a Digital Age' (n 112) para 4 (d). In this respect it has specifically called upon all States '[t]o review their procedures practices and legislation regarding the surveillance of communications, their interception ... with a view to upholding the right to privacy ...': para 4 (c).

<sup>221</sup> John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 Harvard Human Rights Journal 1, 23.

<sup>222</sup> HR Committee, *Estrella v Uruguay* Comm no 74/1980 (29 March 1983) para 9.2.

<sup>223</sup> *Escher et al v Brazil* (n 219) paras 85–164.

<sup>224</sup> See particularly claim of alleged interference with the applicant's correspondence with her children (held to be unsubstantiated) in HR Committee, *Fei v Columbia* Communication no 514/1992 (4 April 1995) para 8.8. cf *Estrella v Uruguay* (n 222) para 9.2; HR Committee, *Tomlin v Jamaica* Comm no 589/1994 (16 July 1996) para 8.3.

<sup>225</sup> See: right 'to have adequate time and facilities for the preparation of his/her defence and to communicate with counsel of his choosing' (ICCPR art 14 (3) (b)); CRC Committee, 'General Comment No 10: Children's rights in juvenile justice' (9 February 2007) CRC/C/GC/10 para 23(f). See also: Rule 8 (protection of privacy) read in conjunction with Rule 15 (legal counsel, parents, and guardians) of UN Standard Rules for the Administration of Juvenile Justice (n 1). cf *Van Hultz v Netherlands* (n 218) para 7.6; Inter-American Court of Human Rights, *Case of Tristán Donoso v Panamá* Series C No 193 (27 January 2009) paras 30–89, esp 55–57.

<sup>226</sup> 'The realisation of the right to health of adolescents is dependent on the development of youth-friendly health care, which respects the confidentiality and privacy and includes appropriate sexual and reproductive health services': ECOSOC, 'General Comment No 14 (2000): The right to the highest attainable standard of health' (11 August 2000) E/C.12/2000/4 para 23. See also: 'State parties are ... encouraged to respect strictly [adolescents'] right to privacy and confidentiality, including with respect to advice and counseling on health matters': CRC Committee, 'General Comment No 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child' (1 July 2003) CRC/GC/2003/4 para 11; CRC Committee, 'General Comment No 20 on the implementation of the rights of the child during adolescence' CRC/C/GC/20 (6 December 2016) ('CRC GC 20') para 46 ('The right to privacy takes on increasing significance during adolescence'. The Committee has repeatedly raised concerns about violations of privacy in respect of eg: confidential medical advice; space for and belongings of adolescents in institutions; correspondence and other communications, either in the family or other forms of care; and exposure of those involved in criminal proceedings).

<sup>227</sup> ACLU, Draft Revised General Comment (n 192) 18. See also *Copland v UK* (2007) 45 EHRR 37.

<sup>228</sup> CRC GC 20 (n 226) para 46.

addressee without interception and without being opened or otherwise read. Surveillance whether electronic or otherwise interceptions of telephonic, telegraphic and other forms of communication, wiretapping and recording or conversations should be prohibited.<sup>229</sup>

C16.P159 It has been noted that this protection applies not only during the transmission of the correspondence ‘by post or messenger, but also in the period before it is sent and after it is received’.<sup>230</sup> Moreover, like the other protected interests, the legal protection of the right to privacy, as expressed by communication, requires not only that any interference be entrenched within law but also adequate safeguards including effective remedies and monitoring mechanisms.<sup>231</sup>

C16.P160 This approach also applies with regard to children’s digital correspondence. The CRC Committee has recommended that states develop effective safeguards against abuse in relation to children’s right to privacy and digital media, and should also develop awareness-raising programs to educate children on privacy risks in relation to the use of digital media.<sup>232</sup>

### C16.S42 3. *Protection of Correspondence in Criminal Justice Settings*

C16.P161 The UN Rules for the Protection of Juveniles Deprived of their Liberty provide that:

C16.P162 Every juvenile should have the right to communicate in writing or by telephone at least twice a week with the person of his or her choice, unless *legally restricted* and should be assisted as necessary in order effectively to enjoy this right. Every juvenile should have the right to receive correspondence (rule 61) (emphasis added).

C16.P163 The Rules do not stipulate when this right can be legally restricted and the CRC Committee has not commented on this issue. As a guide, however the general principles regarding the legitimacy of any interference with any element of a child’s right under article 16 will apply. Thus, there must be valid law which authorizes the restriction, the restriction must pursue a legitimate aim, and the measures to achieve that aim must be proportionate.

C16.P164 It is within this context that the Human Rights Committee has noted in its General Comment on privacy that states are obliged to create specific legal measures that seek to protect the secrecy of correspondence;<sup>233</sup> thus, while it is ‘normal for prison authorities to exercise measures of control and censorship over prisoners’ correspondence’, any such measures ‘shall be subject to satisfactory legal safeguards against arbitrary application’.<sup>234</sup>

C16.N229 <sup>229</sup> HRC GC 16 (n 12) para 8. This is not to say that any form of interference with the correspondence of a child is prohibited, only those which are found to be unlawful. The case of *Pinkney v Canada* (n 217) provides an illustration of how this distinction may be established in practice. The complaint was based on a rule which allowed the Warden of a Gaol to read every letter to a prisoner and granted the Warden discretion to stop or censor any letter on the ground that its contents were objectionable or because the letter was of excessive length. The HR Committee held that this provision violated art 17 of the ICCPR but that the amended rule did not, as it restricted censorship to circumstances where the mail posed a threat to the staff or operation of the prison. According to the HR Committee, the critical problem with the original rule was its general nature which failed to provide satisfactory legal safeguards against arbitrary interference. By way of contrast the new rule made the law considerably more specific in its terms: para 34. See also: HR Committee, CO Poland, CCPR/C/79/Add.110 para 22; CO Zimbabwe, CCPR/C/79/Add.8 para 25; CO Sweden, CCPR/C/SWE/CO/6 para 18.

C16.N230 <sup>230</sup> Fernando Volio, ‘Legal Personality, Privacy, and the Family’ in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981) 185, 197.

C16.N231 <sup>231</sup> Regarding adequate safeguards, effective remedies, and monitoring mechanisms, see respectively: *Pinkney v Canada* (n 217), esp para 34; *Bulgakov v Ukraine* Comm No 1803/2008 (29 November 2012) para 9: HR Committee, CO Zimbabwe (6 April 1998) CCPR/C/79/Add.89.

C16.N232 <sup>232</sup> CRC Committee, 2014 Day of General Discussion (n 103) para 102.

C16.N233 <sup>233</sup> HRC GC 16 (n 12) para 8. <sup>234</sup> *Estrella v Uruguay* (n 222) para 9.2.

In addition, ‘the degree of restriction must be consistent with the standard of humane treatment of detained persons required by ... the [International] Covenant [on Civil and Political Rights]’.<sup>235</sup> In another decision the HR Committee noted that a ban on the sending and receiving of all mail by a specific individual raised questions of compatibility with article 17 of the ICCPR, although the particular complaint was declared inadmissible on procedural grounds.<sup>236</sup>

C16.P165 The jurisprudence of the ECtHR largely echoes that of the HR Committee, and explores more specific issues with regard to the protection of correspondence in prison settings. Thus for example, the ECtHR has recognized that control over prisoners’ correspondence is compatible with the ECtHR,<sup>237</sup> but reasons which justify the control of correspondence must be put forward in each application.<sup>238</sup> Interferences may be justified where letters contain threats of or incitements to violence.<sup>239</sup> However, blanket bans on prisoners’ correspondence on the basis that they contain information about treatment in prison cannot be justified, given that the opportunity to correspond via letters may be inmates’ only link to the world outside prison.<sup>240</sup> The ECtHR has held that prison authorities may read a prisoner’s correspondence where they have reason to believe that it contains an illicit enclosure (including correspondence from the prisoner’s legal counsel),<sup>241</sup> but suitable measures should also be undertaken to ensure that the letter will only be opened but not be read.<sup>242</sup>

C16.P166 The ECtHR has deemed that article 8 cannot be interpreted to guarantee prisoners the right to make telephone calls,<sup>243</sup> and in line with this, the prohibition of cell phones is also protected under article 8.<sup>244</sup>

## C16.S43 F. Protection against Unlawful Attacks on a Child’s Honour and Reputation

### C16.S44 1. The Need for a Child-centred Understanding

C16.P167 The protection against unlawful attacks on a child’s honour and reputation is not an issue that has attracted the attention of the CRC Committee. Moreover, the drafting history provides no insights into how states anticipated that this protection would apply to the lives of children. Indeed, its inclusion appears to be the result of a decision to simply import the equivalent of article 17 of the ICCPR into the Convention without any real evaluation as to merit of doing so.

C16.P168 While the Convention and the ICCPR both use the conjunctive ‘and’ (as in honour and reputation), in practice they are understood disjunctively and it has not been suggested that the prohibition applies only to attacks against *both elements* rather than against either of them. The question then arises as to how the meanings of the two terms differ in this context. This issue arose during the drafting of Article 17 of the ICCPR. Some

C16.Nag

<sup>235</sup> *ibid.* See also *Pinkney v Canada* (n 217) paras 31–34.

<sup>236</sup> *JRT and the WG Party v Canada* Comm no 104/1981 (6 April 1983) (HRC) para 8(c).

<sup>237</sup> *Silver v UK* App no 5847/72 (25 March 1983) (ECtHR) para 83; *Campbell v UK* App no 13590/88 (25 March 1992) (ECtHR) para 42.

<sup>238</sup> *Puzinas v Lithuania* App no 4480/98 (14 March 2002) (ECtHR) para 21; *Tsonyo Tsonov v Bulgaria* App no 3372/03 (1 October 2009) (ECtHR) para 39.

<sup>239</sup> *Silver v UK* (n 237). <sup>240</sup> *Campbell v UK* (n 237) para 45.

<sup>241</sup> Grabenwarter (n 154) 218 para 70. <sup>242</sup> *ibid.*

<sup>243</sup> *AB v Netherlands* App no 37328/97 (29 January 2002) (ECtHR) para 92.

<sup>244</sup> Grabenwarter (n 154) 218 para 70.

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delegates suggested that since concepts of honour varied significantly from one country to another, and since the word ‘reputation’ embraced ‘honour’, the latter was superfluous.<sup>245</sup> Others, however, considered that different concepts were involved. In this vein it was noted that ‘a slur on an individual’s honour involved a judgment of his moral conduct, whereas a slur on his reputation might concern merely an alleged failure to conform to professional or social standards’.<sup>246</sup>

Similarly it has been observed:

Honour is a criterion which an individual applies to himself and is based upon the values by which he feels his conduct should be measured. In this sense, honour bears no relation to public opinion. Reputation, on the other hand, is tied to public opinion, because it involves public recognition of an individual’s qualities and merit. It is equivalent to fame or renown.<sup>247</sup>

In the relevant part of its General Comment on Article 17 of the ICCPR, the HR Committee observes only that the provision ‘affords protection to personal honour and reputation and States are under an obligation to provide adequate legislation to that end. Provision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible’.<sup>248</sup>

For children, whose sense of self remains evolving and who are unlikely to have an established standing within the public sphere, the relevance of concepts such as honour and reputation is not self-evident. At the same time, it should not be assumed that the status and reputation of a child is immune from attack. Consider for example, the problem of cyberbullying, in which the status and reputation of girls (and potentially, albeit less frequently, boys) have become in many cases the subject of attack because of their real or alleged sexual relationships.<sup>249</sup> Consider also the status and reputation of children which may be the subject of attack because of their involvement, whether alleged or proven, in criminal offences. The CRC Committee has noted children in street situations are particularly vulnerable to unlawful attacks on their honour and reputation (and violations of article 16 more broadly) as a consequence of unlawful discriminatory and non-respectful treatment in law and practice on the grounds of their or their parents’ or family’s street situation.<sup>250</sup> Thus, it should not be assumed that children are immune from attacks on their sense of self and public standing by virtue of their age. On the contrary, they remain vulnerable to attacks which may damage their own sense of self (honour) and their public standing (reputation). These problems are compounded in the digital age, as a result of the indelible nature of digital communication on the internet.<sup>251</sup>

<sup>245</sup> UNGA Third Committee, ‘15th Session Official Records, Report’ (8 December 1960) A/4625 para 38.

<sup>246</sup> *ibid.*

<sup>247</sup> Volio (n 230) 198 (footnote omitted). See Nowak (n 12) 306 para 42. See also Inter-American Court of Human Rights, *Escher et al v Brazil* (n 219) paras 113–17, esp 117. Here, the IACtHR cited Nowak, vis-à-vis art 11, the equivalent provision of ACHR: ‘the right to honour relates to self-esteem and self-worth, while reputation refers to the opinion that others have of a person’.

<sup>248</sup> HRC GC 16 (n 12) para 11.

<sup>249</sup> For a general explanation of the issue, see eg Wanda Cassidy and others, ‘Cyberbullying among Youth: A Comprehensive Review of Current International Research and Its Implications and Application to Policy and Practice’ (2013) 34 *School Psychology International* 575.

<sup>250</sup> CRC GC 21 (n 204) paras 43, 27, and 60.

<sup>251</sup> For a discussion of the issue of cyberbullying and infringements of the right to privacy, see eg Anupam Chander, ‘Youthful Indiscretion in an Internet Age’ in Saul Levmore and Martha Nussbaum (eds), *The*



C16.S45 **2. Unlawful Attacks**

C16.P173 Critically the protection of a child from attacks against the honour and reputation is not absolute and only extends to unlawful attacks. The word ‘unlawful’ was introduced in the context of drafting article 17 of the ICCPR ‘to meet the objection that, unless qualified, the clause might be construed in such a way as to stifle free expression of public opinion’.<sup>252</sup> Thus, the goal was said to be to ensure that ‘fair comments or truthful statements which might affect an individual’s honour or reputation should not be considered as ‘attacks on his honour and reputation’.<sup>253</sup> However, a lawful attack should not be equated with an attack that has merely been sanctioned by domestic law. On the contrary, for an attack to be lawful it must also be consistent with international human rights standards. As such it must be reasonable and proportionate.<sup>254</sup>

C16.S46 **3. An Attack**

C16.P174 As to why the phrase ‘attack’ is preferred to ‘interference’ is unclear from the drafting history of the ICCPR and Convention. It has been suggested that the word ‘attacks’ requires a higher threshold than ‘interference’ in this context; the ‘attacks’ must be intentional and include untruthful statements.<sup>255</sup> This higher threshold is arguably an attempt to pay due regard for the right of freedom of expression as expressed within articles 13 and 19 of the Convention and ICCPR respectively. The HR Committee recently affirmed this, stating that such ‘[d]efamation laws must be crafted with care to ensure ... they do not serve in practice to stifle freedom of expression’.<sup>256</sup> At the same time the Human Rights Committee has explained that:

C16.P175 Article 17 affords protection to personal honour and reputation and States are under an obligation to provide adequate legislation to that end. Provision must also be made for everyone to be able to protect himself [or herself] against any unlawful attacks that do occur and to have an effective remedy against those responsible.<sup>257</sup>

C16.P176 Such unlawful attacks may be directed at children as individuals, family members, or part of a group. The Inter-American Court of Human Rights has, for example, found a violation of the equivalent provision of American Convention for the child siblings of two young brothers wrongly castigated as terrorists by the State of Peru:

C16.P177 Regarding article 11 of the Convention, it has been proven that the alleged victims were treated as ‘terrorists’, subjecting them and their family to hatred, public contempt,

C16.N256

*Offensive Internet: Speech, Privacy, and Reputation* (Harvard University Press 2011) ch 7; Christine M Lorillard, ‘When Children’s Rights “Collide”: Free Speech vs. the Right to be Let Alone in the Context of Off-Campus “Cyber-Bullying”’ (2011) 81 Mississippi Law Journal 189.

<sup>252</sup> UNGA, Annotations (n 21) ch VI para 103. <sup>253</sup> *ibid.*

<sup>254</sup> HRC GC 16 (n 12) para 3: HR Committee notes that domestic law should comply with the ICCPR. cf Joseph and Castan, who opine that the law is unsettled, and that the precise delineations between the concepts of lawfulness and arbitrariness are unclear; lawfulness under extant ICCPR Optional Protocol cases can be interpreted to apply only to domestic legislation (ie, whether or not States Parties have created legislation), and that the prohibition on arbitrariness balances out the potentially large scope of appreciation afforded by the concept of lawfulness: Joseph and Castan (n 12) 16.09 (fn 11); 16.48.

<sup>255</sup> Nowak (n 12) 305 para 39; 306 para 41. See also Volio (n 230) 199 (requires deliberate assault on honour or reputation).

<sup>256</sup> HR Committee, ‘General Comment No 34: Article 19: Freedoms of Opinion and Expression’ (12 September 2011) CCPR/C/GC/34 para 47.

<sup>257</sup> HRC GC 16 (n 12) para 11. See also ACLU, Draft Revised General Comment (n 192) paras 9–12.

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persecution and discrimination for which reason there has been a violation of article 11 of the Convention.<sup>258</sup>

C16.P178 Further, the comments of the CRC Committee suggest that unlawful attacks may include attacks against children as a group:

C16.P179 The Committee shares the concern expressed by the State Party about the fact that children are often abused in the media to the detriment of their personalities and status as minors ... The Committee recommends that, on an urgent basis, measures be taken ... to protect the child's right to privacy'.<sup>259</sup>

C16.P180 Whether such an approach is justified remains debateable. What is clear, however, is that paragraph 2 of article 16 imposes an obligation on states to ensure that children enjoy the protection of the law against any attacks on their honour and reputation, or indeed any unlawful or arbitrary inference with their privacy, family, home, or correspondence. It is to the meaning of this obligation that we now turn.

### III. Protection of the law against arbitrary or unlawful interference

#### A. Protection against State and Non-state Actors

C16.S47

C16.S48

C16.P181 The obligation imposed on a state to protect children against arbitrary and unlawful interference with their right to privacy or unlawful attacks on their honour and reputation, extends to interference and attacks from both *public and private actors*. Early in the drafting process representatives of the United States made proposals for the right to privacy that articulated a 'freedom from arbitrary governmental interference',<sup>260</sup> but subsequent drafts removed this limitation. The issue also arose during the drafting of the equivalent provision in the ICCPR and the *travaux préparatoires* indicate that some delegates saw the word 'arbitrary' as referring to interference by public authorities and 'unlawful' as applying to private acts. The view was also expressed that the article should refer only to official acts on the grounds that private interference was appropriately dealt with by national laws.<sup>261</sup> However as one commentator has noted: 'The General Assembly chose the broader view ... since violations are equally detrimental and odious whether committed by governments or by individuals, and state parties should be required to ensure against both kinds of violations.'<sup>262</sup>

C16.P182 This approach has been by endorsed by the HR Committee in its General Comment No 16 on article 17 of the ICCPR, in which it states that 'this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons'.<sup>263</sup> Moreover, this approach is consistent with

C16.N258 <sup>258</sup> *Case of Gómez-Paquiyaury Brothers v Peru* Inter-American Court of Human Rights Series C No 110 (8 July 2004) paras 182, 253 (7).

C16.N259 <sup>259</sup> CRC Committee, CO Nicaragua, CRC/C/15/Add.36 paras 17, 34. Cf: CO El Salvador, CRC/C/SLV/CO/3-4 paras 39-40; CRC Committee, 'General Discussion: The Child and the Media' (7 October 1996) CRC/C/50, Annex IX, 80; Hodgkin and Newell (n 186) 211. cf CRC GC 21 (n 204) paras 43, 27, and 60.

C16.N260 <sup>260</sup> E/CN.4/1983/WG.1/WP.30; E/CN.4/1985/64, Annex II, s V; *Legislative History* (n 10) 473-74.

C16.N262 <sup>261</sup> UNGA, Annotations (n 21) ch VI paras 100-01. <sup>262</sup> Volio (n 230) 192.

C16.N263 <sup>263</sup> HRC GC 16 (n 12) para 1.

the overriding obligation imposed on states under article 2 of the Convention which requires that a state ‘shall respect and ensure the rights set forth in the present Convention’. As detailed in the commentary to this provision, this phrase is understood to impose an obligation on states to respect, protect, and fulfil each of the rights under the Convention including article 16. In practical terms this means that states are under an obligation to take all reasonable measures to:

- C16.P183 • Prevent an unlawful and arbitrary interference with a child’s right to privacy by an agent of the state (*the obligation to respect*);
- C16.P184 • Prevent an unlawful and arbitrary interference with a child’s right to privacy by a non-state actor (*the obligation to protect*); and
- C16.P185 • Ensure the effective enjoyment of a child’s right to privacy (*the obligation to fulfil*).

C16.P186 Thus, in the context of article 16 of the Convention the protection against arbitrary or unlawful interference extends to the actions of all public and private actors. This would include not only *state actors* that work with and have access to information about children but also parents, siblings, teachers, medical, legal, and other private professionals with whom a child may have contact, including commercial actors such as businesses and telecommunications companies that collect and store data on children as a consequence of the commercial transactions they undertake with children.

## C16.S49 B. Legal Protection

C16.P187 Paragraph 2 of article 16 serves to emphasize that children have a right to protection of the law from all relevant forms of interference and attacks. Thus the obligation of states is not simply to abstain from intrusion in the private life of a child and positive measures are required to secure a child’s enjoyment of the right to privacy.<sup>264</sup> States necessarily have a level of discretion with respect to the specific measures they adopt to protect a child’s rights under article 16 subject to the caveat that such measures must be both effective<sup>265</sup> and consistent with the other provisions of the Convention. In this respect, the obligation under article 12 to assure that the views of children are taken into account in all matters affecting them will be relevant.

C16.P188 For its part the CRC Committee has stressed that states ‘consider enacting comprehensive national legislation enshrining the right to privacy’,<sup>266</sup> which protects a child’s right

C16.N266

<sup>264</sup> In the context of ECHR art 8, the ECtHR has established that although its ‘essential object’ is the protection against arbitrary interference into an individual’s private life by public authorities, protection of the right will also sometimes require positive obligations (*Marckx v Belgium* (n 144) para 31 ([Article 8] does not merely compel the State to abstain from . . . interference; in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life’). In determining whether or not a positive obligation exists, consideration must be had as to whether a fair balance has been struck between the interests of the individual and the general interest of the community, and the State’s margin of appreciation, this must be decided on a case-by-case basis (*Rees v UK* App no 9532/81 (17 October 1986) (ECtHR) para 37; *I v UK* App no 25680/94 (11 July 2002) (ECtHR) para 52).

<sup>265</sup> See *Airey v Ireland* (n 155) paras 32–33. (The Court further stressed that the means of protection must be effectively accessible in circumstances where a woman is unable to access a legal procedure in a family law matter due to a lack of legal assistance).

<sup>266</sup> CRC Committee, CO Australia, CRC/C/AUS/CO/4 para 42. cf, inter alia: CO Cook Islands, CRC/C/COK/CO/1 para 34; CO Bosnia and Herzegovina, CRC/C/BIH/CO/2-4 para 38; CO Thailand, CRC/C/THA/CO/3-4 para 46.

to privacy in the family, in schools, and in child care and other institutions.<sup>267</sup> Moreover such measures must be clear,<sup>268</sup> and if necessary, supported by secondary legislation to regulate the practical implementation of the right to privacy.<sup>269</sup> The right to protection of the law also includes a right to an effective remedy for recognized violations<sup>270</sup> and the Committee has recommended states ‘establish child-specific and child-friendly mechanisms for children to complain against breaches of their privacy’.<sup>271</sup>

### C. Non-legislative Protection Measures

Article 16 places an emphasis on the need for states to adopt legislative measures to ensure the effective protection of a child’s right to privacy. However, this provision still remains subject to the overarching obligation imposed on states under article 4 to adopt ‘all appropriate legislative, *administrative, and other measures* for the implementation of the rights recognized in the present Convention (emphasis added)’. Thus legislative measures alone will be insufficient and it is within this context that the CRC Committee has recommended that states ‘take all necessary measures to ensure respect for children’s privacy’<sup>272</sup> and ‘take every necessary measure to safeguard respect for children’s privacy’.<sup>273</sup> Again, states enjoy significant discretion in relation to the adoption of such measures, provided they remain effective and consistent with the other provisions of the Convention. As a minimum however, states must take measures to make the right known to both children and adults who may be working with or for children in a capacity that has the potential to impact on a child’s enjoyment of the right to privacy.<sup>274</sup>

## IV. Evaluation: The Need to Remain Mindful of Children’s Experiences

The inclusion of article 16 in the Convention represents the *explicit* extension of a classic civil and political freedom<sup>275</sup> to children. Within the context of the Convention, however,

<sup>267</sup> CRC Committee, CO Japan, CRC/C/15/Add.90 para 36. See also: CO Australia, CRC/C/AUS/CO/4 para 42. cf, inter alia: CO Cook Islands, CRC/C/COK/CO/1 para 34; CO Bosnia and Herzegovina, CRC/C/BIH/CO/2-4 para 38; CO Thailand, CRC/C/THA/CO/3-4 para 46. See also HRC GC 16 (n 12) para 2 (interpreting the equivalent obligation in art 17 of the ICCPR as necessitating the adoption of ‘... legislative and other measures to give effect to the prohibition against such interferences and attacks’).

<sup>268</sup> CRC Committee, CO Federal Republic of Yugoslavia, CRC/C/15/Add.49 para 13 (request for clarification as to the applicability of the provisions of the Constitution guaranteeing respect for *inter alia* the right to privacy as provided for in art 16 of the Convention).

<sup>269</sup> CRC Committee, CO Nicaragua, CRC/C/15/Add.108 para 28 (welcomes domestic legislation for the protection of a child’s right to privacy but remains concerned about the lack of secondary legislation regulating the practical implementation of these rights).

<sup>270</sup> CRC Committee, ‘General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42, and 44, para 6)’ (27 November 2003) CRC/GC/2003/5 (‘CRC GC 5’) paras 24–25. See also UDHR, art 8, ICCPR, art 2(3).

<sup>271</sup> CRC Committee, CO Bosnia and Herzegovina, CRC/C/BIH/CO/2-4 para 38. cf CO Australia, CRC/C/AUS/CO/4 para 42. cf *Bulgakov v Ukraine* Comm No 1803/2008 (29 November 2012) CCPR/C/106/D/1803/2008 para 9: ‘Pursuant to article 2 of the Covenant, the State party is under an obligation to provide Mr. Bulgakov with an effective remedy, including to restore the original phonetic form in his identity documents and to adopt such measures as may be necessary to ensure that similar violations do not occur in the future.’

<sup>272</sup> CRC Committee, CO Croatia, CRC/C/HRV/CO/3-4 para 29.

<sup>273</sup> CRC Committee, CO Uzbekistan, CRC/C/UZB/CO/3-4 para 35.

<sup>274</sup> CRC GC 5 (n 270) paras 53–54, 66–70.

<sup>275</sup> Nowak (n 12) 377–79 (exploring philosophical development of right to privacy); James Griffin, *On Human Rights* (OUP 2008) ch 13.

its significance has been overshadowed by the inclusion of other specific and more innovative rights which deal with matters that would otherwise fall within the scope of the right to privacy. For example, articles 7 and 8 deal with a child's right to an identity and knowledge of his or her parents, whereas article 9 creates a presumption against separating a child from his or her parents unless this is necessary to secure the child's best interests. This has meant that article 16 has not necessarily gained the attention that its potential scope demands in the context of children. There is also the reality that children's right to privacy remains constrained quite legitimately under the Convention by the capacity of the state and a child's parents to take protective measures which would not be justified in the context of adults.

C16.P191 The challenge in moving forward is to develop an understanding of children's right to privacy and the other related rights under article 16 that is fashioned to reflect their experiences and priorities. Assuredly, the conception of privacy for a child may not be equivalent to that of an adult. But it would be wrong to deny children from enjoying a level of autonomy and agency, consistent with their right to privacy and their evolving capacity. Moreover, privacy is about far more than maintaining the secrecy of personal information. It is concerned with the control that individuals, *including children*, have over their own personal boundaries and the means by which they define who they are in relation to other people including the communities in which they live.<sup>276</sup> Children are not to be deprived of this entitlement to influence and understand their sense of self simply by virtue of being a child. Parents and the state must guide and assist children in this process but they cannot deprive a child of this right.

C16.P192 Thus, the challenge for adults is to accept the idea that children have a right to privacy which may be exercised in ways that challenge historical, and in many cases contemporary, presumptions about how children should be treated. There is also a need to create a dialogue with children themselves about how to best understand and protect their rights under article 16. Research confirms that children actually value their privacy. However, they are often unaware about how best to protect personal information when using social media, or alternatively, may be more prepared to share such information relative to adults.<sup>277</sup> Such observations are suggestive of a need for adults to equip children with the tools to ensure the effective enjoyment of their article 16 rights but at the same time adjust their expectations as to the scope, content, and significance of such rights in light of children's priorities and expectations. It is a dialogue that promises to be enriching for all parties and can only lead to a better understanding of what it means for a child to effectively enjoy their rights under article 16.

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<sup>276</sup> Dowty (n 6) 397.

<sup>277</sup> Mary Leary, 'Reasonable Expectations of Privacy for Youth in a Digital Age' (2010–11) 80 *Mississippi Law Journal* 1035, 1046.



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