UN Convention on the Rights of the Child, Article 2 and Discrimination on the Basis of Childhood

The crc Paradox?

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Abstract

The crc as an instrument calls attention to children as a group. Yet paradoxically it has not resulted in explicit consideration of discrimination against children on the basis of childhood (i.e. detrimental treatment for being young/under 18) in the same way that has happened for other groups like women and ethnic minorities in instruments drafted specifically for their rights. Children are more likely to suffer poverty and violence than adults, and under-18s are largely excluded from national legislation prohibiting unfair discrimination. In this article the jurisprudence of the Committee on the Rights of the Child is examined and it is established that even though child-specific discriminatory practices such as corporal punishment are criticised by the Committee, they are seldom labelled ‘discrimination’ as such. The Committee reserves consideration of Article 2, which enshrines the principle of non-discrimination, for traditionally disadvantaged groups of children such as girls and ethnic minorities. It is concluded that Article 2 has great potential for drawing attention to detrimental treatment for being young/under 18, but that the phenomenon must be more explicitly referenced with greater frequency in law, practice, and scholarship.
Keywords

children’s rights – Convention on the Rights of the Child – non-discrimination – equality – human rights treaties – Committee on the Rights of the Child – implementation

1 Introduction

Equality and non-discrimination are the keystone principles of international human rights law, enshrined in every international and regional international human rights instrument, including the United Nations Convention on the Rights of the Child (‘CRC’). Article 2 of the CRC stipulates that states will ensure that children enjoy their CRC rights ‘without discrimination of any kind’. Attention has been provided in law, practice and academia to discrimination against children on the basis that they belong to particular minority groups such as racial or ethnic minorities; those with disabilities; or due to gender or legal status. However, there is still limited explicit recognition at national and international level that children face discrimination because they are children, which we will refer to here as discrimination ‘on the basis of childhood’. How Article 2 can be used as a tool to counteract such discrimination is also largely unexplored. The fact that we have the CRC at all calls attention to children and to the rights they hold as a group (as well as rights they have as individuals). This, however, is not necessarily the same as recognising that children as a group may face discrimination like other minorities or vulnerable groups.

The limited acknowledgment of age and/or childhood as grounds for discrimination against children is somewhat surprising. The principle of non-discrimination is of key importance in the general human rights context. Added to this, states regularly cite poor attitudes to children as a barrier to the enjoyment by children of their rights. Furthermore, there are many concrete examples of children facing exclusion and unfair treatment because of the low status accorded to childhood compared to adulthood in most societies. Examples considered in this article range from disadvantageous legal protections (e.g. protection from assault) to status offences (such as curfew violations targeted solely at under 18s). It is also now increasingly accepted that children

1 See e.g. M. Skivenes and K. H. Søvig (eds.), Child rights and international discrimination law. Implementing article 2 of the United Nations Convention on the Rights of the Child (Routledge, New York, 2019).

2 R. Thorburn Stern, Implementing Article 12 of the UN Convention on the Rights of the Child: Participation, Power and Attitudes (Brill/Nijhoff, Leiden, 2017).
are affected disproportionately by emergencies such as the covid pandemic\textsuperscript{3} and by the climate crisis.\textsuperscript{4}

After considering examples of how children can be subject to discrimination because of age and childhood, the main focus of this article is to examine and analyse the ways in which the Committee on the Rights of the Child (hereafter ‘\textit{CRC Committee}’ or ‘Committee’) has considered discrimination of children in its jurisprudence. We have focused in particular on Concluding Observations on state party reports, conducting both qualitative and quantitative analysis. It is concluded that the \textit{CRC Committee} generally only considers discrimination in the context of children belonging to particular minority groups such as racial or ethnic minorities; those with disabilities; or due to gender or legal status (from here referred to as ‘traditionally disadvantaged groups’). There is little explicit consideration given by the Committee to the fact that children can face discrimination because they are children. We highlight that many of the issues examined by the Committee could be said to represent instances of discrimination on the basis of childhood, though the Committee does not explicitly frame them as such.

This article argues for greater recognition that children as a group belong in the framework of equality and non-discrimination. It also aims to underline how important Committee comments could be for tackling detrimental state laws and practices in relation to children. It also seeks to encourage the Committee, academics and non-governmental organisations (e.g. in shadow reports) to consider the possibility of framing issues such as poor attitudes to children under Article 2, so that equality and non-discrimination issues relating to children can be better understood as such. Section 2 reflects on examples of discrimination against children on the basis of childhood. Section 3 briefly considers the text of \textit{CRC Article} 2. Section 4 involves in-depth examination of the jurisprudence of the Committee from the perspective of discrimination against children on the basis of childhood. Sections 5–7 provide reflection on the jurisprudence of the Committee relating to traditionally disadvantaged groups. Final conclusions are then drawn on the jurisprudence of the Committee in this area, and the potential for progressing children’s rights by being more explicit about instances of discrimination against them on the basis of childhood.

\textsuperscript{3} European Network of Ombudspersons for Children, \textit{Position Statement on “COVID-19: learning for the future”} Adopted by the \textit{ENOC} 25th General Assembly, 29 September 2021.

\textsuperscript{4} A. Daly, ‘Climate Competence: The impact of youth climate activism on international human rights law’, \textit{32 Human Rights Law Review} (2022).
Recognising Discrimination Against Children and Young – Examples of Unfair Treatment

The terms non-discrimination and equality are complex concepts, from a legal as well as linguistic perspective. The concepts constitute fundamental moral principles as well as key constitutional principles in democratic societies, and are – as mentioned above – included in all major international human rights treaties. The UN Committee on the Rights of Persons with Disabilities for example emphasises the link between the prohibition of discrimination, equality and human dignity, describing them as the cornerstones of human rights. ‘Equality’ and ‘discrimination’ are often referred to as different sides of the same coin (with equality and ‘non-discrimination’ sometimes used interchangeably). Equality is the positive statement of the principle – a person is treated equally with others – and discrimination is the negative statement, as in a person is discriminated against when not treated equally.

There is relatively little analysis in legal scholarship of discrimination on the basis of childhood. This is the case both in relation to other elements of international law, and also in relation to national level. In short, there is little knowledge about how children may suffer discrimination on the basis of childhood. As Webb points out in this context; ‘we have hardly begun to understand how discrimination against children affects their life and welfare’. Yet there is ample evidence that children suffer such discrimination. In this section we will consider examples of situations in which children face discrimination on the basis of childhood both directly and indirectly.

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5 S. Besson and E. Kleber, ‘Article 2: The Right to Non-Discrimination’ in T. John (ed.), The UN Convention on the Rights of the Child: A Commentary (Oxford University Press, Oxford, 2019) p. 43.
6 UN Committee on the Rights of persons with Disabilities, General Comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para. 4–7.
7 See e.g. UN Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 14 January – 1 February 2013, para 41; UN Committee on the Rights of the Child, Concluding observations on the 6th periodic report of Hungary, CRC/C/HUN/CO/6, 3 March 2020, para. 16(a). Some authors feel that there is some nuance to this however, see e.g. G. MacNaughton, ‘Untangling Equality and Non-discrimination to Promote the Right to Health Care for All’ in Health and Human Rights (2009), pp. 47–63.
8 Besson and Kleber supra note 5, p. 57; S. Besson, ‘The Principle of Non-Discrimination in the Convention on the Rights of the Child’, 13 International Journal of Children’s Rights (2005), pp. 433–461.
9 E. Webb, ‘An Exploration of the Discrimination-Rights Dynamic in Relation to Children’ in A. Invernizzi and J. Williams (eds.) The Human Rights of Children. From Visions to Implementation (Ashgate, 2011), pp. 286–306, 290.
2.1 **Direct Discrimination**

Discrimination can be either direct or indirect. *Direct* discrimination means that a person is treated unfairly compared to another person in a similar situation as a result of special attributes of that person, such as age. Direct discrimination against disadvantaged groups is often prohibited at national and international level through the principle of non-discrimination/equality. Equality laws – legal frameworks which advance equality of opportunity for all – exist in many states. Frequently, discrimination is only recognised at national level in these frameworks on the basis of a particular ‘protected characteristic’. Yet childhood as a protected characteristic is rarely included in national jurisdictions. The UK is an example of a jurisdiction where under-18s as a group are largely excluded from protection. At the time of the passage of the bill which would become the UK’s Equality Act 2010 (which came into force in 2012), NGOs such as the Children’s Rights Alliance for England (CRAE) pointed to instances of discrimination on the basis of childhood in the UK. Nevertheless being under the age of 18 was ultimately not included as a protected characteristic (with the exception of some provisions relating to work). Harriet Harman, then Leader of the House of Commons, told members of the UK Parliament: ‘The provisions will not cover people under 18. It is right to treat children and young people differently...and there is little evidence of harmful age discrimination against young people’. This was in spite of the submission of CRAE detailing numerous instances of discriminatory practices in relation to children, some of them seemingly dangerous. Cases were reported for example of ambulance operators refusing to help emergency callers who appeared to be adolescents.

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10 See e.g. M. Campbell, ‘CEDAW and Women’s Intersecting Identities: A pioneering new approach to intersectional discrimination’ 11 Revista Direito GV (2015), pp. 479–504.

11 Children’s Rights Alliance for England, *Making the Case: Why children should be protected from age discrimination and how it can be done: Proposals for the Equality Bill, 2009*, Children’s Rights Alliance for England, 2009. https://archive.crin.org/en/library/publications/united-kingdom-making-case-why-children-should-be-protected-age-discrimination.html Accessed 26 April 2022. See also Equality Commission Northern Ireland, *Strengthening Protection for all Ages Ending Age Discrimination in the Provision of Goods and Services Proposals for Reform – Full Report*, April 2012. https://www.equalityni.org/ECNI/media/ECNI/Addressing%20inequalities%20Policy/StrengtheningProtectionAllAgesFullReport.pdf Accessed 26 April 2022.

12 See further S. Flacks, ‘Is Childhood a Disability: Exploring the Exclusion of Children from Age Discrimination Provisions in the Equality Act 2010.’ 26:4 Child and Family Law Quarterly (2014), p. 421–438.

13 See C. Davies, ‘Discrimination “a fact of life for British children”’, *The Guardian*, 29 March 2009.

14 Children’s Rights Alliance for England, *supra* note 11, p.9.
In Sweden, conversely, under 18s were included in equality law, yet with little difference in practice as compared with the UK example. In Sweden, age as a discrimination ground was introduced with the 2008 Discrimination Act. The focus at this point was primarily on discrimination against older individuals in the context of employment. The Act was amended in 2013 to, among other things, broaden the scope of the prohibition of age-based discrimination (it had previously been limited to education and working life). It is emphasized in the government bill preceding the amendment of the Act that age as a discrimination ground applies to all ages, including children. Yet the law seems to have had limited effect so far on age-based discrimination in relation to children. At the time of writing, no cases on age-based discrimination of children have been tried in Swedish courts.

Apart from these examples of how children and childhood are being excluded from discrimination laws, there are also many other examples where direct discrimination against children due to age is accepted with few if any objections. One example of this is that under-18s are generally not permitted to vote, in spite of the fact that the arguments put forward to justify this are highly questionable at best. Some refer to a perceived disinterest on the part of under 18s in relation to politics, for example, yet children have great capacity for political activity. The disenfranchisement of under-18s is particularly paradoxical considering many work and pay taxes, thus contributing to society’s resources without being allowed to exercise influence over how resources are allocated.

A second example of direct discrimination of children due to age is the practice in some jurisdictions (e.g. the UK and the US) of subjecting under-18s to curfews whereby they are legally not permitted outside at particular times. In the UK, children can also be banned from areas such as streets and shops, and special devices are even used by business people to cause auditory discomfort to younger ears (which can hear at higher frequencies). These measures are supposedly aimed at reducing ‘anti-social behaviour’. The same kind

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15 See Chapter 1, Section 1.
16 Prop. 2007/08:95 Ett starkare skydd mot diskriminering.
17 Prop. 2011/12:159 Ett utvidgat skydd mot åldersdiskriminering.
18 See e.g. L. Beckman, Frontiers of Democracy. The Right to Vote and its Limits, (Palgrave Macmillan, London 2009); J. Wall, Give Children the Vote: On Democratizing Democracy (Bloomsbury Publishing, New York, 2021).
19 See e.g. A. Daly, A Commentary on the United Nations Convention on the Rights of the Child, Article 15: The Right to Freedom of Association and Peaceful Assembly (Martinus Nijhoff, Leiden, 2016).
20 Children’s Rights Alliance for England, supra note 11.
of curfews, increased use of emergency care orders, and an overall ‘tough-on-
crime-agenda’ are now also discussed in politics in Sweden in the context of
combating gang criminality and violence, without consideration of how this
might limit children’s fundamental rights illegitimately.21

Corporal punishment is another prime example of legal discrimination
against children. Despite the proven negative effects on children’s wellbeing,
in many countries (including England), laws protecting adults from violence
exclude children in circumstances where a parent delivers ‘physical punish-
ment’.22 Such issues are rarely framed as a matter of discrimination against
children, nor are they considered in the context of higher rates of homicide for
children compared to adults, though physical punishment and homicide are
likely linked.23

2.2 Indirect Discrimination
Indirect discrimination results when a policy or rule applies to everyone, but
has an inadvertent but unfair impact on people in a particular group. This
is particularly important for children as seemingly neutral policies can det-
rimentally affect them. It is accepted for some purposes that children have
special vulnerabilities which must be catered for and which justify differential
treatment. Nevertheless, these special needs are routinely ignored, leading
to disadvantage for children. Children may find it difficult to access justice as
compared with adults, for example, due to lack of knowledge of the legal sys-
tem or lack of resources.24 It is also little known that children are more likely

21 See for example newly introduced possibility to monitor young offenders, Prop.
2019/2018:118, Ungdomsövervakning and several proposals by the second largest political
party, Moderaterna, https://moderaterna.se/nyhet/10-monsterbrytande-reformer-att-
stoppa-gangen/ from September 2020 last visited 29 May 2021.
22 B. Saunders, P. Leviner, and B. Naylor, Corporal Punishment of Children: comparative
legal and social developments towards prohibition and beyond (Brill/Nijhoff, Leiden,
2018). See information on countries having banned corporal punishment on the
website of the organisation Global Initiative to End Corporal Punishment. https://
endcorporalpunishment.org/countdown/. In February 2022, 63 countries have full
prohibition of corporal punishment.
23 See UK House of Commons Health Committee, The Victoria Climbié Inquiry Report Sixth
Report of Session 2002–03 (UK House of Commons Health Committee, 2003), para.55.
Available https://publications.parliament.uk/pa/cm200203/cmselect/cmhealth/570/570.
pdf, last visited 8 July 2022.
24 See e.g. A. Daly, Children, Autonomy and the Courts: Beyond the Right to be Heard (Brill/
Nijhoff, Leiden, 2018); Child Rights International Network, Access to Justice for Children:
Challenging Violations of Children’s Rights (Child Rights International Network, 2016).
than adults to be poor. Globally, children represent half of those struggling to survive on less than $1.90 a day.\textsuperscript{25}

As children generally do not have the right to vote, they do not have the political power to mitigate such policies. The best interests principle is incorporated in the national laws of many jurisdictions and could be argued to combat indirect discrimination by ensuring decisions are made with children in mind. However, this does not always happen in practice, particularly where the CRC has not been incorporated into domestic law. Courts often remain resistant to the claim that states have an obligation to implement this CRC principle in policy-making, as happened in 2021 where the UK Supreme Court emphasised the viewpoint that it would be undemocratic to give undue weight to ‘unincorporated international treaties’ such as the CRC. The case in question dealt with a policy capping child benefit to only two children per family,\textsuperscript{26} which disproportionately affected mothers and children.

Recent crises have also led to recognition that children as a group can face indirect discrimination. Covid measures during the pandemic for example have been acknowledged to have disproportionately affected children. Research of the European Network of Ombudspersons for Children (ENOC) reveals that ‘children as a population and specific groups of children ...were more likely to be adversely affected by Emergency Measures in response to Covid-19.’\textsuperscript{27} These had an impact on rights relating to children’s mental health, freedom of assembly, and other rights. ENOC stated in 2021 that, where future crises hit, measures limiting children’s rights ‘should only be introduced where these are: necessary, proportionate, non-discriminatory and time limited.\textsuperscript{28}

Another important phenomenon which has brought indirect discrimination to the fore at international level is climate change.\textsuperscript{29} An application was made to the European Court of Human Rights in 2020 which argued that climate policies of states are placing most of the economic and environmental burden on the younger generation. The child and youth litigants argue that insufficient attention is being given to how to share the burden of the consequences

\textsuperscript{25} UNICEF, Child Poverty, https://www.unicef.org/social-policy/child-poverty, last visited 1 June 2022.

\textsuperscript{26} SC, CB and 8 children, R. (on the application of) v Secretary of State for Work and Pensions & Ors [2021] UKSC 26 (9 July 2021).

\textsuperscript{27} European Network of Ombudspersons for Children, Synthesis Report: Mapping the impact of emergency measures introduced in response to the COVID-19 pandemic on children’s rights in ENOC member states (European Network of Ombudspersons for Children, 2021). https://enoc.eu/?p=4262 [last accessed 29 May 2022].

\textsuperscript{28} European Network of Ombudspersons for Children, ibid.

\textsuperscript{29} Daly, supra note 4.
of carbon emissions. They argue that there is inadequate reduction of carbon emissions in the present which will disproportionately affect the younger generation. This groundbreaking application to the European Court of Human Rights appears to be the first time in international law that such a provision is being used to protect ‘youth’ from discrimination.\textsuperscript{30}

There are therefore many situations in which children are subject to direct as well as indirect discrimination. It is surprising that the UN framework has not been well utilised when it comes to protecting children from discrimination on the basis of childhood in the way that it has for women, ethnic minorities and others. Children are a significantly vulnerable group, particularly considering the fact that they are more likely than adults to experience a host of dangers and risks such as violence and poverty. There is also much evidence that there are poor attitudes to children, and that they are affected by discriminatory policies. There are clear arguments therefore that childhood should be recognized as a protected characteristic, as is the case for other groups such as women, ethnic and racial minorities, and people with disabilities. This would have a number of potential benefits for children as a group. It would have the effect of drawing explicit attention to discrimination against children, and making it more obvious that it is unacceptable. It would obligate law makers and other to explicitly outline differential treatment that is proportionate and necessary on the one hand, and detrimental treatment that is arbitrary on the other. It would likely encourage research into the links between negative attitudes to children, and the dangers and risks that they face as a group. It would also increase research and reflection in relation to the need for more specific legal distinctions amongst children themselves – the differences in status between an infant and a teenager and so on.

The jurisprudence from the CRC Committee is examined in Section 4 to ascertain how discrimination is addressed. Section 3 first provides a short description of the meaning of Article 2 of the CRC as interpreted in various legal sources and literature, as well as a brief reflection on discrimination under the CRC as opposed to other UN human rights treaties such as the Convention on the Elimination of Discrimination Against Women (CEDAW).

\textsuperscript{30} See petition at Global Legal Action Network website: https://youth4climatejustice.org/, last accessed 3 June 2021.
3 The Text of CRC Article 2

Article 2 of the CRC provides that all rights in the instrument pertain to every individual child without exception. Article 2.1 of the CRC essentially mirrors Article 2.1 of the ICCPR on non-discrimination. It reads as follows:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Article 2.2 refers to the extension of the protections of 2.1 to discrimination which children may face on the basis of the characteristics of parents or guardians; acknowledging the significance of the child-parent/guardian relationship, and the consequences that this may have for discrimination against the child herself.

The principle of non-discrimination is a particularly crucial one within the CRC, which makes it all the more important to provide thorough elaboration. Together with the best interest principle (Article 3), the right to life, survival and development (Article 6) and the right of children to be heard (Article 12), the CRC Committee emphasises that it is one of the principles which must guide interpretation and implementation of all articles of the treaty. The fact that the CRC Committee saw fit to include it amongst the most key provisions of the Convention highlights the vital importance of the principle of non-discrimination in international human rights law generally, as well as its importance for children.

It may be noted that the language of CRC Article 2 does not refer to “equality”, but only to “discrimination”; though this does not seem to have any particular consequences for the interpretation of the article. The word “discrimination” is not explicitly defined in the CRC. In a much-cited definition of discrimination in its General Comment on non-discrimination, the Human Rights Committee stated that for the purpose of the International Covenant on Civil and Political Rights (ICCPR), the term:

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31 UN Committee on the Rights of the Child, General Comment No. 5: General measures on the implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, 27 November 2003, para. 12.
32 Besson and Kleber, supra note 5, pp. 57–58.
...[S]hould be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.33

The Committee on the Rights of the Child made a comment in its concluding observations in relation to Belgium which reinforces this particular definition, outlining that: ‘the general principle of non-discrimination in the Convention prohibits differences in treatment on grounds that are arbitrary and objectively unjustifiable’.34

The fact that age is not explicitly referenced in CRC Article 2 is of course notable, although the argument can be made that it is to fall under the heading of “other status.”35 The same can be said in relation to the ICCPR, which also refers to “other status.” Yet discrimination on the basis of childhood has so far not been a discussed extensively in legal scholarship and the focus has mainly been on issues of discrimination against certain groups of children, that is traditionally disadvantaged groups.

Some commentators have argued that Article 2 protects against discrimination on the basis of childhood. Breen’s 2006 monograph Age Discrimination and Children’s Rights was ground-breaking because she considers children in the context of the equality and non-discrimination provisions of international human rights law, arguing that every differential treatment of children should be proportionate and justifiable.36 She makes the point that detrimental treatment of children is due to structural inequalities.37 She opines that Article 2 frames discrimination in terms of differences between adults and children (while also pointing out that age-based discrimination can take place within

33 UN Human Rights Committee, CCPR General Comment No. 18 Non-discrimination, 10 November 1989, para. 7.
34 UN Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child, Belgium, CRC/C/15/Add.178, 13 June 2002, para. 6.
35 See e.g. W. Vandenhole, T. Erdem, S. G & Lembrechts, Children’s Rights: A Commentary on the Convention on the Rights of the Child and its Protocols, (Edward Elgar Publishing, Cheltenham, 2019), para. 2.14.
36 C. Breen, Age Discrimination and Children’s Rights (Martinus Nijhoff Publishers, Leiden, 2006).
37 C. Breen, ‘The Ageing of Article 2(1): The child’s right to be free from age-based discrimination’ in M. Skivenes and K. H. Søvig (eds.), Child Rights and International Discrimination Law: Implementing Article 2 of the United Nations Convention on the Rights of the Child (Routledge, New York, 2019).
the category of children itself). She argues that failure to identify childhood/age as a site of discrimination has serious consequences – it makes it difficult for those using the law to ‘access, explore and embrace the differences between children and adults’ and, also, to move away from ‘liberal rights theory’s view of children’s difference as being less than adults’. Sutherland also points to childhood as a source of discrimination. She argues that the inferior status accorded to children and young people and the effects of negative societal attitudes towards under 18s.

There is however some divergence from arguments that CRC Article 2 contains a right of children to be free from discrimination on the basis of childhood. Abramson in his 2008 commentary on Article 2 does not explicitly consider discrimination on the basis of childhood. Archard considers the issue of age-related discrimination from a philosophical perspective, and takes the position that while it is indeed possible for children as a group to be discriminated against in relation to adults, this is not what is covered by CRC Article 2. Instead, he holds that it is ‘about the discriminatory treatment of some children by comparison with other children’ (i.e. traditionally disadvantaged groups). Archard however also emphasises that the discussion on Article 2 leads to a broader discussion on what it means to discriminate as such, and discriminate against children in particular.

When considering the principle of non-discrimination, it is useful to consider the CRC as compared with other UN human rights treaties. One may well ask the question as to whether the CRC as an international human rights instrument is different to other treaties tailored to individual groups when it comes to non-discrimination. CEDAW and the UN Convention for the Elimination of Racial Discrimination (CERD) for example both explicitly have the word

38 Ibid, pp. 64 and 66.
39 Ibid, p. 67.
40 Ibid.
41 E. Sutherland, ‘Article 2 of the United Nations Convention on the Rights of the Child: Non-Discrimination and Children’s Rights’, in M. Skivenes and K. H. Søvig (eds.), Child Rights and International Discrimination Law: Implementing Article 2 of the United Nations Convention on the Rights of the Child (Routledge, New York, 2019), pp. 28, 30.
42 See B. Abramson, ‘Article 2: The Right of Non-Discrimination’, in A. Alen et al. (eds), A Commentary on the United Nations Convention on the Rights of the Child (Martinus Nijhoff Publishers, Leiden, 2005).
43 D. Archard, ‘Respecting Age: Discrimination against the Young and the Old’, in M. Skivenes and K. H. Søvig (eds), Child rights and international discrimination law. Implementing Article 2 of the Convention on the Rights of the Child (Routledge, New York, 2019), pp. 44–45, 52.
44 Archard, supra note 41, pp. 52–53.
“discrimination” in their very names. This may raise the question as to whether these instruments are different from the CRC on the basis that they are particularly designed to tackle discrimination against women and on the basis of race. Unlike CEDAW and CERD however the UN Convention on the Rights of People with Disabilities (CRPD) does not contain a direct reference to discrimination in its title, and it is clearly aimed at protecting people with disabilities from discrimination. It does explicitly state in Article 5 that ‘States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds’. This points of course to a much clearer emphasis on protecting from discrimination on the basis of disability as a characteristic, when compared with the approach to childhood as a characteristic in the CRC. In any case, it is difficult to establish whether these instruments are directly comparable, considering a number of factors, including the fact that they were drafted in different decades (the CRC in the 1980s and the CRPD in the 2000s).

Intersectionality is another important concept to consider in relation to discrimination on the basis of childhood. Intersectionality, a term coined by Kimberlé Crenshaw in 1989, recognises that individuals can experience discrimination in relation to multiple and intersecting identities. Sutherland emphasises that though childhood itself may be a source of discrimination, some groups of children face intersectional discrimination, in that they face discrimination on multiple grounds, for example being ‘a poor, female child with disabilities from an ethnic minority’ may be discriminated against via policies harming teenage, single mothers. It could be argued that the work of the CRC Committee relating to discrimination against traditionally disadvantaged groups is inherently work on intersectional discrimination. This is because the work relates to discrimination against people who are both children (the primary recipients of CRC rights), and also people from traditionally disadvantaged groups such as girls and ethnic minorities.

The Committee on the Elimination of Discrimination against Women has acknowledged intersectionality as part of the scope of state obligations under CEDAW. Campbell points out that, although CEDAW has been criticised for being ‘based on a monolithic woman’ (i.e. taking a single characteristic

45 K. Crenshaw, ‘Demarginalising the Intersection of Race and Sex’ (1989) University of Chicago Legal Forum 139.
46 See e.g. Campbell, supra note 10.
47 Sutherland, supra note 41, p. 30.
48 See further P. Chow, ‘Has Intersectionality Reached its Limits? Intersectionality in the UN human rights treaty body practice and the issue of ambivalence’ 16 Human Rights Law Review (2016), pp. 453–481.
approach), the Committee ‘is praised for addressing women’s different identities.’

49 There is great potential then for the CRC to do the same. It is beyond the scope of this article to examine the issue of intersectionality in-depth. However if CEDAW can have the effect of explicitly drawing attention to discriminatory treatment of individuals both because they are women, and because they are from traditionally disadvantaged groups, then the CRC can do the same for children. The data outlined below indicates that at present this is not being done explicitly.

It has been opined that recent developments in CRC Committee jurisprudence indicates ‘an evolving recognition that children may be subject to age-based discrimination’.50 In the next section we will turn to analysis of this jurisprudence in an attempt to demonstrate how the Committee approaches equality and non-discrimination in relation to children as a group, and whether the Committee has in fact moved towards recognition of discrimination on the basis of childhood.

4 CRC Committee Jurisprudence and Discrimination Against Children on the Basis of Childhood

4.1 Methodology
For the purpose of this research, we examined all the concluding observations of the CRC Committee since the beginning of 2005 until the end of 2020. We aimed to ascertain the extent to which the Committee considers and makes recommendations in relation to discrimination against children because they are children. This research exercise involved examination of a total of 494 concluding observations and recommendations of the Committee. A quantitative analysis of references by the Committee to the words ‘discrimination’ and ‘equality’ was conducted. These terms of course also help identify the words non-discrimination and inequality as they are contained within them (as in non-discrimination and inequality).

It must be acknowledged that there are limitations to this exercise, considering there are many words which can be used to highlight issues of non-discrimination/equality, and there are other ways in which discriminatory laws and practices can be described – consider the example of physical punishment outlined below. It is intended however that this word search would simply provide insight into the use of these terms by the Committee over time,

49 Campbell, supra note 10, p. 483.
50 Breen, supra note 37, p. 64.
and therefore further our knowledge of how the concepts of discrimination and inequality are treated in relation to the CRC. It would also have been ideal to examine all Committee jurisprudence including concluding observations from the beginning of Committee jurisprudence. Although it would have been desirable to examine more words and a longer timeframe, our parameters were what was feasible in the course of the exercise. It would also have been useful to examine all of the state reports and shadow reports to the Committee, as this will determine much of what the Committee has to say in its concluding observations on state reports. Again, this exercise was beyond the scope of this study, but it is an area in which further research is needed.

4.2 Use of the Terms ‘Discrimination’ and ‘Equality’ in Committee Jurisprudence

Table 1 provides an overview of the number of concluding observations documents produced by the Committee in each year, and the number of times the words discrimination and equality were mentioned in those documents:

A quantitative analysis can only tell us so much, however presenting the number of times the Committee uses the words discrimination/equality does provide an important snapshot. The first point to observe is that the word discrimination is used much more than the word equality. The focus on non-discrimination rather than equality is perhaps unsurprising considering the wording of Article 2 refers to discrimination rather than equality. The second point is that in general there does appear to be growing consideration of the theme of discrimination, albeit in terms of characteristics beyond childhood (gender, race etc.), in the Committee’s concluding observations. Committee references to discrimination can in some ways seem to lack a discernable pattern however. In 2005 for example, the Committee used the word discrimination 30 times over 36 documents (so in almost all documents). However just a year later in 2006 the Committee considered the word discrimination in a (proportionately) much lower number of documents – only 28 times in 51 documents (just over half of documents). In 2009 it seems that only one concluding observations/recommendations document (relating to Tunisia51) was produced by the Committee.

The term discrimination arises in roughly half of documents until 2011, a year in which the Committee used the word discrimination 18 times over 23 documents – a significant increase. It seems that the word discrimination was used with greater frequency from that point. In 2019 for example the word

51 UN Committee on the Rights of the Child, Concluding Observations on the Fiftieth Periodic Report of Tunisia, CRC/C/OPAC/TUN/CO/1, 6 February 2009.
discrimination was used 19 times over 22 documents, so in almost all of them. 2020 was of course a highly unusual year with the advent of the global pandemic. There were only nine concluding observations documents produced by the Committee in 2020. It is of note however that the number of discrimination references and documents that year were identical – nine documents, and nine references. Overall it is safe to say that there has been an increasing rate

| Year | Number of C.O. Documents Created by the CRC in each respective year | Mention of Discrimination in each respective year | Mention of Equality in each respective year |
|------|---------------------------------------------------------------------|-----------------------------------------------|--------------------------------------------|
| 2020 | 9                                                                   | 9                                             | 8                                          |
| 2019 | 22                                                                  | 19                                            | 9                                          |
| 2018 | 26                                                                  | 22                                            | 15                                         |
| 2017 | 36                                                                  | 21                                            | 17                                         |
| 2016 | 36                                                                  | 26                                            | 22                                         |
| 2015 | 44                                                                  | 30                                            | 19                                         |
| 2014 | 34                                                                  | 25                                            | 14                                         |
| 2013 | 36                                                                  | 26                                            | 15                                         |
| 2012 | 41                                                                  | 30                                            | 23                                         |
| 2011 | 23                                                                  | 18                                            | 13                                         |
| 2010 | 30                                                                  | 19                                            | 13                                         |
| 2009 | 1                                                                   | 1                                             | 0                                          |
| 2008 | 33                                                                  | 17                                            | 13                                         |
| 2007 | 36                                                                  | 21                                            | 10                                         |
| 2006 | 51                                                                  | 28                                            | 21                                         |
| 2005 | 36                                                                  | 30                                            | 30                                         |
| Total: | 494                                                              | 342                                           | 235                                        |
of reference to discrimination in Committee jurisprudence since its advent. The term equality is used a little more sporadically, however it can be said that, particularly in recent years, it appears in most Committee concluding observations.

In the next section, there will be a substantive analysis and overview of the main themes regarding non-discrimination which were identified in Committee concluding observations in the course of this study. We will begin by considering what are arguably the most important and clear references by the Committee to instances of discrimination on the basis of childhood.

### 4.3 Discrimination Against Children on the Basis of Childhood

As noted above, the principle of non-discrimination is a general principle of the CRC, in that all other rights have to be considered in light of the principle. For this reason it appears that there generally is a ‘non-discrimination’ section in each concluding observation document. In some instances, discrimination arises as a particular problem for a state, as was the case for Italy in 2019:

The Committee reminds the State party of the indivisibility and interdependence of all the rights enshrined in the Convention and emphasizes the importance of all the recommendations contained in the present concluding observations. The Committee would like to draw the State party’s attention to the recommendations concerning the following areas, in respect of which urgent measures must be taken: allocation of resources (para. 8); non-discrimination (para. 15); education (para. 32); asylum-seeking and refugee children (para. 34); and children in situations of migration (para. 36).52

The Committee will sometimes simply make a blanket recommendation that a particular state ensures that all children enjoy the right to be free from discrimination. For example in the Committee’s concluding observations on Lebanon from 2017, the Committee ‘recommends that the State party...Ensure that all children enjoy equal rights under the Convention, in law and practice, without discrimination’.53 It appears here that the Committee is not referring to discrimination against children as a group, but rather to children from particular groups which traditionally experience disadvantage, such as ethnic minorities or children with disabilities.

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52 UN Convention on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Italy*, CRC/C/ITA/CO/5–6, 28 February 2019, para. 4.

53 UN Committee on the Rights of the Child, *Concluding observations on the combined fourth and fifth periodic report of Lebanon*, CRC/C/LBN/CO/4–5, 22 June 2017, para. 14.
In its concluding observations, there are a number of references by the Committee to problematic attitudes to children, detrimental treatment of children, and other situations that could be framed as discrimination on the basis of childhood. However there appears to be only one clear example of the Committee explicitly referring to discrimination against children on this basis, and this is in relation to the state reports of the UK. The 2016 concluding observations (on the UK’s fifth report) reads as follows:

Non-discrimination
21. The Committee is concerned that:
(a) A number of provisions under the Equality Act (2010) exempt children from the protection against age discrimination and, in Northern Ireland, the proposed legislation on age discrimination excludes children under 16 years of age;
22. The Committee recommends that the State party: (a) Consider the possibility of expanding legislation to provide protection of all children under 18 years of age against discrimination on the grounds of their age;54

Looking at the history of Committee comments to the UK, it is quite possible that this represents an evolution in the approach of the Committee. In the 2002 concluding observations in relation to the UK, for example, the Committee does not reference discrimination on the basis of childhood. Rather it simply lists discrimination against traditionally disadvantaged groups of children such as those with disabilities and ethnic minority status.55

By 2008 however the Committee appears to have become more explicit about issues relating to discrimination against children on the basis of childhood. In its 2008 concluding observations (on the UK’s combined third and fourth report) the Committee welcomes the forthcoming Equality Act, and notes the risk of discrimination faced by children from traditionally disadvantaged groups. Then the Committee further notes concern: ‘at the general climate of intolerance and negative public attitudes towards children, especially adolescents, which appears to exist in the State party, including in the media, and may be often the underlying cause of further infringements of their rights.’56

54 UN Committee on the Rights of the Child, Concluding observations on the fifth periodic report of United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/5, 12 July 2016, paras. 21–22.
55 UN Committee on the Rights of the Child, Concluding observations: United Kingdom of Great Britain and Northern Ireland, 9 October 2002, CRC/C/15/Add.188, paras. 22–23.
56 UN Committee on the Rights of the Child, Concluding observations: United Kingdom of Great Britain and Northern Ireland, 3 October 2008, CRC/C/GBR/4, para. 24.
Significantly, the Committee continued in its 2008 concluding observations to recommend that the UK implement ‘urgent measures to address the intolerance and inappropriate characterization of children, especially adolescents, within the society, including in the media’. This is a bold statement in relation to negative attitudes in a States Party. It likely came about because of the approach of the NGO shadow report of the Children’s Rights Alliance for England (CRAE). CRAE decided to explicitly refer to ‘age discrimination’ in their report, outlining discriminatory treatment that under-18s may face on the grounds of age. CRAE referenced examples such as dispersal by police, and detrimental treatment on ‘public transport, access to emergency services, shops and leisure facilities and the availability of health and social care services to vulnerable teenagers’. As noted above, CRAE used these same arguments to lobby for inclusion of being under-18 as a protected characteristic in the UK’s then-forthcoming Equality Act. This example perhaps demonstrates the extent to which NGOs can have a major impact on the pronouncements of the Committee in its concluding observations, and the extent to which civil society has the potential to shape CRC jurisprudence on Article 2. In this case, it resulted in one of the very few instances where the Committee has recommended that the state directly address negative attitudes to children on the basis of childhood, rather than on the basis of their membership of traditionally disadvantaged groups.

In recent years, there appears to have been increasing reference to discrimination on the basis of childhood in activities of the Committee outside of the concluding observations process. In 2019, the CRC Committee together with the Committee on the Elimination of All Forms of Discrimination against Women drafted a Joint General Comment on harmful practices emphasising that such practices are, amongst other things, grounded in discrimination based on age. The CRC Committee in 2017 co-ordinated with the Committee on Migrant Workers in drafting two joint General Comments, emphasising that children in migratory situations are entitled to the enjoyment and upholding

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57 Ibid, para. 25.
58 CRAE, NGO alternative report to the Committee on the Rights of the Child – ENGLAND (CRAE, 2008), Available at http://www.crae.org.uk/publications-resources/ngo-shadow-report-to-the-un-committee-on-the-rights-of-the-child-2008/ (last visited 5 May 2022).
59 Ibid, p.5.
60 UN Committee on the Rights of the Child/UN Committee on the Elimination of All Forms of Discrimination against Women, Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment and No. 18 of the Committee on the Rights of the Child on harmful practices, CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1, 14 November 2014.
of their rights, regardless of their age and their legal status. In joint General Comment no. 4, it is underscored that older children (between 15 and 18 years of age) tend to be provided with lower levels of protection than younger children or sometimes be considered as adults or accorded an ambiguous migration status until they turn 18. In recent general comments, the Committee has also been making groundbreaking statements in relation to the status of children. The Committee’s 2016 general comment on adolescents for example makes reference to discriminatory attitudes against adolescents, stating:

Adolescence itself can be a source of discrimination. During this period, adolescents may be treated as dangerous or hostile, incarcerated, exploited or exposed to violence as a direct consequence of their status. Paradoxically, they are also often treated as incompetent and incapable of making decisions about their lives.

The general comment on children and street situations is also important. There is extensive attention paid to the devastating effects of discrimination on children in street situations – as members of ethnic minorities, as vulnerable people who are not taken seriously by police when they must complain about crimes committed against them, and so on. Nevertheless, it is very noticeable that even though the entire thrust of the general comment relates to the vulnerability of children as opposed to adults in street situations, and the vulnerability of children in street situations to mistreatment and abuse by adults, there is no explicit reference to discrimination on the basis of childhood. For example the Committee lists the type of discrimination faced by children in this situation: ‘Children can face multiple and intersecting forms of discrimination, for example, on the basis of gender, sexual orientation and gender identity/expression, disability, race, ethnicity, indigenous status’. Yet

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61 UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, CMW/C/GC/3-CRC/C/GC/22, 16 November 2017, para. 21–26.
62 Ibid, para 3.
63 UN Committee on the Rights of the Child (CRC), General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, CRC/C/GC/20, 6 December 2016, para. 21.
64 UN Convention on the Rights of the Child, General comment No. 21 (2017) on children in street situations, CRC/C/GC/21, 21 June 2017. See also reference below to UN Committee on the Rights of the Child (CRC), General comment No. 7 (2006) Implementing child rights in early childhood CRC/C/GC/7, 20 September 2006, para. 11.
65 Ibid, para. 26.
childhood itself is not listed. It is perhaps assumed that being a child is a major risk factor – perhaps the major risk factor – for discrimination. Yet it is omitted from the list.

4.4 **Discrimination Against Children “Under The Radar”**

There are however issues which constitute discrimination against children which may not always be framed by the Committee as such. These issues therefore can be said to go under the radar in a search for discrimination on the basis of childhood in Committee jurisprudence.

Hitting or otherwise harming children for punishment, often known as physical punishment or corporal punishment is one such issue. There are often different assault laws in place for children and adults to account for corporal punishment. As this is detrimental treatment of children on the basis of childhood, this can certainly be described as discrimination. The Committee made the point in its 2006 general comment on rights in early childhood that ‘where laws fail to offer equal protection against violence for all children’ (para. 11) this is a discrimination issue, because very young children are so dependent on others for protection. However it does not appear to have framed corporal punishment as a discrimination issue in recent times. In the Committee's report on the concluding observations of the Cook Islands in 2020 for example, it expresses concern that corporal punishment is permitted at home and in some care settings: “The Committee is concerned in particular that section 32 of the draft crimes bill elaborated in 2017 provides for the so-called “lawful correction of a child”, as does the Crimes Act.”

The Committee urges the state to repeal relevant laws and conduct awareness-raising programmes. This reference to the children’s rights violation of corporal punishment is positioned under the heading of ‘violence against children’ in the Committee’s concluding observations. On the one hand this is unsurprising as this is a phenomenon of permission to adults in certain circumstances to assault children. On the other hand, given that in the Cook Islands (as in many other countries) it remains possible for adults in some certain circumstances to assault children in this way lawfully, this could certainly be framed as a discrimination issue. It need not necessarily be considered solely under Article 2, as this may distract from serious issues of violence against children. However there is great potential for both considering it as violence and discrimination. Doing so – emphasising

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66 UN Committee on the Rights of the Child, *Concluding Observations on the combined second to Fifth Periodic Reports of the Cook Islands*, CRC/C/CO/K/CO/2–5, 2 April 2020, para. 25.

67 Ibid, para. 26.
that corporal punishment in this context is an issue of unfair discrimination, enshrined in and mandated by the legal system in the Cook Islands – would help draw attention to the issue of discriminatory practices against children as a group, and the links between this discrimination and violations of other rights such as freedom from violence.

Another issue which is covered by the Committee extensively in its concluding observations is cultural attitudes. The Committee has repeatedly made the important point that what it refers to as “cultural attitudes” whereby there is a lack of respect for children, or an underestimation of children, can pose barriers to children’s participation rights. The Committee does not specifically reference discrimination here, but it is quite clear that the cultural attitudes in question constitute prejudicial attitudes to children, and therefore discrimination.68 Such attitudes and tradition can have negative effects on children being seen as rights holders in the first place; see e.g. concluding observations on Japan where the Committee expresses concern that ‘traditional views which fail to respect the child as a human being with rights severely limit the weight given to children’s views’.69 The Committee has also emphasized that States are obliged to ‘take adequate measures to raise awareness and educate the society about the negative impact of such attitudes and practices and to encourage attitudinal changes in order to achieve full implementation of the rights of every child under the Convention’.70 This is very similar to the Committee comments on negative attitudes in the UK,71 however unlike those UK comments, the Committee has not made the connection between negative attitudes and Article 2 in its concluding observations on Japan. These comments generally appear to be made under the heading of Article 12, the right of children to be heard and to have due weight given to their views.

Another indirect pronouncement by the Committee on discriminatory attitudes that was in the case of Australia in its 2019 concluding observations on that state. Commentators including the Prime Minister made derogatory statements about young climate protestors in the course of that year. The Committee went on to express ‘its concern and disappointment that a protest led by children calling on government to protect the environment received a strongly worded negative response from those in authority, which

68 Thorburn Stern supra note 2, pp. 109–110.
69 UN Committee on the Rights of the Child, Concluding observations: Japan, CRC/C/JPN/CO/3, 20 June 2010, para. 43.
70 UN Committee on the Rights of the Child, General Comment No. 12 The right of the child to be heard, CRC/C/GC/12, 1 July 2009, para. 76.
71 UN Committee on the Rights of the Child, Concluding Observations on the fifth periodic report of United Kingdom of Great Britain and Northern Ireland, supra note 56.
demonstrates disrespect for the right of children to express their views on this important issue’.72 The word ‘discrimination’ was not directly used, although discriminatory attitudes is what the Committee appears to be strongly pointing to. This appears to be another instance in which the Committee could have explicitly considered discrimination against children (under Article 2) but instead considered it to be an issue under Article 12, the right to be heard.

Another point of importance is the fact that children of different ages within childhood may experience discrimination differently. The Committee frequently criticises detrimental treatment of ‘younger children’. In its comments on the 2019 report of Italy, the Committee references ‘the right of the child to be heard without any discrimination due to age’.73 There is no context provided as to why the Committee makes this point, but it seems to relate to the Committee having been provided with information that younger children are unheard more frequently than older children. The Committee is clearly inclining towards making a point about age discrimination here, although it could have been much more explicit about whether it is pointing to discrimination between younger and older children, or discrimination between adults and children.

Considering that all these issues could clearly be referred to as discrimination under the heading of Article 2, there is scope here for the Committee to be more explicit. It could directly reference the Article 2 principle of non-discrimination. There appears to be much potential for the Committee to be more vocal on the matter of how these issues are equality/non-discrimination issues, and therefore progress CRC Article 2 in the process.

5 Traditionally Disadvantaged Groups of Children Noted by the Committee as Experiencing Discrimination

As mentioned before, the majority of references to discrimination relate to children from ‘traditionally disadvantaged groups’ which are particularly vulnerable to discrimination. The Committee frequently makes reference to discrimination against children on various grounds such as gender, ethnicity, disability, religion and so on, and has also added numerous other groups such as children in the care of the state, children in street situations and migrant children to its list of children from groups that are particularly vulnerable to

72 UN Committee on the Rights of the Child, Concluding observations on the combined Fifth and Sixth Periodic Reports of Australia, CRC/C/AUS/CO/5–6, 1 November 2019, para. 40.
73 UN Convention on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of Italy, supra note 52, para 18.
discrimination. As this constitutes the bulk of the Committee’s references to discrimination, it is important to give these points consideration here. These references clearly can contribute to our understanding of the Committee’s approach to discrimination against children on the basis of childhood. This is because the approach taken by the Committee to discrimination against traditionally disadvantaged groups will provide insight into the potential for making comments on discrimination on the basis of childhood. This is particularly important considering the need for research into how the CRC can deal with intersectional discrimination.

One common approach by the Committee in a concluding observations report is to make reference to the need to tackle discrimination against groups which are particularly experiencing discrimination in a particular country. For example, Hungary’s negative and discriminatory treatment of LGBTQI+ persons in the past few years has been well publicised. In 2020, the Committee stated that Hungary must in particular tackle discrimination against lesbian, gay, bisexual, transgender and intersex children, and to take measures to educate the public about equality and non-discrimination and to expand its programmes in schools. Much of the time however, the Committee does not make clear why it is singling out particular groups for attention in a state context.

The Committee also lists groups experiencing discrimination in a particular state. Usually it is groups which one would expect, such as girls and people with disabilities. In the case of Tuvalu, however the Committee, in this ‘listing’ process, included children living in the outer islands in Tuvalu in its concluding observations on that state, noting:

The persistent de facto discrimination against, among others, girls, children with disabilities and children living in the outer islands, especially with regard to access to education, health care and services, and development.

This raises the point that the Committee does make reference to particular groups who may not stereotypically be included for example amongst protected characteristics and domestic equality law. The Committee for example urged states to tackle discrimination against children affected by HIV/AIDS in

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74 See Besson and Kleber supra note 5.
75 UN Committee on the Rights of the Child, Concluding observations on the report of Hungary, supra note 7, para. 16 (a).
76 UN Committee on the Rights of the Child, Concluding observations on the combined second to fifth periodic reports of Tuvalu, CRC/C/TUV/2–5, 31March 2020, para. 16. (b).
the case of Botswana\textsuperscript{77} and discrimination against children in alternative care in the case of Bulgaria.\textsuperscript{78} In the Committee’s concluding observations on Syria, it expressed concern about ‘discrimination against children based on where they live, particularly regarding access to education, health services and safe water.’\textsuperscript{79} In its concluding observations on the report of Korea, the Committee noted discrimination against ‘rural children, economically disadvantaged children’ in access to services for example healthcare and education.\textsuperscript{80} Another group which may not traditionally be considered alongside those having protected characteristics is considered by the Committee in relation to Côte d’Ivoire. The Committee expresses deep concern about persistent discrimination against, amongst other groups, children with albinism.\textsuperscript{81}

The Committee makes frequent reference to discrimination against girls. In some concluding observations, the Committee notes that whilst there is discrimination against many groups, discrimination against girls is particularly problematic. For example in the case of Korea, the Committee noted that regarding conditions of children held in detention, that there were inappropriate conditions including overcrowding and a lack of access to medical assistance: ‘especially for girls.’\textsuperscript{82}

Often, the Committee points to laws concerning sex or healthcare which may constitute gender discrimination, noting for example an issue with the definition of rape in the case of Norway:

The lack of free consent not being at the centre of the definition of rape in section 291 of the Penal Code, which applies to children above 14 years of age, regarding which the Committee on the Elimination of Discrimination against Women and the Human Rights Committee have already raised concerns.\textsuperscript{83}

\textsuperscript{77} UN Committee on the Rights of the Child, Concluding observations on the combined 2nd and 3rd reports of Botswana, CRC/C/BWA/CO/2–3, 26 June 2019, para. 22. (b).

\textsuperscript{78} UN Committee on the Rights of the Child, Concluding observations on the combined 3rd to 5th periodic reports of Bulgaria, CRC/C/BGR/CO/3–5, 21 November 2016, para. 35.

\textsuperscript{79} UN Committee on the Rights of the Child, Concluding observations on the 5th periodic report of the Syrian Arab Republic, CRC/C/SYR/CO/5, 6 March 2019, para. 17.

\textsuperscript{80} UN Committee on the Rights of the Child, Concluding observations on the combined 5th and 6th periodic reports of the Republic of Korea, CRC/C/KOR/CO/5–6, 24 March 2019, para. 16(a).

\textsuperscript{81} UN Committee on the Rights of the Child, Concluding observations on the 2nd periodic report of Côte d’Ivoire, CRC/C/CIV/CO/2, 12 July 2019, para. 19.

\textsuperscript{82} UN Committee on the Rights of the Child, Concluding observations on the combined 5th and 6th periodic reports of the Republic of Korea, supra note 79, para. 46. (f).

\textsuperscript{83} UN Committee on the Rights of the Child, Concluding observations on the ninth periodic report of Norway, CEDAW/C/NOR/CO/9, 22 November 2017, para. 24 (g); UN Committee on
In relation to Norway, the Committee also emphasised ‘oversexualized representations of girls in the media’ and recommended that Norway allocate resources for research into possible connections between this and gender-based violence.\(^{84}\) Likewise, in the case of El Salvador, the Committee urges the state to increase efforts to tackle discrimination against girls ‘particularly regarding their access to education and to sexual and reproductive health services, and in relation to sexual violence, civil unions and teenage pregnancy’.\(^{85}\)

Children with disabilities are a group which receives a lot of attention from the Committee from the perspective of discrimination. The Committee noted recently that ‘children with disabilities [are] being subjected to stigmatization, discrimination, abandonment and concealment from society’ in its examination of the report of the State of Palestine.\(^{86}\) The Committee often emphasises inclusive education for children with disabilities in the context of nondiscrimination, as was the case in Mozambique’s report, where the Committee also emphasised the need to have human rights-based approaches, as well as strategies to eliminate discrimination when it comes to children with disabilities.\(^{87}\)

The Committee frequently has detailed familiarity with specific issues affecting children with disabilities in a particular state context. For example, in relation to Botswana, the Committee notes efforts to combat discrimination against children disabilities, although the Committee cites further rights issues with which the state must deal:

> The Committee welcomes the establishment of the Disability Public Education Office to combat the stigmatization of and discrimination against children with disabilities and the steps taken by the State party towards adopting a human rights-based approach to disability. It also notes that a draft national disability framework is pending approval by parliament. It is concerned, however, about the lack of information regarding the situation of children with disabilities and the insufficient progress in ensuring their access to inclusive education.\(^{88}\)

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\(^{84}\) UN Committee on the Rights of the Child, *Concluding observations on the seventh periodic report of Norway*, CCPR/C/NOR/CO/7, para. 15 (b)).

\(^{85}\) UN Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Norway*, CRC/C/NOR/CO/5–6, 4 July 2018, para. 12.

\(^{86}\) UN Committee on the Rights of the Child, *Concluding observations on the combined 5th and 6th periodic reports of El Salvador*, CRC/C/SLV/CO/5–6, 29 November 2018, para. 13.

\(^{87}\) UN Committee on the Rights of the Child, *Concluding observations on the initial report of State of Palestine*, CRC/C/PSE/CO/1, 6 March 2020, para. 48(b).

\(^{88}\) UN Committee on the Rights of the Child, *Concluding observations on the 3rd and 4th periodic reports of Mozambique*, CRC/C/MOZ/CO/3–4, 27 November 2019, para. 31.

\(^{88}\) UN Committee on the Rights of the Child, *Concluding observations on the combined 2nd and 3rd reports of Botswana*, supra note 77, para. 43.
The Committee often emphasises the need to ensure equality for Indigenous people (see for example the comments of the Committee on the state report of Bolivia). The Committee states that Australia must ‘address disparities in access to services by Aboriginal and Torres Strait Islander children...’ (as well as other groups).

The Committee also frequently makes reference to discrimination against children who may be non-nationals, for example stating that Denmark should ‘[e]nsure that all children, including those attending boarding schools, or foreign children ...have access to the standard educational system...’ In its report on Korea, the Committee comments on discrimination against ‘multicultural children and refugee children’.

6 Age, Discrimination and Domestic Law in Committee Comments

Age does sometimes arise when it comes to discrimination. For example, in its concluding observations on the report of Saint Vincent and the Grenadines the Committee expresses concern about discrimination against lesbian, gay and bisexual children. In particular the Committee calls attention to criminalization of consensual same-sex conduct between men under the Criminal Code (1990). The Committee notes that the relevant law ‘may penalize boys above 16 years of age for same-sex sexual activity’. This type of reference to discrimination is obviously relevant to age, as age limits are noted. However, the age limits appear to be incidental to the issue under consideration. It is not necessarily discrimination against children that is the issue at hand, but rather the characteristic in question such as sexuality. The discriminatory law can be considered to be a matter of intersectionality, when one considers i. the characteristic of being a child, together with ii. the additional characteristic (such as sexuality) combine to create an enhanced type of discrimination.

89 UN Committee on the Rights of the Child, Concluding observations on the report submitted by the Bolivarian Republic of Venezuela under article 8, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, CRC/C/OPAC/VEN/CO/1, 3 November 2014.
90 UN Committee on the Rights of the Child, Concluding observations on the combined 5th and 6th periodic reports of Australia, CRC/C/AUS/CO/5–6, 1 November 2019, para. 19.
91 UN Committee on the Rights of the Child, Concluding observations on the fifth periodic report of Denmark, CRC/C/DNK/CO/5, 26 October 2017, para. 62.
92 Korea, supra note 80, para. 16.
93 UN Committee on the Rights of the Child, Concluding observations on the combined 2nd and 3rd periodic reports of Saint Vincent and the Grenadines, CRC/C/VCT/CO/2–3, 13 March 2017, para. 22.
The Committee focuses on domestic laws and policies when it comes to issues of discrimination and equality. The Committee sometimes notes where a state has domestic law which prohibits discrimination. This is the case in its concluding observations on the report of Bosnia and Herzegovina: ‘The Committee notes with appreciation the legislative, institutional and policy measures adopted to implement the Convention, in particular the amendments to the Law on Prohibition of Discrimination in 2016’.94

The Committee will also emphasise where discrimination is not accounted for in the domestic legal system. For example, in its concluding observations on the report of Sri Lanka, the Committee states that, in order to guarantee that the principle of non-discrimination is observed in law and practice the state should: ‘Ensure compliance with article 2 of the Convention by incorporating the principle of non-discrimination into its domestic legislation and conduct an in-depth revision of its legislation’.95

Also, in relation to the report of Micronesia the Committee noted that although protection against discrimination is enshrined within its constitution, important grounds are omitted from this protection:

The Committee welcomes the information provided during the dialogue that the State party has undertaken legislative measures to expand the grounds on which discrimination is prohibited. It notes that the Federal Constitution and state constitutions of the State party provide for equality and equal protection of the law and that discrimination on the grounds of race, sex, language, national, ethnic or social origin and property is prohibited. The Committee is concerned, however, that discrimination on all explicit grounds covered under the Convention, including disability and religion, is not prohibited.96

The Committee notes where particular laws are discriminatory in a state, they should be amended. In the case of Tuvalu for example the Committee notes that domestic law confers advantages to children of spouses via the Tuvalu Lands Code 1962. The Committee on examining the report of Tuvalu and other discriminatory laws; urging that such laws are changed and recommending

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94 UN Committee on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of Bosnia and Herzegovina, CRC/C/BIH/CO/5–6, 5 December 2019, para. 3.
95 UN Committee on the Rights of the Child, Concluding observations on the combined 5th and 6th periodic reports of Sri Lanka, CRC/C/LKA/CO/5–6, 2 March 2018, para. 16(a).
96 UN Committee on the Rights of the Child, Concluding observations on the second periodic report of the Federated States of Micronesia, CRC/C/FSM/CO/2, 3 April 2020, para 23.
that Tuvalu enact anti-discrimination legislation. The Committee also emphasises that implementing laws that prohibit discrimination will include ‘adequately sanctioning perpetrators and providing child victims of discrimination with appropriate remedies.’

In the Committee’s efforts to deal with discrimination against children taken together with another characteristic, the Committee sometimes references other relevant international human rights obligations. For example in its response to the state report of Cote d’Ivoire, when highlighting the gender specific harmful practice of marriage under the age of 18 years, the Committee stated: ‘the Committee urges the State party to expedite the adoption of the draft law on marriage to remove all exceptions that allow marriage under the age of 18 years.’ This perhaps highlights the potential for progressing into different approaches to discrimination against children – through CEDAW for example – combining the CRC with other instruments which have strong non-discrimination clauses.

When equality frameworks are mentioned by the Committee, it is not in relation to the failure to include childhood as a protected characteristic. The Committee refers e.g. to the lack of legislation on discrimination in its 2019 report on Japan, and urges the state to ‘[e]nact comprehensive anti-discrimination legislation’ but the Committee does not make the point that childhood should be a protected characteristic. The exception to this, as noted above, is in the 2016 concluding observations (on the UK’s fifth report), where the Committee recommends that the UK considers the possibility of expanding legislation to ensure protection of all children under 18 years of age against discrimination on the grounds of their age.

The Committee often emphasises the importance of the availability of complaints mechanisms for children where they may be experiencing discrimination. For example in the case of Bosnia and Herzegovina the Committee urges the state to:

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97 UN Committee on the Rights of the Child, Concluding observations on the combined second to fifth periodic reports of Tuvalu, CRC/C/TUV/2–5, 31 March 2020, para. 17(b).
98 UN Committee on the Rights of the Child, Concluding observations on the combined 5th and 6th periodic reports of Rwanda, CRC/C/RWA/CO/5–6, 28 February 2020, para. 15(a).
99 UN Committee on the Rights of the Child, Concluding observations on the 2nd periodic report of Côte d’Ivoire, supra note 81, para. 18.
100 UN Convention on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of Italy, supra note 52, para 18.
101 UN Committee on the Rights of the Child, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/5, 12 July 2016.
Continue efforts to effectively implement the Law at all levels, including by disseminating information on where children can report discrimination and harmonizing the legislation at all levels within the State party, in compliance with the Law.\(^\text{102}\)

Similarly, in the concluding observations relating to the report of Montenegro, the Committee recommends when combating discrimination, part of this implementation will involve ‘adequately sanctioning perpetrators, providing child victims of discrimination with effective and appropriate remedies.’\(^\text{103}\)

7 Recommendations of the Committee on Combating Discrimination

As with other rights, the Committee has made recommendations relating to the principle of non-discrimination which are important to outline here. In General Comment No. 5, the Committee emphasises that the principle of non-discrimination ‘requires States actively to identify individual children and groups of children the recognition and realisation of whose rights may demand special measures.’\(^\text{104}\) The Committee also highlighted the ‘need for data collection to be disaggregated to enable discrimination or potential discrimination to be identified’. This could also be interpreted to point to the need of states to gather information on how children as a group are affected by particular phenomena such as violence and homicide. Failing to do this potentially masks the extent of violence against children as a group, which can be argued to constitute a non-discrimination issue.

In its concluding observations, the Committee makes specific recommendations as to how states should tackle various types of discrimination. One such recommendation which is relatively common is awareness-raising campaigns. For example in its examination of the report of the State of Palestine, the Committee urged that the state:

\begin{quote}
Undertake awareness-raising campaigns in order to combat stigmatization, prejudice and multiple forms of discrimination against children
\end{quote}

\(^{102}\) UN Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Bosnia and Herzegovina*, supra note 94.

\(^{103}\) UN Committee on the Rights of the Child, *Concluding observations on Montenegro*, crc/c/mne/co/2–3, 22 June 2018, para. 22(a).

\(^{104}\) General Comment No. 5, *supra* note 31, para. 12.
with disabilities, promote a positive image of such children and their recognition as rights-holders, with respect for their dignity and evolving capacities on an equal basis with other children.\textsuperscript{105}

Likewise, in the case of Portugal, the Committee recommends that the State do more to raise awareness among public and civil servants, as well as law enforcement official:

... to combat stereotyping, prejudice and discrimination against girls, children with disabilities, children in migration, those of ethnic, religious and racial minorities, including Roma, people of African descent and Muslim children, as well as lesbian, gay, bisexual and transgender adolescents and intersex children.\textsuperscript{106}

In the case of Hungary, the Committee particularly expressed that the state should take measures to implement non-discrimination programmes in schools.\textsuperscript{107} In countries in which the Committee deems appropriate, reference is made to community and religious leaders as crucial in efforts to eliminate discrimination against particular groups of children. For example in the case of Mauritania, the Committee urges that the state do this: ‘[I]n close cooperation with civil society, the media and community and religious leaders, through awareness-raising programmes aimed at creating an enabling environment that promotes equality among children’.\textsuperscript{108} In its report on Austria, the Committee noted with praise the fact that the state had taken measures such as establishing units for investigation of incitement to hatred.\textsuperscript{109}

Clearly allocating sufficient resources to deal with discrimination will be necessary. In the concluding observations relating to the report of Montenegro, the Committee recommends when combating discrimination, part of this implementation will involve ‘allocating sufficient human, technical and financial resources for the effective implementation of related national strategies’.\textsuperscript{110}

\begin{footnotesize}
\begin{enumerate}
\item UN Committee on the Rights of the Child, \textit{Concluding observations on the initial report of Palestine, supra} note 86, para. 49. (b).
\item UN Committee on the Rights of the Child, \textit{Concluding observations on the combined fifth and sixth reports of Portugal, crc/c/prt/co/5–6}, 9 December 2019, para. 14.
\item UN Committee on the Rights of the Child, \textit{Concluding observations on the sixth periodic report of Hungary, crc/c/hun/co/6}, 3 March 2020, para 16. (a).
\item UN Committee on the Rights of the Child, \textit{Concluding observations on the combined third, fourth and fifth reports of Mauritania, crc/c/mrt/co/3–5}, 26 November 2018.
\item UN Committee on the Rights of the Child, \textit{Concluding observations on the combined fifth and sixth reports of Austria, crc/c/aut/co/5–6}, 6 March 2020, para. 16.
\item UN Committee on the Rights of the Child, \textit{Concluding observations on the combined second and third periodic reports of Montenegro, crc/c/mne/co/2–3}, 22 June 2018, para. 22(a).
\end{enumerate}
\end{footnotesize}
8 Conclusion

The CRC outlines the rights to which under-18s are entitled; and it has certainly been successful in drawing attention to the rights and interests of children. Yet its non-discrimination article – Article 2 – is almost exclusively applied to traditionally disadvantaged groups such as girls, ethnic and racial minorities and children with disabilities. It is used little, if ever, to protect children from discrimination on the basis of childhood. There appears to exist an assumption across most societies that this is unproblematic, and perhaps that; ‘by reason of age alone, children should be afforded less and lesser legal rights than adults.’

There is a lot to be learned from the ways in which the Committee responds to discrimination against particular groups of children. Many of the concluding observations and recommendations which are directed at tackling discrimination against traditionally disadvantaged groups such as girls and children with disabilities will be useful to guide approaches when it comes to children as a group more broadly. For example, as mentioned above, in its examination of the report of the State of Palestine, the Committee urged that the state undertake awareness-raising campaigns in order to combat discrimination against children with disabilities. The same approaches could be taken to combat discrimination against children on the basis of childhood.

Ganty points out (albeit in the context of socio-economic status) that the prohibition of discrimination is an empowering legal tool in the protection of disadvantaged people. It can assist in scrutiny of disadvantage; it can have a role in combating stereotypes and stigma, and can have ‘an important cross-cutting function in cases of multiple discrimination.’ This seems particularly pertinent for children, considering that where there is discrimination on the basis of gender, race and so on; ‘multiple discrimination’ could well be likely. Being a child will put members of these traditionally disadvantaged groups at greater risk of discrimination, with all of the exclusion, danger and risk that this brings. It is clear that greater levels of research into the nature of intersectionality, children and the CRC is needed. Intersectional discrimination is cumulative, and it has been argued that ‘the result is qualitatively different, or synergistic’. This means that discrimination on the basis of childhood

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11 R. Sandland, ‘Lessons for Children’s Rights from Disability Rights?’ in Eva Brems et al. (eds), Children’s Rights Law in the Global Human Rights Landscape. Isolation, Inspiration, Integration?, (Routledge, Abingdon, Oxon, 2017) p. 124.
112 UN Committee on the Rights of the Child, Concluding observations on the initial report of Palestine, supra note 86, para. 49(b).
113 S. Ganty, ‘Poverty as Misrecognition: What Role for Antidiscrimination Law in Europe?’, 21:4 Human Rights Law Review (2021) pp. 962–1007.
114 S. Fredman, Discrimination Law, 2nd ed (Claredon, 2011).
taken together with other categories under the CRC is an important area for future research.

As noted above, the Committee often lists a number of examples in one section of their concluding observations of children from ‘traditionally disadvantaged groups’ who are experiencing discrimination. These often include girls, ethnic minorities, children with disabilities and other groups. It is often not made quite clear on what basis these particular groups are being singled out for special attention, and therefore the Committee comments sometimes seem somewhat inconsistent.

The Committee’s inconsistent approach also means that it has not been made clear that states must refrain from discriminating against children on the basis of childhood. As noted above in Sections 1–2, there is a sense in all societies that children as a group are so different to adults that it is acceptable to simply exclude them from equality frameworks. It must be made clear to states that detrimental treatment of children must be analysed and determined on a case by case basis, and only happen as is necessary and proportionate, as argued by Breen. She considers the special status of children and the need to consider the differences between children and adults: ‘The actual appropriate response is a question of balance in every case whereby the appropriate administrative or judicial decision-makers assess the legitimacy, proportionality and necessity of the limitation in question.’

There is an evolution to be seen in the approach of the Committee to the issue. The quantitative analysis indicates that there is increasing attention being given to discrimination and equality in committee jurisprudence. The UK example demonstrates what can be achieved if NGOs (in this case the Children’s Rights Alliance for England) and others give proper attention to classifying the issue of poor treatment of children where appropriate as discrimination against children. The Committee is clearly open to examining issues in this framework.

The emphasis of the Committee that ‘cultural attitudes’ should not impact on children being heard and taken seriously is an interesting one and intersects greatly with the issue of discrimination against children. It is an area which is ripe for the Committee to explore discrimination themes, rather than replace it with simply reference to ‘attitudes’. Discrimination is a factor which likely underlies so many of the human rights issues affecting children and this needs to be made more explicit by the Committee. To emphasise poor attitudes to children

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115 Breen, *supra* note 36, p. 12.
as discrimination on the basis of childhood would call attention to a potential cause of many other rights violations e.g. poverty and violence against children.

It is also important that the Committee has, through general comments and other means, increasingly framed issues as discrimination issues. It is quite possible however that the reason that we are seeing discrimination on the basis of childhood referred to by the Committee in collaboration with other treaty bodies, is that these treaty bodies are well suited to focus on discrimination itself. The CRC on its own however remains an instrument which does not appear to be inspiring a focus on discrimination against childhood. It is important to note that this does not need to be the case. The CRC Article 2 reference to 'other status' renders it possible to read into the right of children to be free from discrimination on the basis of childhood. Another area of concern, as noted by Besson and Kleber is that the prohibition of discrimination enshrined in Article 2 remains vague and underexamined. A CRC general comment on discrimination on the basis of childhood under Article 2 would be a helpful and important step towards bringing adequate attention to this issue.

The Committee is willing to analyse issues in the discrimination framework in some circumstances, such as through evidence from Children’s Rights Alliance for England (CRAE) in the UK context. It does so when collaborating with other treaty bodies. It is important to ascertain the extent to which increased examination of children’s rights issues in the framework of non-discrimination/equality will benefit children. Academics, non-governmental organisations, and the Committee itself should therefore give greater attention to non-discrimination/equality when it comes to children as a group.

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116 Besson and Kleber, note 5.
117 See UN Committee on the Rights of the Child/UN Committee on the Elimination of All Forms of Discrimination against Women, Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment and No. 18 of the Committee on the Rights of the Child on harmful practices, 14 November 2014, CEDAW/C/31/Rev.1–CRC/C/GC/18/Rev.1.