



Children’s Economic and Social Rights

Aoife Nolan

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Abstract

Recent years have seen a growing understanding of the relationship between poverty and human rights, an explosion in awareness of the status of children as right-holders, and increasing linkages being made between human rights and child poverty in the development context. Galvanized by mounting concerns about the impacts of economic globalization and the 2007–2008 financial and economic crises on children, these developments have unsurprisingly focused academic and practitioner attention on those rights of children that are most directly related to ensuring children’s survival and development needs – namely, children’s economic and social rights (ESR). This chapter focuses on the content of, and obligations imposed by, children’s ESR. It opens by locating ESR under the CRC in terms of the broader international human rights framework on ESR. It then goes on to discuss the duties of States and other actors in terms of those rights, focusing in particular on Article 4 CRC. In doing so, it concentrates in particular on the interaction between the work of the Committee and that of the UN Committee on Economic, Social and Cultural Rights. The chapter concludes

A. Nolan (✉)
School of Law, The University of Nottingham, Nottingham, UK
e-mail: Aoife.Nolan@nottingham.ac.uk

with a discussion of what lies ahead for children's ESR, highlighting crucial challenges, including law's persistent relative neglect of child ESR, the potential impact of the 2030 Agenda for Sustainable Development, and the ongoing marginalization of children within global society.

1 Introduction

Recent years have seen a growing understanding of the relationship between poverty and human rights (see, e.g., UNHRC 2012), an explosion in awareness of the status of children as right-holders, and increasing linkages being made between human rights and child poverty in the development context¹. Galvanized by mounting concerns about the impacts of economic globalization and the 2007–2008 crises on children,² these developments have unsurprisingly focused academic and practitioner attention on those rights of children that are most directly related to ensuring their survival and development needs – namely, children's economic and social rights (ESR).

At the time of its adoption, the UN Convention on the Rights of the Child (CRC) was the first UN human rights treaty expressly to furnish right-holders with economic, social, and cultural, as well as civil and political rights.³ ESR under the CRC include: the right to the highest attainable standard of health (Article 24); the right to benefit from social security (Article 26); the right to a standard of living adequate for the child's physical, mental, spiritual, moral, and social development (Article 27); the right to education (Articles 28 and 29 CRC); and the obligation of States Parties to ensure to the maximum extent possible the survival and development of the child (Article 6(2)).⁴ ESR elements are also included or addressed implicitly in the provisions of the CRC outlining disabled children's rights (Article 23), child victims' right to physical and psychological recovery and social reintegration (Article 39), refugee children's rights (Article 22), the right to rest, leisure, play and recreation (Article 31)⁵, and the right to freedom from economic exploitation and work that is

¹See, e.g., Sustainable Development Goal Target 1.2 on reducing at least by half the proportion of children living in poverty that forms part of (UNGA 2015). For a discussion of child rights and the SDGs, see Sect. 4 below.

²For more on the impact of the financial and economic crises of 2007–2008 on children, see, e.g., UNICEF (2014).

³Prior to this, the UN Covenant on the Elimination of All Forms of Racial Discrimination and the UN Covenant on the Elimination of All Forms of Discrimination against Women included provisions requiring States to ensure equality in the enjoyment of economic, social, and cultural rights.

⁴Note that the CRC does not specify which rights are ESR. The identification of such in this chapter is based, first, on the inclusion of corresponding rights protections in International Covenant on Economic, Social and Cultural Rights (ICESCR) rather than in the International Covenant on Civil and Political Rights. Where equivalent rights provisions do not appear in those instruments, then I have highlighted those with ESR elements.

⁵For more on Article 31 as economic, social and cultural in nature see Weir [forthcoming](#).

likely to be hazardous, interfere with the child's education, or be harmful to the child's development (Article 32).⁶

This chapter will focus on the content of, and obligations imposed by, children's ESR. It will open by locating ESR under the CRC in terms of the broader international human rights framework on ESR. It will then go on to discuss the duties of States and other actors in terms of those rights, focusing in particular on Article 4 CRC. In doing so, it will address the interaction between the work of the Committee and that of the UN Committee on Economic, Social and Cultural Rights. The chapter concludes with a discussion of what lies ahead for children's ESR, highlighting crucial challenges.

2 Locating ESR Under the CRC within the International Human Rights Law Framework

Unsurprisingly, the ESR standards in the CRC to some degree mirror those found in the most influential UN instrument on economic and social rights – the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, while this 1966 treaty clearly served as inspiration to the drafters of the Convention, the ESR provisions under the CRC are considerably more child-specific than those rights accorded to “everyone” by ICESCR. For instance, while Article 9 ICESCR provides for the right to social security of everyone, Article 26 CRC sets out the right of children to *benefit from* social security, reflecting the commonly understood position of children vis-à-vis social security systems (i.e., as indirect beneficiaries via their parents/carers).⁷ In a similar vein, while both Article 12 ICESCR and Article 24 CRC set out detailed steps required to give effect to the right to health, the latter is unsurprisingly focused on advancing the health rights of children and parents.

ICESCR focuses primarily on the obligations of the State. However, the CRC makes clear the location of children within families and the role of parents and others with legal responsibility for children in relation to satisfying their ESR. Article 11(1) ICESCR on the right to an adequate standard of living delineates a range of measures that States must take to vindicate that right. In contrast, Articles 27(2) and (3) of the CRC emphasize that, in the first instance, “parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development”. States Parties have a supplementary role, being required “in accordance with national

⁶It should be noted that while the thematic Optional Protocols to the CRC contain provisions that are ESR-related (e.g., Article 6(3) and 7 of the Optional Protocol on the Involvement of Children in Armed Conflict and Article 10 of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography), these will not be addressed in this chapter.

⁷That is not to suggest that this should be the position of children – or all children – with regard to the delivery of social security-related goods and services. The position of child-headed households, for instance, demonstrates that for children to enjoy the right to social security, it is crucial children (or some children at least) be provided with such goods and services directly.

conditions and within their means” to take “appropriate measures *to assist parents and others responsible for the child to implement this right*” and “in case of need” to provide “material assistance and support programs, particularly with regard to nutrition, clothing and housing” (UNCRC, Articles 27(2) and 27(3), emphasis added).

Another clear indication of the drafters’ understanding of children and the appropriate activities of “childhood” is provided by Article 32. This provision on freedom from economic exploitation and hazardous work is very different from the articles on the rights to work (Article 6) and to the enjoyment of just and favorable conditions of work (Article 7) under ICESCR, and there is no equivalent of ICESCR’s Article 8 trade union rights provision in the CRC. Indeed, the key provision on work in the CRC is far closer to Article 10(3) ICESCR which sets out special measures of protection and assistance to be taken on behalf of all children and young persons.⁸ While General Comment No. 20 on the rights of the child during adolescence does recognize “the positive role of work in adolescents’ lives” (CRC/C/GC/20 2016a, para 86), it is evident from the wording of the CRC that far from viewing children as having a right to work that they should be enabled and supported to exercise, work is something that the CRC considers that children should be protected from, if possible, and should only carry out over certain ages and in carefully regulated conditions (for more, see CRC/C/GC/20 2016a, para 84–86).

The child-specific nature of the CRC is not just reflected in the way in which “general” ESR have been rendered more child-focused. The Convention also includes at least one right – the right corresponding to the obligation of the State to ensure to the maximum extent possible the survival and development of the child in terms of Article 6(2) – that is unique to the CRC amongst UN human rights instruments.

This difference in approach between ESR under the CRC and ICESCR is understandable given the difference in position between children and adults with regard to ESR access and enjoyment.⁹ Children are more vulnerable to violations of their ESR than adults: this is not simply due to their relative bio-developmental disadvantage, it is also attributable to their limited ability to meet their ESR needs themselves either through directly satisfying their rights by means of the resources available to them in their environment or by engaging effectively with those societal institutions, arrangements, and mechanisms that could lead to the satisfaction of said

⁸Article 10(3) states that “Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labor should be prohibited and punishable by law.”

⁹The particular position of children as ESR-holders is dealt with in detail in Nolan (2011, 13–21). There are undoubtedly groups of adults within society that are at least as vulnerable as children due to having a disability, being pregnant, older, or illiterate in a developed country, etc. The observations below are based on a comparison of the relative situation of an adult of reasonable good health and education by the standards of the society of which she forms part with that of an average child in the same society.

rights. Furthermore, children are often affected in a dissimilar way to adults by violations of an alike nature, both in the short and the longer term. The physical and psychological effects that children suffer as a result of violations of their ESR will generally be greater than those experienced by adults due to their age and lower level of physical and mental development. This is true both in relation to (a) the immediate impact that violations of ESR may have on a child's physical and psychological state and (b) the long-term detrimental effects on the child's development and future capacity for autonomy resulting from such violations. Given that, it is unsurprising – and indeed desirable – that the CRC would equip children with a range of detailed ESR that differ from those of adults in important ways.

3 Exploring the Obligations Imposed by ESR under the CRC

Despite the inclusion of ESR in the CRC on an equal footing with civil and political rights, it is clear from the umbrella obligations provision of the CRC, Article 4, that the obligations imposed by ESR (and cultural rights) are not identical in scope to those imposed by civil and political rights under that instrument. Article 4 requires States to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.” But ESR are subject to the second sentence of Article 4, which provides that “[w]ith regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”¹⁰ The wording of Article 4 tells only part of the story, however, and it is necessary to look beyond it to the jurisprudence of the Committee on the Rights of the Child (the Committee) if the variety and scope of the obligations imposed by ESR under the CRC are to be fully appreciated.

Prior to February 2013, the Committee on the Rights of the Child had not issued a rights-thematic General Comment on any of the ESR under the Covenant. While it had dealt with ESR-related issues in some of its other statements, particularly in its General Comment No. 5 on general measures of implementation of the Convention (CRC/GC/2003/5 2003a),¹¹ it had not spelt out the obligations imposed by a particular ESR in detail. The Committee's General Comment on the right of the child to the enjoyment of the highest attainable standard of health (Art. 24) (CRC/C/GC/15 2013c)¹² thus constituted a valuable addition to their work on ESR. The same is true of the Committee's July 2016 General Comment No. 19 on public budgeting

¹⁰This point is made explicit by the Committee in its CRC/C/GC/19 (2016b, para 25).

¹¹The Committee also engaged to a limited extent with ESR or aspects thereof in its General Comment No. 4 on adolescent health and development in the context of the Convention on the Rights of the Child, UN Doc CRC/GC/2003/4 (2003b), and General Comment No. 3 on HIV/AIDS and the rights of the child, UN Doc CRC/GC/2003/3 (2003c).

¹²For details of the call for submissions and information on the detailed scope and proposed structure of the General Comment, see: <http://www2.ohchr.org/english/bodies/crc/callsubmissionsCRC.htm>

for the realization of children's rights (20 July 2016, UN Doc CRC/C/GC/19).¹³ According to the Committee, that latter document "builds on general comment No. 5 ... which states that the concept of 'general measures of implementation' is complex and that the Committee is likely to issue more detailed general comments on individual elements in due course" (CRC/GC/2003/5 2003a, foreword). Before General Comment No. 19, the Committee had fleshed out its framework for ESR under the CRC in greatest detail in the recommendations emerging from its Day of General Discussion on "Resources for the Rights of Children – Responsibility of States" (CRC DGD 2007). While these recommendations do not have the status of a General Comment, they constitute a useful indicator of the Committee's thinking with regard to Article 4 and other ESR obligations under the Convention and have formed an increasing part of subsequent General Comments. My analysis below reflects the range of statements in which the Committee has considered the obligations imposed by ESR under the CRC in terms of Article 4.¹⁴

The first thing to note when looking at how the Committee on the Rights of the Child has addressed ESR under the CRC is its heavy reliance on the work of the Committee on Economic, Social and Cultural Rights (ComESCR). This latter body is mandated to oversee the progress of state adherence to ICESCR (UNESCO 1985). In contrast, the function of the Committee on the Rights of the Child is to examine the progress made by States Parties in achieving the realization of obligations undertaken in the CRC (Article 43). While, as discussed, there is clear overlap between the rights set out in the CRC and ICESCR, the Committees are separate bodies with different, instrument-specific mandates.

In its first extensive General Comment discussion of Article 4 CRC, General Comment No. 5, the Committee on the Rights of the Child highlighted that, "there are articles similar to art. 4 ... such as art. 2 of the International Covenant on Economic, Social and Cultural Rights" (CRC/GC/2003/5 2003a, para 5). The Committee emphasized that the ComESCR "has issued General Comments in relation to these provisions which should be seen as complementary to the present general comment" and in doing so made specific reference to the ComESCR's General Comments Nos. 3 and 9 on the nature of States Parties' obligations and the domestic application of the Covenant, respectively (CRC/GC/2003/5 2003a, para 6).

The Committee went on to state that the second sentence of Article 4 reflects

¹³For the sake of transparency, it should be noted that the author was one of the experts consulted in the production of General Comment No. 19 and played a significant role in relation to the drafting of the elements of that document focused on ESR obligations.

¹⁴The chapter does not however engage with statements made by the Committee in its Concluding Observations on ESR. General Comments are useful authoritative interpretations of the obligations under Article 4. In contrast, statements made in Concluding Observations are frequently context-specific and shaped by the situation under consideration. On that basis, and given the length constraints of this chapter, it is more sensible to focus attention on the General Comments.

a realistic acceptance that lack of resources – financial and other resources – can hamper the full implementation of economic, social and cultural rights in some States; *this introduces the concept of 'progressive realisation' of such rights*: States need to be able to demonstrate that they have implemented 'to the maximum extent of their available resources' and, where necessary, have sought international cooperation (emphasis added). (CRC/GC/2003/5 2003a, para 7)

It did so despite the fact that there is no reference to the language of progressivity in Article 4. Subsequently, in its General Comment 19, the Committee stated that the reference to the language of “to the maximum extent of their available resources” in Article 4 “implies that the full realization of those rights will necessarily be achieved progressively” (CRC/C/GC/19 2016b, para 25). Progressivity has thus been deliberately read into Article 4 by the Committee, with the necessary implication that the overall obligation in terms of Article 4 should be understood to require States to move towards the goal of full realization of child ESR over time as opposed to their being mandated to achieve that goal immediately.

In its General Comment No. 5, the Committee noted that the second sentence in Article 4 is “similar” to the wording under ICESCR and that “the [Committee] entirely concurs with the [ComESCR] in asserting that ‘even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances . . .’” (CRC/GC/2003/5 2003a, para 8). Similarly, in its General Comment No. 19, the Committee recognized “the evolution of the concepts of ‘maximum extent of available resources’ and ‘progressive realization’ in other core international human rights treaties,” citing Article 4(2) of the Convention of the Rights of Persons with Disabilities, and regarded Article 4 of the Convention as reflecting both notions (CCRC/GC/C/19 2016b, para 29).

In these statements, the Committee deliberately linked its interpretation of the umbrella obligation in terms of ESR under the CRC (Article 4, CRC) with the ComESCR’s approach to the umbrella obligation applying to such rights under ICESCR (Article 2(1), ICESCR). This would be unproblematic were it not for the fact that the wording of Article 2(1) is significantly different to that of Article 4 CRC,¹⁵ providing that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

¹⁵For a discussion of some of the differences between the wording of Article 2(1), ICESCR and Article 4, CRC, see Rishmawi (2006, 3–8).

The Committee has not thus far expressly considered the question(s) of if and how the differences in wording might or should operate in terms of ESR obligations under Article 4.

The Day of General Discussion recommendations make clear that “resources” for the purpose of Article 4 are to be understood in qualitative and quantitative terms; resources are not simply financial in nature but include technological, economic, human, and organizational ones. Furthermore, “available resources” are not just limited to those available in the national context but include those available from the international community through international assistance (CRC DGD 2007, para 24). Significantly, from a child rights perspective, the Committee recommended that States “assess ‘available resources’ beyond financial measures”, emphasizing the importance of systematically supporting “parents and families which are among the most important ‘available resources’” for children (CRC DGD 2007, para 25). In its later work in General Comments, the Committee has focused on financial resources in the context of budgets specifically, stating that Article 4 requires States Parties “to mobilize, allocate and spend sufficient financial resources” and that funds allocated to policies and programs that further the realization of CRC rights should be spent “optimally and in line with the general principles of the Convention” (CRC/C/GC/19 2016b, para 28).¹⁶ The Committee has also flagged that corruption and mismanagement of public resources in State revenue mobilization, allocation, and spending “represents a failure by the State to comply with its obligation to use the maximum of available resources” (CRC/C/GC/19 2016b, para 34; see also CRC/C/GC/16 2013b, para 55). It is thus clear that the loss of resources due to state failure to address financial impropriety will constitute a violation of Article 4. Rather confusingly, and in contrast to the ComESCR, in its more recent General Comment, the Committee appears to treat the “maximum extent of their available resources” obligation as twofold in nature, stating in General Comment 19 that States are required to “ensure the availability and maximization of resources for the rights of all children” (CRC/C/GC/19 2016b, para 32). It is unclear why availability needs to be a separate condition here – if maximized resources are “for the rights of all” children, it can presumably be assumed that such resources are available. This appears to introduce a layer of complexity that does not add to the understanding of Article 4.

Not all obligations imposed by Article 4 are progressive or limited by available resources. Indeed, when discussing progressive realization and maximum available resources in its General Comment No. 19, the Committee emphasized that its statements on these obligations were “without prejudice to obligations that are

¹⁶The ComRC also said that spending should be in line with the budget principles outlined in that General Comment (CRC/C/GC/19 2016b, para 28).

immediately applicable according to international law” (CRC/C/GC/19 2016b, para 29). I will now turn to the first of these obligations.

In its Day of General Discussion recommendations, echoing the ComESCR’s approach in that body’s General Comment No. 3, the Committee stated that “progressive realization” in terms of Article 4 imposes an immediate obligation on States Parties to the Convention to undertake targeted measures to move as expeditiously and effectively as possible towards the full realization of child economic social and cultural (ESC) rights (CRC DGD 2007, para 47).¹⁷ This obligation can be understood to correspond to the immediate obligation “to take steps” under ICESCR, which the ComESCR has described as requiring, for instance, that the State adopt and implement a national strategy or plan of action to realize the ESR in question (see, e.g., ESCR GC 13 E/C.12/1999/10 1999, para 52; ESCR GC 15 E/C.12/2002/11 2003, para 47; E/C.12/GC/19 2008, para 68).

Nonretrogression is another immediate duty identified by the Committee. The obligation not to take any retrogressive steps that could hamper the enjoyment of ESC rights “is considered to be inherent in the obligation towards progressive realization of those rights.”¹⁸ Such retrogressive measures might include cuts to ESR-related programming, the withdrawal of funding for ESR-related services, or the cancellation of policies focused on advancing ESR achievement. In its General Comment No. 15, the Committee states that “[i]rrespective of resources, States have the obligation to not take any retrogressive steps that could hamper the enjoyment of children’s right to health” – a position that would appear to remove any possibility of States justifying retrogressive measures in terms of an lack of resources and which is a stricter standard than that set out by the ComESCR in relation to ICESCR. The Committee has shifted away from this position (if indeed it was a deliberate position); in its General Comment No. 17 on the right to play, the Committee highlighted that: “[n]o regressive measures in relation to the right to play, recreation, rest, leisure or participation in cultural or artistic activities are permitted. If any such deliberate measure was taken, the State would need to prove that it had undertaken careful consideration of all alternatives, including giving due weight to children’s expressed views on the issue, and that the decision was justified bearing in mind all other rights in the Convention” (CRC/C/GC/17 2013a, para 55). Leaving aside the inaccurate use of the term “regressive” for “retrogressive,” these are the same

¹⁷For similar language from the ComESCR in the context of the obligation “to take steps,” see its General Comment No. 3 on the nature of States Parties’ obligations (Art. 2 (1)), UN Doc. E/1991/23 (1990), para. 2.

¹⁸See also CRC DGD (2007, para 47). This point is reflected implicitly in the work of the ComESCR, see *ibid.*

conditions imposed by the ComESCR in its General Comments up to that point,¹⁹ together with the added requirement that children's expressed views on the issue should be considered.

The issue of retrogression has been considered most extensively by the Committee in its General Comment No. 19 where, citing its earlier recommendations and General Comment No. 15 as well as the ComESCR's General Comment No. 3, it stated the obligation imposed on States Parties by Article 4 to realize children's economic, social, and cultural rights to the maximum extent

also means that they should not take deliberate retrogressive measures in relation to economic, social and cultural rights. States parties should not allow the existing level of enjoyment of children's rights to deteriorate. In times of economic crisis, regressive measures may only be considered after assessing all other options and ensuring that children are the last to be affected, especially children in vulnerable situations. States parties shall demonstrate that such measures are necessary, reasonable, proportionate, non-discriminatory and temporary and that any rights thus affected will be restored as soon as possible. States parties should take appropriate measures so that the groups of children who are affected, and others with knowledge about those children's situation, participate in the decision-making process related to such measures. The immediate and minimum core obligations imposed by children's rights shall not be compromised by any retrogressive measures, even in times of economic crisis. (CRC/C/GC/19 2016b, para 32, footnote omitted)

While this passage of the General Comment centers on "children," the test applied is largely that adopted by the Committee on Economic, Social and Cultural Rights in its Chairperson's 2012 Letter on Austerity Measures (UNESCR 2012).²⁰ Although that letter does not refer to the term "deliberate retrogressive measures," its contents

¹⁹In its General Comment No. 3, ComESCR states that "any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources" (ESCR GC3 1991, para. 9). This language is echoed in a number of other General Comments (E/C.12/GC/21 2009, para 65; E/C.12/GC/19 2008, para. 42; E/C.12/GC/18 2005, para. 21; E/C.12/GC/17 2006b, para. 27; ESCR GC15 E/C.12/2002/11 2003, para. 19; ESCR GC14 E/C.12/2000/4 2000, para. 32; and ESCR GC13 E/C.12/1999/10 1999, para. 45). Some of these statements also set out the requirement to ensure "there has been the most careful consideration of all alternatives" (E/C.12/GC/19 2008, para. 42; E/C.12/GC/18 2006a, para. 21; E/C.12/GC/17 2006b, para. 27; ESCR GC15 E/C.12/2002/11 2003, para. 19; ESCR GC14 E/C.12/2000/4 2000, para. 32; and ESCR GC13 E/C.12/1999/10 1999, para. 45), as well as a requirement of "independent review" (E/C.12/GC/19 2008, para 42). A number of other General Comments have highlighted that the adoption of any retrogressive measures incompatible with the "core obligations" under the Covenant would be impermissible (see ESCR GC15 E/C.12/2002/11 2003, para. 42; ESCR GC14 E/C.12/2000/4 2000, para. 48). General Comment No. 22 speaks of States having the "burden of proving" the necessity of such measures but then cites General Comment 14, para 32, so it seems unlikely that this language is meant to constitute an additional justificatory element for States (E/C.12/GC/22 2016, para 38). The Committee has also specified the need for genuine participation of affected groups in examining proposed measures and alternatives (E/C.12/GC/19 2008, para 42).

²⁰For more on this letter and the ComESCR's work on retrogression more generally, see Nolan et al. (2014).

have been understood to constitute the Committee on Economic, Social and Cultural Rights' delineation of criteria for the permissibility of such measures – criteria that were developed in the context of austerity measures (see, e.g., Warwick 2016). As with General Comment No. 17, General comment No.19 sees the Committee seeking to render child-specific the nonretrogression obligation outlined by the ComESCR that it has borrowed for the purposes of its own work, including by adding the requirement that children should be the last to be affected and emphasising child participation. A focus on participation is also evident in the Committee's discussion of the "maximum available resources" obligation, with the Committee placing "great importance on accountable, transparent, inclusive and participative decision-making processes at the national and subnational levels as a means of obtaining the resources necessary for the implementation of children's rights" (CRC/C/GC/19 2016b, para 33); such an emphasis on the importance of participatory budgeting is not found in the ComESCR's work so far.²¹

The Committee has adopted the concept of the "minimum core" of ESR, explicitly citing the ComESCR on this point (CRC DGD 2007, para 48–49). While the language employed by the Committee in its description of the minimum core is slightly different to that used by ComESCR,²² it is clear that it intended to make reference to the latter body's understanding of the minimum core obligation "to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights" as fleshed out in that body's General Comment No. 3 (ESCR GC3 1991, para 10). Such minimum essential levels in the context of the right to the highest attainable standard of health and the right to education would include essential primary healthcare and the most basic forms of education, respectively (ESCR GC3 1991, para 10; ESCR GC 13 E/C.12/1999/10 1999, para 57). The Committee also emphasized that "complying with obligations

²¹For an overview of "participatory budgeting" work, see the resources at www.internationalbudgetproject.org. For more of the ComRC's work on this, see CRC/C/GC/19 (2016b, esp. pars 52–57), supplemented by the discussion in Nolan (2013).

²²The Committee stated that, "The Committee on Economic, Social and Cultural Rights has systematically underlined this obligation of States, to guarantee at all times, the minimum level of protection (the minimum core content) in the provision of: essential foodstuffs, equal access to primary health care, basic shelter and housing, social security or social assistance coverage, family protection, and basic education" (CRC DGD 2007, para. 48). In fact, the ComESCR stated that: "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant" (ESCR GC3 1991, para. 10).

relating to the core of a right should not be dependent on the availability of resources” (CRC DGD 2007, para 48).²³ In its General Comment No. 15, the Committee highlighted a range of “core obligations” imposed by that right (CRC/C/GC/15 2013c, para 73), thus echoing the approach of the ComESCR.²⁴ The Committee’s ongoing heavy reliance on the work of the ComESCR is demonstrated by the fact that when engaging with the concept of minimum core/core obligations most recently, it cross-referenced to core obligations specified in a range of General Comments of the ComESCR (CRC/C/GC/19 2016b, para 9).

The Committee has also followed the ComESCR’s lead with regard to delineating other immediate obligations under the CRC. Its reference to the tripartite typology of State obligations, namely, that States Parties should “respect, protect, and fulfill” rights (see, e.g., CRC/GC/2003/4 2003b, para 3; CRC/C/GC/16 2013b, para 26–31; CRC/C/GC/17 2013a, para 54; CRC/C/GC/15 2013c, para 1 and 71–74), makes it clear that the Committee regards States as being under immediate duties not to interfere with the enjoyment of ESR and to take steps to prevent third parties from interfering with the enjoyment of such rights.²⁵ In its General Comment No. 19, the Committee located the tripartite typology in the section of Article 4 focused on “for the implementation of the rights recognized in the present Convention” (or “the implementing of children’s rights”) (CRC/C/GC/19 2016b, para 27–28) and hence made it clear that it regarded the “respect, protect, and fulfill” analytical tool as applying to all rights – not just ESR. In doing so, it used an understanding of the different elements of that typology tightly based on that employed by the ComESCR.²⁶

Beyond the minimum core, States Parties’ obligation of nondiscrimination is also of immediate effect (CRC DGD 2007, para 47; ESCR GC3 1991, para 1), with the Committee making it clear that this extends to age discrimination in the context of ESR enjoyment (see, e.g., CRC/C/GC/20 2016a, para 59 and footnote 28). With

²³The Committee did, however, appear to confuse the ComESCR’s approach to the issues of “maximum available resources” and “minimum core obligations” somewhat, stating in the context of its discussion of the latter that “where the available resources are demonstrably inadequate, the State concerned is still required to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances” (ibid.). In contrast, the ComESCR made this point about with regard to the enjoyment of ESR generally – not just the “minimum core” of those rights (ESCR GC3 1991, para. 11).

²⁴The Committee has adopted this approach in its General Comments since 2000. See, e.g., ESCR GC14 E/C.12/2000/4 (2000); ESCR GC15 E/C.12/2002/11 (2003); E/C.12/GC/17 (2006b); E/C.12/GC/18 (2006a); E/C.12/GC/19 (2008); E/C.12/GC/21 (2009).

²⁵For more on these obligations under ICESCR, see Koch (2005).

²⁶Prior to General Comment No. 19, the ComRC had not always explicitly used the definitions of these obligations adopted by the ComESCR. See, e.g., General Comment No. 15 where the ComRC states that the obligation to fulfill entails “facilitation” and “provision” (at para. 71). This is despite the fact that the ComESCR has made it clear that “promotion” is also a key element of that duty in the context of health (see ESCR GC14 E/C.12/2000/4 2000, para. 37 and footnote 23). The approach in General Comment 19 can thus be regarded as being somewhat of a “correction” in terms of previous practice on this point.

regard to giving effect to this latter obligation, the Committee has recognized “the need for identifying and giving priority to marginalised and disadvantaged groups of children” (CRC DGD 2007, para 40).

There is a final area of ESR obligation that is only really beginning to be explored – both by the Committee and others; that is, the Article 4 obligation of international cooperation – or, as the Committee views it, “global implementation through international cooperation” (CRC/C/GC/15 2013c, para 86). Article 2 CRC refers to States’ responsibility to all children “within their jurisdictions.” However, no mention is made of jurisdiction in Article 4, with its reference to “within the framework of international cooperation” apparently resulting in the imposition of extraterritorial obligations (Langford et al. 2013a, 58). While the full scope of Article 4 is not yet clear (for more see Vandenhoele 2009), recent years have seen significant development of the understanding of this obligation with a growing awareness that “international cooperation” as provided for in the CRC and other international human rights treaties gives rise to legally binding obligations.²⁷ International cooperation is referred to expressly in a number of CRC ESR, including the rights of disabled children (Article 23(4)), refugee children’s rights (Article 22(4)), the right to the highest attainable standard of health (Article 24(4)), and the right to an adequate standard of living (Article 27(4)). The Committee has noted that “Article 4 emphasizes that implementation of the Convention is a cooperative exercise for the States of the world” (CRC/GC/2003/5 2003a, para 60) and that the Convention should form the framework for international development assistance, with the programs of donor States being rights-based (CRC/GC/2003/5 2003a, para 61). States are encouraged to provide and to use, as appropriate, technical assistance in the process of implementing the Convention (CRC/GC/2003/5 2003a, para 63). The Committee has stated that States which lack the resources needed to implement the rights enshrined in the Convention are “obliged to seek international cooperation,” while States with resources for international cooperation have an obligation to provide such cooperation with the aim of facilitating the implementation of children’s rights in the recipient State (CRC/C/GC/19 2016b, para 35). States are required to demonstrate that, where necessary, they have made every effort to seek and implement international cooperation to realize the rights of the child (CRC/C/GC/19 2016b, para 36; CRC/GC/2003/5 2003a, para 7 and 60) and are to collaborate with other States’ efforts to mobilize the maximum available resources (CRC/C/GC/19 2016b, para 37). Furthermore, the Committee has reminded States to meet the United Nations target of allocating 0.7% of gross national income to international development assistance on the basis that financial resources have important impli-

²⁷For an expert overview of the extraterritorial obligations imposed by ESR generally, including those imposed by Article 4, see De Schutter et al. (2012). For more on the ComESCR’s work around the obligation of international cooperation, see various contributions in Langford et al. (2013b). For a thoughtful analysis of how Article 4 should work in terms of the fulfillment of children’s ESR, see Nyongesa Wabwile (2010).

cations for the realization of children's ESR in resource-limited States (CRC/C/GC/15 2013c, para 89).²⁸

Crucially, the Committee has also specified that States should comply with their Convention obligations when engaging in development cooperation as members of international organizations and when signing international agreements (CRC/C/GC/19 2016b, para 39). States should not accept loans from international organizations, or agree to conditions set forth by such organizations, if these loans or policies are likely to result in violations of the rights of children (CRC/C/GC/16 2013b, para 47). The Committee has stated in the context of international cooperation that the World Bank Group, the International Monetary Fund, and World Trade Organization should ensure that their activities related to international cooperation and economic development give primary consideration to the best interests of children and promote full implementation of the Convention (CRC/GC/2003/5 2003a, para 64).²⁹

Indeed, it is important to note that States – whether acting unilaterally or in conjunction with others – are not the only actors with a role to play in terms of ensuring ESR. The Committee has addressed the “responsibilities” of nonstate actors with regard to ESR in a number of statements (see, e.g., CRC/C/GC/16 2013b; CRC/C/GC/15 2013c, Chap. IV (B)) stating that States’ “legal obligation to respect and ensure the rights of children as stipulated in the Convention, which includes the obligation to ensure that non-State service providers operate in accordance with its provisions” creates indirect obligations on such actors (CRC/GC/2003/5 2003a, para 43). While the satisfaction of such responsibilities is important in terms of ESR enjoyment, as the Committee has noted, there is no international legally binding instrument on the business sector’s responsibilities vis-à-vis human rights (or on the rights of other nonstate actors for that matter). Thus, although “duties and responsibilities to respect the rights of children extend in practice beyond the State and State-controlled services and institutions and apply to private actors” (CRC/C/GC/16 2013b, para 8; see also CRC/GC/2003/5 2003a, para 56), international ESR law is currently really only beginning to grapple with the role of nonstate actors from a legal obligations perspective. As such, a primarily State-centric focus to this chapter is appropriate. That said, given the increase in the global phenomenon of privatization, it is important to highlight that the Committee has made it clear that “enabling the private sector to provide services, run institutions and so on does not in any way lessen the State’s obligation to ensure for all children within its jurisdiction the full recognition and realization of all rights in the Convention” (CRC/GC/2003/5 2003a, para 4; see also CRC DGD 2002, para 2, and CRC/C/GC/16 2013b, para 25 for similar statements). Indeed, it is striking that the Committee’s engagement with privatization and the role of private actors vis-à-vis the ESR it monitors significantly predated that of the ComESCR, which only really got to grips with this issue in its

²⁸While this comment was made in the context of the right to the highest attainable standard of health, it is true of all ESR.

²⁹For more on the Committee’s views on steps that IFIs and the WTO should take, see CRC DGD (2007) on resources, para 52(d) and (e).

July 2017 General Comment focused on business activities and State obligations under ICESCR (E/C.12/GC/24 2017).³⁰

In sum, while the Committee's interpretation of Article 4 and hence ESR obligations under the CRC has historically strongly resembled – and indeed almost entirely replicated – that of the ComESCR in relation to ICESCR, the Committee has recently taken significant steps towards introducing a child-specific element to its delineation of obligations, centering in particular on the need for States to ensure child participation in ESR-related decisions and processes. As such, the Committee appears to have shifted definitively towards reclaiming ESR under the CRC as children's rights. Furthermore, the Committee has gone beyond the work of the ComESCR in a number of important child ESR-related areas, including budgets and the obligations of nonstate actors. It is perhaps evidence of its growing confidence with regard to the interpretation and application of Convention ESR that it no longer appears to feel constrained by the work of the ComESCR.

Before moving to our conclusion, it is important to note another avenue that seems set to result in the Committee furnishing ESR under the CRC with more concrete content: namely, the Third Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OP3CRC), which came into force in April 2014. The adoption of the Protocol was significant as, together with the growing ESR case-law at the domestic and regional levels, it further undermined objections to the justiciability of ESR, including those of children.³¹ Crucially from the perspective of the Committee's work in this area, in allowing children and those acting on their behalf to bring complaints alleging ESR violations, the communications procedure furnishes the Committee with the opportunity to develop its approach to ESR through the refinement of its generally phrased conceptualizations of obligations in the context of specific fact situations. Given that at the time of writing the Committee has not yet made any decisions on communications alleging ESR violations, this is very much a project for the future. However, in light of the key role that ESR jurisprudence has played in developing understanding of child ESR and the obligations they impose at the domestic level (see, e.g., *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19 (South Africa); *Unni Krishnan, J. P., v. State of A.P. and Others* (India); SU 225/98 (Columbia)), it seems highly likely that the case-law that emerges from the OP3CRC process will do the same for the purposes of international child rights law.

³⁰For more on privatization and child ESR, see Nolan (2018).

³¹For more on domestic child ESR jurisprudence, see Nolan (2011). For more on regional child ESR jurisprudence, see Nolan and Kilkelly (2016).

4 Conclusion: Ongoing Challenges to Children's ESR

Much of this chapter has focused on the evolution of ESR obligations under the CRC in terms of the Committee's work. It has thus been primarily legalistic in nature, focusing on the standards that should be applied where children's ESR are at issue, rather than considering the factors that contribute to, cause, and exacerbate violations of such rights. It would not, however, be appropriate to conclude without addressing a number of challenges (or rather threats) to children's ESR that are likely to impact on and influence the Committee's approach in coming years.

Some of these challenges are longstanding. For instance, children's ESR enjoyment suffers from the fact that ESR still receive far less attention under international, regional, and domestic human rights law than civil and political rights do.³² This means that the Committee's work in this area is particularly important in terms of ensuring the elaboration and monitoring of ESR.

Other threats are more recent, including the potential impact of Agenda 2030 for Sustainable Development (UNGA 2015, para 10) and State engagement with such.³³ Positively, the 2030 Agenda is explicitly grounded in the Universal Declaration of Human Right and international human rights treaties (UNGA 2015, para 10), with the General Assembly Resolution providing for the adoption of the Sustainable Development Goals (SDGs) stating that: "we [world leaders] reaffirm our commitment to international law and emphasize that the Agenda is to be implemented in a manner that is consistent with the rights and obligations of States under international law" (UNGA 2015, para 18). This clearly includes the CRC and the ESR therein (see, e.g., UNGA 2015, para 67). That said, thus far there is limited indication that the implementation of the SDGs will be child-sensitive or child rights-compliant (Nolan and McGrath 2016) – a fact that belies the pro-human rights wording of Agenda 2030.³⁴ Furthermore, the SDGs potentially provide an opportunity for States that have been resistant to the notion of legally enforceable ESR (including children's ESR) to argue that such rights should fall under the domain of development rather than that of law. The Committee will need to bear this danger in mind carefully when advancing its understanding of ESR in a context in which the SDGs will be ever-more prominent. As the Special Rapporteur on Extreme poverty and Human Rights has argued, "when the 2030 Agenda for Sustainable Development and its

³²Evidence of the extent to which ESR remain unprioritized by States working at an international level is made clear through the comparative neglect of such rights in the recommendations to States emerging from the Human Rights Council Universal Periodic Review process (see, e.g., CESR 2016). For evidence of the greater attention paid to civil and political rights at a regional level, see Nolan and Kilkelly (2016). For evidence of how civil and political rights remain more predominant in national constitutional human rights provisions than ESR, see the following databases: www.constituteproject.org and www.tiesr.org/data_cr.html, accessed 6 December 2016.

³³For more on Agenda 2030 and children's rights, see Arts' contribution to this volume.

³⁴The threat of "rights blindness" in terms of the implementation of the SDGs is perhaps unsurprising in light of the general exclusion of rights language and concepts in the Millennium Development Goals and the work around them. See, e.g., Langford et al. (2012); Alston (2005).

Sustainable Development Goals is automatically equated with the promotion of respect for economic and social rights,” a risk arises of eliding two potentially very different approaches (UNHRC 2016, para 7). Given the historic resistance of States to ESR in light of the burdens of obligation and accountability such rights impose, this elision risks being at the expense of ESR.

The final challenge in terms of children's ESR that will be discussed here arises from the marginalization of children within global society. Just as the CRC has fostered an understanding of children as social agents with a right to be heard (see Chap. 5 by Dr Noam Peleg; CRC/C/GC/12 2009), so too has antipoverty work started to emphasize and prioritize the role of people living in poverty in conceptualizing, designing, and monitoring antipoverty efforts (see, e.g., UNHRC 2013). When drafting its General Comment on public budgeting for the realization of children's rights, the Committee on the Rights of the Child benefited from a study which gathered the views of nearly 2700 children from more than 70 countries about how governments should spend money to protect and promote child rights (Lundy et al. 2015). These findings informed the General Comment, thereby ensuring that children's views were brought to bear in a key soft law standard with a heavy ESR focus.

These are all positive developments that resonate with UNICEF's view that reducing child poverty means improving the opportunities for disadvantaged children to participate in society (UNICEF 2005, 15). However, for children's ESR to be meaningful, there is a need to address head on the socially and legally constructed obstacles that impede enjoyment of their rights, including their (almost universal) democratic unenfranchisement, their (frequent) legal unenfranchisement, their limited economic power, and their highly constrained capacity to exercise indirect influence over those law and policy decision-making processes that are fundamental to ensuring ESR realization.³⁵ Too often, these obstacles have been treated as natural and inevitable. The Committee has noted the challenges faced by children in trying to enforce their rights using the law (CRC/C/GC/16 2013b, para 4(c)),³⁶ and the Optional Protocol to the CRC providing for a Complaints Procedure will enable the Committee to engage with this issue further. However, given the centrality of the role of the executive and legislature to the realization of children's ESR (reflected in Article 4's mandating of “all appropriate legislative, administrative, and other measures” for the implementation of ESR), the implications of children's social, economic and – especially – political marginalization should not be underestimated by those seeking to advance such rights. The Committee has acknowledged that children are often politically voiceless “and are reliant on governance systems, over which they have little influence, to have their rights realized” – something that

³⁵For more on the social, legally and economically constructed obstacles faced by children in the exercise of their ESR, see Nolan (2011).

³⁶Here, the Committee stated that “It is generally challenging for children to obtain remedy – whether in the courts or through other mechanisms – when their rights are infringed upon, even more so by business enterprises. Children often lack legal standing, knowledge of remedy mechanisms, financial resources, and adequate legal representation.”

“makes it hard for them to have a say in decisions regarding laws and policies that impact their rights” (CRC/C/GC/16 2013b, para 4(b)). The Committee has gone furthest in terms of grappling with democratic citizenship in its General Comment No. 20 on the rights of the child during adolescence, where it acknowledged “the importance of participation as a means of political and civil engagement through which adolescents can negotiate and advocate for the realization of their rights, and hold States accountable” (CRC/C/GC/20 2016a, para 34). However, while urging States to adopt policies to increase opportunities for political participation “which is instrumental in the development of active citizenship,” the Committee notably did not encourage States expressly to lower the voting age – rather stating that “[i]f States decide to lower the voting age to under 18 years, they should invest in measures that support adolescents to understand, recognize and fulfill their role as active citizens” (CRC/C/GC/20 2016a, para 34). While having the right to vote is certainly not a panacea for poverty, there is no doubt that children’s nonenjoyment of that right contributes to their political marginalization, thereby rendering them more socially vulnerable. As such, it is disappointing that the Committee was not more forthright in terms of urging States to reduce the age of enfranchisement.

It is positive that the Committee has started to interrogate key political and legal structures that constitute obstacles to children’s enjoyment of ESR, albeit that it has yet to fully grapple with the challenges posed to children in their ESR enjoyment due to their limited democratic citizenship. In the same General Comment, the Committee noted “the impact of poverty has profound implications during adolescence, sometimes leading to . . . social and political exclusion” (CRC/C/GC/20 2016a, para 66). Hopefully its future work will acknowledge and address the huge impact that social and political exclusion has in terms of poverty and children’s enjoyment of their ESR.

5 Cross-References

- ▶ [Children’s Rights and Sustainable Development Goals](#)
- ▶ [International Children’s Rights Law: General Principles](#)

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