

Joint submission on the General Comment of the Committee on the Rights of the Child on children's rights in relation to the digital environment

This submission is made on behalf of the undersigned organisations and individual experts. It was drafted following an in-person working group in May 2019 to discuss the forthcoming General Comment on children's rights in the digital environment from the perspective of justice for children. This submission identifies the areas of common agreement among the signatories regarding the purpose, scope and content of the General Comment.

Purpose and scope

We welcome the broad scope identified for the General Comment, which addresses the extensive ways in which children's rights are impacted in the digital environment. The signatories to this submission recommend that in addition to the topics identified in the concept note, that the General Comment explicitly address access to justice for children, and the rights implications for children within justice systems, whether criminal or civil.

There is the potential for digital technologies to positively impact children's access to justice, through more easily accessible information, education and opportunities for participation in decision making. Digital technologies may also enable the more prompt and efficient resolution of criminal cases involving children. However, the digitalisation of relationships and processes within the justice system carries the risk of negatively impacting relationships, processes and rehabilitation within justice systems. Of particular concern is the risk that current trends in digitalisation of the justice system lead to automated and dehumanised mechanisms that can be harmful for all children. Given the high prevalence of children with learning disabilities, mental health needs, drug use and experience of violent or traumatic family situations, there is an additional concern that these measures will disproportionately affect children in already adverse circumstances.

Structure and content

In light of the considerations mentioned above, this section identifies the issues that the signatories recommend that the Committee address within the General Comment. The authors would be willing to provide further information on any of the issues addressed within this submission.

Access to justice for children

For rights to have meaning, effective remedies must be available to address violations.¹ This principle, which is at the core of the Committee's approach to the general application of rights under the Convention, applies equally to rights in the digital context. However, for access to justice to be meaningful in this setting, its application must be tailored to the reality

¹ Committee on the Rights of the Child, General Comment No. 5 (2003) on general measures of implementation, para. 24.

and challenges of the digital environment. Developments in digital technology also offer opportunities to enhance children's access to justice.²

Regulation of the business environment for digital rights

The provisions of the Convention on the Rights of the Child (CRC) are binding on the State party to the CRC, but States have an obligation to provide effective remedies and reparations for violations of the rights of the child, including those committed by third parties, such as businesses operating in the digital environment. Meeting this obligation entails having in place child-sensitive mechanisms - criminal, civil or administrative - that are known by children and their representatives, that are prompt, genuinely available and accessible and that provide adequate reparation for harm suffered.³

The Convention does not set out any particular form of legislation or regulatory mechanism for ensuring the right to remedies and reparations, but the Committee has set out illustrations of the implementation of this right with respect to businesses. Agencies with oversight powers relevant to children and national human rights institutions may play a role in fulfilling this function and these bodies may have regulatory powers to impose administrative sanctions on businesses which infringe children's rights.⁴

In the online context, implementation of this right to effective remedies would include the provision of child-friendly information, advice and advocacy and access to independent complaints procedures and to the courts with necessary legal and other assistance.⁵ Children should receive expeditious responses to any complaints filed, including explanations of decisions made and avenues to seek further review or redress.

The CRC does not prohibit the involvement of private companies in the provision of services, but States are not relieved of their obligations under the CRC where they delegate or outsource their functions to a private business or non-profit organisation.⁶ A State will be in breach of its obligations under the Convention where it fails to respect, protect and fulfil children's rights in relation to business activities and operations that impact on children.⁷

Privacy and data protection

The concept note for the General Comment identifies the protection of privacy, identity and data processing as a group of rights to be addressed General Comment. We urge the

² See, for example, *Report of the United Nations High Commissioner for Human Rights on access to justice for children*, A/HRC/25/35, 16 December 2013, paras. 18 to 20.

³ Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16, 17 April 2013, para. 30.

⁴ Ibid.

⁵ Committee on the Rights of the Child, General Comment No. 5 (2003) on general measures of implementation, CRC/GC/2003/5, 27 november 2003, para. 24.

⁶ Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16, 17 April 2013, para. 25.

⁷ Ibid.

Committee to address the enforcement of these rights as a necessary corollary of children's right to privacy. The EU General Data Protection Regulation⁸ provides a strong example of mechanisms for ensuring data protection standards, including for children. Ensuring that all children have a legally enforceable right to be informed and to access personal information collected about them as well as to have incorrect information rectified or erased can be an effective means of ensuring their access to remedies for breaches of their right to data privacy online.

Access to justice for vulnerable groups

The development of digital technologies can enhance justice systems to ensure they are accessible for children. Properly developed, these tools can facilitate access to justice for marginalised children. Emerging developments to digitise identity documents for refugee children, for example, can be used to enable children to access health, education and other services where existing infrastructure is not functioning.⁹ However, the digitisation of identity in this setting also requires the establishment of safeguards regarding the collection and sharing of children's data, including across borders. To ensure that children are not excluded or exposed to harm as a result of the collection and processing of their data, States should commit to funding support into the research and development of these tools with safety and child-sensitivity built in by design. Any tool to ensure services for children must also be designed to include all children, including children with disabilities.

Digital literacy and resilience

For routes of accessing justice to be meaningful for children online, children must understand when they are at risk and know how to seek help, to learn from their mistakes and to recover. The concept note for the General Comment recognises the important role of education and digital literacy, but we recommend that this content takes into account the relationship between digital literacy and access to justice in ensuring that children have the knowledge to seek redress for violations of their rights online.

Adapting laws on online sexual abuse and exploitation

Criminal offences committed online, including sexual abuse and exploitation against children, pose challenges for enforcement and require the reform of legislation to ensure they are effective. The production of child abuse images in one country but accessed internationally and the livestreaming of sexual abuse require legal reforms to ensure that children can access justice.¹⁰ States must reform their laws to ensure that these offences are specifically prohibited. The cross border nature of these offences, whereby the victim and

⁸ Regulation (EU) 2016/679 of the European Parliament and Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on free movement of such data, and repealing Directive 95/46/EC,

⁹ For further discussion of digital identity in the context of migration, see Latonero et al, *Digital Identity in the Migration & Refugee Context: Italy case study*, 2019. Available at: https://datasociety.net/wp-content/uploads/2019/04/DataSociety_DigitalIdentity.pdf.

¹⁰ Regarding trends in the live streaming of sexual abuse in the Philippines, see ECPAT, *Online Child Sexual Exploitation: An analysis of emerging and selected issues*, 2017, p. 54. Available at: https://www.ecpat.org/wp-content/uploads/2017/04/Journal_No12-ebook.pdf.

perpetrator may not be in the same jurisdiction, also requires States to establish and assert extraterritorial jurisdiction. The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC) explicitly requires States to establish extraterritorial jurisdiction for the sexual exploitation of a child where the perpetrator is a national of that State, a person who has habitual residence in that territory or where the victim is a national of that State.¹¹ State parties must also establish extradition mechanisms for these offences.¹²

Children in justice systems

Digitisation of courts and justice systems

The digitisation of court processes provides potential advantages with regard to accessibility and efficiency, including facilitating the disclosure of information between parties involved in a case and facilitating the input of agents that may be relevant to a case involving a child, such as education, health or social care. To ensure their right to privacy, the collection and sharing of data must have a legal basis and children should be informed of how their data is used and shared within the justice system. The use of technology, such as video links,¹³ can also provide child-sensitive means for children to give evidence, particularly where there is a risk of retraumatising victims by requiring their direct testimony in court.

The digitisation of services may, however, also have a negative impact on the rights of children in contact with the justice system. Where the digitisation of court proceedings results in a lack of in-person contact with children, it may undermine the child's ability to meaningfully engage with the courts and, within the criminal justice system, frustrate rehabilitative and restorative justice measures built on developing relationships with the child. Where children are deprived of their liberty, in person contact is equally necessary to ensure the well-being and rehabilitation of children.

Data protection for information about children within the justice system

The data of children within the justice system is particularly sensitive and requires additional safeguards and protections beyond other personal data. As recognised by the Committee, the records of children in contact with the criminal justice system should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of the case. These records should not be used in adult proceedings in subsequent cases and records of children who have committed an offence should be automatically removed when a child reaches the age of 18.¹⁴ As noted above, where States use private companies to carry out functions within the justice system, they must ensure that

¹¹ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Articles 4(2) and 3((1).

¹² OPSC, Article 5.

¹³ See Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice: Explanatory memorandum, para. 128. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804b2cf3.

¹⁴ Committee on the Rights of the Child, General Comment No. 10 (20017) on children's rights in juvenile justice, CRC/C/GC/10, 25 April 2007, paras. 66 to 67.

these companies are bound by the same duties with regard to children to respect, protect and fulfil children's rights with regard to their role in the justice system.

Criminalisation of children for online activity

Criminal law reforms to address developments in online technology may be a necessary means of realising children's rights under the CRC, for example, by establishing criminal offences to enable the prosecution of sexual offences against children committed online, but these reforms can also have the effect of widening the net and drawing more children into conflict with the criminal law, in contradiction with the rehabilitative aims the Convention sets out for the child justice system.¹⁵

Criminalisation children for consensual sexual activity

Under the CRC, States are required to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of violence, including sexual abuse and exploitation.¹⁶ As noted above, the challenges posed by technological developments require the reform of criminal legislation to ensure access to justice for children. In the context of sexual exploitation and abuse online, legislation aiming to protect children from sexual exploitation and abuse may have the consequence of criminalising children for consensual sexual activity with other children. Laws that criminalise children for "possessing child pornography" when they have taken a photograph of themselves nude or "disseminating child pornography" if they share it consensually with another person of their own age, can subvert the protective aims of the criminal legislation, particularly where these offences carry lengthy prison sentences or a requirement to register as a sex offender.¹⁷

Online counter-terrorism measures

The use of the internet by terrorist groups to target children online requires States to respond and protect children from recruitment.¹⁸ The protection of the public may also justify limitations under the qualified rights within the CRC, including the right to freedom of expression and privacy. Any such limitation must, however, be proportionate. Surveillance and monitoring for the purposes of preventing terrorism may be a legitimate interference with the right to privacy, but for it to be so it may not be unlawful or arbitrary.¹⁹ In the view of the Special Rapporteur on counter terrorism, 'lawful' restrictions on the right to privacy must be prescribed in legislation, 'necessary in a democratic society', necessary to achieve a legitimate aim, and the least intrusive option available to achieve that aim.²⁰

¹⁵ See Committee on the Rights of the Child, General Comment No. 10 (2007) on children's rights and juvenile justice, CRC/C/GC/10, 25 April 2007, para. 10.

¹⁶ Convention on the Rights of the Child, Articles 19, 34.

¹⁷ See CRIN, *Discrimination and Disenfranchisement: A global report on status offences (3rd edition)*, 2016, p. 38. Available at https://archive.crin.org/sites/default/files/crin_status_offences_global_report_0.pdf.

¹⁸ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Article 4.

¹⁹ Convention on the Rights of the Child, Article 16.

²⁰ *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/HRC/13/37, 2009, paras. 16-17.

Counter-terrorism measures must also be compatible with the prohibition of discrimination so that all children enjoy their rights on an equal basis.²¹ As noted within the Neuchâtel Memorandum, prevention strategies should avoid and seek to prevent the stigmatisation of any religion, culture, ethnic group, nationality, or race.”²² Where systematic monitoring of information within schools produces information that is shared with law enforcement agencies, these measures may serve to draw children into the criminal justice system rather than acting as a safeguarding tool to prevent children being groomed and recruited by terrorist groups.

Conclusion

Signatories to this submission welcome the opportunity offered by the new General Comment on children’s rights in relation to the digital environment to explicitly address access to justice for children, and the rights implications for children within justice systems, whether criminal or civil.

Sincerely,

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- Terre des Hommes International Federation (TDHIF)

²¹ Convention on the Rights of the Child, Article 2.

²² Neuchâtel Memorandum, p. 5.