

“Children Without Parental Care”
Committee on the Rights of the Child
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**SUGGESTIONS FOR GUIDELINES
PERTAINING TO
“CHILDREN [AND ADOLESCENTS] WITHOUT PARENTAL CARE”**

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1. State Law Should Expressly Say That Family Reunification Is A Primary Goal

CRC article 25 requires “periodic review of the treatment provided ... and all other circumstances relevant to his or her placement.” The overriding criteria of the review must be the end objectives, and national law must state the objectives in clear and concise terms.

National law needs to expressly define the objectives that will guide decision-making when children and adolescents are in alternative care. If the law does not clearly lay out the objectives, it is easy to lose sight of the big picture. It is easy for immediate problems – like, “Where will this youngster stay tonight?” --, and on malfunctions in the system – such as, “How can we protect kids from being physically abused by staff in institutional placements?”

The end objectives must include the goal of reunifying the family. As the preamble of the CRC states, “the family [is] the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children.” For a given youngster, this does not mean just *any* family, but *that particular* child’s family – that child’s mother and father (biological or adoptive),

along with that youngster's siblings, grandparents, and other extended family members, as applicable.

It is the duty of the State to do all that it reasonably can to reunite each boy and girl in its legal custody with that youngster's parents, and this end-goal must be expressly defined in the national law.

Of course, there will be cases when a youngster's developmental well-being will not be served by reunification with the parents, or cases when this will be impossible (as when the parent is dead, or missing, or otherwise not available). The law will have to make this clear when it specifies the end-goals of state intervention. But unless parental reunification is expressly specified in the law as the criteria by which all of the innumerable day-to-day care decisions are ultimately judged, then there will be a danger in losing sight of the long-term developmental needs of the child, and of all the other family members. ("The family [is] the fundamental group of society and the natural environment for the growth and well-being of *all its members* and *particularly* children.")

2. The Youngster's Psychological Well-being Should Be At the Center of Attention

The title of the discussion day is "Children [and adolescents] without parental care." We are always prisoners of our language, however. We tend to use words and phrases as shorthand expressions, rather than fully say what we mean. So words quickly become jargon, losing their ordinary meanings, or turn into cliches; as a result, our words not only fail to communicate what we mean, but the jargon and cliches come to our tongue without any thinking or real meaning behind them.

The word *care* has suffered some of these drawbacks.

The word *care* brings up mental images of physical care. ("I take care of my car; I change the oil and tune the engine." "I take care of my goldfish; I feed them everyday, give them fresh water, and clean the bowl."). Of course, at some level of awareness we know that much more than physical care is involved when we discuss the state's obligations to provide alternative care under CRC article 25. But even though we know this intellectually, it is very easy to lose sight of the psychological aspects (the emotional and "cognitive" dimensions) of a young person's inner life.

When matters are framed in terms of "children's rights," the emphasis often tends to be on the word *right*. But rights are held by *human beings* – in this case, by children and adolescents under 18 years --, and the psychological part of existence is fundamental to what it means to be a human being. What is especially important is *feeling* loved, valued, or simply "wanted." And these are precisely the feelings that kids often don't have when they are separated from their parents.

First of all, it is a fact of life that children, especially younger ones, tend to personalize their interpretations of things. When the cause of the separation is beyond the control of the parents, and therefore cannot rationally be attributed to the parents' lack of love or caring, children can still perceive it as their fault. When a parent dies, for instance, it is not unusual for a child to feel responsible. Even adolescents tend to

interpret unavoidable separations as abandonment by their parents; their intellectual reasoning will tell them that this is not so, but they can still *experience* the loss as an abandonment.

In the second place, the problems are even more serious when the cause of the separation is parental abuse and neglect. There are several different emotional patterns that youngsters exhibit in these situations, but the common denominator is the profound sense of being unloved, unvalued, unwanted.

Thirdly, there are the problems that kids experience while in alternative care. A number of submissions to the discussion day have highlighted the neglect, and the physical and emotional abuse, that so often occurs in institutions, and even in foster families. What is important to keep in mind is that the youngsters are *interpreting* these events *in light of* their interpretations of the events that caused them to be away from their parents. The submissions have also described the instability in placements, and the rapid change over in staff and professional helpers. And, here again, we must remember that the kids are interpreting the actions of all of these adults as a continuation of what they have already experienced. The new events simply confirm what they have been feeling: they are unlovable, unwanted, without value.

Finally, there is the intense importance to children and adolescents in maintaining their relationships with their parents *even when* the parents have serious problems that make them “unfit.” For one thing, the emphasis should not be simply on “maintaining contacts” or “links”: the kids need *help in interpreting* their situations. For instance, even though the mother or father may be “unfit” – an alcoholic, or physically abusive, for instance – does not inherently mean that the parent does not love the child. (As professionals in the fields of prevention and treatment say, “Parents who abuse their children do not need to love their children more, they need to love them more wisely.”) The youngsters will need help in understanding that all human beings are imperfect, and that their parent’s faults are not their fault. For another, the kids will need *help in learning to forgive* their parents for the abusive and neglectful conduct. As long as the youngsters are bitter towards their parents, they will be angry at themselves and the whole world. And kids will *need help in learning to value themselves*. Regardless of a parent’s rejecting feelings towards the child, regardless of what has happened to the child, the youngster is still worthy of being loved, valued, and wanted. But since the kids don’t believe that, we must do all we can to help them *feel* that they are truly valuable.

Here, too, we are prisoners of our language. When things have gone so wrong that children cannot live with their parents, “maintaining relations” fails to express the need to heal those relations, and that the healing will come from changes in how the youngsters see themselves, their parents, and their situation.

In summary, too often discussions of kids in state care focus on the physical, and even when attention is paid to their relations to their parents and other family members, insufficient importance is paid to what is going on with them psychologically. How boys and girls see themselves is intimately connected to how they see their mothers and fathers. How they interpret their separations from their parents will strongly influence how they feel about themselves, and how they understand the world, and their place in it.

Some of the submissions make reference to the states of minds of the kids (“deep needs to belong,” “need for affection,” or “feel unwanted,” for instance). But it is very easy to overlook the intangible dimensions of life. For this reason, it is important to deliberately remind ourselves of the emotional lives of children and adolescents.¹

3. The Provision of Alternative Care Should Be Integrated Into a Comprehensive State Policy on Family and Children

While the topic of the discussion day is “children [and adolescents] without parental care,” all of the important issues are connected to things that the State needs to be addressing with respect to families “as the fundamental group of society.” For instance: Providing support to families will help prevent children from being placed in alternative care. The support service that it provides to parents in order to reunify the family are same measure that were needed to have prevented separation in the first place. (The mother overcoming her drug habits; learning anger control and parenting skills; economic assistance, and so forth.) And when kids leave state care, they will, in the not-too-distance-future, become parents themselves, and will be confronted with the same types of things that caused them to be deprived of parental care. (Indeed, a considerable number of “children” in state care are already parents.)

To say that the State’s policies and programs must be “integrated into a comprehensive national policy on families” does not mean that everything has to be done perfectly or perfectly coordinated. Nothing in life is perfect, and it is not possible for a government to operate with the precision of computer or a watch. It only means that laws, and policies, and budgets pertaining to alternate care must not be seen out of the broader context of what the State is (or is not) doing with respect to the institution of the family.

Moreover, each element of the State’s policy on families must have its own budget allocation, and each allocation must correspond to the relative importance of that program within the over-all plan on family and children. Too much spending on institutionalization or foster care, in comparison to the allocations for family support measures aimed at prevention, for instance, will end up harming kids.

¹ To give some random examples:

“[There are a number advantages for children being cared for by relatives. They] include:
Preservation of family, community and cultural ties.
Avoidance of trauma resulting from moving in with strangers.
Less likelihood of multiple placements.”

And:

“basic needs such as adequate housing, nutrition, and health care.”

The number one advantage of living with one’s extended family, from the child’s or adolescent’s point of view, is that their relatives will love them, will make a commitment to the youngster that is seen as part of a life-long relation of mutual caring. In a word, the kids *feel* valued in a way that can not be duplicated by “strangers.” And feeling wanted or valued is as basic a need as a human being can have.

4. All problems need to be subjected to a gender analysis.

The United Nations system has adopted a policy of mandatory gender analysis of the problems that each agency or department is tasked to address. A “gender analysis”

identifies, analyses and informs action to address inequalities that arise from different roles of women and men . . . , and the consequences of these inequalities on their lives, their health, and well-being.²

But it’s easier to require a gender analysis than to ensure that one is in fact carried out.

None of the submissions to the discussion day give sex desegregated data of kids in care, or otherwise discuss the differential impacts of the various causes of separation, or the male/female differences in care services, or the differential outcomes of various programs on boys and girls.

To be sure, the things that give rise to separations *to some extent* will affect youngsters without any differential impact between boys and girls. And the things that need to be done to assist kids while in state care will, *to some extent*, be the same, irrespective of whether the young person is male or female. But to some extent social problems *will have differential impacts* on females and males, and, correspondingly, the solutions will have to be *gender-tailored* so as to meet the needs of girls, as girls, and of boys, as boys.

The purpose of a gender analysis is threefold: First, identifying the sex-differentials in how problems are impacting boys and girls will alert us to the need to look for more closely for the causes of the problems. Second, finding that out will help us to tailor our solutions to more accurately address the problems. And third, a gender analysis will tell us if our program-responses are working. (The aggregate-data may show progress, but the sex-desegregated statistics may reveal that either the boys or the girls are not benefiting as planned, for instance.)

The submissions to the discussion day have identified several categories of situations where children and teenagers are being separated from their parents. These include lock-up in juvenile (and adult) detention centers, street kids, and military service. In all of these situations, boys make up the overwhelming majority. (There is a diversity of patterns when it comes to kids living and working on the streets, of course, but the overall generalization is still valid.) In each of these three situations, things are happening in the lives of boys that are significantly different than what is going on in the lives of girls. Which means that prevention, “care,” reunification, and so forth will have to have gender-specific components in order to be effective in meeting the needs of these young people.

The situation of parents must also be subjected to a gender analysis. For instance, the overwhelming majority of adult prisoners are males, and many of these

² Gender Glossary, Annex.1, WHO, *Integrating Gender Perspectives in the Work of the WHO* (WHO, Geneva, 2002), *citing* UN Doc. E/1997/L.30, adopted by ECOSOC 14.7.97.

are fathers. In addition, many if not most countries in the world are seeing a rise in single parenthood, which typically means “lone mothers,” which in turn means children without their father’s care. This deprives children of half of what other children have in life as their sources of love, protection, role models and so forth. And it exposes the children to the risk of being without any parent at all when something goes wrong in the mother’s life. Once again, a gender analysis has a threefold payoff: pinpointing the problems; tailoring the solutions; and tracking the successes (and shortcomings) of the interventions.

5. We Shouldn’t Be Afraid to Say the M-word.

Institutional care is horribly expensive, and foster care, while much cheaper per youngster, is still very expensive.³ And prevention, while even cheaper per-child-benefited than alternate care, is expensive, especially when one considers the diversity of risks that give rise to boys and girls not being raised by their parents. (Drug addiction, single-parenthood, including unwed, teenage mothers, the illness or death of a parent, and so on.)

One of the purposes for this discussion day is to help the “development of United Nations Guidelines for the Protection of Children [and Adolescents] without Parental Care.”⁴ On the one hand, it is easy to state what should be done. Guidelines can be like a wish-list, a description of the ideal to aim towards. On the other hand, it is much harder to live up ideals, to comply with guidelines, principles, or standards.

To give one depressing example: The UN system has produced dozens of pages of guidelines on juvenile justice in the Tokyo Rules, the Beijing Rules, and so forth; thousands upon thousands of words of text that usually bear very little correspondence to changes in state behavior towards juvenile prisoners. Or to take an example from the topic at hand: Some of the submissions describe the abuse, neglect, and lack of services for kids in state care in several affluent, Western countries. The States in question have good written guidelines. But the guidelines are not being lived up to.

Why is that?

While the submissions do not discuss that question, the bleak descriptions of the staffing situations give some clues. Insufficient personnel; under- or unqualified staff; poor training and supervision; high turnover; and “94% of the staff questioned” said that they have been physically or verbally abused by the kids in their care, for instance.

³ None of the submissions contain overall cost figures for the countries under discussion. The only data the present author has located are old figures from the United States. The federal government spending on foster care went from \$309 million annually to \$1.8 billion in ten years (from 1981 to 1991). This does not include state spending, keeping in mind that family and child protection is primarily a state and local government function, and that the need for foster care greatly surpasses the care actually provided. Susan Mezey, *Children in Court* (1996), at p. 104.

⁴ “Outline: Day of General Discussion: Children without parental care,” at para. 7.

It will take a considerable amount of money to set the staffing situation right. Those staffing needs will have to be costed-out; legislators will have to be convinced to make the budget allocations – either take the money from other programs, or raise taxes, for instance --; and the public will have to be persuaded that it is in its own long-term interests to pay for those expenses. Absent all that, guidelines are a wish-list that few people will take seriously.

If we believe that we have solutions for the boys and girls who are without parental care, and if we have the courage of our convictions, we will have to speak the M-word.

6. Measures For Helping Kids Without Parental Care Need to be Placed in the Broader Context of Good Governance

There is a “systems” dimension to the right to alternative care in CRC article 25, and to the overall challenge of the State’s raising of children and adolescents who are not being raised by their parents. The emerging concept of “good governance” can make an important contribution to the systems-aspect of the issue.

While it is true that human rights are held by individuals, the State realizes those rights primarily by addressing people through bureaucratic systems. For example: Kim has a right to immunization shots, but the state does not create an immunization program just for Kim; Chris has a right to primary education, but the state does not build a school house and train teachers just for Chris. Rather, the state has a public health *system* and a school *system* that it has built up over many years. For Kim and Chris to actually enjoy their CRC rights to health and education, the health care and educational systems will have to be in place even before they are conceived.

And the same is true for the kids who are not being raised by their mothers and fathers, or who are at risk of being deprived of parental child-rearing. Family-support measures; the police and social workers who rescue abused and neglected kids; the emergency facilities where these children will stay upon first coming into state custody; the foster homes and the residential homes; the battery of services, like counseling, parental training, and family monitoring, and more – each of these things requires a bureaucratic system that treats each individual youngster or parent as a member of a class of defined beneficiaries. Kim gets child-protection services not because Kim is a unique individual, but because the State fulfills its obligations to all its right-holders by creating systems that provide goods and services to classes of people defined according to some particular need, and Kim falls into one of the defined categories.

The notion of good governance aims primarily at improving the systems aspect of government: it aims at improving the structures of government, so that all of its systems will do a better job at getting the goods and services to the people who are entitled to them. While quite a few things come under the concept of good governance, this paper will mention four:

- Impact assessments

- Coordinating mechanisms
- Facilitating mechanisms
- Human rights.

Impact assessments

One of the most powerful good governance innovations is the requirement of impact assessments before making a decision. For instance, before passing legislation or issuing an administrative decree, there needs to be a written report that discusses the possible effects of the proposed measure. How might the measure impact on different segments or demographic groups? (E.g., pre-school children, teenagers, men, women, rural residents, different income groups?) How might it affect various types of interests? (E.g., environment, job creation, automobile accidents, right to play, right to education?) What are the potential unwanted, negative consequences or side effects? (E.g., Will economically pressed parents use state care facilities as a “boarding house”? Will the proposed economic supports to pregnant girls result in an increase in teen pregnancies?) What are the probabilities of these risk materializing, how can the risks be minimized or avoided, and at what cost? Have interested groups had a chance to express their views on the proposed measure, and what did they say?

CRC article 3(1) is a procedural rule that is, in essence, a requirement to undertake an impact assessment: the State shall *consider* how its actions are affecting, or its proposed actions might affect, the interests of boys and girls under the age of 18 years.

The duty to take into “consideration” the well-being – the “best interests” – of minors is a procedural requirement to assess the positive and negative impacts of governmental behavior on the affected youngsters. Whether the decision affects a single person (e.g., a school expulsion, the removal of a child from the parents), or a particular group of boys and girls (e.g., the distance and the route that students have to travel to get to a new school), or a demographic group (e.g., the age for mandatory school attendance), the potential impacts must be assessed. The decision-maker must consider the possible consequences on “best interests” – on the youngsters’ well-being from a totally holistic view of the human person – before taking action.

Unfortunately, article 3(1) is often spoken of as if it were a kind of substantive rule – as if it said something like, “the State must do what is best for ‘the child’” --, or else watered down to a “general principle.” As a result, a powerful procedural rule, a mandatory requirement for some type of impact assessment, is turned into a feel-good slogan, an empty rhetorical phrase that does not translate into meaningful behavioral consequences for governmental actors.

The procedural requirements of article 3 play out differently in the different kinds of decision-making. When the state actor is making a decision about an individual boy or girl, it is important for that person to have training. This helps explain the importance that the CRC literature places on “training in children’s rights.”

Unfortunately, there are two problems with the typical advocacy for training. First, the focus is on training in *rights*. But since rights are held by *human beings* – indeed, rights are social constructs to promote respect for each person’s human dignity --, it is absolutely essential to have training *about* human beings – specially, training in the *developmental needs* of kids. The human beings -- the kids themselves -- tend to get lost sight of in the fixation on the abstraction of “children’s *rights*.” The second problem is the focus on *child*. Adolescents are not children; indeed, 16 and 17 year-olds find it offensive to be called a “child” or treated as a child. And, what is critical to the present point, the developmental needs of teenagers are fundamentally different from those of children, just as the development needs of babies differ from those of pre-school children, which differ again from older children. (Contrary to rumors, article 1 does not say that everyone under 18 is a child. The definition of “child” in article 1 is a *legal fiction*, an artificial definition. It is saying, in essence, “When you read the term ‘child’ in this treaty, do not interpret it in its ordinary meaning; rather, read it artificially as meaning ‘everyone under 18’.” It is *not* saying, “When you look at a 16 year-old, you are looking at a ‘child’.”)

When decision-making pertains to measures concerning demographic groups, or affecting smaller social groups, then article 3 is more demanding. The Government will need to have some specialized unit to conduct the more complex impact assessments. The people working in these units will have to understand the developmental needs of all categories of under-18s, from conception onwards, as well as having expertise in other fields of knowledge. Creating these specialized units is a structural, or good governance, initiative.

Impact assessments are disparately needed when minors are outside of parental care. In the designing of the over-all child protective services system; in the running of an individual residential program; or in the case planning for each individual youngster, the State must comply with article 3(1)’s procedural requirements. The way that a State will carry out impact assessments can differ according to the practicalities of the situation, but the best-interests rule is a procedural *right* that must always be respected.

Coordinating mechanisms

If a Government is going to effectively provide goods and services to right-holders, all of the ministries, and all of the departments within and across the ministries, are going to have to do a better job in working together. Information has to be shared, policies and programs have to be jointly planned and carried out, priorities will have to be set at the highest levels of office-holding, and sufficient money allocated to achieve the designated results. More and more States are creating coordinating mechanisms to promote these objectives, thanks in significant part to the prompting of the Committee on the Rights of the Child, CRC advocates, and UN agencies. The Convention of the Rights of the Child contains no provision that requires such coordinating mechanisms, of course, but no Government can do its best to realize the rights of CRC right-holders without such structures.

When it comes to the subject of “children [and adolescents] without parental care,” the problems are so many and so difficult that all States will have to have a whole range of policies, laws, and programs. Family-support prevention measures,

emergency response capabilities, longer-term places to stay, numerous services, and so on, in order to “ensure to the maximum extent possible the survival and development” (article 6) of each child and adolescent within its physical or legal custody.

Facilitating mechanisms

While there are a variety of models of ombudsman offices, one of the common functions is to facilitate the processes of governance. Because they are part of Government, while at the same time standing outside of the ministries that must provide the educational, health, and other goods and services, they have unique opportunities to stimulate improved performance. They can develop best practices, conduct human rights-related training, do trouble-shooting, and provide many other services to officials and public servants throughout the Government.

To put it another way, when discussing guidelines for “children [and adolescents] without parental care,” it is not enough to look only at what happens at the point of service delivery, or at the point of direct, face-to-face interaction between a youngster and a state actor. It is essential to look “up stream.” The state actors are players in a large, complex system that, in turn, is connected to other governmental systems. In order to ensure that the delivery-point actors do what they are required to do, and refrain from doing what is prohibited, innovative “structural” mechanisms are needed. This is why the emphasis on good governance is so important to the actual enjoyment of human rights.

7. Good governance includes respect for human rights, including the parents’ rights under CRC article 5 to supervise their children’s exercise of rights

While “human rights” falls under the concept of good governance, it is not a mechanism like those discussed in the preceding section. It is in large part an attitude, or a way of looking at things, or set of values, which is sometimes referred to as “a culture of human rights.”

In discussing “children [and adolescents] without parental care” in a forum organized under the auspices of the Committee on the Rights of the Child, the idea of “children’s rights” is at the forefront of everyone’s attention. But children and teenagers cannot grow up properly unless their mothers and fathers are empowered to fulfill their roles in child-rearing. Adults have human rights under international human rights law, and parents must be able to exercise those rights if they are to be in a position of doing the best job of parenting that they can.

Enjoyment of the right to work is of obvious importance to the parents’ ability to meet the material needs of the children, or even to keep the family together (ICESCR articles 6 & 7). Parents are the natural and the best champions of the child’s well-being, and the exercise of civil and political rights is essential for mothers and fathers to play their advocacy and representative roles. And the authority of parents to make child-rearing decisions free from arbitrary interference is covered by a number of rights, such as the right to privacy and the right to found a family (ICCPR articles 17 & 23).

While the rights of parents under the two Covenants are clearly visible, what is often overlooked is the fact that the CRC makes parents the guardians of their children's CRC rights. Indeed, most youngsters are not in a position to autonomously exercise rights as adults exercise rights. Older adolescents, of course, can make autonomous decisions in exercising rights, at least when they are given proper guidance and support, so the role of parents under article 5 shifts over time. But throughout the better part of the period covered by the Convention, parents are the *de facto* if not the *de jure* holders of their children's CRC rights.

That the CRC makes parents the guardians of their children's CRC rights is plainly stated in article 5:

States Parties shall respect the ... rights ... of parents ... to provide ... direction and guidance in the *exercise by the child of the rights* recognized in the present Convention.⁵

However, the guardianship nature of article 5, and the fact that parents are the *de facto* right-holders for most of childhood, are often overlooked. The reason for this are the odd ways that article 5 is presented in the literature on the CRC. A few real-life examples will illustrate the situation:

Article 5 stresses that States parties must respect the rights and responsibilities of parents to direct and guide their children,⁶

and,

Article 5 affirms the principle that children should not be seen as the property of their parents but as people in their own rights,⁷

and

[A]rticle [5] ... introduces to the Convention two vital concepts: parental 'responsibilities' and the 'evolving capacities' of the child. The article also signals clearly that the Convention regards the child as the active subject of rights, emphasizing the exercise 'by the child' or his or her rights.⁸

⁵ The quotation has been simplified because of the extreme complexity of the language of the article 5. It reads, in its entirety:

States Parties *shall respect* the responsibilities, *rights* and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, *to provide*, in a manner consistent with the evolving capacities of the child, appropriate *direction and guidance in the exercise by the child of the rights* recognized in the present Convention. (Emphasis added.)

⁶ Gerison Lansdown, *The Evolving Capacities of the Child* (Innocenti Insight, UNICEF & Save the Children, 2005), at 5.

⁷ Nicola Wyld, *European Children's Rights: An Overview of Law Policy and Practice* (European Forum for Child Welfare, Brussels, 1997), at 49.

⁸ Rachel Hodgkin & Peter Newell, *UNICEF Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, 1998), at 75; *quoted in* Cateline Leenen, "Children's Rights

None of those presentations of article 5 comes remotely close to being an accurate or fair description of the parent's rights. That is because all of those statements leave out a crucial part of the text: "States Parties shall respect the ... rights ... of parents ... to provide ... direction and guidance in the *exercise by the child of the rights* recognized in the present Convention." Go back over those three quotations and look for the reference to parents guiding and directing *their child's exercise* of rights. It is not there. In a manner reminiscent of the way the Kremlin removed people from photographs, the critical part of the text of article 5 is removed from the reader's sight. Out-of-sight, out-of-mind: parents are removed from the picture.⁹

There is a crucial difference between parents providing guidance to their children in the process of growing up, and having the *right* under international human rights law to supervise their *children's exercise* of rights under the CRC. In contrast to the three illustrations, States routinely recognize the role of parents in relation to their children's rights. For instance, one implementation report will say that the "child's rights are exercised on his or her behalf by his legal representative, usually the parents."¹⁰ And another that, "The age of majority is the age at which a person moves from a condition of dependency to one in which he or she can independently exercise his or her full rights as a citizen, and at the same time assume the responsibilities of a citizen."¹¹

and the Dutch Termination of Life on Request Act," in, Jan C.M. Willems (ed.), *Developmental and Autonomy Rights of Children* (Intersentia, Antwerpen, 2002), at 141, 153.

⁹ See, e.g., David King, *The Commissar Vanishes : The Falsification of Photographs and Art in Stalin's Russia* (1997).

¹⁰ France, 2nd report, UN Doc. CRC/C/65/26 (2003), at para. 94.

¹¹ Sri Lanka, 1st report, UN Doc. CRC/C/8/13 (1994), at para. 13. State implementation reports make the distinction between *possessing* and *exercising* a right. *E.g.*, Switzerland said:

As regards the minimum legal age for the exercise of certain rights, Swiss law is based, generally speaking, not on age but on "legal capacity". The Swiss Civil Code makes a distinction between the enjoyment and exercise of rights. Whereas all persons possess civil rights [under Swiss law] from birth, in that they can become subject to rights and obligations, only persons who have attained majority and are capable of forming their own views can exercise civil rights and may, by their own acts, give rise to rights and obligations [under Swiss law]. In accordance with this definition, children do not satisfy the majority requirement and cannot therefore exercise civil rights. Depending on their maturity, however, children may be capable of forming their own views and therefore be able to exercise certain rights.

UN Doc. CRC/C/78/Add.3, para. 46; see also paras. 47-59. And Germany wrote:

In speaking of the "rights of the child" the Convention does not in each case mean rights in the sense that the child could autonomously make a disposition of his or her own free will or that he or she could invariably enforce these rights by legal action through a representative. . . . The term "right" is used to describe the relationship of the child to these measures of protection because they serve the well-being of the child and he or she is therefore entitled to them. . . .

UN Doc. CRC/C/11/Add.5, paras. 11, 12.

Parental rights in the context of “children [and adolescents] without parental care”

Mothers and fathers do not lose their human rights, including their rights under CRC article 5, when they are separated from their children. They continue to wear two hats, so to speak: they hold their own rights under the Covenants, and they hold the right to guide and direct their children’s exercise of rights under article 5 of the CRC.

And even mothers and fathers who are alleged to have, or have been proven to have, abused or neglected their children continue to hold their human rights. But the legal situation becomes more complex in these situations. Three points in particular need mentioning.

(i) To begin with, parents, even those who have made serious mistakes, or have behavioral or emotional problems, play an important role in protecting their children when their sons and daughters are outside of their care. This is so for several reasons.

First of all, as the submissions repeatedly show, kids in state custody are all too often subjected to abuse and neglect by their substitute care-givers. They are physically and emotionally assaulted; they don’t get educational, health, and counseling services; they are placed in unnecessarily restrictive settings; they don’t get to see or talk to their family – parents, siblings, and extended family -- ; they have no effective way to bring their grievances to anybody’s attention, and on and on.

Secondly, parents, even those who have acted negligently or abusively, play an important role in defending their children’s rights when the system fails. At least they do in countries that have a basic respect for the rule of law, and especially where parents are able to receive legal assistance. The fact that parents have rights – actually two kinds of rights: their own rights as individuals, and their parental rights to protect their children’s rights – gives them the ability to demand accountability in administrative and judicial forums. While this is by no means enough to fully protect kids in state custody, it still plays an important role that should not be overlooked or undervalued.

And thirdly, most parents and most children want to be reunited as a family, and reunification is possible in most cases when basic support is provided. And the process of reunification is facilitated when parents can take action to protect their children from abuse and neglect while in state care. Performing that protective role is of great psychological importance to both the children and the parents. It validates the mother’s and father’s identity as parents, indeed as human beings, since the parent-child relationship is a basic part of what it means to be a human being, and it demonstrates to the youngsters that their parents have not abandoned them.

(ii) The second point to keep in mind is that parents are in a conflict of interest situation in the legal portions of abuse and neglect cases. That is to say, when the parents are fighting the allegations of abuse or neglect, or, when the

allegations are proven, arguing about whether the children should be allowed to return home. So other actors must be brought into the picture in order for children and adolescents to have the unbiased, undivided, informed guidance and assistance they need for expressing themselves and for making decisions during the legal proceedings. Having an attorney is not enough in these situations because the specialized role of lawyers neither authorizes nor equips them to serve as parental substitutes in providing this kind of guidance and direction. States have found various ways to meet the needs of children and adolescents in these cases, such as community volunteers who serve a friend-of-the-child, or a guardian ad litem.

On the other hand, there is often no inherent conflict or interest, or only an attenuated one, when it comes to parents wearing the two hats in connection to challenging the state's abuse and neglect of their children. With that said, it is still usually advisable for young people to have the same kind of independent friend/advisor as they should have in the legal proceedings, given the strained emotions and relationships.

(iii) The third point is that, while parents retain their *human rights* when they are separated from their children, including their CRC article 5 rights, the state modifies or suspends their authority under *domestic law* with respect to making certain child-rearing decisions when abuse and neglect charges are filed. Social workers and judges are given certain aspects of the parental decision-making authority, subject to various safeguards, such as the parent's right to be heard, and the right to challenge abuses of discretion.

In summary, discussions about "children [and adolescents] without parental care" need to be grounded in human rights, and this must include the rights of all concerned -- the boys and girls, along with the mothers and fathers. And, in light of the marginalization of parental rights under CRC article 5, as either the *de facto* right-holders during childhood, or in their role of advisor, supporter, and friend during adolescence, particular attention must be paid to the parents' human rights under the Convention on the Rights of the Child.

APPENDIX

SUGGESTIONS FOR GUIDELINES
PERTAINING TO
“CHILDREN [AND ADOLESCENTS] WITHOUT PARENTAL CARE”
by Bruce Abramson

Committee on the Rights of the Child
Discussion Day, 16 September 2005
Palais Wilson, Geneva

SUMMARY OF SUGGESTIONS

- 1. State Law Should Expressly Say That Family Reunification Is A Primary Goal**
- 2. The Youngster’s Psychological Well-being Should Be At the Center of Attention**
- 3. The Provision of Alternative Care Should Be Integrated Into a Comprehensive State Policy on Family and Children**
- 4. All problems need to be subjected to a gender analysis**
- 5. We Shouldn’t Be Afraid to Say the M-word.**
- 6. Measures For Helping Kids Without Parental Care Need to be Placed in the Broader Context of Good Governance**
- 7. Good governance includes respect for human rights, including the parents’ rights under CRC article 5 to supervise their children’s exercise of rights**