Chapter 2

Children’s Rights

2.1 Introduction

This chapter aims to introduce the rights terminology used throughout the thesis in the context of child victims. It also sets the stage for the integration between children’s rights and their needs, as articulated in psychological and sociological literature. The rights discourse, however, is controversial, and children’s rights present a particularly difficult case for rights theorists. Arguments against the rights framework in general and children’s rights in particular will be therefore discussed before presenting justifications for such a normative framework.

Although rights rhetoric is not without fault, its use in the context of children is a universal fact today. The overarching rights theory addressing children is the Interest theory, which defines rights as any needs, or interests, that are considered basic and universal. The Interest theory has been suggested as an alternative to the Will theory which excludes all those lacking the capability to make independent, rational choices such as young children, people with mental health problems and those with cognitive disabilities. Following an interest–based, or a needs–based rights theory, numerous scholars propose varying categorizations of children’s rights. A review of these analyses indicates that children have a complex net of welfare, protection and self–determination rights. While different authors make somewhat different categorizations, the interrelationship between children’s needs and their rights is a reoccurring theme in their arguments.

Notwithstanding the theoretical disputes and vagueness regarding children’s rights, the international arena has demonstrated a historical commitment to this issue, as reflected in early declarations. Most important, however, is the 1989 UN Convention on the Rights of the Child,¹ which has been the single most widely ratified treaty ever (Cohen 1992). The Convention sets up a comprehensive bill of children’s rights which includes both self–determination and protective rights. While their application is questionable across nations, it seems that there is no dispute about the existence of these rights, at least as political, and sometimes legal, aspirations.

Accordingly, this chapter begins with a discussion of the opposing arguments to the rights discourse — both in general and in the case of children — before

¹Hereinafter the Convention or the CRC.
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presenting the justifications for rights rhetoric. It next reviews rights theories in
general as well as theories that address the specific case of children’s rights. The
second part of this chapter presents some international human rights documents
that relate to children, while focusing in particular on the Convention, with specific
attention to those rights that are related to child victims.

2.2 The rights discourse: critics and proponents

Critiques of the rights discourse have been expressed by numerous theorists and
emerged from various directions. Six types of claims against the use of rights ter-
minology have been identified (Sunstein 1995):

A. Although some rights are founded on communal support and have a social and
collective character, the rights terminology creates an individualistic discourse,
thus confusing rights that are ‘desirable’ with rights that are not.

B. Rights do not leave room for compromise and competing considerations, and
therefore are not suitable for complex issues. Indeed, feminists have argued
that the simplistic language that characterizes the rights discourse fails to
address the complex experiences and concerns of women (Charlesworth and
Chinkin 2000, p. 208).

C. Rights are general and indeterminant, and therefore unhelpful in resolving con-
crete conflicts. Accordingly, it has been argued that since rights rhetoric is so
vague, it is often unable to meet human needs, in particular when rights con-
flict. The argument is that the balancing mechanism leaves so much discretion
to politics, and is so open to manipulations, that there is hardly any meaning
to the rights discourse in these situations (Higgins 1999, Charlesworth and
Chinkin 2000, p. 209). For example, the right to privacy can be invoked by
those who believe in the right to reproduction and abortion. At the same time,
however, the privacy right has been raised as a justification for not criminaliz-
ing domestic violence (Klare 1991, p. 100). From a social justice perspective,
it has been argued that rights are sufficiently elastic to be used by those who
want to maintain power imbalances, and are too weak to be helpful for those
who want to bring about change (Klare 1991).

D. Rights foster selfishness and individualism, and neglect connections and social
dimensions (Minow 1990). Indeed it has been argued that a needs terminology
is, at least ostensibly, more compassionate, responsive and ‘feminine’ than
rights talk (Waldron 2000, p. 123).

E. Rights protect existing, unjust distributions of power through the protection
of the private sphere. Specifically in the context of women’s rights, it was
argued that rights often focus on autonomy, privacy and liberty — values
that might be relevant to male, autonomic individuals — while at the same
time neglecting the needs of women and the abuse of private power within
2.2 The rights discourse: critics and proponents

the home and the workplace (Higgins 1999). More generally, rights discourse has been criticized for its lack of ability to change race, class, gender and sexual preference discrimination and subordination, as the rights that have traditionally been included leave the private sphere (including work places) intact (Klare 1991).

F. Rights discourse leaves no room for personal responsibilities and obligations (Minow 1986, Waldron 2000).

Perhaps the most difficult critique of rights discourse comes from Minow (1986, 1990, p. 146), who presents the dilemma of difference: rights rhetoric offers only two separate tracks — one track of freedoms and civil rights, granted only for those who are identified as autonomous, rational and capable of making independent decisions; and the second of protections and social provisions, at the price of exclusion and disempowerment, for those who are labelled dependent, incompetent and irrational. People belonging to the latter group can find themselves in a worse situation than they were without having used the rights discourse:

Thus, to this day, many fields of law divide society into persons who are mentally competent and persons who are not. The competent have responsibilities and rights; the incompetent have disabilities and, perhaps, protections. The competent can advance claims based on principles of autonomy; the incompetent are subject to restraints that enforce relationships of dependence (Minow 1990, p. 126).

However Minow and others have addressed these critiques and asserted that rights rhetoric has substantial benefits despite its shortcomings. For many, then, rights rhetoric needs to be transformed, not deserted (Klare 1991, p. 97).

Sunstein (1995, p. 729) argues that critiques of rights talk are typically based on failure to understand their nature and to make necessary distinctions between various rights. Some critiques, for Sunstein, may be true regarding specific rights, but not for the rights rhetoric in general. Therefore, despite the existence of some problems with specific rights, the framework as a whole cannot be rejected: ‘The real question is not whether we should have rights, but what rights we should have’ (Sunstein 1995, p. 757).

As to the concern regarding lack of responsibilities within the culture of rights, which for Sunstein (1995) is a prominent critique, he argues that there are many duties and limitations imposed upon private and public actors such as regulations regarding water pollution, cigarette smoking, sexual harassment and racist speech — which are all legally enforced responsibilities. In fact, Sunstein argues, rights and responsibilities do not oppose — they create each other (Sunstein 1995, p. 744). Waldron (2000, p. 123) too agrees that rights and obligations are correlated and reciprocal.

Replying to critiques regarding the excessive individualism associated with rights discourse, Sunstein claims that many rights in fact help in constructing communal life and are dependent on the existence of community and social institutions.
Other critiques against the rights terminology have been addressed by comparing it to the alternative needs terminology, as the following section demonstrates.

### 2.2.1 Rights versus needs discourses: strengths and weaknesses

Rights proponents often emphasize the advantages of the rights discourse over the needs discourse. Indeed Waldron (2000) focuses his analysis on the comparison of these two ostensibly competing frameworks. Waldron argues that rights are typically regarded as creating duties of omission, rather than of action, while needs create obligations (if at all) to assist, help and provide (Waldron 2000, pp. 124–124). However, this categorization, Waldron claims, is based on traditional understanding of rights. In reality, the language of rights as such does not preclude the use of such claims for active, internationalist or welfarist claims (Waldron 2000, p. 127). Accordingly, rights talk can be used to promote assistance and positive action, but it does this in a different way than needs talk (2000, p. 128). For Waldron, the language of needs is an objective, neutral assessment of the needs of a certain subject, based on others’ expertise or understanding of someone else’s human needs. Rights, in contrast, are typically (although not always, such as in the case of children) expressed in one’s own voice (2000, pp. 129–130). Thus rights reflect not only respect for the person but self–respect as well:

> Both rights and needs amount to a demand that certain interests be attended to; but only rights–talk presents those interests in the voice of one who would be a full-fledged member of society, who is not going to go away, and who expects to be taken seriously as an enduring source of continuing demands (Waldron 2000, p. 131).

As to the concern regarding the indeterminacy of rights, Waldron (2000, pp. 119–120) argues that ‘needs’ are just as contestable, if not more so, because there is no universal definition of human needs. Furthermore, Waldron claims that political concepts are indeterminate by nature, so this vagueness does not discredit either rights or needs talk.

Regarding the confrontational nature of rights terminology in comparison with needs talk, Waldron (2000) claims that the latter is, in fact, just as confrontational. According to Waldron, talking about one’s needs may start as less adversarial, but often turns into individualistic demand similar to rights talk (Waldron 2000, p. 123). At the same time, needs discourse demand has its own faults. It assumes passiveness and focuses on someone else’s needs. Rights talk in contrast, Waldron claims, has traditionally been expressed by right bearers themselves or has reflected the wishes of such right bearers, as independent agents (Waldron 2000, p. 123). Moreover, needs talk has not proved to be effective, and politicians have not been quick in responding to claims about needs. African–Americans in the US, for example, have been describing their needs for generations, without any improvement in their situation (Waldron 2000, p. 122).
2.2.2 An international human rights discourse

Another recurring (and related) comparison raised by advocates of the rights rhetoric is between rights and human rights, with an apparent preference for the latter (Minow 1995b, Higgins 1999, Charlesworth and Chinkin 2000). A central difference between the two is that ‘rights’ are generally associated with negative rights or freedoms only, while ‘human rights’ are considered as including positive rights that address welfare needs as well (Minow 1995b).

Higgins (1999, p. 226) argues that in contrast with the general rights discourse, the international human rights framework is less vulnerable to criticism. For example the vagueness of international human rights can be seen as a virtue rather than a vice, allowing human rights to be used as aspirations, measures to evaluate societies and encourage mobilization. Moreover, human rights are often regarded as independent of a social contract or the existence of legal remedy when they are not addressed. In other words, although they are somewhat abstract and often lack remedial measures, they are broader and have political power (Higgins 1999).

International human rights have also been used to transform whole societies and create communal dialogue — thus encouraging collective mobilization rather than individual claims. For Higgins, nevertheless, one of the greatest challenges for the human rights framework is to address diversity in identities and cultures. This can be achieved if human rights are ready to meet the ‘personhood’ and the needs of various types of individuals, with the full range of cultural, gender and geographic differences (Higgins 1999, p. 245).

Charlesworth and Chinkin (2000) join the supporters of the human rights discourse, whilst acknowledging its limitations. Taking a pragmatic perspective, they argue that rights talk can be a powerful strategy in promoting women’s equality, as long as it is used together with other political and social means (Charlesworth and Chinkin 2000, pp. 210–212). More generally, human rights are regarded as a powerful social instrument, albeit depending on the existence of political and social philosophy to fill them with concrete meanings (Klare 1991, pp. 101–102).

The political power of rights rhetoric is asserted by Kennedy (1997) as well. For Kennedy, rights discourse grants claims a status stronger than mere ‘value judgments’, and at the same time are different from factual political claims. Claiming a right means that the claimant is correct in making a certain judgment. In other
words, ‘rights are mediators between the domain of pure value judgments and the
domain of factual judgments’ (Kennedy 1997, p. 305).

Indeed, whether or not one agrees with critiques of rights, the prevalence of
rights talk in politics and civil deliberation demonstrates its popularity, if not its
effectiveness, notwithstanding its possible existing shortcomings. It seems, however,
that a special kind of rights discourse, one that is based on international human
rights principles and that addresses human needs as well, can potentially overcome
much of the critique against rights.

2.3 Why talk about children’s rights?

If the rights discourse is controversial, then children’s rights present particular the-
etorical and practical difficulties (Minow 1995a, Ezer 2004). First, the traditional
liberal theory of rights assumes independent, rational individuals who are capable
of making choices and expect freedoms from governmental interference. Children
do not fit into this theoretical framework (Minow 1995a, p. 1579). Indeed it has
been argued that children cannot be rights–holders, as they are incapable of making
choices and exercising, or waiving, their rights (Hart 1982). As a result, children
have been largely denied the freedoms that are part of liberal society. Minow (1990,
p. 288), for example, uses children’s rights as an illustration of her ‘dilemma of dif-
ference’: children are either granted rights as equal to adults, or protections which
deprive them of their autonomy and rely on their incompetence and dependence
upon adults. The rights approach, Minow argues, while aiming to challenge the
exclusion of discriminated populations, still allows the different treatment of those
whose difference is regarded as justified or relevant, such as children. However, ac-
cording to Minow (1990, p. 285), this difference–based denial of rights to children is
not based on scientific knowledge regarding children’s capacities. Instead, it reflects
societal beliefs about what children need and how to control risks to the community.

Another argument against children’s rights discourse is that it does not recognize
the importance of kindness and concern for children, which, while not considered
rights, are central to the child’s wellbeing. Hence, in order to include these important
obligations toward children, an obligations–based perspective has been proposed as

It seems, however, that while children do not fit into the liberal notion of nega-
tive rights (rights protecting people against actions by the state), they fit well into a
notion of positive rights obliging states to act, especially for protection (Ezer 2004,
p. 3). But needs–based rights, or positive rights, create even more problems (Minow
1995a, pp. 1579–1580). Many positive rights remained unrecognized, and without
enforcement the rights rhetoric might be seen as futile (Ezer 2004). Indeed, critics
argue that to talk about moral or natural rights in relation to children is merely a
political standpoint, not a descriptive one; that since children’s welfare rights are
being constantly violated it is pointless to adhere to them (O’Neill 1992). More-
over, welfare or positive rights are typically linked with over–paternalism toward
the subjects of these rights and their further exclusion from society (Minow 1990,
2.3 Why talk about children’s rights?

On the political level, children’s rights terminology has been criticized for creating conflict between children and their parents (Brennan and Noggle 1997, p. 14), for limiting the authority of parents and interfering in the private sphere of the family (Glennon and Schwartz 1995, p. 1563). Another related critique is that children’s rights discourse creates regression from traditional child-rearing disciplines toward ‘laissez-faire’ permissiveness (King 1994) — thus ‘abandoning’ children to adult-like rights, while exposing them to adult-world dangers (Hafen and Hafen 1996, Small and Limber 2002, p. 56).

Critics of the critics offer numerous explanations and justifications for the use of rights discourse in association with children. First, the normative, declarative function of rights language is considered important. Rights discourse can evoke a process of learning and adopting these rights in people’s behavior as well as through legislation (Ezer 2004, p. 48).

Second, rights rhetoric is associated with respecting children as individual human beings. For Michael Freeman, for example, rights need not be dependent on competence or capacity, but on dignity and decency; children may have rights simply ‘...by virtue of being children’. (Freeman 1998, p. 140). John Eekelaar (1992) emphasizes the importance of attributing rights to children in order to respect their growing capacities to make decisions. Rights terminology, therefore, is a reminder for adults to refrain from unneeded paternalism and to respect the child’s actual or potential wishes always.

Third, it has been argued that ‘needs’ language is sufficient in normal situations, but not all children enjoy a normal environment. Often in reality children are vulnerable, and their best interests are not always the primary consideration of their parents, caretakers or the state. Rights talk becomes critical when the initial assumptions of parental love and care and children’s general wellbeing collapse (Fortin 2003, p. 592 and Freeman 1992, p. 55). Indeed, the reality of high rates of child abuse shows the price of non-intervention. As Minow (1990, pp. 303–304) argues, to leave the private sphere untouched by law is to abandon children to their own destiny, with high risk of being abused.

Fourth, it has been argued that children can have rights even when those rights are not implemented in reality. According to Dworkin, for instance, certain rights do exist even if they are not encoded in the state’s legislation. A right exists when it will be wrong or unfair of the state to act against it, even when that action benefits the general public or the majority (Dworkin 1981, p. 139). Freeman too believes that rights terminology can be inspirational, rather than descriptive; therefore the lack of a statute protecting a right or creating an enforcement mechanism for it does not mean it does not exist (Freeman 1983, p. 35). Feinberg also acknowledges that there are some ‘manifesto rights’ that are not necessarily correlated with someone else’s duty:

Natural needs are real claims if only upon hypothetical future beings not yet in existence. I accept the moral principle that to have an unfulfilled
need is to have a kind of claim against the world, even if against no one in particular (Feinberg 1980, p. 153).

He is therefore willing to be forgiving to ‘manifesto writers’:

...for this is but a powerful way of expressing the conviction that they ought to be recognized by states here and now as potential rights and consequently as determinants of present aspirations and guides to present policies. This usage, I think, is a valid exercise of rhetorical license ... (Feinberg 1980).

More broadly, and similar to what has been suggested regarding the general rights analysis, most of the arguments against children’s rights can be explained largely by the different meanings this concept bears for different critics. Many of the objections may be related to the Children’s Liberation movement, which promoted equal rights and freedoms for all children in the 1970’s (Fortin 2003, p. 591). With John Holt and Richard Farson as their most prominent advocates, the Liberationists argued that children should be seen as a minority group which deserves to have adult freedoms and self determination rights, similar to other discriminated minorities, such as African–Americans and women (Holt 1974, Farson 1974). Not surprisingly this approach faced numerous objections. In particular, this approach signaled the dichotomy between ‘self–determination rights’ — freedoms and legal rights — on the one hand, commonly associated with adults and teenagers approaching adulthood, and ‘child welfare’ discourse on the other, which focuses on the state’s obligation to nurture and protect all children against harm (Rogers and Wrightsman 1978, pp. 4–6). As suggested earlier, many of the objections relate to children’s self–determination rights, although some critics attack the welfare needs approach as well.

2.3.1 Minow’s Relational Model of Rights

The liberation–welfare dichotomy is not a necessity, as Minow (1990, pp. 214–216) suggests. In fact, a broad meaning of ‘rights’ actually reflects both the differences between children and adults (through protection rights) and the equality of children as human beings (through legal, autonomy rights) (Minow 1990, pp. 288). For Minow, rights talk can include three types of children’s rights (1995b, p. 296): children’s liberation, child protection, and social welfare and redistribution. While each one of these rights groups might be vulnerable to various critiques, when combined together into a broad framework, children’s rights discourse presents a more robust template. The human rights approach, according to Minow, deploys this broader understanding of children’s rights, based on children’s entitlement to dignity, respect and freedom from arbitrary treatment (Minow 1995b, p. 296).

Minow (1995b, pp. 299–303) further replies to critiques regarding children’s autonomy rights. These objections are based upon a contention that children lack the capacity to know their own interests and to engage in an adversarial exchange. To argue that children are different from adults because they lack power, Minow
contends, obscures the fact that it is the relationship that creates the power differences, and these can be changed. Autonomy, she argues, is not a precondition for having rights. Rather, being a rights holder depends on a community willing for the individual to make claims and participate in the ongoing definitions of personal and social boundaries. Self determination rights therefore express the interconnections between the right holders and others who carry obligations towards them.

Addressing the concerns regarding rights as creating conflicts and weakening relationships, Minow (1990) claims that under this broader understanding of the rights framework, legal rights language translates, rather than initiates, conflict. Conflict already exists when legal remedy is sought. Moreover, Minow argues that rights can affirm community, as they acknowledge the claimants’ membership and participation in the larger society. Rights discourse creates dialogue in the community and a process of understanding, in which community ties are strengthened. Through a rights discourse, community members negotiate the relationships between them — such as between children and adults. The discourse of rights therefore enhances equality among the members of the community, at least equality of attention; it urges the powerful to listen to the weak and their claims:

The use of rights discourse affirms community, but it affirms a particular kind of community: a community dedicated to invigorating words with power to restrain, so that even the powerless can appeal to those words . . . Committed to making available a rhetoric of rights where it has not been heard before, this community uses rights language to make conflict audible and unavoidable, even if it is limited to words, and certain other forms of expressions. (Minow 1990, p. 299)

Therefore, while acknowledging the faults of the rights language, Minow appreciates the potential that rights rhetoric has in attending power differences within relationships (Minow 1990, p. 269). Accordingly she suggests, instead of rejecting the rights rhetoric, that it should be used to challenge suppression and power—imbalance (Minow 1990, p. 307). If rights language is seen as a vehicle for social change, then their indeterminacy and lack of objectivity are not problematic.

The language of rights helps people to articulate standards for judging conduct without pretending to have found the ultimate and unalterable truth... children no less than adults can participate in the legal conversation that uses rights to gain the community’s attention. (Minow 1990, p. 308)

To address the ‘difference dilemma’ (the dichotomy between competent, rational people who are granted rights on the one hand, and dependent, incompetent and irrational people who are subject to paternalistic protections on the other), Minow suggests unravelling the presumptions that create these differentiations and taking the perspective of the other. From that new perspective, people might become aware of injuries or features that were not considered earlier (Minow 1990, p. 375). She provides three examples of policies that consider the experience of ‘others’ without
excluding them: first, the shift to sidewalks accessible for handicapped. This can result in improving the lives of the ‘majority’ as well, such as parents with prams and cyclers. Second, the adoption of ‘universal isolation’ procedures in hospitals to protect everybody from HIV–Aids instead of only those who are diagnosed as sick. Third, teaching all school children sign language (Minow 1990, p. 377). Taking someone else’s perspective and using rights to address relationships is not a solution, however, but a first step. The next step, Minow suggests, is to work on the problem of differences in specific contexts and try to communicate with those ‘others’ and address their perspectives. By focusing on relationships it can be possible to change the institutions that create differences and adjust them according to the various needs of diverse actors (Minow 1990, pp. 383–384):

The way things are is not the only way things could be. By aligning ourselves with the ‘different’ person, for example, we could make difference mean something new; we could make all the difference (Minow 1990, p. 377).

In the context of children, Minow’s theory promotes a complete reevaluation of previous assumptions regarding children’s incapacities and exclusion, through a change of perspective to that of children themselves. It might mean, for example, talking with children to evaluate their own beliefs about their capacities in various fields and a joint reconstruction of rules regarding their participation in civil life. It might also mean that instead of excluding children from decision–making processes altogether, such processes need to be adjusted to become clear to children and to make their participation feasible, in ways that fit their different mental, cognitive and emotional capabilities.

2.3.2 Federle’s Empowerment Rights Model

Another justification for choosing rights rhetoric in the case of children is what Katherine Hunt Federle calls the empowerment rights perspective (Federle 1995). She argues that it is necessary to recognize the centrality of power (and lack of it) in interpersonal interactions. Children are a powerless group, as their rights are dependent upon the good will of adults, and elites in particular. Rights, in this context, are a valuable commodity as they are able to remedy powerlessness. Rights can provide the powerless with access to political and legal hierarchies and with means of challenging their oppression and subordination. Therefore, granting children rights may empower them — in other words, make adults treat children with respect. For example, under an empowerment rights perspective, children in divorce proceedings would be accorded the same legal status as their parents through representation, equal opportunities to state their opinions, and their consent as a condition for any agreement. Similarly, in child–protection procedures an empowerment rights perspective would require legal representation of children and their rights would be central in the process and its outcomes. Under this perspective, for instance, the removal of the child is the last resort and should be used rarely. The child as the wronged party has the right not to sustain further
Federle rejects Minow’s theory with regard to children; she argues that giving centrality to relationships in fact strengthens their hierarchical nature where children are powerless (Federle 1994). Minow, however, does not claim that the relationships between children and their parents and other adults are based on equality. Rather, she aims to expose the imposition of assumptions regarding children’s incapacities through an examination of the relationships within which these assumptions are made. There are power imbalances in Minow’s relational analysis, which, she argues, rights talk might transform. It seems, therefore, that both Minow and Federle regard rights as an important political instrument, with the potential to empower the powerless through negotiating the inequalities within the community, while maintaining (and even strengthening) community ties, including those in families. Like ‘general’ human rights advocates, then, both Minow and Federle, while acknowledging the limitations of the rights discourse, support its use for its political power in changing realities and promoting children’s issues. As Minow argues, rights discourse is the ‘coin of the realm in national, and increasingly in international law and politics’, and children’s rights advocates should follow women and African–American movements in putting children’s issues ‘on the map’ (1995b, p. 297)

2.4 Theories of rights in relation to children: the needs–rights debate

If the rights discourse is a valid framework for discussing issues concerning children, then there is a need to delineate theories of rights that explain and define these rights. Such theories might suggest solutions to the needs–rights dichotomy, which parallels the ‘difference dilemma’ (Minow 1990) — the difficulty in granting rights (rather than needs) to those that are considered ‘different’ or ‘incompetent’, such as young children and people with disabilities.

However, before describing child–inclusive rights theories, it is important to first discuss the most central rights theory that has been attacked for excluding children, as well as other ‘incompetent’ people, from the world of rights. This is the Will, or the Choice theory (Hart 1982). According to the Will theory, a precondition for having rights is the ability to make rational choices that lead to either waiving or claiming them. Hence, the existence of an obligation toward a person and the ability of that person to activate this obligation constitute a right toward that person (Marmor 1997, Bandman 1973).

The natural conclusion that follows the Will theory is that children (at least young ones) cannot have rights, as they lack the capacity to claim or waive them (Campbell 1992). But is this outcome unavoidable? Hart claims that the Will theory does not necessarily exclude children from having rights: children are rights–holders under the Will theory, albeit represented by others such as their parents or other guardians until they reach maturity (Hart 1982). Another proposition is that the Will theory can be applied to children if we
consider them as having the potential for being capable of making decisions in the future (Coady 1992). Like Hart, Coady believes it is sufficient that the child is represented by a proxy (such as the child’s parent) who exercises the child’s rights.

These propositions are problematic, however, as they raise questions about the appropriate representative for the child and the extent to which such a representative can be true to the child’s own wishes when conflict arises. In many child custody cases, for example, both parents claim to represent the child’s interests and yet each of them argues for conflicting arrangements. An additional difficulty is related to the way such a representative is to decide what the child’s true wish is (and not the child’s interest, need or welfare), without letting that adult’s own views affect his or her decision (Archard 2002). It is easy to see how, when represented by proxy, not the actual choice of the child but other elements may activate or waive the child’s right. This contradicts the very notion of the Will theory, which bases itself on free will. It is not surprising, then, that most children’s rights theorists reject the Will theory and search for other, child–inclusive, rights theories.

Neil MacCormick uses children as a ‘case study’ to criticize the Will theory as a whole (1982, pp. 157–165): the duty to care for children, he argues, is not discretionary; nobody — not the child, nor the parents or any other adult as representing the child — can waive it. The choice aspect therefore is missing, and yet there is no question that children are entitled to nurture, care and love. Even when a child is abandoned or neglected, the child’s right does not cease to exist. Rather, those who fail to fulfill it (the parents in most cases) may face sanctions, and the State takes over, at least temporarily, to ensure that someone else fulfills the child’s right to care, protection and nurture. His conclusion is, then, that children do have rights, irrespective of their ability to waive or claim them and even when their caretakers violate these rights. The Will theory, therefore, cannot be applied to children and is thus inappropriate.

The Interest, or Welfare theory (MacCormick 1982, Raz 1986, Campbell 1992, Marmor 1997), has been suggested as an alternative to the Will theory, chiefly in order to overcome the conceptual difficulty of including children and other ‘incompetent’ (or simply different, as Minow (1990) would argue) populations. Under the Interest theory, a precondition for holding rights is the existence of basic and important needs or interests that deserve to be protected by a duty imposed on others. Such a duty does not create the right — rather, it is the outcome of having a right (MacCormick 1982, p. 158). Needs, then, are not contradictory to rights, but in fact define rights; needs–based rights exist independently of the existence of a duty to address them.

The existence of rights irrespective of existing corresponding obligations is demonstrated by Feinberg (1980, p. 140):

Imagine a hungry, sickly, fatherless infant, one of a dozen of children of a desperately impoverished and illiterate mother in a squalid Mexican
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Slum. Doesn’t this child have a claim to be fed, to be given medical care, to be taught to read? Can’t we know this before we have any idea where correlative duties lie? Won’t we still believe it even if we despair of finding anyone whose duty is to provide these things? Indeed, if we do finally assign the duty to someone, I suspect we would do so because there is a prior claim, looking, so to speak, for a duty to go with it.

It is important, however, to acknowledge the difficulties that the Interest theory presents in this context. Tom Campbell (1992) comments that the decision as to what children’s interests are, which ideally is based on psychological empirical knowledge, but in reality is often unclear, may result in over paternalism (1992). In the same vein, Federle (1994) argues that the Interest theory defines the rights of children based on their incapacities: children have rights because they are vulnerable, and therefore need protection. It seems then, that whether children’s interests are defined as needs or as rights, both terminologies might lead to over paternalism and dependency upon the views of others rather than of the rights holders themselves. This is an important cautionary consideration. The integration of a broad human rights perspective (which includes self–determination as well as welfare rights) with evidence–based findings of children’s needs, might reduce the risk of over–paternalism.

In contrast with the dichotomous division between the Will and the Interest theory — or between rights and needs — Wolfson (1992) proposes a model of rights that regards capability as a continuum, and accordingly generates a gradual shift from welfare rights to freedoms. People’s rights are identified according to two types of interests — both project interests, which require free will and ability to make choice, and welfare interests, which do not. As the individual becomes autonomous, fewer positive welfare rights are required and the state is expected to step away and provide more freedoms and negative rights. At the same time, if a person becomes unable to assert his or her own project interests (such as in the case of comatose people), then the state steps in and provides positive welfare rights. It seems that under Wolfson’s theory, all people hold both project and welfare interests. This dual understanding of rights within each individual might eliminate the clear–cut differentiation between the competent and the incompetent.

Applying Wolfson’s theory to children, it would seem that a pendulum between protections and freedoms can be envisioned. Whenever a child is able to act independently, he or she should be granted autonomy and freedoms. Whenever a child needs assistance and support, the relevant positive rights should be granted, but without denying the child’s autonomy unnecessarily. Indeed, capturing capability as a continuum is particularly appropriate in the case of children, since their gradual development and growing autonomy is a natural, universal process.

A somewhat similar way of describing the shift between paternalism and autonomy is Flekkøy and Kaufman’s (1997, p. 50) distinction between having rights and exercising rights. This distinction reflects the idea that children, like all other human beings, are born with certain freedoms and basic rights. Vulnerable and inexperienced, young children often cannot exercise these freedoms, but it is adults’
obligation to take off the veil of protection, or paternalism, as soon as they are ready to make their own decisions.

Another effort to capture the rights–needs equilibrium in a non–dichotomous way is Joel Feinberg’s (1980) categorization: 1. Adults–rights (or A–rights, which are liberties); 2. Rights provided both to adults and children (A–C rights, which are welfare rights); and 3. Rights provided exclusively to children (C–rights). C rights, according to Feinberg, include protection against abuse and neglect, food, shelter and love; and, importantly, the ‘anticipatory autonomy rights’, that ensure that future adults can later exercise both their liberties (A–rights) and their welfare rights (A–C rights). These ‘rights in-trust’ are primarily the right to adequate education and the right to develop decision–making skills.

Feinberg’s analysis is valuable in overcoming some of the conceptual obstacles raised earlier in three ways. First, similar to Minow and Wolfson, Feinberg too regards welfare interests as part of the rights discourse, not a contradiction to it. Second, his analysis demonstrates that those considered incapable, such as children, have not only welfare interests (or rights) but ‘developmental’ rights as well. Such developmental, or ‘rights in–trust’ include participation. Third, Feinberg’s account indicates that adult, ‘capable’ people are also subjects of welfare rights, thus diminishing the sharp dichotomy between the capable and the incapable.

Campbell (1992) categorizes children’s rights into the following four rights categories: 1. Universal human rights children hold simply by being human beings, such as the right to life, health care, right against torture and discrimination; 2. Specific rights for children such as protection against abuse, to care, and the right not to be illicitly transferred abroad (similar to the protection elements of Feinberg’s C–rights); 3. Rights as future adults (particularly the right for development); and 4. Specific rights for adolescents, such as the Convention’s provision of adequate standard of living according to the child’s development. Similarly, Eekelaar divides children’s rights into three groups: 1. Basic interests to physical, emotional and intellectual care; 2. Developmental interests to fulfill the child’s potential; and 3. Autonomy interests — freedom to choose a life style (Eekelaar 1992).

Campbell and Eekelaar demonstrate additional efforts to avoid the needs–rights trap. Eekelaar specifically includes the autonomy interest separately from the development interest. This means that children, for Eekelaar, have a right to practise their autonomy as much as they can, not in order to ensure their full development into productive adults in the future, but because they are entitled to it, here and now. Campbell’s theory is somewhat broader, as it includes general human rights as well as a specific rights group for adolescents. Both scholars, however, treat children as having specific rights in addition to, and not instead of, the rights they share with the rest of humanity.
2.5 Conclusions so far

The first part of this chapter presented various theoretical models that address the ‘difference dilemma’ (Minow 1990) and demonstrate that rights rhetoric is suitable for children. The Interest theory is the general framework under which children are rights holders, as it does not require, in contrast with the Will theory, capability as a condition for having rights. Rather, it is the universality of certain needs, or interests, that justifies their normative anchoring as rights. The Interest theory broadens both the scope of ‘rights’ (to include welfare as well as self-determination rights) and the target populations (to include the ‘incapable’ as well as the ‘capable’).

Following this basic notion that children are rights holders simply by being human, and that their rights derive from their interests, different writers suggest various categorizations for children’s rights. A review of some of these analyses suggests that while children hold a mix of self-determination, welfare and developmental rights, any children’s rights discourse is inherently intertwined with a needs discourse (Feinberg 1980, Campbell 1992, Eekelaar 1992, Wolfson 1992, Minow 1995b, Bojer 2000). Accordingly, basic needs are not only the justification of having rights, they also identify the nature of many of children’s rights. Indeed the children’s rights dispute demonstrates that needs and rights do not necessarily collide. In fact, in this context, they complement each other. As Waldron (2000) argues, rights talk can provide an important framework to discuss human needs while addressing ideas of self respect and dignity. Once a need has been diagnosed, the rights talk takes over to create an associated claim, which in turn creates an obligation by others (2000, pp. 131–132).

The previous discussion also indicates that there is no real dichotomy between the rights of ‘younger’ and ‘older’ children, as children of all ages need a certain level of protection as well as a certain level of autonomy. Teenagers might need protection, support and provision of special services to secure their safety from adult or peer violence. Concurrently, even very young children need adults to respect their autonomy and provide them with opportunities to practise their negotiation and decision-making skills, in measures that fit their age. Therefore, it would be artificial and inaccurate to claim that autonomy should be (if at all) granted only to adolescents and adults while protection is what society owes to its young children. Children of all ages deserve respect for their liberties as well as protection against harm.

Finally, whichever approach one takes, any theory of interests seems to necessitate some kind of empirical investigation in order to define the scope and nature of children’s rights. Omission to conduct such empirical investigation is problematic not only due to the imposition of other people’s views regarding children’s needs and wishes (the ‘over-paternalism’ problem); it also leads to uncertainty as to the nature of children’s interests. However, empirical and theoretical efforts have resulted in similar, but nonidentical conclusions.²

²See, for example, the analyses by Maslow (1954), Doyal and Gough (1991), Nussbaum (2000), Ochaita and Espinosa (2001).
basic interests, as vague as this phrase may be, is still preferable to the alternative Will theory, which excludes children by definition. Further, as Jane Fortin argues, the vagueness of children’s interests is not so detrimental in a practical sense, since the Convention on the Rights of the Child with its immense popularity sets a comprehensive list of children’s interests, presented as rights (Fortin 2003, p. 18).

If children’s rights, and more so needs–compatible international human rights, is a viable discourse, then the next step is to explore the international arena. Accordingly, the second part of this chapter includes a brief review of international children’s rights documents, and a detailed discussion of the Convention on the Rights of the Child with particular focus on rights directly related to child victims.

2.6 International children’s rights documents

With the emergence of child development as a distinct social science field in the Twentieth Century, it became widely accepted that children are entitled to human rights just as any other human being (Flekkøy and Kaufman 1997, p. 22–23). International attention grew, and was expressed in several international documents. The Geneva Declaration (1924) is the document regarded as the first human–rights instrument that deals specifically with children’s rights, although it regarded children as ‘objects’ that need protection, rather than individuals with personal rights. For example, the fourth principle of the Geneva Declaration provides that:

The child must be put in a position to earn a livelihood and must be protected against every form of exploitation.

The next significant United Nations document addressing the rights of children was the Declaration of the Rights of the Child (1959). This Declaration was more detailed and regarded children as subjects to their own legal rights, but still addressed only the protective aspect of children’s rights. Additionally, it is unclear who is obligated under the 1959 Declaration to provide the rights enumerated in it, and to this extent this document is vague (Freeman 1983, p. 19).

Both the Geneva and the 1959 Declarations were predominantly of a declarative nature, and did not include any enforcement or follow-up mechanism.

The first binding international provisions regarding children were included in two general human rights covenants, both adopted by the United Nations on the same day in 1966. Both provisions, however, focused again on the rights of children to special measures of protection and thus dealt, in fact, with children’s welfare. Children’s freedoms and autonomy had not been specifically acknowledged yet. The Covenant on Civil and Political Rights (1966) provided in Article 24(1) that:

Every child shall have, without any discrimination as to race, color, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2.7 The UN Convention on the Rights of the Child

The International Covenant on Economic, Social and Cultural Rights (1966) provided, in Article 10, 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.

In addition to general human rights and specific children’s rights documents, the international community has also acknowledged the special status of crime victims, as specified in the UN Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) (hereinafter: the Declaration). Adopted by consensus in the General Assembly of the United Nations, the Declaration is based on the philosophy that victims of crime should be adequately recognized and treated with respect for their dignity. Accordingly, the Declaration states the importance of access to fair and respectful judicial mechanisms, prompt redress, adequate assistance and other services, state compensation, restitution, information, participation, and informal methods of conflict resolution instruments, including customary and indigenous practices, for victims. Victims’ privacy and safety are also stated as crucial.

Another relevant UN document is the Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime (2005), adopted by the Economic and Social Council. While this UN resolution holds a weaker status than treaties as well as Declarations accepted by the UN General Assembly, its exclusive focus on the rights of child victims makes it an important source of information regarding agreed–upon standards in the area. Following the general principles stated by the Convention on the Rights on the Child, the guidelines stipulate that professionals should treat child victims and witnesses of crime according to the following principles: dignity, non–discrimination, best interests, protection, harmonious development and participation. These principles are discussed in detail below, as part of the analysis of the Convention’s Articles.

The document then moves on to translate these general principles into more specific guidelines. Importantly, the guidelines provide that age should not be a barrier to a child’s right to participate in the justice process; that children have a right to be protected from hardships during the justice process; and that reparation should be combined with any criminal, informal or community justice procedure such as restorative justice. These guidelines will be discussed in further detail in Chapter 4, where the needs–rights of child victims within the criminal process are discussed.

By far the most comprehensive international binding document with regard to children’s rights is the 1989 Convention on the Rights of the Child. This Convention, for
the first time, acknowledged children as individuals fully entitled to human rights, without neglecting their special needs for protection (Detrick et al. 1992, p. 27).

Small and Limber (2002, pp. 61–63) argue that the uniqueness of the Convention lies in the following characteristics.

First, the Convention enjoys world-wide consensus as it has been ratified by almost all countries in the world. The only exceptions are Somalia and the United States. Although the US has signed, but has not ratified the Convention, the common view is that it enjoys such wide international consensus that in fact the Convention reflects customary international law, to which the US is subject (Flekkøy and Kaufman 1997, p. 1). At the same time, the Convention is flexible and sensitive to cultural differences more than any other human rights instrument (Alston 1994). The unprecedented popularity of the Convention combined with its flexibility made it a powerful political instrument that has affected internal legal and constitutional debates as well as professional education within nations (Van Bueren 1999b).

Second, the Convention includes the widest variety of rights for children — social, legal, cultural, civil and human rights — and therefore represents a new, broader approach to children’s rights. Children are no more regarded as merely objects of protection (although the right to be protected is a central principle); they are human beings, part of the world’s community, and thus deserve to be treated with respect for their human rights and freedoms. Most importantly, the Convention provides a broad framework of citizenship for children through the introduction of the participation principle for the first time (Roche 1999).

Third, the Convention is unique in its coherent nature and indivisible Articles, with children’s dignity as its central theme that should be read into each one of its articles (Melton 1991, Van Bueren 1999a).

Finally, the Convention created for the first time, with the founding of the United Nations Committee on the Rights of the Child, a mechanism for evaluation and follow-up for state members, thus making it a dynamic document. Not only did the monitoring mechanism create a system of ‘naming and shaming’ of states that do not comply with the Convention’s words and spirit; it has also established a unique source of guidance and interpretation to the meaning of the various articles of the CRC and of children’s rights in general, a sort of international resource center for both theoreticians and activists (Small and Limber 2002).

An additional advantage of the Convention is that it proposes a relatively pragmatic agenda compared with the contentious liberationist approach. The Convention does not include any provision that aims at treating children as adults, nor does it state that even ‘mature minors’ should be entitled to complete autonomy and freedom in decision-making. The Convention focuses, in this area, on the right of children to participate in the decision-making processes that precede any decision affecting their lives, giving gradually more weight to children’s views as they mature and develop their capacities — not the right of children to make their own decisions.

A related aspect of the CRC is what Barbara Bennet Woodhouse (1998)
The general principles of the Convention

The Convention represents a holistic approach according to which its various articles should be implemented interdependently (Van Bueren 1999a). Accordingly, its four ‘general principles’ which have been recognized by the official UN blueprint for the implementation of the Convention (Hodgkin and Newell 2002) as having a guiding status, should be applied to each one of the other Convention’s articles (2002, p. 42).

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6 Under Article 51 of the Convention, states are allowed to make reservations regarding specific articles upon ratification, as long as they are not incompatible with the purpose of the CRC.
Indeed, the Committee requires reporting states to demonstrate how the general principles are reflected in the implementation of each one of the Convention’s specific rights. It is therefore important to start with a description of the four guiding principles of the Convention.

2.8.1 First guiding principle: Equality

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

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members. (CRC, Article 2)

The non–discrimination principle requires that all children are provided with the same rights, both de-jure and de-facto. The first and most obvious implication of the non–discrimination principle is that states should treat equally all disadvantaged groups of children in their allocation of goods, including children belonging to minority groups, disabled children, children born out of wedlock, children who are non–nationals, migrants, refugees, displaced or asylum–seekers, and children who work or live in the streets.

It is important to note, however, that equality does not mean that children should receive exactly the same resources, protections or freedoms. To achieve substantive equality, a legal system has to be sensitive to the inequalities of children, and provide them with the required means to overcome these inequalities as much as possible, in order to provide all children equal opportunities (Van Bueren 1999a).

Martha Nussbaum articulates this point eloquently:

To treat A and B as equally well–off because they command the same amount of resources is, in a crucial way, to neglect A’s separate and distinct life, to pretend that A’s circumstances are interchangeable with B’s, which may not be the case. To do justice to A’s struggle, we must see them in their social context, aware of the obstacles that the context offers to the struggle for liberty, opportunity, and material well–being. (Nussbaum 2000, p. 69)
It seems then that the Convention sets a humane, substantive equality principle under which each child should be treated with equal respect to his or her special circumstances, needs and capabilities. This broad meaning of equality is similar to Minow’s (1990, pp. 375–377) relational rights approach, under which she calls for taking the perspective of the ‘other’ and changing institutions in order to enable their full inclusion.\(^9\)

Thus, in the context of this work, Article 2 creates an international obligation on states to ensure that all child victims have equal access to mechanisms of prevention and protection, reporting, investigating and prosecuting, as well as rehabilitation and reintegration. This includes children who were victimized while being tourists or illegal residents in the country; children of minority groups; all available services should be adequately accessible for children with special needs, children in rural parts of the country or children in the periphery. While the laws protecting child victims are likely to apply to all children without discrimination, states are expected to ensure the equal implementation of these laws as well, which is significantly harder to achieve. In practice, to assure meaningful equality to child victims, states need to be sensitive to the special needs of different children and meet these special needs through the provision of various aids. Some children need longer periods of therapy to recover from their victimization. Others may need an advocate sensitized to their cultural background, language barriers or socio-economic status. Physical support might be needed, such as translators for hearing impaired children and ramps for children on wheelchairs. Specific intervention plans for different types of mentally disabled children may sometimes be appropriate.

### 2.8.2 Second guiding principle: the Best Interests of the Child

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision. (CRC, Article 3)

In many ways the best interests principle seems simple to grasp as it relates to the wellbeing of children — surely a consensual value, even among those who object to children’s rights terminology. However, the Convention goes further than simply stressing the importance of the wellbeing of children; it creates an obligation for state members to always give primacy to the child’s best interests. This creates a twofold difficulty. Not only is it challenging to identify the best interests of the child in specific situations (this point will be discussed in further detail below); state authorities are also expected to gauge these interests with other competing interests while giving primacy to the former. The ‘primacy’ weight granted to the child’s interests under Article 3(1) means that it should take precedence over other considerations external to the child. It does not, however, grant it an exclusive status, as would be the case if an alternative wording such as ‘the paramount consideration’ had been chosen.\footnote{For a detailed discussion of the wording of the best interest principle and its weight, see Marshall 1997, pp. 8–11.}

Perhaps most importantly, however, the best interests principle creates a duty to make an individual examination of the interests of the specific child, instead of relying on general assumptions regarding children in different situations.

The best interests principle is relevant to child victims in two ways. First, Article 3(2) creates a duty upon states to allocate financial and human resources to the prevention of child victimization.\footnote{The Committee emphasizes the strength of the wording ‘to ensure’ and the fact that it includes both active and proactive obligations (Hodgkin and Newell 2002, pp. 42–47).} This obligation is based on an assumption that the safety and wellbeing of children are always in their best interest, and there is no need to make individual enquiries as to each child’s interests in this regard. Second, Article 3(1) means that after victimization has occurred and during the process following the offence, the victimized child’s best interests must be a primary consideration.

The duty to give primacy to the interests of child victims during the process following their victimization is not without problems. Other interests might be paramount in these circumstances, such as the right of the offender to due process, the interest of the prosecution to efficiently and quickly handle cases, and the general public interest to prevent crime.\footnote{Chapter 4 discusses the competing interests in the context of the criminal justice process in further detail.} The conflict may be even greater when the perpetrator is also a minor, and thus deserves a ‘best–interests–primacy’ approach as well. For example, existing provisions regarding the use of screens, video links and pre–trial testimony are aimed to secure the child’s wellbeing and best interests, but they must be balanced against the competing rights of the defendant to confrontation, cross–examination, and the rule against hearsay evidence (Hodgkin and Newell 2002, p. 252). Such balance may lead legislators to provide children with special procedural protections while requiring special evidentiary and procedural safeguards to protect the competing interests.

Additionally, there may be a conflict between the best interests of the specific victimized child and the general interest of all children for protection and safety (Alston 1994, p. 14). For example, even when it is in the child–victim’s best interest
to be diverted from the court process to an alternative, restorative justice gathering, still in order to protect other children a criminal justice procedure might be preferred if it is expected to be more effective both in preventing the specific perpetrator from recidivating and in deterring others from crime.

Giving primacy to the child’s interests is therefore not always as simple as it seems in theory, even for those who work in various aspects of children’s safety and protection. It seems, however, that the Convention’s contribution is to add guidance in hard cases, where such guidance is really needed. Therefore, when treating child victims, special attention should be given to their interests even when competing with other legitimate, important ones. In other words, the balance should be tilted in favor of the child’s interests even in cases where if it were an adult instead of the child other interests would have received priority.

Given the notion that the child’s best interests should prevail, other contentious questions arise, such as who is to decide what the child’s best interest is, and how such judgment should be made (Todres 1998). In many cases the question is not an easy one. Decision-makers may find themselves struggling to reach the right decision as to the best interests of the child, with several competing views. Often the child’s wishes are in contrast with what others regard as his or her best interests; there are cases in which the parents’ view of what is best for their child contradicts the child’s views, the views of the social workers or of other state authorities. Who is then to decide — when, if at all, should the parents’ view of the child’s interest overcome the child’s own view, and when, if at all, should the parents’ views be overruled by the state authorities?

Flekkøy and Kaufman (1997, p. 45) suggest that a decision should refer to a specific question, depend on the child’s current needs and stage of development, reflect the child’s culture and preferably take into account not only the immediate interests of the child but the long-term interests of the future-adult. Freeman (1983, pp. 51–52) suggests a ‘liberal paternalism’ approach based on the promotion of ‘primary social goods’ in Rawls’s words. He suggests that as a rule, parents should take into account their children’s views, but eventually parents are expected to make a decision that best promotes the child’s interests in achieving those primary goods: ‘liberty’, ‘health’, ‘opportunity’. These can be neutrally examined, Freeman argues, at least to some extent. This test implies that whenever parents do not follow the ‘child’s primary goods’ rule (with the future of the child in mind), the court, or other third party, should have the authority to intervene and make a decision.

It is questionable, however, how neutral this test really is. Let us take an example of a 12 year-old boy who has been assaulted, and whose parents object to his participation in a restorative justice process following his victimization, arguing that this will be a damaging experience for him. The child, on the other hand, wishes to participate. Should we follow the child’s or the parents’ wishes? According to Freeman’s test, it might be argued that the child’s recovery (which undoubtedly will affect his future conceptions of justice, trust in people, self image and so forth) depends on the opportunity he is given to face his assailant, ask him questions and

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13For a detailed explanation of Rawls’s theory, see Rawls 1999, Chapter III.
receive answers. At the same time, it is possible to argue that the parents are making a choice within the scope of their authority to promote the boy’s primary goods, as they are concerned that the process will re-victimize the child. The unquestionable values of ‘future opportunity’ or ‘health’ for children, therefore, become debatable when translated into specific real-life dilemmas.

Brennan and Noggle (1997) propose a formula for balancing the child’s needs and the child’s rights. According to their argument, parents carry the following three types of duties toward their children: first, they are obliged not to violate the rights of the child. Second, they are expected to prevent others from violating these rights. Third, they are required to promote the interests of the child. The third duty which concerns the child’s interests may be in conflict with the other two duties that concern the child’s rights. It is the parents’ responsibility to find the balance in these situations between protecting the child’s rights and promoting the child’s interests. Further, Brennan and Noggle argue that the equal moral status of children requires parents to take their rights seriously, even when these rights conflict with the child’s wellbeing. Thus, parents should infringe their child’s rights (for instance, act against their wishes, violate their privacy) only when such infringement is absolutely necessary to protect the child’s interests, and only to the level necessary. Taking children’s rights seriously means that parents (and more broadly, decision-makers), should respect the wishes of the child as much as possible, as long as it is not in conflict with the child’s interests. Even then, adults should make an effort to respect those wishes to the maximum extent possible.

Brennan and Noggle (1997) however do not address the concern about adults making their own judgments regarding the child’s best interests. Indeed, it seems that the problem of value-biased decisions by adults will linger whatever the test is. How, then, is it possible to create an objective mechanism that respects the child’s wishes but at the same time secures the child’s primary goods?

Brennan and Noggle’s formula relates to the relationship between the best interests principle and other children’s rights, with the underlying presumption that these are separate, sometimes competing, spheres. In other words, the wellbeing of the child is not considered by them as part of the bill-of-rights of children, in contrast with the right to self-determination. The Convention, however, reflects a more holistic view, under which the ‘best interests’ interpretation must be consistent...

...with the spirit of the entire Convention, and in particular with its emphasis on the child as an individual, with views and feelings of his or her own ...(Hodgkin and Newell 2002, p. 42).

Thus the best interests principle itself, as appears in the Convention, might be read as giving a significant role to the child’s wishes, and in fact be interpreted in a way consistent with their proposition. Hence the best interests of the child should perhaps have primacy over other interests external to the child. As far as the child’s own competing rights, however, the child’s views should arguably be given maximum weight in accordance with the age and maturity of the child, and as long as these wishes are not severely endangering the child’s interests.
Therefore, turning back to the child in the previous example, since nobody can predict what in fact will happen at the restorative process and what the outcomes will be for the child, it is best perhaps to follow the child’s wish and belief that it would be in his best interest to participate in it, unless it is predicted that the restorative justice process will be an extremely harmful event that will worsen his emotional (or even physical) condition. This does not mean, however, that the adults involved hold no further responsibilities. They should, for instance, take measures to limit the risks of further traumatizing the child and help him participate in the process in a way that will promote his best interests.

The best interests principle indeed suffers from vagueness and implementation difficulties. It is, however, an important reminder of the centrality of the child and the need to consider the specific child’s circumstances in every case.

### 2.8.3 Third guiding principle: Life, Survival and Development

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child. (CRC, Article 6)

The outcomes of some forms of child victimization may be devastating for children, especially when the perpetrator is a parent (Herman 1992). Violence and sexual victimization, in particular, jeopardize children’s right to survival and development (Hodgkin and Newell 2002, pp. 85, 94). Indeed Article 6 of the Convention is closely related to Article 19 regarding protection against child abuse. The Committee on the Rights of the Child relates to the right to life, survival and development when discussing violence against children. For example, in its concluding observations on the initial report of Guatemala, the Committee stated that it

> ... is deeply alarmed at the persistence of violence against children... The high number of child victims of violence raises serious concern, particularly in view of the ineffectiveness of investigations into crimes committed against children which paves the way for widespread impunity.\(^{14}\)

If victimization is such a danger to the child’s safe development, society then carries an even heavier burden to ensure the healthy development, and healing, of a child who has been victimized. In other words, this article creates yet another source of normative obligation on states to strive to repair harms caused to children by crime in order to maximize their chances for positive development. States should search for the best way to restore the child’s development, even if that means putting aside other interests. Allowing children to participate in decision-making, for example, might help them learn to use the ‘little power they actually have’ and

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to develop their judgment (Rayner 2002). Furthermore, reacting in a responsive, sensitive and empowering way to children’s loss may encourage their growth from their victimization (Murray 1999).

**Parents’ role and children’s evolving capacities**

Article 5 is closely related to the development principle:

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.

This Article introduces three important concepts central to the Convention: 1. The centrality of the family (including the extended family, where this is part of the local culture); 2. The conception of the child as a subject of rights on his or her own, rather than a mere recipient of protection; and finally, 3. The duty of the family and the general society to help the child exercise his or her rights in a gradual manner, according to the child’s evolving capacities (Hodgkin and Newell 2002).

These three concepts are interrelated. The family is the central societal group which carries not only rights, but duties and responsibilities toward the child. Family responsibilities are aimed at helping the child exercise his or her rights according to the child’s evolving capacities:

The civil rights of the child begin within the family... The family is an essential agent for creating awareness and preservation of human rights, and respect for human values, cultural identity and heritage, and other civilizations. There is a need to consider appropriate ways of ensuring balance between parental authority and the realization of the rights of the child, including the right to freedom of expression.\(^\text{15}\)

The notion of the child’s ‘evolving capacities’ is a key concept in the Convention (Hodgkin and Newell 2002, p. 91), and together with the development principle provides guidance to the implementation of children’s rights and freedoms. Instead of setting strict ages to regulate levels of autonomy and weight of the child’s views, the Convention sets a flexible formula based on the individual child’s capacities. The concept reflects the notion that children do not instantly become adults once they turn eighteen. Childhood is a process in which children gradually learn how to make decisions and exercise their rights, and families should support children in gradually enhancing their autonomy. In practice, the ‘evolving capacities’ concept means that when a child is able to practice any of the rights provided in the Convention, it is the parents’ (as well as the state’s) responsibility to allow the realization of that right,

unless there are compelling reasons not to do so. Moreover, parents are expected to guide their children in developing their capacities through practice, in order to promote their maturation into autonomous adults.

The evolving capacities and development principles are central justifications for the broad definition used in this thesis. They explain why even very young children should be granted opportunities to express their views, and emphasize at the same time the importance of treating every child according to his or her individual developmental stage.

### 2.8.4 Fourth guiding principle: Participation

While several Articles in the Convention set various aspects of children’s rights to free expression and self-determination, Article 12 provides the general principle of respect for the child’s views:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The participation principle is a relatively new concept and perhaps the most controversial among the guiding principles, as it reflects an expansion of the rights rhetoric beyond those promoting the protection and welfare of children. The participation principle, however, is not necessarily a rival to welfare and protection. In fact it is arguable that the wellbeing of children is dependent, among other things, on their opportunities to be active participants in decision-making processes, since such opportunities develop their trust in others, self esteem and a sense of being respected (Flekkøy and Kaufman 1997, pp. 62–63). Participation is also considered to have strong educational and developmental components and accordingly may be regarded as another basic need in a child’s development (Ochaita and Espinosa 1997).

The participation principle is justified not only for its developmental and educational value in children’s growth; it is also claimed to be beneficial to democratic society in general. First, practice in shared decision-making processes helps children become future competent participants who are tolerant to other people’s views and who respect themselves and others. These traits cannot be taught theoretically; they need to be gradually acquired through experiencing shared decision-making and problem-solving processes. Second, involving children in decision-making processes benefits the present surroundings of the child — the family, the school and the community — through gaining more knowledge on the child’s perspectives and strengthening democratic values within themselves. (Flekkøy and Kaufman 1997, pp. 56–57).
In a UNICEF publication, Lansdown (2001, pp. 5–6) argues that children’s participation is important since children may have valid views about their best interests which are different from adults’ views; indeed children are typically less cynical, more optimistic and more flexible in their approach to the future and therefore might offer fresh ideas and creative solutions. Furthermore, adult–based decisions that are aimed at promoting children’s welfare based on assumptions rather than on actual children’s views often turn out to be wrong.

Lansdown (2001, p. 7) also claims that excluding children from the decision–making process actually includes a two–fold discrimination against children. First, it represents a denial of their fundamental right to participate embedded in Article 12 of the Convention. Second, it prevents children from influencing and exercising whichever rights are relevant in the specific case. Thus to take child victims as an example, excluding them from the discussion regarding the outcome of the process that follows their victimization would not only infringe their general right to participate, but would also prevent them from advocating for restoration that fits their needs, possibly resulting in less preferable outcomes for them.

Lansdown (2001, p. 9–10) further argues, however, that using children to promote an adult agenda is at best tokenistic and at worst exploitative. Therefore, age–appropriate, sufficient information must be provided to allow children to have meaningful input. Accordingly, and following the indivisibility idea (Van Bueren 1999a), the combination of the participation and the non–discrimination principles suggests that all children should be treated with equal respect in any decision–making process regarding their lives, regardless of their age, situation, ethnicity, abilities and other factors. However, children cannot be required to participate — their attendance and participation must be voluntary.

Considering the practical meaning of the participation rights, can children of all ages be regarded competent participants? Anne Smith (2002, pp. 82–85) points out that even very young children are capable of understanding their experiences and expressing themselves. Her review of empirical research suggests that babies, infants and preschoolers are active participants in their immediate environments. Thus, even very young children can participate in significant ways in decision–making. She further argues that adults should be sensitive to the child’s current level of understanding and allow gradual growth in the responsibilities and weight given to the child and the child’s views. Moreover, parents and professionals should understand that children need to have the opportunities to express their views, initiate actions and make decisions, in order to mature into decision–making, involved citizens (2002, pp. 82–85).

Gary Melton (1999) argues that at age 14 children have similar intellectual and social capacities as adults, allowing them to make decisions like adults (Schneider et al. 1989, as cited in Melton 1999). In addition, Melton (1999) claims that even

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16With the appropriate accommodations to their specific needs — see the previous discussion on equality.
younger children who are not able to articulate their reasoning, will often follow adult models and eventually reach the same decisions adults would make. It seems, then, that children of all ages can potentially be partners in decision-making processes, although clearly in very different ways, regarding different subjects, and in varying levels of understanding.

In practice, the participation principle contains two aspects: first, it provides children who are capable of doing so with the right to express their opinions freely in all matters affecting them. This right has been stated both in the Universal Declaration of Human Rights (Article 19) and in the International Covenant on Civil and Political Rights (Article 9(1)). However, Article 12 of the Convention encompasses another aspect of participation, which has never been incorporated in a child-focused international document before (Detrick et al. 1992, p. 28). It provides that children should not only be allowed to express their opinions freely, but also that their opinions will be considered and given due weight according to their age and maturity (Hodgkin and Newell 2002, p. 145).

Article 12(2) specifies the application of the participation principle with respect to judicial and administrative proceedings, where the child’s views should particularly be heard either personally or by a representative. Surely, the criminal process that follows the child’s victimization is a ‘matter affecting the child’, as Article 12(1) provides. Decisions regarding both the nature of the process itself (should it be referred to court or to an alternative process), the role that the child should take in it, and its outcomes (what kind of punishment, or restitution, should be inflicted on the offender), affect the child directly and therefore require adults to listen to the child’s views. Sometimes these decisions concern even the safety of the child and his or her future life.

The participation principle does not mean that children have a veto right, or that their opinions should always be determinative in the decision-making (Ochaita and Espinosa 1997, Hodgkin and Newell 2002). In other words, this principle is not the equivalent to the children’s liberationists’ claim that children should be able to make their own decisions as part of their rights to self-determination and autonomy. Rather, it indicates the right of children to have their capacity to autonomy promoted through participation and consultation (Fortin 2003, p. 20). Moreover, it is arguable that the child’s right to be heard on matters concerning the child’s life substitutes the right to make their own choices, which adults (and more mature children) hold (Archard 2002).

The differentiation between the right to make one’s own decisions and the right to take part in the decision-making process might make the participation principle presented in the Convention easier to accept, but at the same time it raises the question whether there is a certain stage where participation is not enough, and full autonomy can be asserted.

17...the views of the child being given due weight in accordance with the age and maturity of the child — Article 12(1).
18The various child representation models will be discussed in chapter 6.
It may be surprising to realize, however, that children themselves regard the opportunity to participate in the decision-making process — to be listened to and respected — as more important than having their opinion accepted. This has been demonstrated in practice (Thomas and O’Kane 1998, Morrow 1999). Accordingly, Melton (1999) argues that children feel that they are taken seriously if their views are listened to and considered with respect, even if the final decision is made by others.

Therefore, while not creating a right to make independent decisions, Article 12 does mean that the older and more mature the child is, the more weight should be given to his or her views, even when ‘adults’ think differently. The difficult question is, naturally, how to apply the participation principle in real-life situations. Different writers have tried to confront this challenge.

Moira Rayner (2002, p. 6) argues that the nature of the specific subject matter affects the weight that is given to the child’s view. She holds that the greater the effect of the decision on the child’s life is, the more important it is to consult with the child and to be influenced by the child’s views, while assuring that the child receives adequate explanation and information on the matter.

Flekkøy and Kaufman (1997, p. 65) emphasize the need to balance between over-protection and under-protection of children, leaving them just the right spaces for adequate participation in decision-making. They argue that the ‘best interests’ and the ‘evolving capacities’ principles provide sufficient guidance in finding the middle way. In practice, Flekkøy and Kaufman suggest that it is important to consider, in each individual case, how much and what kind of protection the child needs, while...

...taking into consideration the maturity and experience of the child, the situation, the consequences of the decisions to be made and the benefits of increasing experience and autonomy. Perhaps it is necessary to consider whether the child, even if deemed incapable to make the entire decision on his or her own, could be capable of giving an opinion or making a ‘part’ decision, as one step to the final decision. It is also important to consider the consequences of not letting the child voice an opinion, make a choice or share a decision-making (Flekkøy and Kaufman 1997, p. 67).

With reference to medical treatment, Nancy Walker (2002) proposes a model under which children progress from ‘assent’ (the child is informed and cooperates with the adults’ decision), through ‘dissent’ (the child may have a different view which should be taken seriously, assuming they have a sufficient knowledge and understanding of the matter), to ‘consent’ (when the child is appropriately informed and well aware of the circumstances and has the capacity to consent, there should be no coercion in treatment). Like the Convention, Walker’s model focuses on children’s evolving capacities in decision-making, rather than on strict age classification. She further argues that this model should be applied in accordance with the ‘best interests of the child’ standard, which in this context requires that the child: 1. Receives developmentally appropriate information; 2. Has all questions sufficiently answered;
3. Expresses his or her opinions freely; 4. Has those opinions heard and respected; and 5. Participates as completely as possible considering the child’s developmental level.

Walker’s integration of the participation, best interests, and evolving capacities principles together conforms with the Convention’s holistic approach. Her model might be useful in other areas, particularly when the question is whether or not to conduct some procedure. For example, applying her model to the context of this thesis, a young child who has been victimized should be informed of a decision to refer the case to a restorative justice setting, and should have an opportunity to express his or her opinion about it. A more mature child might be asked for a more detailed opinion regarding matters arising from that decision, such as the list of participants. The child can also decide whether or not to take part in the process. Older children should perhaps have, in addition, a veto right against the decision to have a restorative process itself. A child’s advocate may need to suggest the alternatives; but if the child is aware of such alternatives, there is no need to be overly paternalistic.

It is important to note that the scope of the participatory principle is very wide. It applies to all matters affecting the child, even those that are not specifically mentioned in the Convention (Pais 1997). The participatory principle is not only broad in terms of the matters it applies to, but also in the level of participation provided to the child, according to the child’s age and maturity:

...This article sets one of the fundamental values of the Convention and probably also one of its basic challenges. In essence it affirms that the child is a fully–fledged person having the right to express views in all matters affecting him or her, and having those views heard and given due weight. Thus the child has the right to participate in the decision–making process affecting his or her life, as well as to influence decisions taken in his or her regard (Pais 1997, p. 426).

Roger Hart’s (1992) work on children’s participation provides an important instrument for gauging various mechanisms of child participation. Hart proposes a ‘Ladder of Participation’ (see Figure 2.1), to help evaluate existing participatory projects and construct new ones. The ladder has eight levels. The lower three levels represent different forms of engaging children in ways that may seem participatory but in fact do not allow children to have real input in decision–making processes. The five higher levels represent true participatory rungs. Hart emphasizes that different levels of participation are appropriate in different cultures, contexts and ages. Levels four and five describe projects that are designed and run by adults but children understand their meaning, the decision–making process is transparent, and in the latter, children are consulted and their opinions are treated seriously. In level 6, decisions are made in a shared manner between children and adults, as opposed to mere consultation where the decision–makers are the adults. The highest two levels describe projects that are initiated and managed by children themselves.

In the context of child victims, levels 5 and 6 of Hart’s ladder are particularly interesting. Level five describes processes where children are consulted and their
Figure 2.1: Roger Hart’s Ladder of Participation (1992)
views are seriously considered. Level 6, however, is significantly different as it describes situations where children are partners in the decision-making process and have equal voice to that of the adults. As Hart argues, different circumstances, the child’s age, cultural considerations and other aspects determine the appropriate level of participation in a particular case.

The child’s participation right and the child’s family

Attention should be drawn to the implications the participation principle has on the role of the child’s family. The Convention regards the family, and specifically the child’s parents, as the central players in the child’s life, aiming at strengthening the status of the parents, not weakening it. Being the innermost circle of the child’s caretakers, parents are provided with rights and responsibilities to promote their children’s rights and interests. Thus with regard to participation, the Convention does not attempt to intervene between children and their parents (with the exception of protecting the child’s wellbeing — see Article 3(2)), but rather to regulate the relationship between the state and the child directly. Article 12 focuses, then, on administrative and judicial decisions, not on internal family matters. The family’s traditions and beliefs are respected as long as they are not harmful to the child. However, parents are expected to guide and support their children’s participation in decision-making, in accordance with their evolving capacities, as Article 5 provides. Additionally, being a child-focused document, the Convention does imply that when state intervention has already occurred, the child has a right to have his or her own opinion justly considered even in cases of conflict with the parents’ views (Flekkøy and Kaufman 1997, pp. 58–60).

2.9 Child–victims’ rights under the Convention

According to the Committee, the Convention’s guiding principles, namely the participation, best interests, equality and development, should be integrated in the interpretation of each one of the specific provisions and guide their implementation (Hodgkin and Newell 2002, p. 42). These principles were therefore reviewed here as they are necessarily relevant in the context of the rights of child victims. It is equally important, however, to explore the Convention’s specific provisions relating to child victims. The following provisions could be relevant in some way:

- The right of the child not to be unjustly separated from his or her family (Article 9). This right becomes relevant when an intra-familial offence has been reported;

- Protection against arbitrary violation of the child’s privacy (Article 16). This right is relevant whenever the child’s personal matters become of interest to others, such as the case of a private journal being used as evidence or when the child’s body is being violated for forensic medical examination;
• Protection against abuse, neglect and violence, whether inflicted by family or others who care for the child (Article 19). This Article relates directly and explicitly to childhood victimization and will be discussed in more detail below;

• Special protection for out-of-home children (Article 20). This Article is relevant when a child has been placed in an alternative placement due to intra-familial offence, and in relation to the protection of all children who reside in such alternative placements, against victimization;

• The right of children with disabilities to receive equal opportunities and services according to their needs (Article 23). This Article applies to child victims with special needs;

• The right to access to health services (Article 24). This provision becomes relevant to child victims when they need medical treatment or mental health services.

• Specific protections against abuse related to narcotic drugs (Article 33), sexual abuse (34), trafficking (35), and other sorts of exploitation (36). These specified obligations on states to protect children from practically all crimes emphasize the importance of the right of children to be safe and the positive duty upon states to ensure their safety;

• Protection against torture and other cruel, inhumane and degrading treatment or punishment (Article 37). Although this provision is usually associated with the rights of child-offenders, it has direct relevance to the subject of this thesis, as it prohibits violence against children who are in state institutions. This includes protection against corporal punishment and other forms of violence against children in boarding schools, militias and detention facilities (Hodgkin and Newell 2002, pp. 545–547); and

• The right to recovery and reintegration (Article 39). This right is also explicitly and directly related to child victims, and therefore will be discussed in detail below.

As this list demonstrates, several Articles articulate the right of children to be protected against the occurrence of victimization. Once a child has been victimized, a whole new set of rights is being activated. Two provisions, however, target exclusively the situation of childhood victimization, namely Articles 19 and 39. Article 19 focuses on prevention and protection, and Article 39 focuses on the recovery of children who had already been victimized. However Article 19 relates only to violence by the child’s caretakers, and should be read together with the other proactive provisions, namely Articles 33, 34, 35 and 36. The reactive measures specified in Article 39 apply on all forms of child victimization.
2.9 Child–victims’ rights under the Convention

2.9.1 Protection against victimization

Article 19 provides:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

The first part of this Article focuses on the responsibility of states to protect children from all forms of maltreatment. Accordingly, children are entitled to be safe from being victimized by their caretakers, including their parents or other guardians, their teachers, foster families or any other caretaker. The protection provided in the Article includes sexual, physical and emotional abuse, neglect, negligent treatment, maltreatment or exploitation — a wide array of actions and omissions. According to the Committee, corporal punishment — whether inflicted within the family, schools or other institutions, as well as in the penal system — is also prohibited by the Convention (Hodgkin and Newell 2002, pp. 259–274).

The second part of this Article lists specific measures that governments are expected to take to assure such protection and to assist child victims. The Guidelines for Periodic Reports specify that states should: 1. Show legislative prohibitions of all forms of child abuse; 2. The existence of complaint and reporting procedures, and remedies such as compensation; 3. Procedures for intervention by the authorities to protect child victims; and 4. Educational and other measures adopted to promote positive and non–violent forms of discipline. The Guidelines further ask states to document existing programs for support and rehabilitation of child victims, confidential help lines, advice or counselling (Hodgkin and Newell 2002, p. 680).

Thus, not only does Article 19 oblige states to protect children from abuse and exploitation, it also provides these children with remedial measures, an aspect that appears also in Article 39. However, the Article creates these duties only in relation to victimization by caretakers, which even when interpreted broadly does not include stranger–perpetrators. Therefore it should be read with Articles 33 – 36, that expand the protection right to other contexts as well.

2.9.2 The right to rehabilitation

Article 39 states:
States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

According to this provision once victimization has occurred, an obligation is created toward the child to promote his or her emotional healing as well as their social reintegration. Punishing offenders is not enough; the responsibility of state members toward young victims continues until they are fully rehabilitated.

The 1996 Declaration of the world Congress Against Commercial Sexual Exploitation of Children provides an important account of what is expected from states with regard to rehabilitation and reintegration of child victims. It particularly demonstrates the connection between child–friendly processes and the rehabilitation of child victims. Article 5 of the Declaration, titled ‘Rehabilitation and Reintegration’, provides that a state should

a) Adopt a non–punitive approach to child victims of commercial sexual exploitation . . . and establish a child–friendly judicial system, taking particular care that judicial procedures do not aggravate the trauma already experienced by the child and that the response of the system be coupled with legal aid assistance and provision of judicial remedies to the child victims;

b) Provide medical, psychological and other support to child victims of commercial sexual exploitation . . . with a view to promoting the self–respect and dignity of the child with conformity with the Convention on the Rights of the Child;

c) Train medical personnel, social workers, non–governmental organizations and others working to rehabilitate and reintegrate child victims of commercial sexual exploitation on the Convention on the Rights of the Child, other relevant human rights standards and child development;

d) Take effective action to remove societal stigmatization . . . facilitate the rehabilitation and reintegration of child victims in community or family settings . . .

Apart from stressing the importance of child–friendly processes, this declaration requires states to do more than the provision of universal services to children at risk or families in crisis: special services, with the child victims as their specific target population, should be established in order to ensure effective rehabilitation.

2.10 Conclusions

This chapter presented the theoretical foundations for children’s rights. The most fundamental justification for children’s rights is their membership of the human race,
which entitles them to equal respect as any other members of society. The notion of children’s dignity is also central in the Convention (Melton 1991), as its preamble demonstrates:

Considering that, . . . recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

. . .

Considering that the child should be fully prepared to live an individual life in society, and brought up . . . in the spirit of peace, dignity, tolerance, freedom, equality and solidarity . . . (Extracts from the Conventions’ Preamble).

Despite criticism against the use of rights terminology with regard to children, it seems that a special type of rights discourse might provide a more robust framework. This is a rights discourse, based on the international human rights arena, that acknowledges the importance of protection and family ties as well as self determination and autonomy. A rights discourse that connects rights with needs, is therefore more vital than one which excludes needs or is in competition with them.

Indeed, respect for children means respecting both their special vulnerabilities, or needs, and their evolving capacities through allowing them to exercise their rights increasingly as they mature (Flekkøy and Kaufman 1997, p. 49). As the first part of this chapter showed, the Interest theory grounds rights on people’s basic needs, and therefore avoids categorizing people according to their capabilities or lack of them.

However, justifying rights on the basis of need does not mean that needs–based rights are necessarily weaker than choice, or will–based rights. The various models reviewed earlier by Feinberg (1980), Campbell (1992), Eekelaar (1992), Wolfson (1992) and Minow (1995b) demonstrate that children hold a complex mix of welfare, human, liberal, and protection rights. Indeed, the international body of human rights reflects a similar holistic approach toward children’s rights as it does not follow the strict separation between negative and positive rights or between liberal rights and protective needs. Children’s positive right to protection, for example, was stated internationally as early as 1959, in the UN Declaration of the Rights of the Child, linking the child’s needs with the child’s rights (Ezer 2004, p. 23).

However, the Convention on the Rights of the Child has gone the furthest in articulating a comprehensive, interrelated network of children’s rights, reflecting a multidimensional understanding of rights. The Convention’s guiding principles of equality, best interests, participation, and the right to life, survival and development are indivisible and should be read into each one of the Convention’s other provisions. This interlinking method offers a broad, flexible and yet powerful network of rights which extends beyond the protection–autonomy dichotomy. For example, as Flekkøy and Kaufman (1997) suggest, the dilemma between over–protection and under–protection related to the participation principle can be adequately addressed through the deployment of the ‘best interests’ and the development, or the ‘evolving capacities’ principles in its implementation. In other words, the integrated use
of the four guiding principles provides a tool for resolving internal dilemmas and ostensibly conflicting priorities in the application of children’s rights.

The Convention also reflects an inclusive attitude toward children, similar to what Minow (1990, p. 375) calls ‘taking the perspective of the other’. Indeed, the Convention requires society to make the needed adjustments to include children in public discourse while addressing their vulnerabilities, instead of excluding them from the adult world due to their limited experience and lack of maturity. Accordingly, the Convention stipulates that children should be encouraged to develop their evolving capacities, receive any aids they need to overcome disabilities and take part in decision-making processes according to their capabilities. In other words, the Convention creates a utopian framework in which the worlds surrounding children are being fitted according to their special needs, allowing them to be active participants in them. At the same time, and similarly to Minow’s emphasis on the importance of relationships, the Convention acknowledges the centrality of the child’s family, relatives, culture and nationality.

It seems, then, that the Convention is unique in its unprecedented holistic approach toward children, as well as in its (perhaps surprising) world wide popularity. Therefore, while there are limitations to the rights discourse in general and to children’s rights as reflected in the Convention in particular, its near universal ratification makes children’s rights part of today’s political reality. The question each ratifying nation must then ask is not whether children (or child victims, in the context of this work) have rights, but instead how the Convention should best be implemented to meet these rights. In other words, and in the context of this thesis, children’s rights are, theoretically and practically, a valid instrument in evaluating current responses to childhood victimization, making the Convention an important international measurement for the achievements (and failures) in this field.

Next, this chapter mapped those rights in the Convention which relate to child victims. Although the Convention’s 42 substantive Articles are intertwined and affect each other, it was possible to identify the most relevant provisions that apply to child victims. Six such provisions were chosen. Four of them are the guiding principles of the Convention, namely the best interests, equality, the right to life, survival and development (termed here the development principle, for simplicity), and the participation principle. Additionally, two provisions relate exclusively to child victims: the right to be protected from all forms of violence, and the right of child victims for physical and psychological recovery and social reintegration. The interrelationship between these provisions is reflected in Figure 2.2. As the image demonstrates, while the four guiding principles affect each other and have direct application on policies regarding child victims, they also influence, or shape, the understanding and implementation of the two specific rights, namely the right to protection and to rehabilitation.

One could argue against this account that it fails to include other international norms that are relevant to the context of childhood victimization. For example, perhaps the right of crime victims to restitution from the offender stated in the Declaration should be included in this model. However, there is merit in keeping this account broad and open for specific interpretations in accordance with varying
Figure 2.2: Child victims’ rights: a visual account
cultures, mechanisms and circumstances. The right to restitution from the offender has a narrower nature and can be considered as part of the rehabilitation right or the best interests principle. Moreover, unlike the Convention, the Declaration is not a binding instrument, and therefore its provisions have a weaker status compared with that of the Convention’s Articles.

Furthermore, each one of the six rights in this account (the four guiding principles and the two specific provisions) reflects, beyond its literal meaning, a complex body of understandings as discussed earlier. For example, ‘equality’ means not only procedural, but substantive equality (Van Bueren 1999a) which requires individual evaluation of the child’s difficulties in having equal access to whichever institution is being considered, and efforts to overcome these obstacles. ‘Participation’ refers to Roger Hart’s (1992) differentiation between meaningful and tokenistic participation. ‘Development’ indicates the importance of considering (and promoting) the evolving capacities of the child, and accordingly a gradual expansion of children’s autonomy dictated by the capabilities of each individual child. ‘Protection’ refers not only to Article 19 (crimes by caretakers) but to the other specific provisions that create protections against extra–familial exploitation. Finally, ‘best interests’ should be understood in its broad meaning which includes the child’s wishes. Therefore, one should read this account of child victims’ rights as a coded presentation of a much more complex network of interrelated values.

A recurring theme emerging is this chapter has been the interrelationship between an empirical investigation of children’s needs on the one hand, and a normative analysis of their basic rights on the other. An examination of children’s needs, or interests, provides the foundation for children’s rights. In other words, at least some of the rights children have are based on their universally acknowledged needs. Rights, in turn, provide these needs a certain power, a status strong enough (at least theoretically) to bring about political change. As Waldron (2000, pp. 131–132) says, the needs discourse provides a diagnosis; the rights discourse uses this diagnosis as claims to create duties upon others.

But this is not the full picture of the mutual relationship between needs and rights, or the empirical and the normative discourses in the context of child victims. An important feature of the Convention is the broad meaning of its provisions. This allows flexibility and adjustments for different cultures, children and circumstances. However, this also presents a difficulty in translating its provisions into action. Indeed, vagueness is one of the main critiques against rights discourse in general, and the Convention in particular. An empirical exploration might be helpful in uncovering the specific meanings of the Convention’s provisions in the context of childhood victimization and overcome this concern. This is the underlying assumption of psychological jurisprudence (Melton 1992), which calls for the cooperation of law and psychology to allow evidence–based judicial decisions. In other words, empirical findings as to children’s daily realities provide not only the general justification for children’s various rights, they also provide these rights content regarding specific circumstances. The next chapter, therefore, aims to complete the needs–rights template by reviewing the psycho–social literature regarding childhood victimization.