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DEVELOPING THE RIGHT TO DEVELOPMENT

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Developing the Right to Development

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1. Introduction

Back in 1998, Onora O'Neil argued that children's main remedy is to grow up (O'Neil, 1998). This narrow perception of childhood, which subjugates children's agency and dignity in the present to their potential future, is not uncommon (Freeman, 2010). In fact, this has been the dominant narrative underpinning international children's rights law since 1924, when the League of Nations adopted the *Declaration on the Rights of the Child*, also known as the *Geneva Declaration*.

The *Geneva Declaration* begins by stating that a 'child must be given the means requisite for its normal development, both materially and spiritually'. This statement signals the principal objective of international children's rights law: ensuring that the child develops in a 'normal' manner to become an adult. The questions what qualifies as a 'normal' process of development and what means are necessary to safeguard it remain open since.

The *1989 UN Convention on the Rights of the Child* ('the Convention') embraces and perpetuates a similar narrative about childhood: Article 6(2) of the Convention acknowledges children's unique right to development, and eight elements of child development (physical,

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mental, moral, social, talents, cultural, spiritual and personal development) are protected in the context of five others Articles (18, 23, 27, 29 and 32).

For nearly thirty years after the adoption of the Convention by the UN General Assembly, the right to development gained little attention. This journal, for example, dedicated only three papers to the right. The first two articles on this issue were published in its first two issues (Himes, 1993; Hodgson, 1994), and the third article was published nearly 20 years later (Peleg, 2013). In practice, and although the Convention's monitoring body, the UN Committee on the Rights of the Child ('the Committee') defined Article 6 as one of the Convention's four guiding Principles (General Comment 5, 2003), States Parties rarely refer to this right in their implementation reports, and the Committee addresses this right infrequently in its Concluding Observations and General Comments (Peleg, 2013; Peleg, 2017).

This paper analyses how the right to development of children has been interpreted thus far in both international and domestic law, using family law and juvenile justice as case studies. It then moves to examine the increasing role of using social and natural sciences about child development in courts, and the problems this raises. Drawing on these changes, the paper concludes by suggesting avenues for further engagement in developing the right to development of children. Namely, differentiating between its role as a 'stand-alone right' and as a guiding principle, its usage as a procedural right and a substantial right and the need to adopt a consolidated legal interpretation for the term 'child development'.

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2. Disengaged Right

Concentrating on the image of the child as a future adult, and subsequently establishing legal obligations to facilitate this transition from childhood to adulthood resonate with the broader social construction of childhood in the Western world (Archard, 2004; Mayall, 2002; James and Prout, 1997). Therefore, it was only reasonable to find a commitment to advance this objective in international children's rights law, including in the Convention. The inclusion of the 'right to development' in a binding international law treaty, and the corresponding duty on States Parties to ensure this right 'to the maximum extent possible' was included at first draft of the Convention, which was introduced by Poland in 1978. This draft mentioned child development in the context of the rights to health and education, and in addition, Article 2 in that draft provided that:

> The child shall enjoy special protection and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity...

This Article and the question of establishing a right to development did not receive much attention during the drafting process. It was ten years later, in 1988, that India suggested adding Article 6 to the Convention about the child's right to life, linking it to children's rights to survival and development. The Working Group responsible for drafting the Convention supported this suggestion, and indeed most of its subsequent discussions focused on the meaning of the right to survival, and its potential overlaps with the right to life. However, the right to development was left at the margins. The Working Group did not meaningfully engage with the opportunities and challenges the right to development presents for children's lives.

In that sense, this part of the drafting process carries limited weight in any attempt to utilise it in the process of interpreting the Convention (Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*).

By and large, the academic literature about Article 6 mirrors the neglect that prevailed in the drafting process. Manfred Nowak's 2005 commentary on Article 6 is one example (Nowak, 2005). Nowak provides a comprehensive analysis of the right to life, stipulating in detail its negative and positive elements, the duties it carries for States Parties and some of the interlinkages it has with other rights of the child, primarily the right to health. The right to survival of the child, the second element of Article 6, is then briefly discussed. However, the right to development is only mentioned in the last three pages of the book. Nowak's discussion on the right to development focuses on the similarities and differences between the Convention's conceptualisation of the right to development, and the right to development in 'general' international law, essentially comparing between the Convention and the 1986 *Declaration on the Right to Development* (Nowak, 2005: 44-48). As I have argued elsewhere, this short comparison simplifies the relationship between the two documents and the two rights and overlooks some fundamental elements of the child's right to development (Peleg, 2012a). The intrinsic, independent merit and meaning of the child's own right to development are not discussed in this commentary.

The next important reference to the right to development of children can be found in Martin Woodhead's work. Woodhead suggests that the right to development bears special relevance for younger children, arguing that the child's early years of life are the period when the most rapid developmental changes occurs (Woodhead, 2005). This interpretation draws on developmental psychology theories and the significance these put on early years, but it does

not follow basic rules of treaty interpretation. Namely, that according to the Convention, all children below the age of eighteen are rights holders under the Convention (Article 1), and therefore all of them are entitled to enjoy protection for their right to development. Nonetheless, Woodhead is right to suggest that the meaning of this right changes in accordance to the developmental stage that a child is in. An adequate interpretation of the Convention should take this into account, considering also local contextual perceptions of the support and means necessary to promote child development further.

Research conducted by Didier Reynaert and her colleagues shows that since the early 1990s, children's rights scholarship focused on three main themes. First, Article 12 and the right to participation of children. Second, the parent-child relationship, and third, measures of and challenges in the implementation of the Convention (Reynaert and Vandevlde, 2009). In addition, as Ann Quennerstedt argues, little scholarly attention been dedicated to the analysis of the Convention itself. One of the main reasons for this omission is that much of the research about the Convention is used for advocacy purposes, and there is a sense that highlighting difficulties with the Convention might be used to undermine the children's rights project (Quennerstedt, 2013). But as John Tobin suggests, validating and reaffirming the importance of protecting the human rights of children require critical engagement with the argument that human rights theory is applicable to children (Tobin, 2013). Similarly, it seems that the lack of engagement with the right to development by scholars is partly because of the ambiguity surrounding the term 'child development', and the hesitation to suggest that Article 6 is not very clear. This lack of engagement means that in practice, the right to development is neither being addressed nor protected.

3. The Right to Development in the Jurisprudence of the UN Committee on the Rights of the Child

In recent years, the right to development has gained increased attention at the jurisprudence of the Committee. But this attention has not yet been translated into a tangible and theoretically-sound interpretation of the right that clarifies what children can expect from States Parties, their parents and other duty-bearers.

In the first decade of the Committee's jurisprudence (1993-2003), the right to development was addressed infrequently and without consistency. Rarely was the right described as an independent right of the child, as most of the discussions about Article 6 tended to focus on the right to life, and similarly to the Convention's drafting process, to a limited extent on the right to survival. In the few occasions where the Committee did refer to the right to development, it was usually in the context of other rights, for example the child's rights to health or education (again, similarly to the connection made at the first draft of the Convention). These references did not address the interpretation or implementation of the right to development as an independent obligation. For example, the Committee noted that inadequate access to post-natal health care services undermines the child's right to health as well as having a negative impact on their right to development. Similar connections were made with respect to some other events in the child's life including: poverty and the right to adequate standard of living (Article 27); inadequate parental care (Article 18); and the living conditions of street children (Peleg, 2012b).

In 2003, the Committee published General Comment 5 on the 'General Measures of Implementation' of the Convention. In this General Comment, the Committee defined Article 6 as one of the Convention's four guiding principles, together with Articles 2, 3 and 12. This

definition should have been translated into increased attention to Article 6, including to the right to development. However, this change in attitude did not happen. Instead, the Committee continues to refer to the right to development on an ad-hoc basis, often in the context of other rights of the child. Based on an analysis of all of the Committee's jurisprudence until 2017, it can be argued that the Committee conceptualises the right to development in one of two ways. The first is interpreting the right to development as a collateral right, meaning that when another right of the child is being violated, for example the right to education, it also constitutes a violation of the right to development. The second interpretation is drawing causality between two rights, stating that a violation of a right of the child undermines the ability of the child to develop fully. Taking the right to education as an example once more, this interpretation suggests that a violation of the right to education leads to a lesser ability of the child to develop fully in the future

In 2016 the Committee published its General Comment 20 'The Implementation of the Rights of the Child During Adolescence'. Giving its acknowledgment of the need to take this right more seriously, this is the Committee's most recent engagement with the right to development, and its first attempt to provide an interpretation of the right. In this General Comment, the Committee 'emphasizes the importance of valuing adolescence and its associated characteristics as a positive developmental stage of childhood', and discusses the role adolescence can and should have in society (2016: 5). It also highlighted that even in this later developmental stage, adolescents are still in need of support for their psychological and other developmental needs (similarly to its suggestion in General Comment 4). In doing so, the Committee confirmed that the right to development applies to all children under the age of 18, contrary to Woodhead's position. However, whilst the Committee focused on the

child's developmental status as a measuring tool to differentiate adolescents from other groups of children, mainly toddlers, the General Comment remains silent on how to interpret the right. Indeed, by conceptualising child development as a status, the General Comment did not seize the opportunity to discuss the independent developmental elements intrinsically requiring protection as a matter of human rights. Therefore, this welcomed and much necessary attempt to engage with the right to development has limited contribution, and more work is needed by the Committee in clarifying to all duty bearers what their obligations under Article 6(2) are. The Committee's suggestion that the law should regard child development as a status signals an important shift in the relationship between child development and international children's rights law, which to some extent follows a similar trend in domestic law, which will be discussed below.

It is expected that in the coming years the Committee will discuss the right to development further, and a general comment on Article 6(2) will be welcomed. This should include addressing it as a stand-alone right, and interpreting it in the context of Article 6 and the Convention, not just as a generalised human right or a guiding principle. Like the Committee's interpretation of the best interests principle (General Comment 14), there is a need to account for the right to development's meaning as both a substantive and procedural right.

4. Child Development and Child Law on the Domestic Level

The care for child development has traditionally been a central concern for domestic family law. For example, family law in Australia requires courts to take account of the potential impact their decisions could have on the development of a child. For example, in the context

of divorce orders for couples with children below the age of 18, an order will not take effect unless the court is convinced that 'proper arrangements … have been made for the care, welfare and development' of the couple's children (*Family Law Act 1975* (Cth), section 55A(1)(b)(i)). Similarly, section 3 of New Zealand's *Care of Children Act 2004* states that the purposes of the Act are to 'promote' and 'facilitate' children's development. However, these laws do not specify what child development means, and what aspects of child development should be accounted for when assessing any potential impact of future arrangements. The law in England and Wales, trying to avoid such a lacuna, suggests the following tautological definition of child development: 'physical, intellectual, emotional, social or behavioural development' (*Children Act 1989* (UK), section 31). Absent a clear definition, this sort of laws invite judges to interpret and apply them on a case-by-case basis, looking beyond the law for guidance as to what child development means. This essentially leaves judges with a wide discretion to decide how to interpret child development as a legal concept, and subsequently to decide what measures should be taken in order to protect it in any future living arrangements.

This treatment of child development in domestic law is similar to what we see in the realm of international children's rights law: a broad recognition of the need to protect child development on the one hand, but a lack of a concrete and implementable definition on the other. Therefore, when such laws are interpreted, it is almost inevitable that judges will rely on their own personal and subjective experiences as adults (and usually as parents too) about the 'proper' ways for children to grow up. Judges are also likely to rely on expert witnesses' testimonies, usually in the form of a psychological evaluation of the child and an assessment on the potential impact(s) of the parental dispute and post-separation orders on the future

development of the child (Cashmore and Parkinson, 2014). Such approaches are susceptible to bias based on race, ethnicity, religion, class, gender, sexuality or disability, and their intersections. This approach might also run the risk that judges will favour, as Helen Reece argued, the assumed best interests of the individual child at the expense of promoting fundamental social values like gender and sexual equality (Reece, 1996). The background for this argument was a series of decision made by English courts during the 1990s in post-separation guardianship decisions, that removed children from homosexual parents in favour of a heterosexual parents, due to the perceived 'risk' that the child's development and well-being would be undermined if she were to grow up with the 'social stigma' associated with having gay parents. Not only does this line of reasoning surrender to social biases and discrimination against LGBTIQ parents, as Reece rightly argued, but it also presents a narrow perception of what child development means, and ignores the potential impact that alienating a child from her gay parents might have on her development, and her sense of self. As Buss and Maclean noted, such discriminatory treatment of gay parents has been scrutinised by the US Supreme Court (*Palmore v Sadoti* 466 US 429 (1994)), which ruled that the state is under the duty to avoid perpetuating injustice against adults (Buss and Maclean, 2010: 6-25). Nonetheless, given the broad discretion that judges still have under these laws, and the various social and legal biases against non-traditional families (for example, lack of recognition of a gay household, biases towards "mix" race families etc) there is a need to develop the relationship between the law and child development further.

4.1. Developing the relationship between law and science

Research about child development, children's rights and the law tends to ask why child development science is relevant to the law. It focuses on the ways in which science constructs its conception of 'childhood' and how it helps to create and shape the legal image of the 'child' and the subsequent treatment of the 'child' by the law (Scott, 2000-2001; Eekelaar, 1994; Emery et al., 2005; James and Prout, 1997). There has been a growing interest on how the law in general, and courts in particular, make use of social and natural sciences in children's cases and how these understandings of child development are deployed in court (Fineman and Opie, 1987; Cashmore and Parkinson, 2014; Prescott, 2016; Emery et al., 2016; Cashmore, 2016). As Emily Buss notes, there is also a need to account – in research and in practice - to the active role that the law, including domestic law, has on child development, especially the child-rearing aspects of the law itself (Buss, 2016).

Improving the protection of the right to development requires engaging with the competing conceptions of child development in law and to develop some conceptual and practical clarity that will enable judges and lawyers to better protect child development. In an attempt to create some consistency and certainty, there has been a wave of amendments incorporating some assumptions about child development into legislation. For example, a new section 61DA was added to Australia's *Family Law Act 1975* (Cth), declaring that when parents separate, the child's future development will be best served if both parents retain an equal and shared parental responsibility. This amendment outlines a legislative pathway for ensuring that child development is served in a post-separation situation, but it does not clarify all the ambiguity surrounding this term.

Shortcomings in the conceptualisation of child development can be contrasted with the legislative and judicial treatment of the principle of the best interests of the child, also known as the 'welfare principle' is some jurisdictions. A growing number of domestic legal systems have adopted legislative 'check-lists' in an attempt to construct and constrain judicial decision-making, reduce subjectivity and increase consistency. For example, section 60CC of *Family Law Act 1975* (Cth) provides that 'the benefit to the child of having a meaningful relationship with both of the child's parents; and the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence' are the Court's primary considerations when applying the best interests principle. The section then adds a list of secondary considerations including, *inter alia*, the child's views, her relationship with her parents, and the roles that parents took in her upbringing. Section 1(3) of the *Children Act 1989* (UK) provides a shorter list that includes the child's 'physical, emotional and educational needs; the likely effect on him of any change in his circumstances; his age, sex, background and any characteristics of his which the court considers relevant'; and how capable each parent is.

These lists provide judges with concrete criteria that should be taken into account when analysing what is the best interests of a specific child in each and every case. While these check-lists have created more certainty and consistency, they nonetheless leave judges with a necessary broad discretion and (Bala and Wheeler, 2012; Parkinson, 2008; George, 2014). However, room for fundamental errors sometimes remains, for example, when a judge does not distinguish between parental interests and those of the child (Michalowski, 1997). Importantly, check-lists do not nullify judges' discretion, and discretion in turn is not always at odds with coherency or conceptual clarity. The need for a well-crafted legal road map to

determine what children's developmental needs are, and how they can be subsequently protected and promoted, is imperative.

It is sometimes argued that attempting to address child development in court is an ill-conceived ambition. More specifically, it has been argued that the law cannot accommodate the complexity of social science, and there are no consistent processes for courts to evaluate the developmental status of a child, her future needs, or the potential impact of court order on her development (Beatty et al., 2006). One option to overcome these limitations, as Buss suggests, is to change the ways in which law relates and interacts with social and natural sciences. In particular, Buss suggests that there is a need for the 'law' – as both a discipline, and through its actors such as lawyers and judges – to realise that social and natural sciences can provide them with some insights into the developmental status and development needs of children. However, as Buss states, it is the duty of both lawyers and judges to then utilise this knowledge when implementing (and I would add creating) law (Buss, 2009-2010).

Some respond to this point by stating that lawyers may not be qualified to do what Buss expects them to do, and that there is a need to solve the problems of judicial ignorance about child development and the misuse of scientific evidence (both social science and natural science) by law. Educating judges and lawyers and equipping them with the tools to understand and appreciate these bodies of knowledge is therefore imperative to advance better protection of child development in and through law (Cashmore and Parkinson, 2014; Steinberg, 2013). This, together with a legislative reform that upholds Articles 6(2) and 2 of the Convention can ensure that the right to development of children, either as individuals or as a collective, will not be compromised or side-lined in favour of racism, xenophobia, and misogyny.

5. Juvenile Justice in the United States

Another legal territory that utilises child development science is juvenile law, most notably in the United States (the only country in the world that did not ratify the Convention). In the last decade, the usage of neuroscience and developmental psychology in sentencing decisions changed dramatically, utilising neuroscience and developmental psychology. In a series of key cases (*Roper v Simmons* 543 U.S. 551 (2005); *Graham v Florida* 560 U.S. 48 (2010); *J.D.B v North Carolina* 564 U.S 261 (2011); *Miller v Alabama* 567 U.S. 460 (2012); and *Montgomery v Louisiana* 577 U.S. _ (2016)) that involved accused who were found to be guilty of committing a crime before turning 18, the Supreme Court referred to developmental science to account for minors' 'immaturity' and subsequently justify the conclusion that they were less culpable than adults for their crimes.

In *Roper v Simmons* the Court ruled that executing an individual who committed murder before turning 18 was a cruel and unusual punishment and therefore in violation of the Eighth Amendment of the Constitution. The Court's reasoning was based on what 'any parent knows' about the differences between adults and adolescence (*Roper v Simmons* 543 U.S. 551, 569 (2005)). The Court stipulated three such differences: first, due to adolescents 'lack of maturity and … underdeveloped sense of responsibility' they 'cannot be classified as among the worst of offenders'. Second, adolescence 'are move vulnerable or susceptible to negative influence'. And third 'that the character of a juvenile is not as well formed as that of an adult' (p. 566). Thus, accounting for adolescent' stage of development as a legal status that influence the ways in which constitutional rights should be interpreted.

In *Graham v Florida* the Supreme Court applied similar analysis in deciding that a sentence of life-without-parole on a juvenile offender who committed an offence other than murder violated the Eighth Amendment. However, an added component to the Court's analysis was its use of neuroscience. The Court gave considerable weight to scientific evidence that the 'parts of the brain involved in behaviour control continue to mature through late adolescence' (*Graham v Florida* 560 U.S 48, 68 (2010)), and that this suggests that denying adolescents the opportunity to change their ways would be a cruel and unusual punishment (560 U.S 48, 73 (2010)). Buss sees a 'paradoxical quality to the Court's connection of minor's special amenability to change in adolescence' (Buss, 2016: 744) given that the change might occur only much later in life, and because the juvenile is usually sentenced after turning 18.

In *Miller v Alabama* and *Montgomery v Louisiana*, two subsequent life-without-parole cases, the Supreme Court further differentiate between children and adults based on children's ability to change and their lesser culpability. In *Miller*, the Court ruled that a mandatory life sentence without the possibility of parole is unconstitutional for juvenile offenders, unless that sentence is based on an individualised assessment of the offender and the offence (particularly in cases of murder). However, in *Montgomery* the Court narrowed the test for juvenile murderers further, ruling that only those 'who exhibit such irretrievable depravity that rehabilitation is impossible' could be sentenced to life without parole ((577 U.S. __ 733 (2016)). While these decisions can be celebrated for defining a period of special protection for children, Buss argues that assuming *Montgomery* 'represents an accurate assessment of the role of an individual minor's development played in his crime' is problematic (Buss, 2016: 745). Cohen and Casey, however, celebrate these decision, saying that they are a welcomed

change that account for the influence of peers, potential threat and the "hijack" of the emotional centres of the brain on the adolescence behaviour (Cohen and Casey, 2014: 64).

It is not only the prospect of change and the child's ability to transform into a responsible and productive citizen that the Supreme Court should ask the trial judges to identify. The trial judge is also expected to focus on the child's stage of development, and her future developmental prospects as part of her rights and freedoms.

Accounting to children's developmental stage as a matter of status is further demonstrated in *J.D.B v North Carolina*. In this case, the Supreme Court held that age is relevant when determining police custody for Miranda rights purposes (the right to silence warning given by police in the United States to criminal suspects in police custody or in a custodial interrogation) while rejecting any usage of developmental science. Instead, the Court based its analysis on common sense (564 U.S. 261, 2403 (2011)), mimicking O'Neil's arguments about the value of childhood.

In that sense, the gap between the ways in which the two legal systems – the Convention on the one hand, and the US domestic criminal law on the other – define their roles vis-à-vis the child's future is narrower than it might first appear. Both systems ask to provide as many opportunities as possible for the child to develop, while taking a contextual approach that helps to identify the developmental needs of every child and to account to the effects of the law. The needs of the child who has committed a crime might be different, and the fact that she is about to be punished for a crime does not relinquish the State of its the duty to care for her development. In that sense, there is a lot to be learned from this domestic criminal law jurisprudence when thinking about Article 6(2) of the Convention.

But at the same time, juvenile law is less concerned with caring for child development and promoting it, compared to the Convention or domestic family law. Instead, it takes the child's level of development, primarily assumed to be her level of cognitive development as determined according to the child's age, as a matter of status. This is a very problematic assumption given that age is not an accurate indication of cognitive development, surely when it is not examined with respect to a concrete child's capabilities. The 'status' of a child's development is then used to rethink the sort of punishment that the guilty child should receive, and its likely impact (mainly the impact of incarceration) on the child's future development.

6. Conclusion

The next stage in the quest to better understand, and implement, the duty to protect and promote the child's right to development requires addressing how the law should engage with and utilise child development science, how to differentiate between the right's interpretation as a 'stand-alone right' and as a guiding principle of international children's rights law, and its usage as a procedural right and a substantive right. Further examination is also required of the ways in which law, science and society, conceptualise this period known as 'childhood'.

The protection of the right to development of children should account for a child's current stage of development and protect both the processes of development, as well as its outcomes. Back in 1924, the *Geneva Declaration* referred to the protection of the 'normal' and 'healthy' process of a child's development. The meaning of these terms has changed over the years, and is likely to continue to do so. However, the objective of international children's

rights law remains the same: to ensure that children get the chance to develop to their maximum potential. The interpretation of the right to development, and the subsequent obligations this creates for parents and the State predominantly depends on the ways in which each society – including children – define what these 'normal' and 'healthy' processes of development are.

Developments in neuroscience teaches us new things about how the brain functions, and how the brain controls and regulates emotions and behaviour. It also teaches us about people's capabilities and their capacity to make 'rational' choices. Using this science can be beneficial, albeit also very problematic as will be argued below, when interpreting the child's right to development. By allegedly providing some scientific, thus objective, evidence, insights from science should be used with a pinch of salt in the legal context. Mainly, as conclusions based on such evidence can invite discriminatory treatment between children based on their developmental stages (Maroney, 2009: 156-160), or – developmental performances. Children's developmental status will be determined according to an age/performance matrix, which can produce unjust treatment for early or late developers, or indeed to any child who does not fit this 'objective' matrix.

Such evidences also the ignore the intersections of socioeconomic factors, the child's family environment, and political climate and their influence on the developmental status and trajectory of the child (Glennon, 2015-2016: 935). For example, the developmental status of two 14-year-old boys might be identical, but the means required to protect their right to development might be completely different, as one of them is a white boy who lives with his wealthy parents at the upper east side in Manhattan and goes to a top performing private school, and the other is a Roma child, the son of a single mother in Romania, where Roma

people have virtually no access to any public services and his mother lacks the means to provide him with any support. Another unwanted implication of using this science can be the denial of protection from such children, who are on the one hand below the age of 18 and therefore qualified as children under Article 1 on the Convention, but on the other will perform as adults in terms of their developmental stage (physical development? brain cell development?) and therefore will be treated as adults (cf. Maroney, 2011).

It is therefore the role of the UN Committee on the Rights of the Child, and other stakeholders like courts and Ombudspersons, and the child's rights scholarly community, to develop this right further, both in terms of its theoretical foundations as well as its practical meaning.

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