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**Children in Alternative Care and Article 25 of the CRC**

A contribution to the Day of General Discussion on “Children’s Rights and Alternative Care”, 16 – 17 September 2021.

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**Introduction**

One of the articles mentioned in the Concept Note of the Committee is article 25, which is in our view a crucial one for children in alternative care and one that is closely linked to children’s right to access to justice.[[2]](#footnote-2) In the middle of all kinds of articles and recommended actions of governments and non-governmental organizations to prevent and reduce placements in alternative care, article 25 of the CRC comes down to the individual child placed in alternative care. This child has the right to have her/his treatment and the other circumstances relevant to the placement reviewed regularly (for the purpose of this review see hereafter para 3).

Despite this importance of the right enshrined in article 25, the attention it has been given over the last 30 years in e.g. the States Parties’ reports, the Concluding Observations of the CRC Committee and in the Guidelines for the alternative care for children (2009) is very limited. Tobin and Luke rightfully call this right: ‘[a] neglected but critical right’.[[3]](#footnote-3)

This contribution to the Day of General Discussion on the rights of children in relation to alternative care is meant to draw the attention to questions on the interpretation and the implementation of article 25 of the CRC.

**“States Parties recognize the right of a child who has been placed by competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.”**

To avoid a lengthy document, we shall focus on a limited number of questions without going into details on e.g. the drafting history and the reporting practice[[4]](#footnote-4).

**Interpretation**

**1 Non-discrimination (art. 2 CRC)**

The right of the child to a periodic review is limited to her/his placement by the competent authorities. It is left to the States Parties to decide, preferably by law, who these authorities are. This rule means, however, as confirmed by the drafting history, that children placed in institutions by their parents or legal guardians do not have the right to a periodic review although they are often in the same institution as children placed by competent authorities. This interpretation is a clear example of a violation of the right of the child to enjoy all her/his rights enshrined in the CRC without discrimination of any kind.

In this regard, we like to cite a recommendation to the State of Palestine found in one of the Concluding Observations we considered : Ensure that the removal of children from their families is based on a court order’,[[5]](#footnote-5) which seems to suggest that all removal from family, including placement in an institution for alternative care instigated by the family should be approved by a court of law or other competent authority. This is even more important if the institutional placement amounts to deprivation of liberty of the child (see also art. 37 (d) CRC).

To avoid misunderstanding: the other articles qualified by the CRC Committee as General Principles are also applicable in the review process, such as the best interests of the child as a primary consideration (art. 3, para 1) and the right of the child to be heard and have her/his views taken into account (art. 12).

**2. The right to a periodic review applicable in the context of juvenile justice?**

During the drafting of article 25, no specific attention was paid to the question whether it would be applicable to juvenile justice as regulated by article 40 and 37 of the CRC. The representative of the USA stated that her delegation understands that the text of article 25 does not apply to placements under the juvenile justice system. There were no reactions from representatives of other countries. The text of article 25, however, does not explicitly nor implicitly exclude these placements, since it refers to placements ‘for the care, protection or treatment of her or his physical or mental health’. Hence, the key factor for an answer to the question is the interpretation of the purpose of the placement.

The term ‘review’ appears in a number of documents relevant to juvenile justice. The Beijing Rules, for example, are applicable as far as relevant to the treatment of juvenile offenders in institution, including those in detention pending adjudication.[[6]](#footnote-6) According to para 26.2 of these rules, children placed in institutions shall receive care, protection and all necessary assistance, including *inter alia* psychological, medical and physical care. Furthermore, in light of the objectives of juvenile justice – the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society (art. 40, para 1 CRC) – physical and psychological care or assistance is likely to be a part of the treatment of children, particularly when placed in juvenile justice institutions amounting to deprivation of liberty. Moreover, in various countries a form of treatment can be part of the juvenile justice intervention, which brings those intervention within the ambit of article 25 CRC. In its reporting guidelines 1996, the CRC Committee asked to indicate in their reports measures adopted to ensure that “a periodic review is made of the situation of the child (deprived of her or his liberty) and of the circumstances relevant to his/her placement”.[[7]](#footnote-7)

In light of all the above we submit that the right to a periodic review of a placement should be applicable to children placed in institutions in the context of juvenile justice. This is even more important in light of the strong link between the juvenile justice system and the (youth) care system in many countries in the world.

**3.The purpose of the review.**

Article 25 does not provide information about the purpose of the review. During the drafting process the Canadian representative proposed a text of which para. 2 stated: ‘States Parties shall take all appropriate measures to provide an adequate mechanism for reviewing the effectiveness of the treatment and the need for its continuation’. There was no substantive discussion about this proposal and it was not included in the CRC for the interesting reason that it was already considered implicit in the proposed first paragraph, that is: the current text of article 25. This seems to imply that the effectiveness of the treatment and the need of its continuation are the purposes of the review of the treatment. Many questions remain unanswered, however. For example, what if the treatment is ineffective and an institution of alternative care cannot provide the required effective treatment? Should a child then be placed in another (and/or less intrusive) form of alternative care? Or can the conclusion be that there is no justification any more for the continuation of the treatment? If the answer to the latter is affirmative, article 25 CRC’s purpose shows resemblance with article 37 (d) CRC, which provides children deprived of their liberty with the right to *habeas corpus*.

In its Concluding Observations, the CRC Committee rarely pays attention to the possible purposes of the periodic review. In 1996 it recommended Croatia to carefully monitor the system of foster care to eliminate acts of abuse, which seemed to imply a more general call upon a State Party to monitor the foster care system.[[8]](#footnote-8) With regard to Turkey, the Committee recommended that the periodic review should assess whether the treatment serves the intended purposes.[[9]](#footnote-9) These and other recommendations are of a rather general nature and do not provide specific guidance on meaning and the individual nature of the periodic review. The most individualized recommendation was made in the Concluding Observations concerning the Czech Republic: ‘Ensure the timely development of individual childcare plans from the time the child enters an institution and strengthen inclusive education policies and practices, thereby facilitating the child’s expeditious return to a family type environment.’[[10]](#footnote-10)

According to article 25 of the CRC, the review should also cover ‘all other circumstances relevant to [the child’s] placement’. This text was added to the draft without specific information about its meaning. Regarding the question which other circumstances are relevant to the child’s placement one could take into account the views of the European Court on Human Rights (ECtHR). The jurisprudence of this court shows a rather consistent set of criteria: placements in alternative care are in principle of a temporary nature and should aim at the reunification of the child with her/his parent(s).[[11]](#footnote-11) This requires that the treatment of the child includes efforts to maintain personal contact with both parents (art. 9, para 2 CRC) and the family (art. 37 (c) CRC in case of deprivation of liberty). We therefore submit that the review should assess *inter alia* the contacts between the child and her/his parents, but more specifically the efforts to strengthen the capacity of the parent(s) to perform their child-rearing responsibilities (with a view to the possible return of the child).

**4.The periodicity of the review.**

The drafting history does not provide any indication of the meaning of ‘periodic’. The literature shows different views on the appropriate length of the intervals between reviews, while practice and legislations also apply different frequencies varying from every two month to every 6 or 12 months.[[12]](#footnote-12) The Guidelines for the Alternative Care of Children recommends a regular and thorough review, preferably at least every three months, of the appropriateness of the care and treatment of the child. It should be carried out by duly qualified and authorized persons and should fully involve the child and all relevant persons in the child’s family life.[[13]](#footnote-13) We submit that this should be interpreted in such a way that it takes into account the nature of the placement as well as its impact on the child. When a child is placed in an institution, for example, the need for regular review within a relatively short period of time is bigger, then when a child is placed in foster or kinship care. Moreover, it must be born in mind that for children the perception of time is different from that for adults.

**5. Reporting on and monitoring of article 25.**

In the 1996 Guidelines on periodic reporting, the CRC Committee required States Parties to provide information on the authorities considered to be competent to place children (for the purposes mentioned in article 25), the circumstances taken into account when deciding on the placement of a child, the frequency of review of the placement and treatment, assurances made in relation to respect for the provisions and principles of the CRC and finally on relevant data on the children placed.[[14]](#footnote-14) The 1996 Guidelines were revised in 2005 and the specific questions related to the implementation of article 25 were removed with the note that the Guidelines of 1996 would remain relevant.[[15]](#footnote-15) In order to get at least some picture of the impact of the guidelines on reporting on article 25, we reviewed the Concluding Observations of 1996, 2001, 2011, 2019 and 2020.[[16]](#footnote-16) The results:

1996: In 3 of the 19 Concluding Observation contain short recommendations on article 25, which did not much more than repeating the core of article 25. With regard to Uruguay, the Committee stated: ‘In case where placement is necessary adopt measures to ensure periodic review of the treatment and all other circumstances are necessary?”[[17]](#footnote-17).

2001: In 12 out of the 47 Concluding Observations, article 25 was mentioned or referred to. Most references were repeating the obligation provided in this article. For instance, the Committee recommends that the State party ensures adequate periodic review of the placement of children living in institutions.[[18]](#footnote-18) A rather rare but specific recommendation was made in the Concluding Observations for Portugal where the Committee recommended to strengthen the review of placements of children and to ensure that it is conducted regularly and frequently, and takes into account the views and the interests of the child.[[19]](#footnote-19)

2011: In many of the 20 Concluding Observations issued by the Committee States Parties there were references to the 2009 Guidelines for the Alternative Care of Children.[[20]](#footnote-20) For two States Parties, the Committee recommended (Syria) or urged (Afghanistan) that the State Party ‘[periodically review(s) the placement of children in alternative care facilities and fully include children in the review of their placement.”[[21]](#footnote-21) For Belarus, the Committee recommended that the State party ‘ensures a comprehensive periodic review mechanism for children placed in alternative care in light of article 25 of the Convention.”[[22]](#footnote-22)

2019: In the 17 Concluding Observations, the Committee referred to the Guidelines for the Alternative Care of Children (2009) in rather general terms. In some other Concluding Observations recommendations were made regarding the periodic review using a kind of standard formula: ‘Ensure periodic review of the placement of children in institutions and in foster care and monitor the quality of care therein (or: in such institutions and foster care; JD &TL)’[[23]](#footnote-23). Rather new was the recommendation made to the State Party Japan, which was recommended to ‘ensure independent external review of the placement of children in foster care and institutional settings (…) and monitor the quality of care therein’[[24]](#footnote-24).

2020: In this year affected by COVID-19, the Committee held two sessions, one in January in Geneva (no. 83) and one in March on site in Samoa (no. 84). It adopted nine Concluding Observations. In three of them specific recommendations were made to ensure the periodic review using the same formula used in 2019[[25]](#footnote-25) and in four a general reference was made to the Guidelines for the Alternative Care of Children.

**6. Some conclusions and recommendations**

Most of the 112 Concluding Observations, we reviewed did not pay any attention to the right of the child placed by competent authorities to have her/his treatment in institutions or in foster care periodically reviewed. When attention was given to article 25, the recommendation was most of the time insisting on taking ‘measures to ensure the periodic review of placement/treatment’.

A possible explanation of this limited attention in the Concluding Observations is that the States Parties did not include information about the implementation of article 25 and that NGOs did not provide information either. It is evidence, however, that article 25 is a seriously neglected provision in the CRC. This must be considered as a problem because it means that a very important right of every child placed in alternative care to have the effectiveness of her/his treatment and the justification of the continuation of her/his placement periodically reviewed, is largely neglected.

Therefore we make the following recommendations:

a. Develop and adopt a General Comment on alternative care of children with special attention for article 25 or a separate set of Guidelines for the implementation of article 25 CRC in which the Committee provides guidance and recommendations regarding the issues we raised above in para 1– 5 including the meaning of “other circumstances” in article 25.

b. In the meantime strengthen the reporting on article 25 by including in the context of the simplified reporting procedure rather systematically in the List of Issues Prior to Reporting (LOIPR) specific requests for information about the implementation of article 25.

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2. Ton Liefaard, Access to Justice for Children. Towards a Specific Research and Implementation Agenda, *International Journal of Children’s Rights*, 2019, 27:2. [↑](#footnote-ref-2)
3. John Tobin and Elliot Luke, ‘Article 25 The Right to Periodic Review’, in: John Tobin (Ed.), *The UN Convention on the Rights of the Child. A Commentary.* Oxford: Oxford University Press 2019, p. 970. [↑](#footnote-ref-3)
4. See for more information e.g. the commentary on article 25 by Tobin and Luke in John Tobin (Ed.), *The UN Convention on the Rights of the Child. A Commentary.* Oxford: Oxford University Press 2019, p. 970-985. [↑](#footnote-ref-4)
5. Concluding Observations for the State of Palestine, UN Doc. CRC/C/PSE/CO/1, 6 March 2020, para 47 (c). [↑](#footnote-ref-5)
6. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) para 27.1. [↑](#footnote-ref-6)
7. Reporting Guidelines 1996, UN Doc. CRC/C/58, para 143. These Guidelines were revised in 2005 and this specific requirement disappeared from the text but the Committee remarked that the Guidelines of 1996 remain relevant for reporting. [↑](#footnote-ref-7)
8. Un Doc. CRC/C/15/Add 47, 13 February 1996, para. 25 [↑](#footnote-ref-8)
9. Concluding Observations Turkey, UN Doc. CRC/C/51/Add 152, 9 July 2001, para 289????? [↑](#footnote-ref-9)
10. UN Doc. CRC/C/CZE/CO/3-4, 4 August 2011, para 46 (e). [↑](#footnote-ref-10)
11. See recent decisions of the European Court of Human Rights about the right to unification: Strand Lobben e.a. v. Norway, 10 September 2019 , nr. 37283/13, ECLI:CE:ECHR:0910JUD003728313.

See also M.L. V Norway 22 December 2020 Nr. 64639/16,ECLI:CE:ECHR:2020:1222JUD006463916. [↑](#footnote-ref-11)
12. See for more information John Tobin and Elliot Luke, ‘Article 25 The Right to Periodic Review’, in: John Tobin (Ed.), *The UN Convention on the Rights of the Child. A Commentary.* Oxford: Oxford University Press 2019, p. 978. [↑](#footnote-ref-12)
13. Annex to Resolution of the UN General Assembly adopted on 18 December 2009, UN DOC. A/RES/64/142, para 67. [↑](#footnote-ref-13)
14. General Guidelines regarding the form and contents of periodic reports to be submitted by States Parties under article 44, paragraph 1 (b) of the Convention, UN Doc. CRC/C/58, 20 November 1996, para 86, 87. [↑](#footnote-ref-14)
15. General Guidelines regarding ( see title 1996 Guidelines), UN Doc CRC/C/58/rev.1, 29 November 2005. Also in later revisions the requirements of the 1996 Guidelines did not appear. However the CRC Committee never stated that this requirement was withdrawn or cancelled. [↑](#footnote-ref-15)
16. These years were chosen for rather practical reasons: 1996 because it was the year in which the Committee published the reporting Guidelines (assumption that this was reflected in the Concluding Observations (COs); 2001 because 5 years after the Guidelines were published ( assumption that by then there would be more attention for article 25 CRC); 2011 hoping that by then the attention for art. 25 CRC would have been increased); 2019 and 2020 to get a most recent picture of the attention for article 25 in the reporting and monitoring. [↑](#footnote-ref-16)
17. Concluding Observation for Uruguay, UN Doc. CRC/C/.15/Add…. 11 October 1996, para 23. [↑](#footnote-ref-17)
18. Concluding Observations for the Dominican Republic, UN Doc. CRC/C /15/Add 150, 21 February 2001, para 31. recommendations were in the Concluding Observation for e.g. Cameroon UN Doc. CRC/C/15/Add 164, para 39 (b), provide for regular periodic review; and for The Gambia, UN Doc. CRC/C/15/Add. 165, 6 November 2001 Para 37, ensure periodic review of placements in institutions. [↑](#footnote-ref-18)
19. UN Doc. CRC/C/15/Add.162, 6 November 2001, para 33 (c). [↑](#footnote-ref-19)
20. UN Doc A/RES/64/142 with the encouragement to take them into account and bring them to the attention of all relevant stakeholders in the field of alternative care of children. [↑](#footnote-ref-20)
21. Concluding Observations for the Syrian Arab Republic, UN Doc. CRC/C/SYR/CO/3-4, 2 February 2012, para 58 (e); idem Afghanistan UN Doc. CRC/C/AFG/CO/1, 8 April 2011, para 44 (d). [↑](#footnote-ref-21)
22. Concluding Observations for Belarus, UN Doc. CRC/C/BLR/CO/3-4, 8 April 2011, para 46. See also Concluding Observations for Laos, UN Doc. CRC/C/LAO/CO/2, 8 April 2011, para 44 with the encouragement to set up a mechanism to ensure periodic review of the placement of children. [↑](#footnote-ref-22)
23. Concluding Observations for Singapore UN Doc. CRC/C/SGP/CO/4-5, 28 June 2019, para 32 (c). See also the Concluding Observation for Cabo Verde, the Syrian Arab Republic, Bosnia and Herzegovina, Bahrain, the Federates States of Micronesia [↑](#footnote-ref-23)
24. Concluding Observations for Japan, UN Doc. CRC/C/JPN/CO/4-5, 5 March 2019, para 29 (d). [↑](#footnote-ref-24)
25. Concluding Observations for Rwanda, UN Doc. CRC/C/RWA/CO/5-6, 28 February 2020, para 29 (b); Belarus UN Doc. CRC/C/BLR/CO/5-6, 28 February 2020, para 28 (d) and the Federated States of Micronesia, UN Doc. CRC/C/FSM/CO/2, 3 April 2020, para 45 (e). [↑](#footnote-ref-25)