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The UNCRC: The Voice of Global Consensus on Children's Rights?

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ABSTRACT

That the United Nations Convention on the Rights of the Child (UNCRC) encompasses contradictions is known. Despite this knowledge, attention to conflicting aspects within the convention is limited, and instead, the assumption that the convention represents an international consensus on the meaning of children's human rights seems to be widespread in policy and academic work. Furthermore, the available literature within the field of children's rights is largely silent regarding precise and elaborated knowledge about the inherent contradictions within the UNCRC. This paper expands upon and specifies the knowledge about consensus and inconsistencies within the convention. Through an in-depth study of the drafting process of the UNCRC, the paper identifies and displays both contradictions within the convention, and ways in which the text of the convention can be seen to express consensus. The analysis shows how a certain consensus was produced for respectively civil and political rights, and socio-economic rights, but that different and inconsistent children's rights logics underlay the formation of these respective consensus-formations.

KEYWORDS

Children's Rights; Human Rights; UNCRC

1. Introduction

In this paper, we address the tendency towards consensus thinking surrounding the United Nations Convention on the Rights of the Child (UNCRC).¹ Attention to contradictions and tensions within the convention are uncommon in children's rights research. Through highlighting and elaborating on some of these contradictions, this paper seeks to contribute to a broader critical academic debate about the development of the UNCRC and its role in children's rights research.

Since the adoption of the UNCRC in 1989, meanings attributed to children's rights within global political and academic arenas are largely based on the text of the convention. Recent studies demonstrate that governments, non-government organisations (NGOs)

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¹Convention on the Rights of the Child (UNCRC) (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

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and children's rights research refer to the UNCRC as the given norm for children's human rights.² For example, Archard argues that the UNCRC is a 'codification of children's rights', defining a '... recognisable canon of thought about the rights of children',³ and Holzscheiter maintains that the convention is the principal driving force behind a global children's rights culture, dominating international children's policy.⁴ This position as a largely uncontested and legally valid norm has contributed to making the UNCRC a dominant and compelling instrument for advancing human rights for children.

Although critical scholarly work addressing inconsistencies and other problematical aspects within the convention is rare, some work has been undertaken in this area. Aspects of the convention that have been critically commented upon include: the tendency of the convention towards a liberal and Western bias;⁵ the tension between paternalistic and anti-paternalistic features;⁶ and a lack of academic attention to the conceptual foundations of the UNCRC and thereby to the rights accorded to children under it.⁷ Despite these critical insights, the main trajectories within children's rights research remains unaffected, with the UNCRC continuing to be largely accepted and unproblematised. Some scholars identify children's rights research as itself being implicated in an international consensus building, given its tendency to focus upon matters that reinforce a triad of standards-setting-implementation-monitoring, in which the UNCRC is used as a basis.⁸ Reynaert and others argue that children's rights research is characterised by a lack of critique and theoretical challenge and that there is little discussion about the *meaning* of children's rights, cautioning that academic children's rights debate thereby risks turning into a technocratic discourse.⁹

We believe that the tendencies to consensus thinking around the UNCRC and the unproblematised approaches to the convention should be acknowledged and their effects given serious consideration. With the ambition of stimulating increased multiplicity of meaning in children's rights discussion, the paper addresses the currently under-explored area of the processes and discussions that led to the text of the UNCRC. Through an in-depth examination of the drafting of the convention, the paper identifies, presents, and discusses the tensions and inconsistencies within the UNCRC, and how, despite these, an official consensus was produced. Through clarifying contested meanings attributed to children's rights and identifying closures to these meanings throughout the process of its

²John l'Anson, 'UNCRC at 25: A Critical Assessment of Achievements and Trajectories with Reference to Educational Research' in Jenna Gillet-Swan and Vicki Coppock (eds), *Children's Rights, Educational Research and the UNCRC: Past, Present and Future* (Symposium Books 2016); Solveig Hägglund and Nina Thelander, 'Children's Rights at 21: Policy, Theory, Practice. Introductory Remarks' (2011) 2(3) *Education Inquiry* 365; Didier Reynaert, Ellen Desmet, Sara Lembrechts and Wouter Vandenhole, 'Introduction: A Critical Approach To Children's Rights' in Wouter Vandenhole, Ellen Desmet, Didier Reynaert and Sara Lembrechts (eds), *Routledge International Handbook of Children's Rights Studies* (Routledge 2015); Ann Quennerstedt, 'Children's Rights Research Moving into the Future: Challenges on the Way Forward' (2013) 21(2) *International Journal of Children's Rights* 233.

³David Archard, *Children: Rights and Childhood* (Routledge 2015) 108–109.

⁴Anna Holzscheiter, *Children's Rights in International Politics* (Palgrave Macmillan 2010) 87.

⁵*ibid.*

⁶Peter Bryson, 'Alternative Education, Equity and Compromise: Dilemmas for Practice Development' (2010) 16(4) *Child Care in Practice* 347; Archard (n 3).

⁷John Tobin, 'Justifying Children's Rights' (2013) 21(3) *International Journal of Children's Rights* 395.

⁸Quennerstedt, 'Children's Rights Research' (n 2); Didier Reynaert, Maria Bouverne-De Bie and Stijn Vandeveldel, 'A Review of Children's Rights Literature Since the Adoption of the United Nations Convention on the Rights of the Child' (2009) 16 (4) *Childhood* 518; Karl Hanson and Olga Nieuwenhuys, *Reconceptualizing Children's Rights in International Development: Living Rights, Social Justice, Translations* (Cambridge University Press 2012).

⁹Reynaert and others, 'A Review of Children's Rights Literature' (n 8).

formation, our examination of the drafting of the UNCRC will add value to contemporary children's rights debate and invoke the consideration of alternative routes of thinking about human rights for children.

Aims of the paper

This paper analyses the development of the text of the UNCRC through scrutinising the drafting of the convention from its inception in 1979 to its publication in 1989. The analysis centres on the discussions that took place between the parties of the working group responsible for the drafting. The specific purpose of the paper is to *demonstrate ways in which the final text of the convention expresses consensus reached during the drafting process and identify unresolved conflicting perspectives in the drafting*. This will be achieved by clarifying:

- (a) co-existing alternative meanings attributed to human rights for children and to the convention's role and character;
- (b) instances of closure in the drafting in order to produce consensus regarding human rights for children and the role of the convention, and if so, what form that closure took;
- (c) how the final adopted text of the convention relates to alternative meanings and possible closures.

2. The Convention on the Rights of the Child

In 1989, after 10 years of deliberation, the United Nations General Assembly unanimously adopted the Convention on the Rights of the Child, and today the UNCRC has been ratified by 196 states. The 'success-story' of the UNCRC can be told in different ways, such as the positive evaluation expressed by Kaime: 'This overwhelming normative consensus affirms a shared and welcome global recognition of the rights of the child.'¹⁰ Mower, however, voices a more critical view:

... it might be said that the states became parties simply to avoid the appearance of being unconcerned about children. It also might be said that they took this action because they felt that the convention contained so many loopholes ...¹¹

The process of developing the UNCRC began in 1978 when the Polish government proposed to the UN Commission on Human Rights a convention on children's rights. The early years of drafting were beset by Cold War tensions that had hampered earlier efforts at building international agreement on human rights. In 1948, the UDHR collated all kinds of rights,¹² but the possibility of reaching a post-war human rights consensus became difficult, given a clear fault line discernible between West and East: the West tending to emphasise civil and political rights, while the East accentuated socio-economic rights. Therién and Joly argue that this division in human rights thinking represented

¹⁰Thoko Kaime, *The Convention on the Rights of the Child. A Cultural Legitimacy Critique* (Europa Law Publishing 2011) 3.

¹¹Glenn A Jr Mower, *The Convention on the Rights of the Child: International Law Support for Children* (Greenwood Press 1997) 14.

¹²Universal Declaration of Human Rights (UDHR) (adopted 10 December 1948) UNGA Res 217 A(III).

competing visions of the world's future.¹³ The differing ideas of the essence of human rights in turn impacted upon the UNCRC drafting process. This was visible from the outset, with the Polish proposal being clearly aligned with an Eastern orientation to rights, while subsequent proposals from Western nations tended to privilege civil and political rights. Consequently, the UNCRC was, according to some commentators,¹⁴ initially regarded as an Eastern-bloc-aligned project, that countered the parallel drafting of the Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁵ in turn seen as a Western project.

Several scholars have characterised the 1970s as the human rights breakthrough decade and recognition of the full range of rights became increasingly successful over the drafting of the UNCRC.¹⁶ In the subsequent years, East–West tensions gradually lessened and – to some extent – were replaced by increasing divisions between the Global South and North, henceforth placing questions of resources much more firmly on a rights agenda. Whilst the historical and political backdrop of the drafting is important to enable a fuller understanding of the convention's production, this paper is primarily concerned with *identifying alternative meanings and closures in relation to the coming into being of the convention*. Broader contextual factors relating to the drafting process will therefore remain in the background, rather than being an explicit focus of analysis.

In 1979, the Commission on Human Rights set up a working group, open to member states and NGOs, to draft a new text for the convention. The Commission decided that the convention was to be drafted on the basic principle of consensus, and that a draft convention submitted by Poland was to form the basic working document.¹⁷ The process consisted of three phases – the *first reading* during 1979–1988; the *technical reading* in 1988 and the *second reading* in 1989. In the first reading, the working group discussed each article proposed in the draft convention chronologically; once all parties had reached agreement about an article, it was adopted. It was, however, common for discussions on articles adopted in earlier years to be re-opened and, following new discussions, altered versions were adopted or the previous version was retained. The principle of consensus on all content of the UNCRC and the sometimes differing views between state parties led to complicated negotiations, especially during the first reading, but at times extending into the second reading. Accepting a certain flexibility and vagueness in language was necessary in order to complete the convention; the alternative would most likely have been failure to accomplish a human rights instrument for children.

When the working group had finalised the first reading, the concluded draft convention underwent technical review by the United Nations Secretariat. The purpose of the technical reading was to identify overlaps and repetition within the draft convention, to check for consistency in language use, and to compare the standards established in the convention

¹³Jean-Philippe Thérien and Philippe Joly, 'All Human Rights for All: The United Nations and Human Rights in the Post-Cold War Era' (2014) 36 *Human Rights Quarterly* 373.

¹⁴Holzscheiter, *Children's Rights* (n 4).

¹⁵Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

¹⁶Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap-Harvard University Press, 2010); Aurélie Gfeller, 'Champion of Human Rights: The European Parliament and the Helsinki Process' (2014) 49(2) *Journal of Contemporary History* 49(2) 390.

¹⁷UN Economic and Social Council (ECOSOC), Commission on Human Rights (UNCHR), 36th session, *Question of a convention on the rights of the child: Note verbale dated 5 October 1979 addressed to the Division of Human Rights by the Permanent Representation of the Polish People's Republic to the United Nations in Geneva* (17 January 1980) E/CN.4/1349.

with those in other human rights instruments. In the second reading, the working group made the final revisions to the text, taking the reports from the technical reading into account. When the second reading was completed, the final draft convention was submitted first to the Economic and Social Council for consideration, and then to the General Assembly for adoption.¹⁸

2.1 Consensus

Within this process, much hinged on the establishment of a consensus; however, the meaning and implication of ‘consensus’ in practice can vary significantly. A strong understanding of consensus is found within Habermasian theorising, where the force of the better argument leads participants in a deliberation to agree not only on the desirable norms and what to do based on these, but *also* on the reasons for the desirability of norms and actions.¹⁹ A consensus of a more limited nature is referred to as an overlapping consensus, which relates to an agreement on norms and/or actions, despite disagreement on the reasons for endorsing those.²⁰ An even more restricted kind of consensus has been labelled practical, designating agreement only on the outcome, but where the underlying understandings and perspectives about norms and motives leading to the outcome can vary substantially.²¹

The possibility of reaching a strong consensus on both norms and outcome is rarely likely to be achieved in human rights contexts, with consensus of an overlapping or practical kind being more likely. In relation to human rights, Tobin’s²² consideration of the UNCRC as an ‘incompletely theorised’ agreement²³ highlights that the convention displayed consensus *despite* disagreements about the reasons or principles that underlay it. According to Tobin, the state parties in the UNCRC drafting did not reach consensus about the convention on a theoretical level, about moral justification for children’s rights or basic principles, but they did reach consensus on the need to recognise the *idea* of children’s rights. For this, the states were willing, to a certain degree, to put aside differing opinions.

Freeman views practical consensus on human rights as a solution to a situation where there is a gap between theory and activism: the immediate need to enact rights downplays theoretical explorations about how human rights can be justifiably founded.²⁴ A perceived cross-cultural consensus is then sufficient, and verbal acceptance by most states is taken as an indication of satisfactory agreement about the underlying moral vision. However, Freeman maintains that practical consensus is weak in reality, and since the promulgation of rights without a reasoned defence is vulnerable, ‘... evading the task of finding the best grounding for human rights [...] demonstrates a lack of intellectual responsibility’.²⁵

¹⁸Adam Lopatka, ‘Introduction by Chairman/Rapporteur of the Working Group on a Draft Convention on the Rights of the Child’ in United Nations, *Legislative History of the Convention on the Rights of the Child* (United Nations 2007).

¹⁹Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996); John Dryzek, *Deliberative Democracy and Beyond* (Oxford University Press 2000).

²⁰John Rawls, *Political Liberalism*, (Columbia University Press 1993).

²¹Michael Freeman, ‘The Philosophical Foundations of Human Rights’ (1994) 16(3) *Human Rights Quarterly* 491.

²²Tobin (n 7).

²³Cass R Sunstein, ‘Incompletely Theorized Agreements’ (1995) 108(7) *Harvard Law Review* 1733.

²⁴Freeman, ‘The Philosophical Foundations’ (n 21).

²⁵*ibid* 493.

3. Previous Research into the Drafting of the UNCRC

Research that examines the drafting process of the UNCRC is limited,²⁶ but the studies undertaken shed some light on various difficulties in the drafting deliberations. Some studies have elucidated how the deliberations led to partial agreements or compromises, how the interest of various parties was balanced, and how some topics were left without being discussed. For example, Alston and Tobin examined how the complex issue of the relation between the right to life of the unborn child and abortion was dealt with.²⁷ They conclude that the compromise solution did not resolve the issue at hand, for whilst the drafters were able to reach agreement on the *concept* of childhood, such consensus did not extend to questions concerning its boundaries, due to deep philosophical disagreements about when life begins. This was, therefore, left open in the convention. Quennerstedt explored how the relation between parents' rights and children's rights took shape in the drafting.²⁸ She concludes that the discussions were characterised by a balancing act between the civil and political rights pertaining to the child on the one hand, and the rights of parents to make decisions about the upbringing of their children on the other. Alston's examination of 'the best interest of the child' principle showed that although article 3 was discussed at some length by the working group, the *meaning* attributed to the 'best interest of the child' was never debated, not even when one representative in the final year of drafting objected to the inherently subjective character of the principle, and warned about dangers associated with the potential for large variations in interpretation.²⁹

Price Cohen examined how different parties of the working group influenced the drafting process. In her study of what effect NGOs had on the drafting process and the final convention, she found that by mainstreaming their interests through an alliance that issued joint proposals, the NGO impact was quite extensive.³⁰ Price Cohen also studied the role of the USA in the drafting process and showed how the highly active USA delegation was involved in some of the most significant proposals and had a substantial impact on discussions that concerned the drafting of the UNCRC.³¹

Holzscheiter explored the discussion surrounding the incorporation of the principle of 'child's evolving capacities', and argues that it defied historical images of the vulnerable child.³² The initially prevailing protection discourse on childhood and children's rights was thereby transformed in the drafting process, paving the way for civil and political rights for children. Nolan found inconsistencies in the drafting discussions about children's economic and social rights.³³ The two main principles of the International

²⁶Holzscheiter, *Children's Rights* (n 4).

²⁷Philip Alston, 'The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child' (1990) 12(1) *Human Rights Quarterly* 156; Tobin (n 7).

²⁸Ann Quennerstedt, 'Balancing the Rights of the Child and the Rights of Parents in the Convention on the Rights of the Child' (2009) 8(2) *Journal of Human Rights* 162.

²⁹Philip Alston, 'The Best Interest Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8(1) *International Journal of Law and the Family* 1.

³⁰Cynthia Price Cohen, 'The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child' (1990) 12(1) *Human Rights Quarterly* 137.

³¹Cynthia Price Cohen, 'Role of the United States in Drafting the Convention on the Rights of the Child: Creating a New World for Children' (1998) 4(Spring) *Loyola Poverty Law Journal* 9.

³²Anna Holzscheiter, 'Power of Discourse or Discourse of the Powerful? The Reconstruction of Global Childhood Norms in the Drafting of the UN Convention on the Rights of the Child' (2011) 10(1) *Journal of Language and Politics* 1.

³³Aoife Nolan, 'Economic and Social Rights, Budgets and the Convention on the Rights of the Child' (2013) 21(2) *International Journal of Children's Rights* 248.

Covenant on Economic, Social and Cultural rights (ICESCR), *progressive implementation* in accordance with *available resources* were differently met. There was much concern relating to resource limitation, but little concern relating to progressive implementation.

Previous studies focusing on the drafting have demonstrated that the working group's strategies when standpoints clashed in the drafting included avoidance of difficult discussions, finding compromises that removed controversial text and a balancing of interests. The research demonstrates some of the vagueness and ambiguity that were built into the text of the UNCRC from its inception.

4. Theoretical Framing: Dialogue and Monologue – Counteracting Forces

The analysis in this paper draws on Bakhtin's theorising about two forces in language – *dialogue*, which moves towards multiple voices and perspectives, and *monologue*, which tends in an opposite direction, towards a single voice and perspective.³⁴ The drafting of an international treaty is a particular instance, where parties with sometimes highly differing views and interests meet with the purpose of reaching an agreement. Language exchange is the primary means through which a treaty is produced, including meaning-making and meaning-negotiation. Examination of the deliberations that produced the text of the convention can increase our understanding of such a discursively powerful document as the UNCRC³⁵. By clarifying how counteracting forces worked in different directions, the contestations within children's human rights can be made more explicit and accessible for contemporary discussions about the multiple meanings of children's rights. Bakhtin's theory was developed to discuss language in literature, but it has also been used extensively within social analyses³⁶ and we believe that the theory provides fruitful tools for identification and precise elaboration of opposing and connecting voices operating in the drafting of the UNCRC.

Bakhtin understood language as constituted by counteracting centrifugal and centripetal forces, pulling away from each other towards either dialogue or monologue respectively.³⁷ To Bakhtin, dialogue was the basic condition for language; it is characterised by polyphony, which consists in the play of multiple voices that cannot be reduced to a single perspective. Dialogue tends towards centrifugal expansion outwards in different directions, and the heteroglossic language within dialogue opens up meaning.³⁸ Heteroglossia refers to the existence of multiple and contesting utterances within a social language.³⁹ The tendency towards polyphony and decentralisation is countered by monologue, in which monoglossic language seeks to '... unify and centralize the verbal-ideological world'⁴⁰ and to close down other voices.⁴¹ Monoglossia, describes a stable

³⁴Mikhail Mikhailovich Bakhtin, M. Holquist (ed), *The Dialogic Imagination: Four Essays* (University of Texas Press 1981).

³⁵The value of discursive investigations of the UNCRC has also been argued by Holzscheiter, *Children's Rights* (n 4).

³⁶Michael M Bell and Michael Gardiner (eds), *Bakhtin and The Human Sciences: No Last Words*. (Sage 1998).

³⁷Lynn E Cohen, 'The Heteroglossic World of Preschoolers' Pretend Play' (2009) 10(4) *Contemporary Issues in Early Childhood* 331.

³⁸Andrew Robinson, 'In Theory – Bakhtin: Dialogism, Polyphony and Heteroglossia' *Ceasefire Magazine* (29 July 2011) <<https://ceasefiremagazine.co.uk/in-theory-bakhtin-1/>> accessed 14 March 2018.

³⁹Bakhtin (n 34) 270.

⁴⁰Bakhtin (n 34).

⁴¹Robinson (n 38); Becky Francis, 'Gender Monoglossia, Gender Heteroglossia: the Potential of Bakhtin's Work for Re-Conceptualising Gender' (2012) 21(1) *Journal of Gender Studies* 1.

language that might be regarded as settled and uncontested, seeking to establish a maximum level of mutual understanding.⁴²

The UNCRC's role within much current research, as well as within policy, is stable and uncontested to a high degree. Set within a Bakhtinian framing, this could indicate that the UNCRC is currently mobilised in ways that tend towards the monologic pole. We therefore suggest that academics, governments, NGOs and others in authority largely presume that the convention is a text that expresses unification and mutual understanding, and that dialogue in Bakhtin's sense – embracing multiplicity, openness and contestation – does not characterise discussions surrounding children's rights.

5. Material and Analysis

This study is a text analysis of the UN's own documentary evidence of the drafting process of the UNCRC. The primary material consists of reports of the working group's annual sessions between 1979 and 1989. Other material which has also been analysed includes: Poland's initial proposal for a convention, and comments from states and organisations relating to this initial proposal; the revised Polish proposal; proposals from states and NGOs submitted during the two readings; and the result of the technical reading.

The reports of the working group's sessions are in the form of written records of discussion and decisions undertaken. These reports, which frequently include detailed accounts of deliberations, are of considerable value in understanding the drafting process. There are, however, certain limitations that must be acknowledged. The reports are not comprehensive in the sense of including all details of every deliberation. For example, the speaker behind a note in a report is not always explicitly identified. Furthermore, there is no certainty about how well the reports reflect the discussions of the working group. Some parts of the deliberations are very quickly brushed over with the statement 'after some discussion it was decided ...', while other parts give detailed accounts of actual exchanges. Despite these limitations, the UN's documentation on the drafting process of the UNCRC is worthy of consideration. The documented reports are the official record of the drafting process and it is reasonable to assume that had they reflected the discussions poorly, there would have been objections raised.

The Vienna Convention on the Law of Treaties provides guidance for the interpretation of treaties.⁴³ It emphasises that the text and the words of a treaty shall be approached without intent to misread or over-interpret, assumed to express the authentic intention of the authoring parties, and understood in relation to relevant context.⁴⁴ The Vienna Convention mainly guides treaty interpretation in legal contexts, but the spirit of the convention has informed this research.

Our analysis focuses on two themes: the meaning attributed to (a) human rights for children and (b) the convention's role and character. In the analytical reading of the documents, the working group's discussions relating to these two themes were identified. A detailed analysis of the selected sections was conducted by searching for instances of

⁴²Kay Fuller, 'Gendered Educational Leadership: Beneath the Monoglossic Façade' (2014) 26(4) *Gender and Education* 321.

⁴³Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁴⁴Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2015).

heteroglossic and monoglossic tendencies respectively. Heteroglossic tendencies were sought by identifying ways in which the *multiplicity of meaning increased* through:

- standpoints expressed *in* proposals for the convention text,
- standpoints expressed in utterances *about* the proposed text,
- standpoints highlighted in reactions to utterances in the discussion.

Monoglossic tendencies were sought by locating movements towards *unity and decreased multiplicity* through:

- the content of critique of, or support for, standpoints expressed in the discussion,
- the success or dismissal of such critique and support,
- how the final wording of an article came to include or exclude the standpoints that had been expressed in the discussion.

6. Findings

The UN subdivides human rights into civil and political rights, and economic, social and cultural rights.⁴⁵ Within the following analysis we discuss the two themes *human rights for children* and *the convention's role and character* in the context of these divisions. To account for the content of, and movements within the discussions, the drafting deliberations are represented by selected quotations organised in three tables. Quotations were selected to support the interpretation of various meanings represented in the discussions, to highlight the closures that occurred, and to show changing discourse over time. The findings draw upon a significantly larger number of utterances than can be displayed in the tables. The chosen quotations accordingly function as representatives of central aspects put forward in a wider range of statements.⁴⁶ The range of alternative meanings identified (heteroglossia) and the process of closure (movements towards monoglossia) are clarified after each table.

To enhance the readability of the tables, the quotations have been shortened at times by omitting words, indicated by three dots (...), and explanatory additions are given [within brackets]. In the left column, the year and UN source documents are stated and the main column shows the content of deliberation. To further facilitate reading, the working group's proposals for *convention text* are *italicised* in the tables, while the general discussion is presented in non-italicised text.

6.1 *The understanding of human rights for children*

In the following we elaborate on how meanings attributed to children's human rights were related to civil and political rights, and socio-economic rights, in the drafting deliberations.

⁴⁵International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 3.

⁴⁶The focus in this paper is to identify and define the various meanings and closures, and therefore the particular actors in the deliberations are not given specific attention. However, for the interested reader information about what party is behind an utterance or proposal, when this is possible to distinguish, is provided in the tables.

6.1.1 Civil and political rights

The Polish draft proposal contained very few civil and political rights, and in the early stages of drafting there were no objections to this from any party. In 1983, the absence of civil and political rights was raised as an issue. After some initial resistance, support for including these rights grew, and during the last years of the drafting period, a range of civil and political rights came to be included in the draft convention. [Table 1](#) demonstrates how the discussion in the working group changed with regard to civil and political rights for children.

The standpoint promoted in the persistent proposals for including civil and political rights, year after year, despite initial resistance in the working group, was:

- (i) Children have civil and political rights and these cannot be neglected in the convention.

Resistance against including civil and political rights in the convention was based on three other standpoints, which initially prevailed in the discussion:

Table 1. Civil and political rights for children⁴⁷

Year Doc.	Content of deliberation
	<i>Deliberations on the right to parental care and place of residence</i>
1983 p.4	' One speaker stated that the draft convention submitted by Poland emphasized economic and social rights but neglected civil and political rights. Other speakers stressed that, in their view, economic rights were equal or even of greater importance ... for children. They therefore questioned the need ... to duplicate the International Covenant on Civil and Political Rights.'
p.10	'The representative of the United States reintroduced a proposal he made in 1982 according to which the draft convention should contain a provision ensuring the right of the child not to be subjected to arbitrary or unlawful interference by government authorities. ... For some speakers, the inclusion of such provisions was not necessary. In their opinion, the fulfilment of the child's basic needs was a more urgent matter. No agreement was reached.'
	<i>Deliberations on the right to freedom of expression, association, assembly</i>
1987 p.26f	'The representative of the United States said that the protection of children's civil and political rights was of fundamental importance to his country ... the rights in the draft article were universally accepted in the International Covenant on Civil and Political Rights.'
	'The Chinese delegation ... was of the opinion that the freedoms of association, peaceful assembly and privacy could not be enjoyed by children in the same way as they are enjoyed by adults because the intellect of a child was not as developed as that of an adult, and therefore a child could only engage in activities commensurate with its intellect.'
	<i>Deliberations on the right to privacy</i>
1988 p.10f	'... the representative on the United States of America stated that children not only had the right to expect certain benefits from their Governments; they also had civil and political rights to protect them from abusive actions of their Governments. These rights are largely the same as those enjoyed by adults ... While children might need direction ... in the exercise of these rights, this does not affect the content of the rights themselves. The United States proposal was intended to complete the process already begun by the working group of incorporating provisions from the International Covenant on Civil and Political Rights into the draft convention.'
	'The idea of including civil and political rights in the draft convention to reinforce the protection of children was strongly supported by several participants . However, the legitimate rights of parents and tutors should be safeguarded, the balance between rights of children and rights of the family should be preserved ...'
p.15	' One representative expressed its concern at the piecemeal transfer of provisions from other legal instruments to the convention ... since, depending upon how it was applied, it may have repercussions on the right of parents to guide and educate their children ...'

⁴⁷ECOSOC, UNCHR, 39th session, *Report of the Working Group on a Draft Convention on the Rights of the Child* (25 March 1983) E/CN.4/1983/62; ECOSOC, UNCHR, 43rd session, *Report of the Working Group on a Draft Convention on the Rights of the Child* (9 March 1987) E/CN.4/1987/25; ECOSOC, UNCHR, 44th session, *Report of the Working Group on a Draft Convention on the Rights of the Child* (6 April 1989) E/CN.4/1988/28.

- (i) civil and political rights are not very important to children, and the focus of the convention should be on economic rights and basic needs
- (ii) children do not have the level of development required to exercise civil and political rights, therefore, the convention does not need to include these;
- (iii) since civil and political rights are not that important to children, there is no reason to duplicate existing statements in other human rights instruments.

From 1987, support for including civil and political rights appears to have increased dramatically, but a number of voices proposed restrictions to these rights. Two standpoints expressing such restrictions are clearly visible, both of which gained increasing acceptance:

- (i) children have civil and political rights, but the convention must express how these should be balanced against the rights of parents;
- (ii) children have civil and political rights, but the convention must express how these need to be adapted to children's evolving capacities.

Throughout the drafting process, a dialogic movement opening up a larger space for meanings attributed to human rights for children in terms of including civil and political rights can be identified. The resulting heteroglossia concerning children's civil and political rights was clear in the drafting, with recorded views initially differing quite substantially as to whether children really have these rights and whether the convention should include them. The standpoints that civil and political rights are not relevant for children and, therefore, not appropriate for the convention, were however gradually silenced in the course of the drafting. This constitutes a closure: in the end of the drafting process, the view that children do not have civil and political rights was no longer argued by any state party. Acceptance of civil and political rights for children was accompanied by demands that certain adaptations and restrictions be made. This second instance of closure was an agreement within the working group that the rights of parents, and children's level of development, are legitimate grounds for placing limitations upon the expression of children's civil and political rights.

6.1.2 Socio-economic rights

The Polish draft convention contained a number of socio-economic rights. There were few objections raised within the working group against these rights being included in the proposed convention. What was debated in the working group, however, was whether the absence in the Polish draft of explicit attention to progressive implementation, in accordance with available resources, indicated more far-reaching obligations on states. This would, in turn, raise the standard of socio-economic rights for children beyond that which had been agreed upon in earlier instruments. This met opposition as well as support in the working group. [Table 2](#) exemplifies the deliberations on children's socio-economic rights.

With regard to socio-economic rights for children, a dialogic situation with different views was visible in the drafting, thereby increasing the possible meanings attributed to children's human rights. The discussions about socio-economic rights did not focus on whether children have these rights or not; rather, two main standpoints on whether children have a *stronger* entitlement to welfare rights than other humans were expressed in the deliberations:

Table 2. Socio-economic rights for children⁴⁸

Year Doc.	Content of deliberation
	<i>Discussion about the rights of the disabled child:</i>
1978 p.3	[Proposal in Polish draft:] '1. The States Parties to the present Convention recognize the right of a mentally or physical disabled child to special protection and care ... and undertake to extend adequate assistance to any such child. 2. A disabled child shall grow up and receive education in conditions possibly most similar to those provided to all other children.'
1983 p.13f	'The discussions, this year, focused on the means to ensure the realization of this right [to a full and decent life] and more specifically on the means of financing the services to be provided to the disabled child.' 'For several representatives , responsibility for the care of disabled children rested primarily on Governments, and services should be provided free of charge.' ... 'While agreeing on the need to provide all necessary services to disabled children, others noted that, in their countries, because of limited resources, it would not be possible for Governments to provide all services free of charge.' 'In order to avoid this same debate in connection with the consideration of each article of the draft convention concerning social welfare benefits, several delegations supported the idea of a heading applying to all of them which would incorporate language comparable to Article 2 of the International Covenant on Economic, Social and Cultural Rights.' 'The representative of Poland reintroduced ... a proposal, which underlined that services should be provided free of charge: ... <i>His special educational needs shall be addressed for free of charge; aids and appliances shall be provided ...</i> ' 'The representative of the United States of America proposed an amendment to the text submitted by Poland ... : ... <i>His special educations needs shall be addressed and aids and appliances shall be provided ...</i> He further proposed that the words 'in accordance with available resources' be added either to the first or to the second sentence of his amendment.'
	<i>Discussion about the right to health and health services:</i>
1980 p.4f	Proposal in Polish draft: '1. It is recognized that the child shall be entitled to benefit from the highest attainable standard of health care for his physical, mental and moral development, and also, in the case of need, from medical and rehabilitation facilities. 2. The States Parties to the present Convention shall pursue full implementation of this right ...'
1985 p.4f	'The representative of the Union of Soviet Socialist Republics proposed the addition of the words "free of charge" to the provision of medical assistance and health care, which found the support of the delegation of the German democratic Republic . A lengthy discussion ensued as to the appropriateness of including a concept of gratuity in the paragraph under consideration.' 'The delegation of the United States of America felt that to state that in all circumstances the State should provide health care free of charge might entail a misappropriation of resources ...' [After a discussion about whether to include international cooperation on health issues, a fourth paragraph was added which introduced the concept of progressive implementation in the article:] 'States Parties to the present Convention undertake to promote and encourage international cooperation with a view to achieving progressively the full realization of the right recognized in this article ...'
	<i>Technical reading, comment by UNICEF:</i>
1989 p. 3	'The second sentence of this paragraph provides that: 'The States Parties shall strive to ensure that no child is deprived for financial reason of his right of access to such health-care services'. The phrase "for financial reasons" does not occur in any existing international human rights instrument and its meaning is not entirely clear ... On the assumption that the phrase is intended to place a limit on a State Party's obligations, based on the resources available to it, a more felicitous formulation ... might be: 'The States Parties shall strive to ensure, to the maximum of their available resources, that no child is deprived of his right of access to such health-care services.' [In the Second Reading, the Working Group deleted the words for financial reasons, but did not include available resources.]

⁴⁸ECOSOC, UNCHR, 35th session, *Question of a Convention on the Rights of the Child* (27 December 1978) E/CN.4/1324; E/CN.4/1983/62 (n 47); ECOSOC, UNCHR, 36th session, *Question of a convention on the rights of the child: Note verbale dated 5 October 1979 addressed to the Division of Human Rights by the Permanent Representation of the Polish People's Republic to the United Nations in Geneva* (17 Jan 1980) E/CN.4/1349; ECOSOC, UNCHR, 41st session, *Report of the Working Group on a Draft Convention on the Rights of the Child* (3 April 1985) E/CN.4/1985/64; ECOSOC, UNCHR, 45th session, *Report of the Working Group on a Draft Convention on the Rights of the Child* (2 March 1989) E/CN.4/1989/ 48.

- (i) the rights standard for socio-economic rights should be set higher for children than for other humans;
- (ii) the rights standard for socio-economic rights should be the same for all humans.

Agreement on a way forward was achieved with only marginal resistance. The working group's discussions document how, what initially appeared to be incompatible positions, became aligned with standards previously set in the International Covenant on Economic, Social and Cultural Rights. Wordings in the draft proposal giving room for interpretations that raised the rights standard and the expectations on states were criticised and deconstructed step by step. The principles of progressive implementation and available resources were brought into the draft within articles dealing with socio-economic rights, sometimes with reference to nations' differing resources and the costs of raising rights standards, but mainly with the more principled argument that the convention should not set different standards from those in other instruments.

The degree to which children's socio-economic rights were open to debate (*heteroglossia*) was effectively closed down in the course of the drafting process. A (*monologic*) movement towards clarifying the same rights standard in the convention as set in other human rights instruments was highly successful. The agreement embodied in the adopted convention text – that children have *the same* socio-economic rights as other humans – constitutes a closure, albeit a principled one.

6.2 The understanding of the convention's role and character

We now turn to the second theme of analysis: meanings attributed to the role and character of the convention.

Concerns about how the new convention was to be understood and related to the general human rights framework were highlighted at the very outset of the drafting process when a number of states raised this matter in their responses to Poland's initial proposal. Thereafter the question as to the role and character of the convention was raised on several occasions during the drafting process, mainly in discussions that addressed which rights should be included or excluded. [Table 3](#) shows comments and discussions on this matter over the years from 1979 to 1989.

The revised Polish draft contained a range of rights already covered in other human rights instruments, and more rights came to be included in the convention in a more-or-less reformulated way during the drafting process. Different members of the working group repeatedly raised concerns about the uncertainty surrounding the relation between the convention and other instruments. For example, several representatives suggested that rights already covered elsewhere should not be repeated, while some representatives were of the opinion that the relation between the convention and other instruments should be clarified in the convention itself. Other delegates warned about the danger of confusion through the double-regulation, and some called for statements that rights covered elsewhere should not be diminished in the convention.

The analysis identifies two fundamentally opposing standpoints in the deliberations regarding what kind of rights instrument the convention was supposed to be:

- (i) the convention should be a *supplement* to other human rights instruments for children;
- (ii) the convention should be *the* human rights instrument for children.

Table 3. The understanding of the convention's role and character⁴⁹

Year Doc.	Content of deliberation
	<i>Comments from states on initial Polish draft:</i>
1978 p.6	'Finally, the Austrian Federal Government takes the liberty of suggesting a thorough revision of the draft. Revisers should in particular see whether the rights referred to in the draft are not already safeguarded by the International Covenants on Human Rights.'
p.14	'Moreover, the formulation of the principles in the present draft Convention is rather vague. A lot of them are already embodied in the ... Covenants on Civil and Political and on Economic, Social and Cultural Rights [where they are] taken care of in a far more extended and concrete manner. In ... [the view of the Netherlands Government] a draft convention must ... be supplementary to already existing instruments and activities, in order to avoid unnecessary duplication.'
	<i>Proposal for new article:</i>
1983 p.5	'A number of proposals have been made concerning the inclusion in the draft convention of a saving clause dealing with the applicability of other international human rights instruments. The representative of Poland proposed ... the following text as article 19: <i>This Convention shall not have the effect of diminishing the rights which the child may enjoy by virtue of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.</i> Several delegations supported the Polish proposal.' [No record of any decision]
	<i>Deliberations on article 19 (treatment in penal matters):</i>
1986 p.20	'The representative of Austria stated that in drafting the article under consideration ... care should be taken not to include the provisions of other existing international human rights instruments already applicable to children.'
	<i>Deliberations on proposal from Finland:</i>
1987 p.31f	'Nothing in the present Convention may be interpreted as implying for any State party to the present Convention any right to impose any restriction upon or derogation from any of the fundamental human rights recognized or existing in that State Party by virtue of law, conventions, treaties, agreements, regulations or customs on the pretext that the present Convention does not recognize such rights or that it recognizes them to a lesser extent' 'Following a brief exchange of views between the delegations of Finland and the United States as to the reasoning behind and justification for such a provision, no decision was taken by the Working Group on the proposal, and the observer for Finland suggested that it be considered at the second reading of the draft Convention.'
	<i>Second reading, proposal for new article 2:</i>
1989 p.136f	'The delegate of the Federal Republic of Germany pointed out that many rights which under the International Covenants already apply to children, were included again specifically for children in the draft convention, but on the other hand, not all the rights guaranteed by the Covenants appeared in the draft convention ... The delegate said that this selective double-regulation of rights would create problems and even contradictions with the Covenants and that a general clause ensuring the application of general human rights to children, should be substituted for the present article 2.' 'The observer for Australia stated that the proposal ... was totally new, bringing into question the whole approach of the convention.' 'The delegate of India stated that the proposal ... covered entirely new areas ...' 'The representative of the Federal Republic of Germany withdrew his proposal ...'

These opposing standpoints rest on different basic ideas about human rights for children: The basic assumption in the first standpoint is that children have *general human rights*, which are already defined in existing instruments. Besides these, children have additional rights. 'Children's rights' include both the general human rights and the additional rights. Based on this understanding, *the role of the convention is to define the combination of general and additional rights*. The second standpoint rests on the assumption that since human rights cannot be directly applied to children, they instead

⁴⁹E/CN.4/1324 (n 48); E/CN.4/1983/62 (n 47); ECOSOC, UNCHR, 42nd session, *Report of the Working Group on a Draft Convention on the Rights of the Child* (13 March 1986) E/CN.4/1986/39; E/CN.4/1987/25 (n 47); E/CN.4/1989/48 (n 48).

have a specially *adapted version of human rights*: ‘children’s rights.’ From the point of view of this understanding, *the role of the convention is to define the adapted version of human rights that is children’s rights*.

These two – essentially different – ways of attributing meaning to ‘children’s rights’, had implications *vis-à-vis* the purpose of the convention, and the kind of text that was to be its outcome. The different perceptions of human rights for children and the role of the convention were never explicitly articulated or discussed: in other words, no monologic movement striving to silence the other perspective can be identified. Whilst there were attempts to bring the contradiction out into the open, so that it might be addressed, these attempts were either ignored or rejected by the working group. Accordingly, a certain heteroglossia concerning the meaning of children’s rights and the role of the convention remained in play throughout the drafting process, with both of these competing ideas having a presence in the finally adopted text of the convention; there was no discernible closure in relation to this particular issue.

7. Discussion

A qualifying insight is gained by bringing the two themes of analysis together. If the respective processes of closure for civil and political and socio-economic rights are viewed from the perspective of the two different basic ideas about children’s rights as shown above, it appears as though *different children’s rights logic underlay the closures for different kinds of rights*.

The monologic movement concerning civil and political rights had a distinct orientation towards a rights logic proposing the ‘adapted version-understanding’ of children’s rights; civil and political rights could only be agreed upon by adapting them to children. This adaption led to a more restricted approach to the civil and political rights of children, in which the same rights standard for children, as stated in general human rights instruments, was not accepted. Instead, civil and political rights had to be curtailed in various ways so as to reach a consensus. For socio-economic rights, the monologic movement was instead directed towards the rights logic proposing a ‘general rights-understanding’ – consensus in the working group on these rights required clarification that the rights standard is the same as the one set in other human rights instruments. Attempts made in the proposal to adapt socio-economic rights by raising the standard for children were accordingly not accepted. Instead, children were regarded as possessing the same rights as others.

This basic contestation can be seen as a dialogic presence in the convention. Centripetal forces in the drafting, pulling meaning in different directions, made it impossible to reach consensus on a *principle valid for all rights* of children. It was, however, conceivable to attain a certain consensus about the underlying principle for *the respective rights groups*. The identification of the simultaneous presence of these two contradictory lines of argument (or rights logics), demonstrates a theoretical inconsistency built into the UNCRC in the drafting process.

It is known that the UNCRC is a product of negotiations and compromise, and therefore, includes tensions and inconsistencies. However, few *specifications* of these inconsistencies have been presented⁵⁰ and a more common portrayal of the convention

⁵⁰For an overview of research that has elaborated on tensions and inconsistencies, see earlier parts of this paper.

is that it is a congruent codification of children's rights.⁵¹ In view of the inconsistencies, however, critical questions can be raised around what value-specified knowledge about the inconsistencies and alternative meanings that appeared in the drafting of the UNCRC has for contemporary thinking about children's rights. We share Holzscheiter's perspective that knowledge of the actual discussions that led to the production of the UNCRC helps to deepen our understanding of why the convention, despite being hailed as globally consensual, continues to pose problems when trying to establish a comprehensive view of the child as rights subject.⁵² Precise knowledge about which aspects in the drafting that were contested, what alternative standpoints that were expressed, and how contested matters were dealt with can shed crucial explanatory light on current tensions within children's rights thinking. Acknowledging and bringing forward points of disagreement into contemporary discussions can also counter the risk cautioned by Reynaert and others that children's rights research is turning into a technocratic discourse, engaging in matters of implementation and monitoring, rather than critical and theoretical discussions about the meaning of children's rights.⁵³ In short, the exposure and elaboration of tensions and contestations in the drafting of the UNCRC can significantly contribute to stimulating scholarly debate around children's human rights.

We have argued that the drafting process included both monologic production of consensus, and a continuing dialogic situations. The question of how we view the consensus that was produced and embedded in the convention can be raised. Did those involved in the drafting agree on the underlying norms, or was the consensus of the more restricted practical kind, where parties only agreed on the outcome, but shared little thinking about the reasons that led to this? Tobin maintains that the state parties involved in the UNCRC drafting did not reach consensus about moral justifications or principles for children's rights, rather, they agreed on the more overarching idea that children have human rights.⁵⁴ We argue that the consensus reached in the drafting deliberations and inscribed in the convention, particularly around civil and political rights for children, was of a stronger nature than suggested by Tobin. In the drafting of civil and political rights, two underlying norms were largely uncontested, and hence, formed a consensus base – first that children's immaturity confines civil and political rights, and second that the rights of parents cannot be outrivalled by the civil and/or political rights of the child. These norms can be viewed against Hart's and Pavlovic's description of a reverse trajectory for the expansion of human rights for children when compared to the development of human rights for adults.⁵⁵ The rights first claimed for adults (autonomy, self-determination, political influence) were the last to be considered for children, and the final rights added to the general human rights (economic and social security) were amongst the first to be considered for children. The drafting of the UNCRC can be seen as a critical historical battlefield for children's civil and political rights, where persistent proposals from some actors eventually prevailed and led to the inclusion of civil and political rights in the convention. At the same time, however, the inclusion of these rights was

⁵¹Reynaert and others, 'A Review of Children's Rights Literature' (n 8); Quennerstedt, 'Children's Rights Research' (n 2); Archard (n 3); Holzscheiter, *Children's Rights* (n 4).

⁵²Holzscheiter, *Children's Rights* (n 4).

⁵³Reynaert and others, 'A Review of Children's Rights Literature' (n 8).

⁵⁴Tobin (n 7).

⁵⁵Stuart Hart and Zoran Pavlovic, 'Children's Rights in Education: A Historical Perspective' (1991) 20(3) *School Psychology Review* 345.

closely connected to a normative consensus of reasons to restrict the rights through acknowledging children's immaturity and the rights of parents.

We see scope for connecting findings from our work to Bobbio's reasoning that human rights' treaties must be understood as starting points.⁵⁶ Bobbio asserts that human rights emerged gradually as the product of human civilisation and struggle and are, therefore, susceptible to continuous transformation. A human rights instrument has to be kept alive '... by making it grow from within'.⁵⁷ Freeman discusses the Convention on the Rights of the Child in a similar way when he rejects the tendency to assume that the Convention constitutes a finishing line.⁵⁸ Instead, he urges us to view it as both provocation to more critical thinking and spur to further action.

8. Conclusion

As we approach the 30-year anniversary of the UNCRC's adoption, if children's rights are not to be regarded as set in stone,⁵⁹ the perception, inscription, and mobilisation of these rights will change. We believe that heightened awareness about alternative standpoints in the drafting process can open up and rejuvenate contemporary discussions about human rights for children. Such informed discussion may be a necessary condition and starting point for reimagining children's rights in the light of present concerns in ways that may well move beyond the text of the UNCRC and pave the way for rethinking the project of children's rights.

This paper is intended as a contribution towards such a dialogue. Throughout this paper, we have, by analytical arguments and empirical demonstration, suggested that the 'consensus' informing the current construction of the UNCRC needs to be revisited in light of the inconsistencies, tensions and contradictions that have been identified. In particular, we have argued that the (putative) consensus on different kinds of human rights expressed in the text of the UNCRC draws on inconsistent perceptions of human rights for children. In the course of our analysis, we have sought to specify these inconsistent underpinnings for children's rights. Through tracing and elaborating on the meaning-making processes that produced these inconsistencies, we have further displayed alternative meanings about children's human rights. We suggest that continued attention to the disparate perceptions of children as rights holders, inscribed in the Convention but difficult to detect, is of particular importance in the process of continuous engagement in – and transformation of – the meanings attributed to children's human rights. Further examination of how consensus was reached for children's civil and political rights is needed – while questions also need to be asked about whether the normative foundation for this consensus remains or has changed in the light of new challenges since the drafting of the UNCRC.

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⁵⁶Norberto Bobbio, *The Age of Rights* (Polity Press 1996).

⁵⁷*ibid* 20.

⁵⁸Michael Freeman, 'The Future of Children's Rights' (2000) 14 *Children & Society* 277.

⁵⁹Bobbio (n 53).