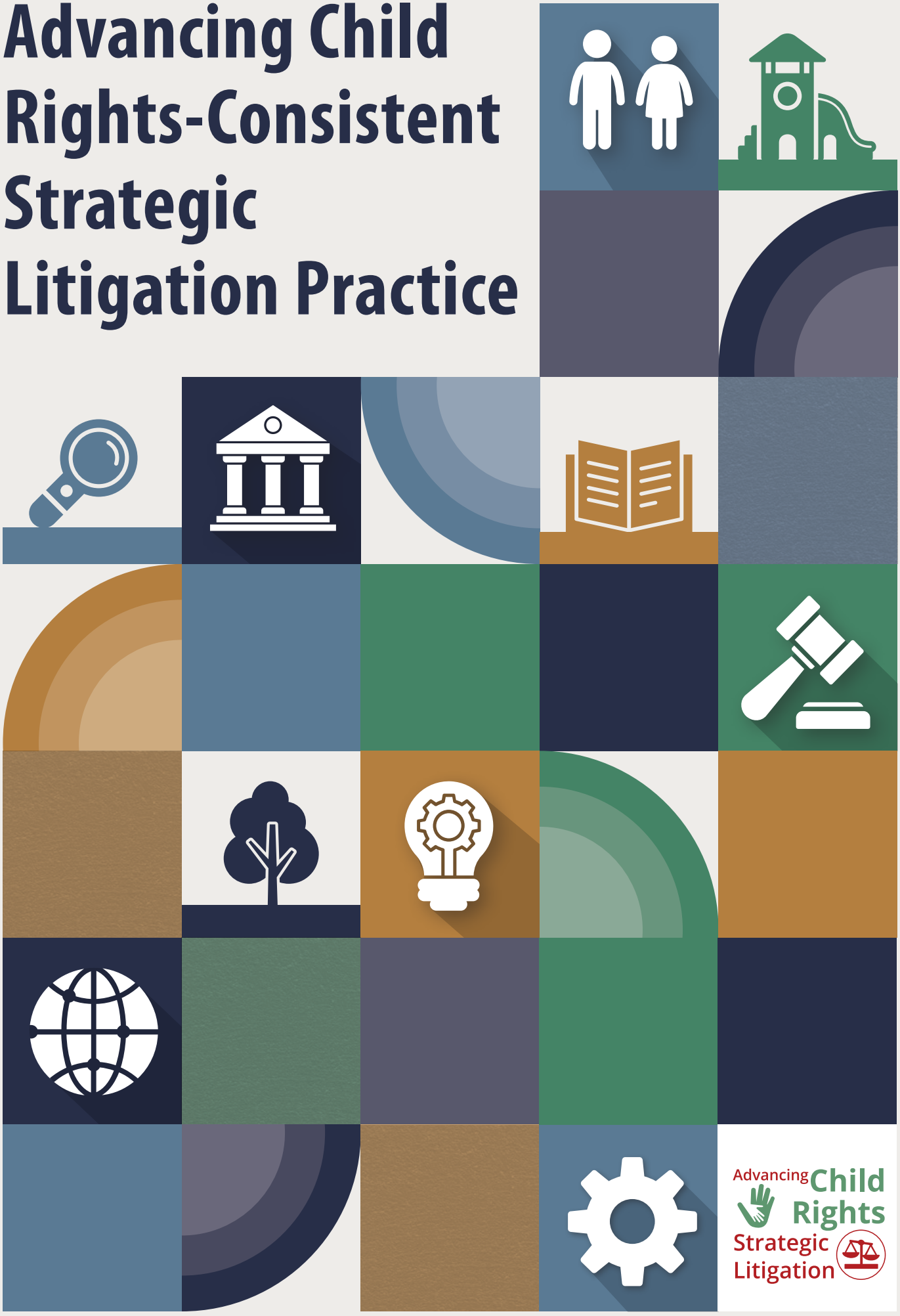
Advancing Child Rights-Consistent Strategic Litigation Practice



Advancing Child Rights Strategic Litigation

A. Nolan, A. Skelton and K. Ozah, 'Advancing Child Rights-Consistent Strategic Litigation Practice' (ACRiSL, 2022)

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For more information on the ACRiSL project and to join the ACRiSL Network, please see www.acrisl.org.

Advancing Child Rights Strategic Litigation

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EXECUTIVE SUMMARY

BACKGROUND, INTRODUCTION AND METHODOLOGY

Child rights strategic litigation (CRSL) is litigation that seeks to bring about positive legal and/or social change in terms of children's enjoyment of their rights.

This report emerges from the Advancing Child Rights Strategic Litigation (ACRiSL) project, a three-year global research collaboration bringing together partners from advocacy and academia to work on child rights strategic litigation. A key aim of this work is to support and contribute in a meaningful way to the work of practitioners, advocates and others working in the area of CRSL, and strengthen existing CRSL efforts to advance children's rights. In clarifying what child rights-consistent CRSL practice looks like, the report aims to support practitioners in improving their work by putting children's rights at the heart of their practice.

Thus far, children's rights have primarily played an 'outward-facing' role in the context of CRSL and have not generally been used as a framework for the assessment of the **practice** of CRSL.

CRSL practitioners are not direct duty-bearers in terms of the UNCRC. However, litigation practice should avoid any unintentional harm to or undermining of rights. A commitment to advancing child rights through law should include practice that takes concerted efforts to avoid such harm, and those interviewed for this study expressed a desire to do so.

This report has been produced through the employment of a combination of socio-legal qualitative and legal doctrinal methodologies, including desk-based research, and a survey completed by over 50 members of the ACRiSL network. It drew directly on structured interviews with over 30 CRSL practitioners based in the Americas, Europe, Oceania and Africa, as well as with a small number of young people who had been involved in CRSL as children. The project benefited from the insights of the project's Child and Youth Advisory Group.

A key aim of this work is to support and contribute in a meaningful way to the work of practitioners, advocates and others working in the area of CRSL, and strengthen existing CRSL efforts to advance children's rights.

PART A

Part A establishes both the background to and the conceptual foundations of this study on child rights-consistent CRSL practice. It sets out key definitions and provides a global overview of CRSL in action. Having made clear the extent to which CRSL actors take children's rights into account in their practice, it lays out the child rights schema that the study argues should frame child rights-consistent CRSL practice.

Chapter 1 Defining CRSL

The research team developed a definition of child rights strategic litigation as **'litigation that seeks to bring about positive legal and/or social change in terms of children's enjoyment of their rights'.**

Not all child rights cases are CRSL. Therefore, identifying whether a case qualifies as CRSL depends on a number of factors. These include:

- **the process that led up to the case;**
- **the way in which the case was developed or shaped by child rights during the process of the litigation;**
- **the remedy granted;**
- **the outcome of the case (both legal and extra-legal).**

The research team asked two further key questions in identifying cases that are CRSL:

who are the litigants and/or the litigators?

what is/was the objective(s) of the litigation?

FOCUS: While recognising that there is growing work by child rights litigators at the regional and international level, **domestic litigation** forms the core of CRSL efforts and is the primary focus in the report.

SCOPE AND CONTEXT: This report is global in scope. However, its arguments and recommendations are based on a strong understanding of the importance of ***context*** to CRSL. The report seeks to speak to CRSL actors working in a diverse range of ways and situations.

Chapter 2 CRSL in Action - An Overview

Key themes in three decades of CRSL

The nature and scope of CRSL activity is discussed in Chapter 2 of the report. A broad trends analysis based on jurisprudence and the project literature review reveals that in the twenty years after the coming into force of the UNCRC, litigation globally tended to focus on civil and political rights, with criminal justice high on the agenda.

Economic and social rights litigation was generally slower to get off the ground, with litigation on education being an exception in this regard. However, by the second decade after UNCRC adoption, economic and social rights litigation focusing on children's rights was on the rise in developing and developed economy nations, with notable efforts being made in Africa and Latin America in particular. Migration rates and a burgeoning awareness of children's rights in the context of migration has led to a surge in migration CRSL in the UNCRC's third decade.

This decade also saw the emergence of children as agents for their own change, and cases were brought on themes involving autonomy and evolving capacity, such as access to sexual and reproductive health services, sexual decision making, recognition of intersex children and the right to vote. Litigation on the right to preserve and protect identity, end child marriage, and in relation to tough new laws on sexual offences, has also been a site of CRSL work. Children have moved to the front of litigation efforts in the environmental protection context with a sharp upward trend in this type of CRSL noted in the last ten years.

The Key Players in CRSL

Geographical expansion of CRSL

The research found that CRSL is happening in many regions of the world. It recognises that many common law systems create space for strategic litigation, that jurisdictions with a codified constitution (including those with civil law systems) are very active sites of litigation activity, and that the European human rights system has triggered significant levels of CRSL at the national level in that region.

Most interviewees were of the view that bringing a child rights perspective to bear would constitute real value-added in terms of their existing, often organically developed, child-centred practice.

Chapter 3 The Potential for 'Child Rights-Consistent' CRSL Practice

Scope for child rights-consistent CRSL practice and potential challenges

All of the CRSL practitioners interviewed for the project shared an interest in improving and strengthening litigation practice so as to maximise children's enjoyment of their rights. However, while nearly all interviewees employed children's rights (whether under international or domestic law) as part of their legal argumentation or as defining the goals of strategic litigation, far fewer had explicitly engaged with children's rights as a framework for their own **practice**. Where they had done so, their focus was primarily on the best interests of the child (Article 3(1)), and children's right to be heard (Article 12(1)).

Most interviewees were of the view that bringing a child rights perspective to bear would constitute real value-added in terms of their existing, often organically developed, child-centred practice. Some practitioners cited excellent examples of their efforts to make their practice more child rights-consistent. However, a number of practitioners stated that their legal practice was already in line with a child rights-consistent approach. Others expressed reservations or foresaw challenges related to their lack of expertise and increased demands on resources (funding and time).

Overall, while there is a general appreciation amongst CRSL practitioners of the potential value of a child rights-framing of CRSL practice, this is not uniform, and there is some genuine concern about the challenges such an approach to strategic litigation would entail.

Chapter 4 Children's Rights that are Relevant to CRSL

This section focuses on those elements of the international children's rights framework that the project views as particularly important for use by practitioners to assess and shape their own practice from a child rights perspective.

RIGHTS MOST DIRECTLY ENGAGED IN CRSL PRACTICE			
Article 12(1) Right to be heard	**Article 13** Right to Freedom of Expression	**Article 17** Right to information	**Article 5** Evolving capacities of the child
Article 2 Non-discrimination	**Article 3(1)** Best interests	**Article 19(1)** Right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation	
Article 16 (1) Right to privacy	**Article 6** Right to life, survival and development	**Article 39** Right to physical and psychological recovery	**Article 4** Appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention

The report does not argue for a 'one-size-fits-all' approach to CRSL, and recognises the importance of context, and draws on concrete experiences to translate child rights consistent practice from abstract rights framing to reality.

The report accepts that a child rights framing does not provide all the answers, but it argues that it is important for practitioners to consider children's rights, as appropriate, when it comes to decision-making on the conceptualisation and operationalisation of their CRSL-related work.

PART B

The chapters in Part B focus in detail on the practice of CRSL. They centre on four stages of CRSL decision-making, namely:

i. the scoping, planning and design of CRSL;
ii. the operationalisation of CRSL;
iii. follow-up to CRSL, including implementation;
iv. extra-legal advocacy (political advocacy and other campaigning, media and communications work).

Chapter 5 The Scoping, Planning and Design of CRSL

The strategic nature of CRSL implies that there is an opportunity to consider the scope and aims of the litigation before the case is launched. Keeping in mind the reality that litigation often emerges from cases that spontaneously arise rather than being carefully planned, Chapter 5 of the report captures what CRSL actors have shared about the thematic areas that they have chosen, why and how they identify the key aims of the litigation, how they choose the type of actions that they take, and – if the children involved in the litigation do not self-select – how they are selected. Participation of children, and internal communication with them in the early phases of scoping, planning and design of CRSL are also examined. In outlining and analysing these CRSL actor experiences, the chapter makes clear how different UNCRC rights are engaged by, and can be used to shape, CRSL actor efforts with regard to these different areas of decision-making.

The interviews revealed that some CRSL practitioners carry out their work within one thematic area or across a selection of themes. This is often combined with an approach of scanning the horizon of current litigation to see opportunities to intervene, and in some cases, to head off litigation that would have negative impacts on children's rights. It was observed that organisations and practitioners that work consistently on children's rights and are repeat players in that arena, are more likely to do their work in line with a holistic child rights approach (Article 4 UNCRC), prioritising a longer term strategy that will bear dividends for children's rights over short-term gains.

If the children involved in the litigation do not self-select – how they are selected. Participation of children, and internal communication with them in the early phases of scoping, planning and design of CRSL are also examined.

The report points out that these reasons are linked to various rights issues such as privacy (Article 16(1) UNCRC), protection of the child from physical or mental violence (Article 19 UNCRC) physical and psychological recovery (Article 39 UNCRC).

Client selection (in cases where children do not self-select) was also found to be occurring in a range of different ways, including through clinical work, professional and personal networking, or in a very deliberate manner through matching the 'ideal' client to the particular issue to be litigated. There were cogent reasons provided by practitioners for sometimes consciously selecting institutional clients or young adults as litigants. The report points out that these reasons are linked to various rights issues such as privacy (Article 16(1) UNCRC), protection of the child from physical or mental violence (Article 19 UNCRC), and physical and psychological recovery (Article 39 UNCRC), This demonstrated child rights-consistent practice in the balancing of best interests (Article 3(1) UNCRC) with children's right to be heard (Article 12(1) UNCRC).

There were a few good examples of participation of children in the early stages of the cases. There was also evidence of the value of social networking platforms at the outset of a case to facilitate internal communication in line with children's rights to be heard and have their views considered, as well as to receive information, so as to allow them to make informed decisions. However, practitioners acknowledged that they do not always involve children in the scoping and design phase of CSRL and this emerged as an area for improvement.

Chapter 6 The Operationalisation of CRSL

Chapter 6 focuses on the operationalisation of CRSL. It clarifies the role that children's rights can and should play in shaping decision-making around argumentation, priority-setting and messaging during the course of the litigation. It examines the way in which litigators address children's need for support throughout (and possibly beyond) the strategic litigation process, how children's rights do and should frame practice around protection of children from harm and retrauma, as well as management of children's expectations, and the issue of calling a halt to CRSL or agreeing to a settlement. The chapter also considers the right to be heard before turning to the crucial issue of communication, participation, and empowerment of children in the operationalisation of CRSL.

The research provided insights into choices made regarding possible alternative lines of argumentation, and also revealed some examples of children's involvement in decision-making. Characterisation of cases and the considerations that should be taken into account in order to ensure that negative perceptions are avoided were explored. The study indicated that children's rights to privacy (Article 16(1)) and to have their best interests considered (Article 3(1), are important factors to guide the way that a case is characterised.

Design of remedies was considered by practitioners to be an important feature of CRSL, and while almost all acknowledged the relevance of children participating in the design of remedies (in line with the rights to information (Article 17 UNCRC), to be heard (Article 12(1) UNCRC), and to freedom of expression (Article 13 UNCRC), few examples were offered, showing that this is an area for development. The research demonstrated that children need support throughout (and possibly beyond) the strategic litigation process, which may engage Articles 6 (right to life, survival and development), 19 (right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation) and 39 (right to right to physical and psychological recovery). Similarly, the study uncovered examples that highlight the need to avoid, and if necessary, mitigate, any harm or (re)traumatisation in the process of litigation, with the Convention rights at play in this regard including the (right to life, survival and development (Article 6 UNCRC), the right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (Article 19 UNCRC) and the right to physical and psychological recovery (Article 39 UNCRC).

Management of expectations was an area where practitioners reported tough experiences of having to deliver bad news, and other more positive stories that demonstrated that if children are well prepared with adequate information (Article 17 UNCRC), and are afforded an opportunity to express their views (Articles 12(1) and 13 UNCRC), then they are able to deal with losses in litigation.

The research demonstrated that children need support throughout (and possibly beyond) the strategic litigation process, which may engage Articles 6 (right to life, survival and development), 19 (right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation) and 39 (right to right to physical and psychological recovery).

CRSL can take a long time, and thus calling a halt to or settling cases was examined, together with the extent to which children's views are considered in this phase of the case. As time advances during the litigation, children mature and their views should be given more weight in accordance with their evolving capacities (Article 5 UNCRC read with Article 12(1) UNCRC). The interviews revealed that sometimes children may wish to leave the litigation for various reasons. Communication with children throughout all stages of the case was flagged as crucial, with technology playing an increasing role (raising issues in terms of Articles 17, 12 and 13 UNCRC).

Chapter 7 Follow-up to CRSL

Chapter 7 considers how child rights should shape CRSL practitioners' efforts with regard to providing information and explaining litigation outcomes to children involved in litigation, the provision of ongoing support for children where necessary following the conclusion of the litigation, and strategies for Implementation of court judgments.

Chapter 7 demonstrated that CRSL follow-up work engages the rights to be heard (Article 12(1)) and to information (Article 17 UNCRC). The examples provided by the interviewees indicated that children can cope with losing a case, if there is a two-way flow of information. In some situations, Article 19 (right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation) may be engaged – for instance, in situations where there could be reprisals. In these situations, support should be provided. A child rights-consistent approach requires close attention to the child's best interests (Article 3) and may require the provision of psycho-social support in line with children's right to physical and psychological recovery (Article 39) in cases where the outcome has a major impact on an individual or group. Interviews with various CRSL actors show that only a few of them actually provide ongoing support to children. Strategies for implementation of court judgments were found in some examples provided by interviewees, pursuant to the right to information (Article 17 UNCRC) and children's right to be heard (Article 12(1) UNCRC). Although there were some good examples, it was found that few practitioners involve children directly in follow-up.

A child rights-consistent approach requires close attention to the child's best interests (Article 3) and may require the provision of psycho-social support in line with children's right to physical and psychological recovery (Article 39) in cases where the outcome has a major impact on an individual or group.

Chapter 8 Advocacy, Media and Communications Work

A key element of CRSL work is extra-legal advocacy, which can take the form of: (i) political advocacy or other campaigning in collaboration with children and organisations; (ii) media work, and/or (iii) communication. Children's rights can serve as a framework for all of these activities and, very positively, existing CRSL practice provides useful examples of rights-consistent practice that can be used by those working in the CRSL space to shape their own work (albeit those said examples did not result from a rights-framed model of practice).

Chapter 8 made clear the challenges faced by practitioners, particularly in relation to ensuring child agency and autonomy in relation to these activities while simultaneously ensuring that children are not exposed to avoidable harm. In all three areas of extra-legal advocacy activity, interviewees demonstrated an understanding of the importance of ensuring that children's voices and views were given effect to, in line with Articles 12 and 13 UNCRC, while ensuring that the privacy of children was maximised as needed to ensure that they were not subjected to negative impacts. These latter concerns are consistent with children's their rights to privacy (Article 16(1) UNCRC)and protection from physical and mental violence or other harm (Article 19 UNCRC).

Interviewees and the research more broadly provided examples of advocacy and campaigning aimed at diverse audiences, including politicians and the general public. Those practitioners who had involved or collaborated with children in advocacy showed a strong concern with ensuring that children's voices and views play a central part in informing and shaping such work (consistent with Articles 12(1) and 13 UNCRC). Children and young people interviewed stressed the role that such advocacy had played in terms of advancing children's goals with regard to the CRSL even (and indeed particularly) where such litigation was not successful before the courts.

Interviewees demonstrated an understanding of the importance of ensuring that children's voices and views were given effect to, in line with Articles 12 and 13 UNCRC, while ensuring that the privacy of children was maximised as needed to ensure that they were not subjected to negative impacts.

With regard to media work, interviewees demonstrated awareness of both the potential opportunities and risks of such work, particularly where children were involved directly. While rights language was not necessarily used by interviewees, the issues raised (and the methods used to address them) were very much in line with children's rights related to protection, privacy and voice. Practitioners flagged the key role of training, the development of information and other resources such as 'defensive briefings', as well as the potential of digital technology platforms and messaging apps to ensure effective child involvement in media work. Children and young people themselves highlighted the important role of these efforts. As such, it is evident that child rights-consistent CRSL practice does not require litigators to become experts in media (or indeed advocacy or communications); rather it may simply involve the identification of, and effective collaboration with, external partners to ensure that children are adequately supported in such work.

With regard to communications aimed at external audiences, interviewees flagged a number of different strategies (story-telling, the development of key messages and support to children when dealing with external audiences in the context of social media) that served both to empower and protect children in line with their rights. A key finding of the research – which bodes well for the child rights consistency of future CRSL practice in this area – was the recognition on the part of CRSL practitioners of the need to be able to respond in an agile way to new challenges.

CONCLUSION

The research has demonstrated that those CRSL actors who worked with children in the context of follow-up and extra-legal advocacy (political advocacy and other campaigning, media and communications work) were particularly aware of the need to ensure that their practice was aligned to child rights principles. Notably, there was generally less conscious integration of children's rights into CRSL practitioner efforts around scoping, planning, design and operationalisation of CRSL. While to some degree this is unsurprising given the technical and strategic challenges faced by litigators in relation to the litigation process, it was clear from the research that there is greater scope for child rights-consistent practice at these stages of CRSL than is currently the norm.

Overall, the research made clear that many of the key rights 'gaps' in terms of CRSL practice and the main opportunities for rendering such work more child rights-consistent centred on child participation and engagement. In contrast many practitioners were familiar with issues relating to protection and privacy.

CRSL is a rapidly moving field and it is clear that there is growing practitioner understanding of the challenges and opportunities it poses to children's rights enjoyment. The study's research findings, together with the rights framework itself, has led to the production of Key Principles for Child Rights-Consistent CRSL Practice. These can be found in the annexe to this report.

INTRODUCTION

This report approaches child rights under the UN Convention on the Rights of Child (UNCRC/ Convention) as a framework to inform and assess the inputs, outputs, processes and outcomes of child rights strategic litigation (CRSL), in line with the view that children's rights set out in the Convention can and should play a role with regard to shaping and informing litigation practice. It proceeds from the assumption that where CRSL efforts aim to advance children's rights through legal and/or social change but are inconsistent with children's rights in terms of how they are operationalised, their legitimacy is weakened, as well as their internal coherence and capacity to contribute to children's rights achievement in practice.

In outlining how strategic litigation practice can take express account of children's rights in terms of design, operationalisation, follow-up and accompanying advocacy, media and communications work, this report seeks to strengthen existing CRSL efforts to advance children's rights. In making clear what child rights-consistent CRSL practice looks like, the report aims to support practitioners in improving their work by putting children's rights at the heart of their practice.

BACKGROUND: INTRODUCING ACRISL

This report emerges from the Advancing Child Rights Strategic Litigation Project, a three-year global research collaboration bringing together partners from advocacy and academia to work on child rights strategic litigation. **CRSL is litigation that seeks to bring about positive legal and/or social change in terms of children's enjoyment of their rights.** Made up of eight partners based in Africa, Europe and Asia, ACRiSL aims to strengthen the capacity of such litigation to deliver on children's rights globally through the deepening of practice and research collaboration between advocacy and academic partners with the common goal of advancing children's enjoyment of their rights. A key part of this work is to support and contribute in a meaningful way to the work of practitioners, advocates and others working in the area of CRSL.

Despite an explosion in human rights-focused strategic litigation practice and associated research in recent years, child rights-specific strategic litigation has received limited express attention. The relative silence in practitioner and academic circles on this topic is at odds with the growing body of CRSL in the areas of poverty, child justice, education, immigration, disability rights, and climate change. Given these developments, as well as the evolving body of international law-level jurisprudence in terms of the Third Optional Protocol to the UN Convention on the Rights of Child, it is vital that child rights advocates, researchers and practitioners engage effectively with the challenges and opportunities presented by CRSL, and to do so from a children's rights perspective.

THE ROLE OF CHILDREN'S RIGHTS IN CHILD RIGHTS STRATEGIC LITIGATION PRACTICE

Thus far, children's rights have primarily played an 'outward-facing' role in the context of child rights strategic litigation: that is, they have been treated by practitioners and others involved in planning and implementing CRSL as a schema that should constrain or mandate the actions of external decision-makers that are the direct or indirect targets of the strategic litigation.

Child rights have not generally been used as a framework by which to assess, and as necessary, critique the practice of CRSL – i.e., as a lens to be turned inwards by those carrying out such litigation to consider the extent to which their practice (rather than simply the aims or impact of such) are consistent with child rights standards. This is in contrast to other areas of child rights advocacy, policy and scholarly work where we see growing efforts to put a child rights (or child rights-based) approach into action (e.g., social policy, development programming, research, and judicial decision-making).

CRSL practitioners are not direct duty-bearers in terms of the UNCRC. However, litigation practice can potentially harm and undermine children's rights enjoyment. The fact that this harm is unintentional and/or results from good faith efforts on the part of those seeking to advance children's rights does not prevent it from having negative impacts on the children affected. A commitment to advancing child rights through law should include practice that takes concerted efforts to avoid such harm, and those interviewed for this study expressed a desire to do so.

The use of children's rights as a frame for practice is not simply about seeking to 'do no harm' to children or to child rights; it is also motivated by a concern to improve and strengthen litigation practice so as to maximise children's enjoyment of their rights in all contexts. Children's rights provide a coherent, multi-faceted framework for CRSL decision-making – a framework which encourages reflective practice focused on securing the dignity of children in all contexts.

METHODOLOGY

This report has been produced through the employment of a combination of socio-legal qualitative and legal doctrinal methodologies. Our first tasks were the mapping of CRSL work (both litigation efforts and judicial outcomes) globally, and the production of a literature review. This desk-based research was followed by a survey which was completed by over 50 members of the ACRiSL network with CRSL experience. The most important source of empirical data for the purpose of the report took the form of interviews, including structured interviews with over 30 CRSL practitioners – lawyers and civil society advocates – based in the Americas (7) Europe (9), Oceania (5), Asia (4) and Africa (6). There were also a small number of interviews with adults who had been involved in CRSL as children. The data produced by these efforts was complemented by more informal conversations with a wide range of actors involved in CRSL in Europe, Asia, the Americas and Africa.

The project benefited from the insights of the project's Child and Youth Advisory Group which, in a series of workshops, has engaged around strategic litigation and barriers faced by children in using the law to bring about legal and/ or social change in order to develop tools to help overcome those barriers. This was particularly instructive in terms of project appreciation of how the normative rights framework should shape CRSL work and of how CRSL practitioners should understand and explain their duties, obligations, and representation in a CRSL context. The report also draws on a number of public ACRiSL Network events in which children and young people with lived experience of CRSL, litigators and other CRSL actors shared their experiences.

STRUCTURE

The report is made up two parts. Part A opens with an explanation of what child rights strategic litigation practice is (Chapter 1), before moving on to outline the current state of play of CRSL (Chapter 2). Chapter 3 addresses the extent to which CRSL actors regard children's rights as a frame for their own practice, their views on the 'value-added' of such an approach, and the potential challenges associated with (re)shaping litigation practice around child rights principles. Chapter 4 focuses on the children's rights principles that are relevant to developing child rights-consistent CRSL practice. Part B of the report focuses on making child rights-consistent practice real in CRSL work. Chapter 5 addresses the scoping, planning and design stage of strategic litigation, while Chapter 6 considers the operationalisation of strategic litigation. Chapters 7 and 8 focus on how children's rights can be brought to bear in work on the follow-up to strategic litigation, including implementation, as well as on extra-legal advocacy (political advocacy and other campaigning, media and communications work). The conclusion sets out the key findings and recommendations of the report.

PART A

Part A establishes both the background to and the conceptual foundations of this study on child rights-consistent CRSL practice. It sets out key definitions and provides a global overview of CRSL in action. Having made clear the extent to which CRSL actors take children's rights into account in their practice, it lays out the child rights schema that the study argues should frame child rights-consistent CRSL practice.

CHAPTER 1
DEFINING CRSL

1.1 WHAT IS CHILD RIGHTS STRATEGIC LITIGATION?

Against a backdrop of an often-overlapping multiplicity of terms used to describe litigation aimed at legal or social change,[1] this report focuses on 'child rights strategic litigation'. Our choice of the terminology of 'strategic litigation' is due, first, to the relatively general nature of that term and its use in numerous different national and international contexts to cover a range of litigation approaches. Second, this language explicitly captures the deliberate planning and conscious design that underpins litigation efforts to bring about legal or social change. The use of 'child rights' serves to make clear that we are looking at a sub-category of strategic litigation, namely such work focused on child rights. Consistent with both the purposive and group rights-specific focus of our approach, we define child rights strategic litigation as **'litigation that seeks to bring about positive legal and/or social change in terms of children's enjoyment of their rights'.**

Not all child rights cases (in the sense of cases that involve the litigation of children's rights standards set out in international, regional or domestic law) will be CRSL. Therefore, identifying whether a case qualifies as CRSL depends on a number of factors. These include:

- **the process that led up to the case;**
- **the way in which the case was developed or shaped by child rights during the process of the litigation;**
- **the remedy granted;**
- **the outcome of the case (both legal and extra-legal).**

With regard to the latter point, it should be clear that there will be examples of CRSL which do not succeed in bringing about legal or social change – due to, for example, a negative judicial outcome in a particular case, the means/lack of implementation of a specific decision, or because of the ultimate impacts of the decision in practice.[2] As such it is necessary to be cautious with regard to including outcomes in the criteria to be used to identify CRSL.

1 Open Society Justice Initiative, 'Strategic Litigation Impacts: Insights from Global Experience' (OSI 2018) 25.

2 For more on the risks of the negative impacts of relying on judicial intervention to secure the rights of children, see Aoife Nolan, *Children's Socio-Economic Rights, Democracy and the Courts* (Hart Publishing 2011) ch 6; Ann Skelton, 'Children's Rights', in Jason Brickhill (ed), *Public Interest Litigation in South Africa* (Juta 2018) 274.

There are also instances in which CRSL which is unsuccessful in court will ultimately result in legal or societal change due to factors such as extra-legal advocacy surrounding the litigation, an increase in public attention, sympathy or concern as a result of media coverage, or the creation of a movement or political mobilisation around a child rights issue.[3] (For more, see chapter 8).

There are also instances in which CRSL which is unsuccessful in court will ultimately result in legal or societal change due to factors such as extralegal advocacy surrounding the litigation, an increase in public attention, sympathy or concern as a result of media coverage, or the creation of a movement or political mobilisation around a child rights issue.

1.2 HOW DO WE IDENTIFY CRSL?

Building on the factors identified above, there are two key questions to ask when seeking to determine whether a case is CRSL. First, **who are the litigants and/or the litigators**?

Litigants may include any parties in the case: applicants, plaintiffs, defendants, appellants, petitioners, authors, amici curiae, or party intervenors.[4]

A case is likely to constitute CRSL where litigants are:

a child or group of children;

an adult such as a parent, guardian, curator/guardian ad litem who expressly acts on behalf of a child or children with a broader aim than merely meeting the needs of the individual child;

a human rights or civil society organisation (often but not always a children's rights organisation) acting on behalf of a child/children, in the child-specific public interest or in the interests of children generally;

national human rights institutions (NHRIs), ombudspersons or children's commissioners, children's rights' defenders (e.g., the Defensor/a de los Derechos de las Niñas, Niños y Adolescentes, Argentina), or human rights public defenders with a child rights-related mandate (e.g., the Defensoria Pública in Brazil).

3 For more on the potential of unsuccessful strategic litigation to still result in legal and social change, see e.g., Ben Depoorter, 'The Upside of Losing' (2013) 113 Colum. L. Rev. 817.

4 Note that if there is an appeal, the plaintiffs may become the defendants.

Generally, for a case to qualify as CRSL, the aim of the litigants will need to be a broader one than merely resolving a legal, child rights-related problem for an individual child. The litigation will need to seek to advance the rights of more than one child and/or to bring about social change that will benefit all children or a category of children.

Furthermore, a growing amount of CRSL is being brought by litigation organisations, individual lawyers acting in their own names or nomine officio, law clinics and public interest law groups.

In identifying CRSL, it will be especially important to consider who *initiated* the case. However, in some instances CRSL may include cases that are initiated by ordinary litigators as 'run of the mill' civil or criminal matters, but parties with strategic aims get involved at some stage of the case (e.g., as amici curiae or third party intervenors).

Furthermore, in some jurisdictions judges initiate cases themselves, while this is rare in others. That said, judges elsewhere certainly sometimes raise legal/constitutional questions of their own volition within 'run of the mill' cases before them. These kinds of 'judge-initiated' cases do not fit the definition of CRSL that is employed in this report, unless parties with strategic aims get involved at some stage of the case – for instance, by serving as amici curiae or third party intervenors to provide argumentation or evidence. The same is true of situations in civil law systems where cases are initiated by public officials acting in the public interest, but with a strategic aim which is then taken up or assisted by litigators with a strategic intention.

The second key question in terms of identifying whether a particular instance of litigation constitutes CRSL relates to the *aims* of that litigation: **what is the objective(s) of the litigation?**

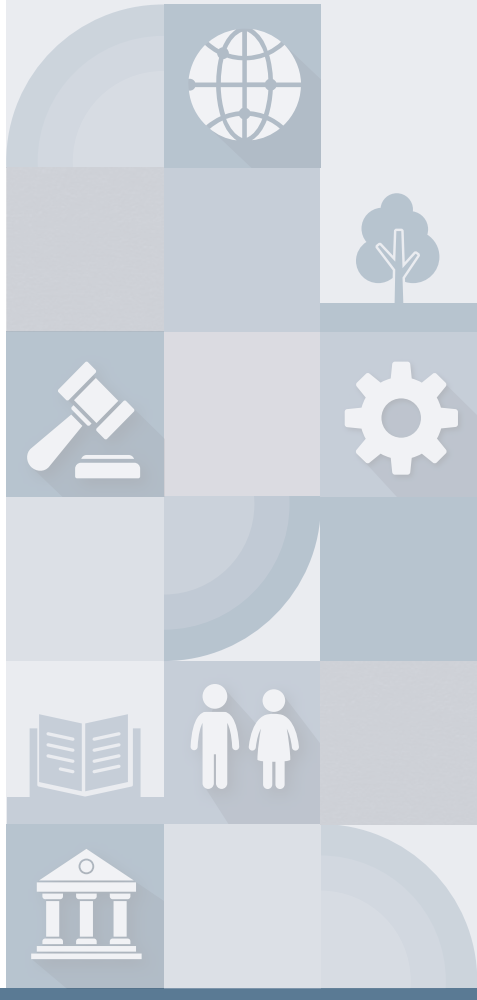
Generally, for a case to qualify as CRSL, the aim of the litigants will need to be a broader one than merely resolving a legal, child rights-related problem for an individual child. The litigation will need to seek to advance the rights of more than one child and/or to bring about social change that will benefit all children or a category of children. However, even where the main parties in the case may have a more limited or individualised aim (for instance, defending a particular child in the criminal justice system), an amicus or third party intervenor admitted to the case may have a different, more strategic intention. As such, it is not just the aims of the main litigants that are relevant when considering whether a specific case qualifies as CRSL.

1.3 WHAT KINDS OF CRSL DOES THIS STUDY EXAMINE?

It should be noted that the nature of the target fora for the purposes of CRSL work is not relevant to the definition of whether an action qualifies as CRSL as such. However, while there is growing work by child rights litigators at the regional and international level (for more, see Section 2.3), domestic litigation forms the core of CRSL efforts globally and is our primary focus in this report.

There are several reasons for this. First, the vast majority of CRSL has been and is being brought at the national level. As such, the domestic context is both the richest source of data and gives rise to the largest potential audience for the purposes of this report and the project's findings more broadly. Second, a significant number of the CRSL cases that end up before regional or international judicial or quasi-judicial bodies will have been initiated at the domestic level. This is a direct result of the fact that many regional and international systems (including UN treaty bodies, the European Court of Human Rights, the African Committee on the Rights and Welfare of the Child and the Inter-American Commission on Human Rights) require domestic remedies to have been exhausted prior to those supra-national systems being approached. Therefore, this report – and the data underpinning it – predominantly centres on CRSL and CRSL practice at the national level.[5] In doing so, it looks at CRSL in the setting of formally established courts in common law, civil law and mixed legal systems.

The report does not look at CRSL practice in relation to national administrative bodies, tribunals or ombudspersons. Nor does the study consider supra-national complaints or dispute resolution processes such as the OECD Guidelines for Multinational Enterprises. Given resource and capacity constraints, it was inevitable that not all possible forms of CRSL and CRSL practice could be covered if the project was to be manageable and its findings meaningful. Thus, while the findings in this report may be of some relevance to actors working in the those spheres, the authors recognise that CRSL work oriented towards administrative and other complaints systems potentially raises questions in terms of CRSL practice that go unaddressed in this report.



5 The study focuses on high court or highest (apex) court litigation at the domestic courts. This is because lower levels of court systems which do not result in written or reportable judgments are unlikely sites for strategic litigation except as a first step of a longer litigation journey.

1.4 CRSL IN ACTION – THE IMPORTANCE OF CONTEXT

This report is global in scope. However, its arguments and recommendations are based on a strong understanding of the importance of *context* to CRSL. As made clear above, CRSL arises in multiple different ways. The design and operationalisation of CRSL will necessarily differ from one legal system to another and will also depend on issues such as rules of standing, the types of legal actions that are permissible, the risks of costs orders, and the remedial powers of courts. It may also depend on the socio-political environment, the space for civil society actors and the independence of the judiciary. Furthermore, those involved in CRSL are wide-ranging in nature and their roles in CRSL will vary. While the efforts of some will be centred on presenting legal argumentation in the courtroom, others will be involved in supporting children on a day-to-day basis. Some CRSL actors will work directly with the children whose rights are at issue, others will work at a remove. What will be possible or prove successful in terms of CRSL will depend on a range of factors, many of which are beyond litigators' control.

As such, none of the report findings or recommendations are based on pre-existing assumptions about the form of CRSL work or the system in which it may take place. Rather, the report seeks to speak to CRSL actors working in a diverse range of ways and situations.

Some CRSL actors will work directly with the children whose rights are at issue, others will work at a remove. What will be possible or prove successful in terms of CRSL will depend on a range of factors, many of which are beyond litigators' control.

1.5 CONCLUSION

Having defined CRSL for the purposes of the project and outlined which forms of such activity this study focuses on, the report now turns to address CRSL in action.

CHAPTER 2
CRSL IN ACTION – AN OVERVIEW

2.1 KEY THEMES IN THREE DECADES OF CRSL

Before focusing in detail on the practice of CRSL, it is crucial to have a proper sense of the nature and scope of such activity.[6] A broad trends analysis based on jurisprudence and the project literature review reveals that in the twenty years after the coming into force of the UNCRC, litigation globally tended to focus on civil and political rights,[7] with child justice[8] (particularly sentencing)[9], and child protection systems abuses being high on the agenda.[10] Family law-related cases featuring children's rights also dominated in the early phase. Corporal punishment cases featured significantly, with litigation challenging the practice in various settings being a notable theme in various regions.[11] In India, child labour cases were prominent. [12] In Latin America and Africa, there were cases about displacement and armed conflict.[13]

Economic and social rights litigation was generally slower to get off the ground. Education litigation was an exception in this regard, having received sustained legal attention in different global regions, perhaps because many angles of education litigation such as segregation and exclusion engage civil and political rights (historically more likely to form part of constitutional rights schema) as well as economic and social rights ones.[14]

6 This section is drawn from Aoife Nolan and Ann Skelton, ''Turning the Rights Lens Inwards': The Case for Child Rights-Consistent Strategic Litigation Practice' (2022) *Human Rights Law Review* (forthcoming September 2022)

7 Child Rights International Network (CRIN), 'CRC in Court: The Case Law of the Convention on the Rights of the Child' (2012) 16 lists these top ten themes in child rights litigation that cited the UNCRC: juvenile justice, immigration, child custody, public protection of child, discrimination, child protection, corporal punishment, armed conflict, adoption and child support – the eleventh was education. While CRSL does not necessarily cite the UNCRC, this study provides a sense of the issues that those most working on child rights – who were those most likely to cite the UNCRC – were focussed on.

8 See, e,g., *J.D.B. v. North Carolina*, 564 U.S. 261 (2011); *S and Marper v. UK* ECHR 2008-V 167.

9 See, e, g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Miller v. Alabama*, 560 U.S. 48 (2010); *Centre for Child Law v. Minister of Justice and Constitutional Development* [2009] ZACC 18.

10 CRIN's 2012 study of cases citing the UNCRC (n 7) showed that the ten most common articles cited by the courts were Article 3 (best interests), Article 37 (detention, punishment), Article 19 (protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation), Article 9 (separation from parents), Article 40 (child justice), Article 7 (nationality), Article 2 (equality), Article 12 (right to be heard), Article 1 (definition of child) and Article 8 (identity). Although citation of UNCRC and CRSL are not directly correlated, this list gives an indication of child rights themes litigated during that period.

11 See, e.g., Cr. A. 4596/98 Plonit v. Attorney General P.D 54(1) (Israel); *A v. United Kingdom ECHR 1998–VI; Canadian Foundation for Children, Youth and the Law* v. Canada [2004] 1 SCR 76; BLAST v. Secretary of the Minister of Education, (2011) (31) SCC. The theme has continued beyond the second decade following the UNCRC in Southern Africa: *Pfungwa v. Headmistress of Belvedere Primary School* [2017] ZWHHC 148; YG v. S (A263/2016) [2017] ZAGPJHC 290; *Freedom of Religion South Africa v. Minister of Justice* [2019] ZACC 34.

12 See, e.g., M.C. Mehta v. State of Tamil Nadu, (1996) (6) SCC 756; Bachpan Bachao Andolan v. Union of India and Others, (2011) (5) SCC 1.

13 See, e.g., Constitutional Court of Colombia. Third Review Chamber. T–025 of 2004. (Manuel José Cepeda Espinosa, Jaime Córdoba Triviño, Rodrigo Escobar Gil; 22 January 2004); Constitutional Court of Colombia. Second Review Chamber. Auto 251 of 2008. (Manuel José Cepeda Espinosa; 6 October 2008); Batumike et al ('Affaire Kavumu'), RPA no. 139/2018 (High Military Court of the Democratic Republic of the Congo).

14 See, e.g., *DH and another v. the Czech Republic* ECHR 2007–IV, which originated in a constitutional appeal lodged on 15 June 1999; *Horvath and Kiss v. Hungary* (2013) 57 EHRR 31 was initially brought in the Szabolcs-Szatmár-Bereg County Regional Court in 2006. In the US: *Rose v. Council for Better Education* 790 SW 2d 186 (Ky 1989); *Campaign for Fiscal Equity v. State of New York* 719 N.Y.S. 2d 275 (2001).

Landmark economic and social rights cases in the early phase often only tangentially dealt with children's rights, these frequently being subsumed within the rights of families and communities.[15] However, by the second decade after UNCRC adoption, economic and social rights litigation focusing on children's rights was on the rise in developing and developed economy nations, with notable efforts being made in Africa and Latin America in particular.[16]

Migration rates and a burgeoning awareness of children's rights in the context of migration has led to a surge in migration-related CRSL in the UNCRC's third decade, focusing on issues such as migration procedures,[17] separation from parents,[18] deprivation of liberty,[19] and access to services including education.[20] A child rights perspective in family law cases emerged on issues such as children of imprisoned caregivers,[21] intercountry adoption[22] and surrogacy,[23] with CRSL playing a role through amicus curiae or third party interventions.

This decade has also seen the emergence of children as agents for their own change, and cases on themes involving autonomy and evolving capacity, such as access to sexual and reproductive health services,[24] sexual decision making,[25] recognition of intersex children,[26] the right to vote,[27] and to participate in peaceful assembly.[28]

15 See, e.g., *Government of South Africa v. Grootboom* [2000] ZACC 19; *Minister of Health v. Treatment Action Campaign* [2002] ZACC 15.
16 For a discussion of key cases, see Nolan (n 2).
17 See, e.g., *Centre for Child Law v. Minister for Home Affairs* 2005 (6) SA 50 (T); STS 16 June 2020 (307/2020) (Spain).
18 See, e.g., *Ms. L. v. U.S Immigration & Customs Enforcement,* 302 F. Supp. 3d 1149 (SD Cal. 2018).
19 See, e.g., Stipulated Settlement Agreement, Flores v. Reno [1997] No. CV 85–4544, C.D. Cal.; *J.b.M.R. v. Public Prosecutor* [2017] 7 AMR 128 (44-51-03/2017) (High Court of Malaysia); R.R.b.M.S. & 6 *Ors v. Komandan, Depot Imigresen Belantik, Kedah & 3 Ors* [2019] 4 AMR 619 (KA-44-81-09/2018) (High Court in Alor Setar, Malaysia).
20 See, e.g., *R (On the application of Tigere) v. Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; *Centre for Child Law v. Minister of Basic Education*, 2020 (3) SA 141 (High Ct. Eastern Cape Div. Dec. 12, 2019).
21 See, e.g., *S v. M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; *Chiramba v. Minister of Home Affairs N.O. & Anor* [2008] ZWHHC 1029; HC 143.641, STF, 20 February 2018 (Brazil).
22 See, e.g., *St. Theresa's Tender Loving Care Home v. State of Andhra Pradesh* (2005) 8 SCC 525; *Stephanie Joan Becker v. State* (2013) 12 SCC 786; *AD v. DW (Department of Social Development Intervening; Centre for Child Law as Amicus Curiae)* [2007] ZACC 27.
23 See, e.g., *AB v Minister for Social Development* [2016] ZACC 43.
24 See, e.g., *Planned Parenthood of the Great Northwest v. Alaska*, 375 P.3d 1122, 2016 WL 3959952, Alaska, July 22, 2016 (NO. S–15010, S–15030, S–15039).
25 See, e.g., T*eddy Bear Clinic v. Minister of Justice* [2013] ZACC 35.
26 See, e.g., *Baby A (Suing through the Mother EA) v. Attorney General* [2014] eKLR.
27 *Make it 16 Incorporated v Attorney-General* [2020] NZHC 2630; *Make it 16 Incorporated v Attorney General* [2021] NZCA 681.
28 See, e.g., *Mlungwana v. The State* [2018] ZACC 45.

Litigation on the right to preserve and protect identity,[29] child marriage,[30] and in relation to tough new laws on sexual offences that have caused unintended consequences for children in the criminal justice system,[31] has also been a site of CRSL work. Children have moved to the front of litigation efforts in the environmental protection context, with a sharp upward trend in this type of CRSL noted in the last ten years.[32]

This decade has also seen the emergence of children as agents for their own change, and cases on themes involving autonomy and evolving capacity

2.2 KEY PLAYERS IN CRSL

But who are the actors driving and supporting this work, and has that changed over time? Chapter 1 has already indicated some of the litigants whose involvement in litigation suggest strongly that it is CRSL. Here, however, we will provide an overview of the ever-more diverse set of actors bringing CRSL.

Child rights organisations and university-based centres and clinics have worked and continue to work with lawyers acting pro-bono and long-time strategic litigators to successfully bring child rights cases and amicus curiae briefs to courts. There is a range of practice using in-house lawyers and/or lawyers on brief. Sometimes the litigation work is carried out by specialist pro-bono law 'firms', who use a range of strategies to select themes for litigation and to identify cases and clients. Some of them work directly with children in legal clinic situations or cooperate closely with organisations that deliver services to children.

29 See, e.g., *Inst. for Human Rights & Development in Africa (IHRDA) and Open Society Justice Initiative (on Behalf of Children of Nubian Descent in Kenya) v. Kenya* (2011) Decision No. 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC).

30 See, e.g., Mudzuru v. Ministry of Justice, Legal & Parliamentary Affairs N.O. [2016] ZWCC 12.

31 See, e.g., *J v. National Director of Public Prosecutions* [2014] ZACC 13.

32 See the Climate Change Litigation Index, available at 'Climate Change Litigation Databases – Sabin Centre For Climate Change Law' *(Climate Case Chart)* <http://climatecasechart.com/climate-change-litigation/.> accessed 4 February 2022.

In legal systems where litigation brought by an institution is possible, children's rights organisations have been visible as institutional clients. CRSL litigators have also taken advantage of the possibility of collective litigation complaint mechanisms.[33] NHRIs with a child rights mandate[34] and Children's Commissioners[35] have also been active in CRSL in some countries, and in various cases Legal Aid or Legal Services Authorities[36] have been involved. Lawyers' associations have also featured in some of the work.[37]

The respondents in these cases are usually state actors (at all levels), but this is also shifting. Private role players, including businesses providing goods or services to children[38] or exploiting children (such as through child labour)[39] are increasingly being targeted as respondents in CRSL, and this has sharply increased in the surge of environmental litigation.

2.3 THE GEOGRAPHICAL EXPANSION OF CRSL

Another notable trend is the spread of CRSL across different geographical regions, and across different types of legal systems. The United States has the longest history of strategic litigation on CRSL, involving the use of precedent as a means to develop the law.

33 See, e.g., "Civil Association for Equality and Justice (ACIJ) c/ Gobierno de la Ciudad de Buenos Aires (Ministerio de Educación) and others on precautionary measures" CApel. Satyr, Sala I, EXP 8849/2019, 2020.

34 In India the National Human Rights Commission played a role in the death penalty case of Ramdeo Chauhan v. Bani Kant Das (2010) 14 SCC 209, and in several High Court matters relating to police brutality, and weaknesses in the Remand Home system. See further Enakshi Ganguly Thukral and Anant Kumar Asthana 'Children's Rights in Litigation: Use of the CRC in Indian Courts', in Ton Liefaard and Jaap Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2015) 49–50.

35 For example, Northern Ireland's Commissioner for Children (NICCY) has intervened in cases including criteria for state aided education *JR (a minor) acting by his mother and next friend* [2021] NIQB 21.

36 See, e.g., the work of the National Legal Services Authority (NALSA) in India and Legal Aid South Africa.

37 For example, the Coletivo de Advogados em Direitos Humanos in the Supreme Federal Court of Brazil (n 21).

38 See, e.g., the work of Alana challenging advertising to children in Brazil, including REsp. 1.558.086 – SP (2015/0061578-0), STJ, 10 March 2016; 'Tiktok Sued on Behalf of Millions of European Children over Data Concerns' *Financial Times* (2021) <https://www.ft.com/content/02bb235f-f6f3-42be-a921-bc2c86b86271> accessed 18 April 2022.

39 Annie Kelly, 'Apple and Google Named in US Lawsuit over Congolese Child Cobalt Mining Deaths' *The Guardian* (2019) <https://www.theguardian.com/global-development/2019/dec/16/apple-and-google-named-in-us-lawsuit-over-congolese-child-cobalt-mining-deaths> accessed 18 April 2022.

Other common law jurisdictions such as England and Wales – and to a more limited degree, Australia and New Zealand – have provided some space for CRSL.[40]

In the constitutional democracy of India, public interest litigators, using judicial review via writ petitions[41] have long been active in the sphere of children's rights.[42] On the African continent, a significant body of child rights case law has been strategically built in South Africa since its final Constitution was enacted in 1996,[43] and CRSL cases have also emerged in other African jurisdictions with codified constitutions, such as in Kenya, Uganda and Zimbabwe.[44]

Continental Europe's civil legal systems rely more heavily on written codes, and the law is not developed by precedent in the same way as in common law systems. The European human rights system has triggered significant levels of CRSL at the national level in this region.[45] The other large region where civil systems dominate is Latin America. However, several jurisdictions in Latin America have extensive constitutional and legislative child rights protections, and have legal avenues and remedies that have been used by civil society groups seeking justice,[46] such as civil actions in the public interest[47] and writs of mandamus.[48] Important institutions in several Latin American jurisdictions that play an important role in CRSL include the Ministério Público, a public officer that actively promotes rights, and the Defensoria Pública, which provides legal assistance and has standing to present civil actions.[49]

Several jurisdictions in Latin America have extensive constitutional and legislative child rights protections, and have legal avenues and remedies that have been used by civil society groups seeking justice, such as civil actions in the public interest and writs of mandamus.

40 See, e.g., Jane Williams, 'England and Wales' in Liefaard and Doek (n 34) 55–56. Andrea Durbach and others, 'Public Interest Litigation: Making the Case in Australia' (2013) 38(4) Altern. Law J. 219.
41 See Thukral and Asthana (n 34) 31–51.
42 Gaurav Jain v. Union of India & Ors. [1990] Supp. SCC 709; M.C. Mehta (n 12); Bachpan Bachao Andolan (n 12); Ajay Goswani v. Union of India AIR 2007 SC 493.
43 Julia Sloth Nielsen, 'Children's Rights Jurisprudence in South Africa – a 20 Year Retrospective' (2019) 52 De Jure 501.
44 Ann Skelton, 'The Development of a Fledgling Child Rights Jurisprudence in Eastern and Southern Africa Based on International and Regional Instruments' 2009 9(2) Afr. Hum. Rights Law J. 482.
45 For more, see the various contributions to Liefard and Doek (n 34).
46 Open Society Justice Initiative, 'Equal access to quality education' (Open Society Foundations 2017) 31.
47 Civil process to protect individual right – i.e. ação civil pública.
48 A remedy to protect individual rights – i.e. mandado de segurança or amparo.
49 See for example HC 143.641 (n 21); REsp. Nº 1.558.086 – SP (2015/0061578-0) (n 38).

While many of the cases are brought by parents on behalf of children, the UNCRC Committee has received some cases where children are supported by strategic litigators and there is involvement of NGOs, NHRIs, academics and special rapporteurs.

Domestic litigation forms the core of CRSL efforts and is our focus in this report, but there is increasing activity by child rights litigators at the regional and international level.[50] Regionally, we see CRSL being brought before the Inter-American Commission,[51] the European Court of Human Rights,[52] and the European Committee of Social Rights,[53] and the African human rights complaints mechanisms.[54]

The coming into force of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure in 2014 has created a new horizon for CRSL. Although ratification has been slow, the number of cases and the range of issues being covered is expanding.[55] While many of the cases are brought by parents on behalf of children, the UNCRC Committee has received some cases where children are supported by strategic litigators and there is involvement of NGOs, NHRIs, academics and special rapporteurs.[56]

2.4 CONCLUSION

It is clear that CRSL is on the increase – both in terms of the numbers of cases, the thematic areas covered and the range of actions and actors targeted. The report now turns to focus on the practice of those carrying out this work.

50 Aoife Nolan and Ursula Kilkelly, 'Children's Rights under Regional Human Rights Law – A Tale of Harmonisation?' in Carla M. Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill/Nijhoff 2017).

51 James L. Cavallaro and others with Caroline Bettinger-Lopez and others, *Doctrine, Practice and Advocacy in the Inter-American Human Rights System* (Oxford: OUP, 2019), 595–635.

52 Claire Fenton Glynn, *Children and the European Court of Human Rights* (OUP 2021) 398.

53 For more, see European Social Rights Department, 'Digest of the Case-Law of the European Committee of Social Rights' (Strasbourg: COE, 2022).

54 See, e.g., Benyam D. Mezmur, 'The African Children's Charter @ 30: A distinction without a difference?' (2020) 28 Int. J. Child. Rights 693.

55 CRC Trends – OPIC' (*Child Rights Connect*, 2022) <https://opic.childrightsconnect.org/crc-trends/> accessed 9 April 2022.

56 For example, the Spanish non-governmental organisation Fundación Raíces has been involved in numerous migration cases brought under OPIC. The third party interventions by NHRIs in *N.B.F. v. Spain* (2018) CRC/C/79/D/11/2017 UNCRC; the third party interventions by academic experts in *L.H. and Others v. France* (2022) CRC/C/89/D/77-79-109-2019 UNCRC, as well as by current and former Special Rapporteurs in *Sacchi and Others v. Argentina and others* (2021) CRC/C/88/D/104/2019 UNCRC.

CHAPTER 3

THE POTENTIAL FOR 'CHILD RIGHTS-CONSISTENT' CRSL PRACTICE

3.1 SETTING THE SCENE: WHAT SCOPE FOR CHILD RIGHTS-CONSISTENT CRSL PRACTICE?

As stated in the Introduction, this report and the ACRiSL project as a whole operate on the presumption that children's rights can and should play a role with regard to shaping and informing litigation practice. All of the CRSL practitioners interviewed for the project shared an interest in improving and strengthening litigation practice so as to maximise children's enjoyment of their rights. However, while nearly all interviewees employed children's rights (whether under international or domestic law) as part of their legal argumentation[57] or as defining the goals of strategic litigation,[58] far fewer had explicitly engaged with children's rights as a framework for their own practice. One interviewee noted that : '[c]hild rights serves a theory. It also serves as a framework to guide litigation practice that involves children.' [59] However, a more representative view was that while the purpose of CRSL 'is to protect children's rights'[60] those rights were not consciously integrated into the practitioner's CRSL process.

Of the small number of interviewees that had considered the role of children's rights in terms of informing practice, emphasis was placed on the implications of the best interests principle and the child's right to have their views respected in litigation-related activities. Both of these rights were recognised by different CRSL actors as playing a role in shaping their work, including their engagement with children. One interviewee stressed that 'it is important that [CRSL] is centred on the voices of children and their narrative.'[61] Another stated that: 'In terms of the best interest of the child, I know that it has become "a catch all phrase" that everybody uses, we are also guided by it in all our litigation.'[62]

57 AFP2 (27 October 2021); AFP4 and AFP5 (30 November 2021).
58 AFP2 (n 57).
59 ASP4 (7 November 2021). Another interviewee, with extensive strategic litigation experience in a wide range of areas had previously considered human rights-consistent practice, but not from a child rights perspective (OCP1 (3 March 2022)).
60 AMP2 (30 November 2021).
61 AFP1 (12 July 2021).
62 AFP3 (22 November 2021).

It is perhaps unsurprising that these two elements of the child rights schema were focused on by litigators. In addition to being possibly the best known elements of the child rights framework, these issues (and the concerns underlying them) have also been a focus for practitioners in the context of professional ethics for those representing children, as well as in the context of child protection and safe-guarding efforts on the part of organisations working with children.[63] The same is true with regard to issues related to privacy and confidentiality, which were flagged by a number of interviewees as of particular relevance when working with children in a litigation context.[64] In the words of one interviewee upon been asked about whether CRSL should differ from other rights-based litigation:

Children should have the opportunity to speak to the issues that affect them [through strategic litigation]. Our experience shows that in most cases children if given the opportunity are able to speak and are able to address these challenges effectively. All that children need is the right platform to do that and their right to privacy protected if need be.[65]

3.2 PERCEPTIONS OF THE ADDED VALUE OF CHILD RIGHTS-CONSISTENT CRSL PRACTICE

Despite the limited evidence of practitioner efforts focused on the development, implementation and follow-up of CRSL from a child rights perspective, it was clear from many of the interviews that there was an openness to the idea that child rights could (and should) have a role in shaping CRSL.

Most interviewees were of the view that bringing a child rights perspective to bear would constitute real value-added in terms of their existing, often organically developed, child-centred practice, with one interviewee noting '[i]magine that the whole process … itself isn't children's rights compatible. You can't do that really, can you?.'[66] Another interviewee, drawing on their own experience stated 'it's correct to say that you know we didn't sort of sit down prior to engaging with this group and think "right, these are the rights we need to be conscious of".

63 Legal Aid South Africa and Centre for Child Law, 'Guidelines for Legal Representatives of Children in Civil Matters' (PULP 2016).
64 AFP2 (n 57); AFP4 and AFP5 (n 57).
65 AFP2 (n 57).
66 EUP1 (27 January 2022).

And you know in hindsight, I think it would have been a very beneficial exercise.'[67] More generally with regard to the value added by a child rights-consistent approach to CRSL, one interviewee, having noted the special vulnerability of children which they argued required children to be treated differently to adults in litigation, stressed that the advantage of a rights-based approach was that it moved past a protectionist 'very much top-down patronising approach towards children'.[68]

Several interviewees also observed that the discussion of child rights-consistent practice was timely in terms of their existing practice. This was particularly so for two interviewees representing organisations with very strong human rights strategic litigation experience who are seeking to focus on children's rights-specific litigation to a greater degree.[69]

That said, one interviewee expressed the view that their practice was largely child rights-consistent anyway, albeit that they didn't adopt an explicit rights framework:

> **Yes, there would be buy-in but I think a lot of people's view would be that we are already [doing that] without making explicit reference to specific rights ... I don't think there'd be resistance per se, but I don't know that it would be very clear what the added value [would be].[70]**

Another commented that, 'a lot of the things you are saying are also incorporated into legal practice'.[71] Both of these practitioners were based in jurisdictions with limited child-specific rights protections and lawyer engagements with international child rights standards was unusual. In contrast, those practitioners who engaged regularly with child rights standards (both national and international) as part of their legal work (for instance, in argumentation) were less likely to suggest that consciously adopting a child rights-consistent approach would not impact on their practice as it stood.

One interviewee, who worked in a jurisdiction with limited child-specific rights protections and very limited engagement with international child rights standards, flagged that a child rights-framed approach to practice would necessitate a conceptual shift on the part of lawyers in that jurisdiction, given that children's rights (and the UNCRC in particular) did not play a significant role in the relevant legal system and the work of lawyers.[72] Another practitioner, based in a jurisdiction with similar characteristics, highlighted their limited understanding of the international children's rights framework and stressed that rights frameworks were not how practitioners working in that jurisdiction conceptualise practice.[73] In doing so, they stressed the importance of being provided with a practical framework and not just a theoretical one if they were to incorporate a child rights-consistent approach into their practice:

67 EUP5 (5 July 2021).
68 EUP7 (9 June 2021).
69 AMP5 (9 April 2021 and 28 April 2021); OCP1 (n 59).
70 AMP1 (15 November 2021).
71 OCP2 (30 November 2021).
72 AMP3 (25 October 2021).
73 OCP2 (n 71).

> **I find that the conceptual stuff about 'is my practice in line with Article 3(1) of the blah, blah, blah?', like, you know, it's important, but really what I want is what are the practical ways in which I can shape my practice and my relationship with clients, because that's the thing that's actually going to help them and is actually going to … you know, it's where the rubber hits the road in terms of where these things happen.[74]**

A notable finding of the interviews was that, although actors carrying out CRSL were not necessarily employing a child rights-consistent approach to practice, many of them were adopting such an approach with regard to their other non-litigation-related activities (for instance, policy work and advocacy).[75] As such, while there was commitment to children's rights as a framework for work with and about children in other areas, this was not reflected in strategic litigation activities. That said, one interviewee was clear that this work (and children's involvement in shaping it) had a direct role in informing the legal work of their organisation:

> **'I wouldn't say that [children] are directing litigation, they're not directing litigation, but what they are doing is informing our own policy choices and legal goals, in terms of the advocacy choices that we make, or the cases that we get involved in'.[76]**

3.3 POTENTIAL CHALLENGES IN TERMS OF CHILD RIGHTS-CONSISTENT CRSL PRACTICE

When considering the implementation of such practice, a number of interviewees highlighted potential challenges, including a lack of expertise and the demands this would make on resources (both funding and staff time).[77] This was raised by a number of interviewees with regard to child engagement or participation in particular. (For more, see Section 5.6). One interviewee highlighted the challenge of establishing a stable group of children with which to engage in in terms of CRSL work, given the time-bound nature of legal childhood and children's movement between different schools.[78]

74 ibid.
75 E.g., AMP3 (n 72); AMP4 (6 July 2021).
76 AMP3 (n 72).
77 E.g., AMP5 (n 69); EUP7 (n 68).
78 AMP5 (n 69).

Furthermore, one interviewee (who was clear about their support for practice that promoted the rights of children in terms of freedom of expression, rights to be heard and decision-making), raised a concern that the adoption of a child rights framework as a *compliance* requirement for CRSL practice should not serve as a procedural obstacle in terms of children being able to access the courts.[79] Another CRSL practitioner expressed the view that the value of such an approach would be as a 'required consideration rather than an option'.[80]

Some interviewees highlighted efforts they had made to make their practice child rights-consistent:

> **When I took these cases I tried to train myself, I read literature related to the defence of children's rights, I attended training sessions about strategic litigation, I share the cases to get other opinions and points of view from other colleagues. I try to attend to as many forums and meetings, like the one in [location anonymised], to try to adapt and complement my knowledge to be as consistent with children's rights as possible.[81]**

3.4 CONCLUSION

Overall, it is clear that while there is a general appreciation amongst CRSL practitioners of the desirability and potential value-added of child rights-framing of CRSL practice, this is not uniform. Furthermore, there is some genuine concern about the challenges such an approach to strategic litigation would entail. The next chapter looks at the specific elements of the child rights framework that can be used by practitioners to enhance the child rights-consistency of their work.

It is clear that while there is a general appreciation amongst CRSL practitioners of the desirability and potential value-added of child rights-framing of CRSL practice, this is not uniform.

79 EUP6 (23 November 2021).
80 EUP5 (n 67).
81 EUP3 (23 February 2022).

CHAPTER 4
CHILDREN'S RIGHTS THAT ARE RELEVANT TO CRSL

4.1 LOCATING CHILD RIGHTS-CONSISTENT CRSL PRACTICE WITHIN THE FRAMEWORK OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD

This section focuses on those elements of the international children's rights framework that the project views as particularly important in relation to CRSL practice. These provisions, set out in the UNCRC, can be understood as a framework that can be used by practitioners to assess and shape their own practice from a child rights perspective.

These rights of course form part of a treaty that imposes duties on states parties that have signed up to that treaty. The project does not suggest that the articles of the UNCRC cited below are directly legally binding on CRSL practitioners.[82] However, these rights can serve as key tools for practitioners who are concerned with ensuring that the process of their litigation is aligned with its rights-advancing aims and outcomes.

The UNCRC is a broad instrument that engages with a wide range of different aspects of children's lived experiences and the challenges they face in terms of enjoying their rights. Given the diversity of national situations it was intended to apply to, the UNCRC is expressed in general terms and the rights therein reflect a series of concerns, many of which are of direct relevance to the CRSL context.

Focussing on the UNCRC in a deliberate, consistent way when considering CRSL practice, enables lawyers and others to think about their practice in a unified way. It allows them to draw on the standards and values reflected in the Convention to ensure that that practice is coherent (both within and across cases) and rights-consistent in terms of the way it is conceptualised, operationalised, implemented and pursued through follow-up.

82 For more on duty-bearers under the UNCRC, see Aoife Nolan, 'Children's Rights' in Daniel Moeckli et al (eds), *International Human Rights Law*, (4th Edn, OUP forthcoming 2022).

4.2 WHICH UNCRC RIGHTS ARE CRSL-RELEVANT?

The choice of provisions for the purposes of CRSL practice is inevitably a subjective exercise – an exercise that is made more challenging by the UN Committee on the Rights of the Child's (UNCRC Committee/Committee) very limited discussion of strategic litigation thus far.[83] As such, the Committee's work provides very little concrete guidance with regard to how such litigation should be carried out. The articles selected below are those that the project team judged to be most clearly and textually linked to the issues faced by practitioners in the CRSL context, including how to ensure child participation, protection, privacy, provision of information and non-discrimination.

Right to be heard

Article 12 Para 1 States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Right to freedom of expression

Article 13 Para 1 The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

Right to information

Article 17 States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

Evolving capacities of the child

Article 5 States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

83 See UN CRC, General Comment no. 25 on children's rights in relation to the digital environment (2021) CRC/C/GC/25 [44]; UN CRC, General Comment no. 16 on State obligations regarding the impact of the business sector on children's rights (2013) CRC/C/GC/16 [68]; UN CRC, General Comment no. 2: The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child (2002) CRC/GC/2002/2 [19(p)], [19(r)]. For more, see Nolan and Skelton (n 6).

Non-discrimination

Article 2 Para 1 States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

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

Best Interest

Article 3 Para 1 In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation

Article 19 Para 1 States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Right to privacy

Article 16 Para 1 No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

Right to life, survival and development

Article 6 Para 1 States Parties recognize that every child has the inherent right to life.
Article 6 Para 2 States parties shall ensure to the maximum extent possible the survival and development of the child.

Right to protection from exploitation

Article 36 States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Right to physical and psychological recovery

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

The list also includes one provision, the relevance of which to issues faced by CRSL practitioners is not immediately evident:

- **Article 4** States parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention.

A NOTE OF EXPLANATION ON ARTICLE 4

Unlike the other rights provisions set out above, the first sentence of Article 4 UNCRC is strongly and explicitly focused on a generally expressed state duty without being linked to particular rights or rights-specific duties. This is consistent with the role played by that provision in terms of the UNCRC schema: namely, to ensure the implementation of all rights under the Convention. The Committee has stressed that 'while it is the State which takes on obligations under the Convention, its task of implementation – of making reality of the human rights of children – needs to engage all sectors of society and, of course, children themselves'.[84] This necessarily includes CRSL practitioners. The Committee has also made clear that '[i]f Government as a whole and at all levels is to promote and respect the rights of the child, it needs to work on the basis of a unifying, comprehensive and rights-based national strategy, rooted in the Convention'.[85] The authors of course recognise that CRSL actors are not the same as governments – whether in terms of powers, functions or obligations under international human rights law. However, if CRSL is to maximise its effectiveness in child rights terms (in the sense of ensuring the achievement of those rights in terms of its aims, practice and outcomes), then it will need to reflect a holistic rights-centred and 'strategy'-based approach to children's rights.

4.3 AVOIDING A 'ONE-SIZE-FITS-ALL' APPROACH

Child rights have implications for CRSL practice in any and all settings. However, far from arguing for a 'one size fits all' model of CRSL practice, this report recognises (as noted in Section 1.4) that the form and content of CRSL practice – and the legal, political and other challenges faced by those bringing such litigation – will vary from place to place, from issue to issue, and over time. As such, the specific application of rights principles and the resultant impact in terms of CRSL practice will necessarily depend on the specific context in which those principles are being applied. Thus, an evaluation of concrete experiences is invaluable in terms of translating understanding of child rights-consistent CRSL practice from abstract rights-framing to reality.

84 UN CRC, General Comment no. 5: General measures of implementation of the Convention on the Rights of the Child (2003) CRC/GC/2003/5 [1].
85 ibid [28].

4.4 WHERE CHILDREN'S RIGHTS DO NOT PROVIDE THE ANSWER

It is also important to recognise that there will be times when children's rights do not push CRSL practice in a specific direction – i.e. they will not give a definitive steer as to what CRSL practitioners need to do in a particular situation. Rights can be given effect to, and undermined, in a variety of different ways in the context of CRSL practice. There will also be situations in which different and potentially conflicting rights needs to be balanced in a context-sensitive way. This report does not suggest that the rights framework will always serve as a clear path for all aspects of CRSL practice or that child rights have equal relevance to all elements of that work. Rather, it argues that it is important for practitioners to consider children's rights, as appropriate, when it comes to decision-making on the conceptualisation and operationalisation of their CRSL-related work.

4.5 CONCLUSION

This chapter has made clear which UNCRC rights are of particular relevance when it comes to framing and assessing CRSL from a child rights perspective. Part B of this report will look at the application of these articles in the context of different stages of CRSL decision-making.

PART B

Thusfar, this report has focused on defining CRSL and outlining the state of play of CRSL globally. It has explained and justified the study's focus on child rights-consistent CRSL and has suggested which UNCRC rights are most relevant to developing such practice.

The chapters in Part B focus in detail on the practice of CRSL. In doing so, they centre on four stages of CRSL decision-making, namely: (i) the scoping, planning and design of CRSL; (ii) the operationalisation of CRSL; (iii) follow-up to CRSL, including implementation, and (iv) extra-legal advocacy (political advocacy and other campaigning, media and communications work. In reviewing these areas of CRSL work, the study draws on project interviews, and considers current practice against a child rights framing. The chapters highlight numerous examples of rights-consistent CRSL work that will be of use to practitioners seeking to render their work more child rights-consistent. Each chapter also includes a series of key principles that should be borne in mind by CRSL actors in their future work.

CHAPTER 5
THE SCOPING, PLANNING AND DESIGN OF CRSL

5.1 INTRODUCTION

The strategic nature of CRSL implies that there is an opportunity to consider the scope and aims of the litigation before the case is launched. Keeping in mind the reality that litigation often emerges from cases that spontaneously arise rather than being carefully planned, this section of the report captures what CRSL actors have shared about the thematic areas that they have chosen, why and how they identify the key aims of the litigation, how they choose the type of actions that they take, and – if the children involved in the litigation do not self-select – how they are selected. Communication with, as well as empowerment and involvement of children in these early phases of scoping, planning and design of CRSL are also examined. In outlining and analysing these CRSL actor experiences, the chapter makes clear how different UNCRC rights are engaged by – and can be used to shape CRSL actor efforts with regard to- these different areas of decision-making.

5.2 CHOICE OF THEMATIC AREA AND LONG-TERM STRATEGIC THINKING

CRSL is being brought in a wide range of thematic areas. The study examined the way in which practitioners are making thematic choices and considered the rights that are engaged by those decisions. Of particular interest, was whether child rights framing was considered in making such choices, and whether those choices aligned with the overarching goal of implementing children's rights holistically, captured in Article 4 as interpreted by the UNCRC Committee. The interviews also sought examples of children being involved in thematic selection, including through being provided with information in line with Article 17 UNCRC and being given to the opportunity to be heard and to express themselves consistent with Articles 12(1) and 13 UNCRC.

The feedback from the interviews together with the literature review, revealed that some organisations involved in strategic litigation were set up to focus on a particular thematic area. Others work on a combination of thematic areas. Some organisations have adopted a more flexible approach in the sense that, even though they have particular focused thematic areas, they also accept cases that are outside those foci, which might advance the rights of children. In several instances, practitioners were working on certain themes in the context of clinics providing legal or other support to children – for example, child victims of sexual abuse.[86] In other instances, practitioners reported that they were doing broader child or human rights advocacy and campaigning work on themes such as adolescent sexual and reproductive rights,[87] or on the right to education,[88] and litigation was only one strategy used to promote the work being done on that theme.[89]

While interviewees did not necessarily explicitly conceptualise their decision-making processes in terms of thematic area around children's rights, the aims of those decisions were very clearly child rights-centred.

No real concerns arose with regard to child rights-consistent practice in terms of choice of thematic area. There have undoubtedly been litigation efforts involving children's rights in which the thematic focus of litigation has arguably been driven by adult agendas in a way that may not be consistent with children's rights and interests or their views on their rights.[90] This was not, however, something that arose in any of the interviews. (Indeed, such litigation would not qualify as CRSL in terms of the definition outlined in Chapter 1). While interviewees did not necessarily explicitly conceptualise their decision-making processes in relation to thematic area in terms of children's rights, the aims of those decisions were very clearly child rights-centred. As highlighted in Section 4.2, CRSL practice that is holistic, rights-centred and 'strategy'-based aligns with Article 4 UNCRC, as interpreted by the Committee. In this regard, 'long-term strategic thinking' of repeat player child rights litigators is consistent with child rights-consistent practice overall because it ensures that a children's rights perspective is dominant in the work over time, and quick wins which might be harmful to children's rights are avoided or transformed into outcomes that are positive for child rights.

The research indicates that strategic litigators engaging in litigation who focus on children's rights as their general everyday work are more likely to apply a child rights-consistent approach in selecting their themes for litigation, than those that have a general human rights orientation or are more centred on another human rights issue.

86 ASP4 (n 59).
87 ibid.
88 AFP1 (n 61).
89 AFP2 (n 57), AFP7 (23 November 2021), ASP4 (n 59), and ASP1 (26 November 2021).
90 See, e.g., the litigation giving rise to *Bell v Tavistock* [2020] EWHC 3274.

This is because child rights specialists know the sector, have a deeper insight in children's rights debates and are more likely to be aware of the longer term benefits and risks associated with litigation outcomes. As Dugard and Langford have pointed out 'clearly the more immersed you are in the area you are litigating the better. As with any kind of litigation, this includes conducting ongoing research, coordinating with stakeholders and learning from being a repeat player. In this respect there is mounting evidence that civic action requires long-term strategic thinking based on thorough contextual and structural analyses'.[91]

This strategic long-term child rights thinking is illustrated by one interviewee who expressed concern about a case brought by an individual who sought an order that all child marriages would be declared void: 'we decided to go in [as amici curiae] because … if all cases are declared void [as was sought by the individual litigant] it will have a huge hit on our cases'.[92] In another case, a CRSL actor explained the motivation for intervening in a case: 'we were kind of looking at it because there was no child rights angle because the [name of civil society organisation were coming from an adult perspective'.[93]

Another example captured in the literature, is a case where it was decided by child rights litigators not to base arguments about minimum sentencing too centrally on brain science, as they knew their organisation had another case in the pipeline regarding consensual sex between teenagers. There was a concern that an argument based on brain science evidence of poor decision-making by adolescents in the sentencing case might make it difficult to argue later that adolescents can make responsible decisions regarding consensual sexual activity. Furthermore, the litigators were of the view that case could be won based on the constitutional protection against deprivation of liberty of children except as a last resort and for the shortest appropriate period of time.[94] In doing so, they focused on the overall contribution of their litigation to the goal of securing children's rights beyond particular, immediate litigation opportunities.

Child rights specialists know the sector, have a deeper insight in children's rights debates and are more likely to be aware of the longer term benefits and risks associated with litigation outcomes.

91 Jackie Dugard and Malcolm Langford, 'Art or Science? Synthesising Lessons from Public Interesting Litigation and the Dangers of Legal Determinism' (2017) 27(1) S Afr J Hum Rights 39.
92 ASP1 (n 89).
93 See, e.g., EUP1 (n 66) and EUP2 (27 January 2022).
94 Skelton (n 2) 272–273.

The research tentatively indicates that CRSL actors are selecting themes for litigation that advance overarching children's rights fulfilment. There are some examples, discussed above, that show that they do this deliberately. These can be distinguished from individual litigators who advance only the narrow cause of their own individual case.[95] There is evidence of thematic choices often being aligned to an organisation's broader objectives and areas of work,[96] but it is also clear that some CRSL actors survey the landscape for opportunities to advance children's rights, and engage in litigation that they did not initiate, if they see an opportunity to influence a child rights related outcome.[97] Furthermore, the study indicates that repeat players in the CRSL space are more likely to see unintended consequences of litigation choices, and they act to avoid these.[98]

THE INVOLVEMENT OF CHILDREN IN THE SELECTION OF THEMES FOR LITIGATION DID FEATURE IN SOME OF THE INTERVIEWS

One practitioner described her organisation as 'a social youth led movement' and stated that '[d]uring COVID we spoke to members across the provinces about what impact this lockdown period during COVID was, and they spoke to us about lack of food in their homes, and so we though to respond to this food crisis for children in particular by asking the government to reinstate the school feeding scheme'.[99] This resulted in litigation, the basis of which was information given by affidavit by children who were going to bed hungry.

This is a positive example of thematic selection involving children that is in line with the rights to be heard (Article 12(1)) and to freedom of expression (Article 13) under the Convention.

Another organisation, which always litigates as an institutional client, also made clear that children's views guided their choice of litigation areas:

We also run youth and child participation processes to provide platform for children to express their views directly. We observe those interactions, and gauge from the children's input, to ascertain the level of evidence of the problem on the ground. We are also led by what children are saying in those forums to decide what will we litigate on.[100]

While child and/or youth led initiatives are emerging, several practitioners acknowledged that they do not involve children directly in selecting themes for litigation – and this emerged as an area where practitioners could expand their child led work.

95 See also Steven Budlender, Gilbert Marcus and Nick Ferreira, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (The Atlantic Philanthropies, 2014) 116–117. The authors identify being 'a repeat player' as an important aspect of a successful long-term strategy, and they cite CCL as an example of such an organisation. In addition from distinguishing such players from non-strategic litigators, they also distinguish them from 'one shot' strategic litigators who, they argue, have less success.

96 ASP4 (n 59); AMP3 (n 72).

97 EUP1 (n 66) and EUP2 (n 93).

98 See Budlender, Marcus and Ferreira (n 95). The authors identify being a repeat player as an important aspect of a successful long-term strategy, and they cite CCL as an example of such an organisation.

99 Noncedo Madubedube, General Secretary, Equal Education, 'Litigating for Access to the National School Nutrition Programme during the Covid-19 Pandemic' (Presentation at ACRiSL First Network Event: Current Issues in Child Rights Strategic Litigation (CRSL), 16 July 2021, [19:30]).

100 AFP7 (n 89).

5.3 IDENTIFICATION OF KEY AIMS OF LITIGATION

Once the idea for a future or an actual case has emerged or been selected, practitioners consider how the case will bring about legal and social change. The study examined the extent to which children's rights play a role in the identification of key aims in a general sense (captured in this report through reference to Article 4 UNCRC, which concerns implementation of all rights in the Convention). It also looked at whether children were involved in decision-making on aims, an assessment which entailed considering the implications of such involvement (or not) for the child's rights to be heard (Article 12(1) UNCRC), to information (Article 17 UNCRC) and freedom of expression (Article 13 UNCRC).

The case idea is often initiated with the aim of bringing about a particular social and/or legal change. In some cases, litigation is used to generally raise the profile of a particular issue as part of a broader strategy aimed at bringing about political change or raising public awareness to mount pressure on political decision-makers. (For more, see Chapter 8). This strategy might be particularly useful in countries where the remedies of the courts do not include changes to the law.[101] Child and youth activists in such a country, who were interviewed for this study, indicated that litigation was part of their broader strategy and they valued the status and attention it gave to their campaign, even though they 'lost' the first two rounds of their case. They knew that even if they ultimately won the case, the law would require legislative reform, but this did not deter them.[102]

This indicates the importance of children participating in the early stage of determining the purpose of the litigation. The children and young people in this example were provided with access to information (in line with the child's right to information in Article 17 UNCRC) about the realistic prospects of the case from the outset. They saw, and continue to see, the case as advancing their right to freedom of expression and as a vehicle by which their voices and views can shape political decision-making. This is consistent with their exercise of their rights to freedom of expression and to be heard under Articles 13(1) and 12(1) UNCRC, respectively.

101 See, e.g., the example of New Zealand discussed in Make It 16 Aotearoa (Presentation at ACRiSL Third Network Event: Engaging with Children and Young People in Child Rights Strategic Litigation (CRSL), 5 April 2022 [13:58–23:55]).

102 OCY1 (10 February 2022).

The way that their legal team worked with them ensured that they have played a role in deciding on the purpose of the litigation, which they see as one facet of their broader campaign, showing an interconnectedness between the operation of Articles 17 and 13(1) with Article 12(1) UNCRC).

Some practitioners mentioned the use of urgent measures to interdict actions by the State that could cause harm to a particular child or children, but with a view to using the case as a vehicle to change laws, policies and practices. This is in line with a child rights-centred, strategy-based approach to CRSL. Migration is an example of a context where urgent or interim action is particularly relevant, given the frequently imminent risk of deportation. Swift action in this situation can prevent both short and longer terms harms to the individual child or specific group At the same time, however, the CRSL practitioner seeks an outcome that will be favourable for a wider group beyond the individual.

A further example of interdictory action as part of a broader strategy is an Africa-based case which was brought in two parts – Part A was brought to prevent the publication of identifying details of a girl who had been kidnapped as a baby and was identified as the missing child when she was 17 years old.

The media were pushing to identify the girl, who told her social worker that she was not ready to speak about what had happened, the social worker requested a litigation centre to legally represent the child and prevent her identification. The centre saw the opportunity to simultaneously challenge the constitutionality of the law which provided inadequate protection for the protection of identity of child victims and children accused of criminal offences once they became adults, and thus challenged that legal provision in Part B of the case. This interdict thus played the dual role of protecting the client's rights in the short term, but also provided an important vehicle that many other children could benefit from.

In her interview for this study, a young adult, explained how she felt being harassed by the media and why it was necessary for her lawyers to rush to court to stop her being identified when she turned 18 years old.

These examples demonstrate an amplification of rights protection from one individual to a group, or from a small group to a larger group, through the deliberate strategies of CRSL practitioners. A crucial part of ensuring such work is child rights-consistent is the application of best interests as a primary consideration in all actions concerning the child (pursuant to Article 3(1) UNCRC), as well as adopting an inclusive, non-discriminatory approach (in line with Article 2 UNCRC) so as to ensure that the benefits of litigation reach all children who are similarly situated to the child who is the client.

However, in other situations the aim of the litigation is strategic from the outset, rather than evolving from a starting point of the challenge faced by a particular child. Several examples of such cases were considered in this study, including litigation brought seeking to declare discriminatory age of marriage provisions to be unconstitutional,[103] a case seeking a finding of violations of a wide range of rights of vulnerable displaced persons including children in Colombia, as well as wide-ranging remedies to address such violations.[104]

CRSL that is planned as such from the start may have better prospects of being child rights-consistent from a practice perspective, because there is time to identify the theme, define the scope, and develop the key aims of the litigation. This should provide better opportunities to engage with the clients, including children where possible and appropriate, from the earliest stage of litigation planning. This involves consciously discussing the holistic child rights aims of the litigation, providing appropriate information to children (consistent with Article 17 UNCRC), and allowing them to express their views and to give their views appropriate weight in decisions about the aims of the case (in line with Article 12(1) UNCRC). While some interviewees were able to demonstrate excellent examples of child participation in the early stages of such CRSL,[105] others conceded that they do not always involve children in the early stages, even when the case is carefully planned from the outset.[106]

103 The Attorney General v Rebeca Z Gyumi (Civil Appeal No. 204 of 2017) [2019] TZCA 348.
104 T–025 of 2004 (n 13).
105 Chrisann Jarrett, We Belong, on their work around *R (on the application of Tigere)* (n 20), which sought access to student loans for students with limited or discretionary leave to remain in the UK, (Presentation at the ACRiSL Third Network Event: Engaging with Children and Young People in Child Rights Strategic Litigation (CRSL), 5 April 2022, [26:20–35:25]).
106 ASP2 (30 November 2021); AFP7 (n 89); AFP6 (27 October 2021).

Another case exemplifies how litigation can be intended to be strategic from the get-go but then organically develops into CRSL In one instance, the litigators started with 'an idea of holding, certain actors accountable for decisions under legislation'[107] in the context of climate change litigation aimed at bringing evidence regarding the particular harms to children arising from climate change. The practitioner explained that the focus on harms to children (as opposed to adults) became clearer as the evidential basis was being built, that 'young people would be the best people to take it forward for evidentiary, forensic reasons, but also because they would be keen to take it on and would be good spokespeople for it and could own it'.[108] This led to reaching out to potential child litigants and to a key argument in the case being to stress the responsibility and duty of care that the state has towards children in the context of climate change.[109]

'Our presence there changed the entire narrative in the court case and the decision that came out'.

In some instances, CRSL actors entered cases that were already ongoing. Some examples discussed by interviewees and visible from the literature are criminal matters, for instance where a particular individual's case is emblematic of a systemic problem or a constitutional issue.

In India, CRSL actors positioned themselves to offer legal representation to a 17 year old a charged in a sexual violence case that was causing the public to call for life imprisonment of children convicted of offences. This was, as the litigator put it, 'a game changer'.[110] The aim of the case was to protect the provisions of the Juvenile Justice Act that included all offenders below the age of 18 years within its ambit, which were now under threat of amendment to exclude 16 and 17-year-olds from its scope, due to public outrage about the fact that the 17-year-old in question would escape the harsh punishment that an adult would face. The CRSL continued through the High Court and the Supreme Court. 'Our presence there changed the entire narrative in the court case and the decision that came out'. Although the law was subsequently amended, the child rights advocates 'also had a huge negotiating space when the law got changed, due to the influence from the judgment.'[111] In similar vein, the US death penalty and life without parole cases for children under the age of 18, brought in the context of criminal appeals, were interventions in existing cases aimed at changing the law for all children in the criminal justice system.[112]

107 OCP2 (n 71).
108 ibid.
109 *Anjali Sharma and Other v Minister for the Environment* (No.2) [2021] FCA 774 (Bromberg J).
110 ASP2 (n 106).
111 ibid.
112 *Roper* (n 9); *Miller* (n 9).

Beyond the criminal justice field, a similar pattern in terms of intervention in ongoing cases can be observed. As one CRSL actor described with regard to a public law matter in which they had intervened:

> **'I mean I think it's not overstating to say our intervention was very significant, if not decisive in deciding that the [...] government's approach was not compatible with human rights'.**[113]

In another case, an organisation reported that it was invited by the court to join an ongoing a case as amicus curiae to make a case for pregnant learners that were being discriminated against and excluded from school due to pregnancy, thus breaching their right to education. They participated the aim of ending discriminatory practice against young pregnant girls.[114]

In some cases, and again in line with a rights-centred strategy-based approach, the threat of litigation alone may be a key avenue by which to secure the rights of children. In one interview, the difficulties faced by children without birth certificates in terms of accessing a social grant to which all children were entitled under the law were explained. However, the agency dealing with grants terminated the grants to this group of children every three months, on the basis that they would get their birth certificate or identity document within three months. This was an impossible condition given the operational difficulties in the relevant government department. After several failed negotiations with the agency, the organisation sent a letter of intent to litigate against the agency. The litigation was aimed at ensuring that the three months condition be removed and that these children continued to receive a social grant. The threat of litigation forced the agency to agree to suspend the three months condition, which preserved the grants for 32 000 children.[115]

In sum, the aims of CRSL are often clearly identified by the organisations involved. In some cases this is carefully planned from the outset but the study's findings also show that CRSL litigators are frequently poised to act swiftly when opportunities for cases or interventions to advance child rights-related aims arise spontaneously.

This work displays a child rights-consistent approach, reflected in a holistic manner, by ensuring a coherent, long-term commitment to litigation that advances child rights – and taking responsive action to prevent children's rights being impeded or wrongly interpreted.

113 EUP1 (n 66) and EUP2 (n 93).
114 AFP2 (n 57).
115 AFP7 (n 89).

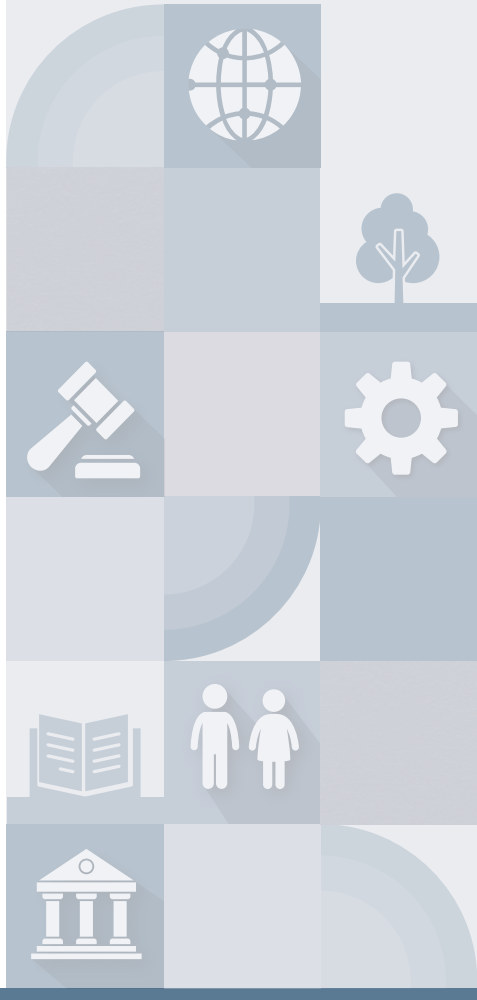
5.4 CLIENT SELECTION

Client selection in CRSL may be organic (arising naturally from pre-existing professional relationships, connections or networks, or may be deliberate, where a client is sought whose situation exemplifies the cause of action. This aspect of the study examined the child rights consistency of the ways in which client selection is being carried out. While holistic child rights implementation (Article 4 UNCRC), the rights to information (Article 17 UNCRC), to be heard (Article 12(1) UNCRC) and to freedom of expression (Article 13 UNCRC) are all relevant in such selection processes. The study also focused on rights such as non-discrimination (Article 2 UNCRC) and best interests (Article 3(1) UNCRC).

There is a growing-tendency to talk about 'child-led' or 'youth-led' litigation.[116] In practice, however, the study found only a very small number of examples of child-led or initiated litigation in the sense of cases in which children brought a theme or issue to adult CRSL practitioners who then acted on the basis of that choice of theme.[117]

Where clients (whether children, their parents or other adults responsible for them) approach an organisation, law clinic or lawyer on their own initiative, this has advantages in that the case is 'ready-made' and perhaps already at an advanced stage. However, the possible disadvantage is that the litigators then have to work with imperfect facts and situations, which may make developing the broader strategic nature of the case more challenging.

There may also be other risks, such as settlement of the case with the individual(s) concerned or the fact that the client is almost 18 and will soon no longer be a child. CRSL actors displayed strategies to deal with this problem, such as selecting organisations as clients rather than individuals, where the legal system permitted this.[118]



116 This language has been a particular feature of climate litigation work. (See, e.g., Aoife Daly, 'Youth Climate Activism and Its Impact on International Human Rights Law' (2022) 22(2) HRL Rev; Larissa Parker et al, 'When the Kids Put Climate Change on Trial: Youth-focused Rights-based Climate Litigation around the World' (2021) 13(1) J. Hum. Rights Environ. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3960982> accessed 15 February 2022).

117 EUP6 (n 79). The project also engaged with Curtis Parfitt Ford with regard to the litigation he initiated in relation to predicted school exam results down-grading. For more, see Mattha Busby, 'A-Level Student Launches Legal Bid Against Ofqual' *The Guardian* (2020) <https://www.theguardian.com/education/2020/aug/16/a-level-student-launches-legal-bid-against-ofqual> accessed 5 July 2022. Curtis was, however, 18 at the time that the litigation was launched.

118 AFP3 (n 62).

In some cases there have been conscious decisions to represent institutional clients rather than individual children or groups of children, and in others to represent young persons previously affected as children.

In some cases there have been conscious decisions to represent institutional clients rather than individual children or groups of children, and in others to represent young persons previously affected as children. This has been evident in cases where the nature of the case makes it difficult to identify any particular child for the case – such as decriminalisation of consensual sex,[119] child marriage,[120] or even corporal punishment.[121]

The study has also shown that in some instances, clients and CRSL practitioners are linked through clinical relationships or general legal representation of children, where litigators have direct connections to individual children or groups whose matters become the vehicle for a broader CRSL case. An example relating to child victims of sexual abuse was given by one interviewee, [122] and work with children in the criminal justice system was provided by another.[123] The linkage of litigators with clients through clinic work can prove positive because it affords an opportunity to advance children's rights for the group while also assisting a particular child.[124] An Asia-based example of this is an organisation that has a law clinic for child victims of abuse and which brings strategic litigation on the part of some clients aimed at resolving systemic issues.

It will also present opportunities for providing support to children as envisaged by Article 39 UNCRC, particularly those who may have experienced trauma such as sexual abuse.

Others are linked through personal relationships, especially where the objectives of both parties converged. One CRSL practitioner observed that the organisation was just developing its work on the emerging issue of climate change when it was linked to a group of children who were expressing their fears on the impact of climate change. An individual who had a relationship with both parties overheard the conversation from both sides and linked the parties, which resulted in a climate change litigation case, with the children acting as clients.[125]

119 Ainsley Delany, 'Mapping A Multi-Faceted Child Rights Strategic Litigation and Advocacy Campaign in Relation to the South African Sexual Offences Act' (Centre for Child, Law University of Pretoria 2021) <https://centreforchildlaw.co.za/wordpress21/wp-content/uploads/2022/07/WEB_CFCL-Case-Study.pdf> accessed 6 July 2022.
120 Mudzuru (n 30).
121 S v Chokuramba Justice for Children's Trust Intervening as Amicus Curiae Zimbabwe Lawyers for Human Rights Intervening as Amicus Curiae [2019] ZWCC 10.
122 ASP4 (n 59).
123 OCP1 (n 59).
124 ASP4 (n 59).
125 EUP5 (n 67).

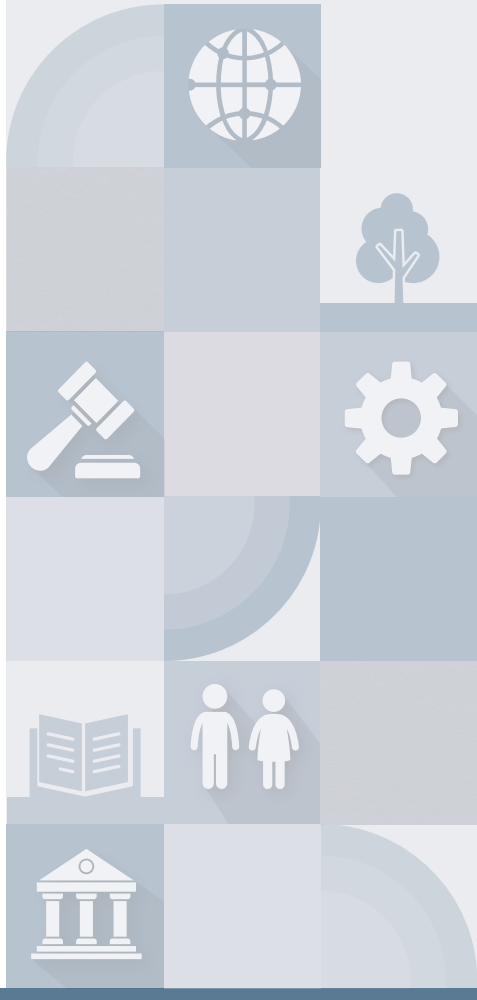
In some instances, organisations identify a particular problem affecting a community, and building a case or litigation around it and search for people affected by the problem to be the complainant or client. Another interviewee working in the climate change space stated that they analysed the impact of climate change, and built a case around it, using colleagues and their social and professional networks to identify children to serve as complainants in the litigation.[126]

Another approach that is used by CRSL players who work in the field and have observed a systemic problem, is to actively seek a client whose factual situation demonstrates the problem optimally. As one interviewee described it, they preferred litigation that is more 'grounded', for example, urban citizens should litigate cases on city issues, and expressed discomfort with a case that had been litigated 'top to bottom' instead of from the ground up.[127]

The sense that children are sometimes viewed more sympathetically by courts – and by the public – than other groups of litigants is something that CRSL practitioners are aware of. One practitioner, commenting on xenophobic attitudes in the country where they work said,

> **I think that most people can get on board with children, especially vulnerable children that are denied basic rights. So, I think from an advocacy perspective it will change, and the way that you conduct your litigation has to be done in a more sensitive manner to protect the interest and privacy of children.[128]**

Another practitioner, working on the issue of refugees in a very hostile political environment, made a similar point – they chose to work with children who were born in the arrival country, 'you know they're innocent … so they were the perfect plaintiff'.[129]



126 AMP2 (n 60).
127 ibid.
128 AFP4 and AFP5 (n 57).
129 OCP1 (n 59).

Sometimes the there is an emblematic advantage of having a well selected client. One practitioner interviewed, who had worked with children in alternative care had 'for years and years' been worried about the fact that siblings had no right to participate in forums where decisions were being made about their siblings. After efforts to find policy solutions through engaging with government failed, they 'set out to find a client'. In retrospect, they said that the learning from the process was that they wished they had identified a case and taken the case earlier, because once they had selected a client 'it was so obvious', and yet years of raising the concern with government in an abstract way had yielded no result.[130]

While this section has primarily focused on the different ways in which CRSL actors select clients, it is important to note there are a number of rights-related issues that potentially arise in relation to practice with regard to this issue. For instance, there will be times when litigators will face tough choices between ensuring non-discrimination (Article 2 UNCRC) and maximising the (apparent) prospects of success of a particular CSRL effort. Donger highlights the fact that the need to overcome standing in climate litigation cases may result in children with greater climate privilege being a 'better fit', even though there may be others at greater risk.[131]

That said, where an action is taken with minimal chance of success in terms of advancing the rights enjoyment of children involved, then this raises other rights issues (for instance, whether such CRSL is in the best interests of the children in question) and an appropriate balance will have to be struck between the need the diverse rights of children whose rights are at play in the relevant decision-making. Article 2 UNCRC implies that biases, whether explicit or subconscious, must be acknowledged and avoided in order to ensure that these do not play a role in shaping choices about client or case selection in ways that are discriminatory against children.

A child rights-consistent approach to client selection requires a balancing of children's rights to privacy (Article 16 UNCRC) and best interests (Article 3(1) UNCRC) with their right to be heard (Article 12(1) UNCRC). Sound reasons were expressed by some litigators as to why, in some situations, the rights to privacy and best interests of children would favour the selection of institutional clients or clients older than 18 years (for example in cases that would require a child to be a public face for a controversial issue such as sexual and reproductive health rights)[132] or in cases and there is a need to avoid retraumatising a child.[133] Decision-making involving the balancing of rights must conform with a child rights-consistent approach and the relevant rights at play must be consciously considered.

130 EUP1 (n 66) and EUP2 (n 93).

131 Elizabeth Donger, 'Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization' (forthcoming, 2022) Transnatl. Environ. Law 1, <https://www.cambridge.org/core/journals/transnational-environmental-law/article/children-and-youth-in-strategic-climate-litigation-advancing-rights-through-legal-argument-and-legal-mobilization/7B3C59B37A7708495D16687073C95B25> accessed 5 July 2022.

132 AFP6 (n 106).

133 AMP1 (n 70).

5.5 CHOICE OF ACTION (INDIVIDUAL CHILDREN, COLLECTIVE, INSTITUTIONAL)

The choice of action in CRSL is influenced by a number of factors and is inevitably dependent to some extent by what is permissible in the legal system. However, there are also strategies that are more child rights-consistent than others.

For example, a child rights practitioner seeking to find a solution for an individual child or group of children whose rights have been violated may bring an individual action on behalf of a child or a collective action involving the rights of a group of children within one case. Some interviewees explained how adding institutional clients in litigation, where this is permitted by the legal system, can be protective of individual children's rights by ensuring that children are not put at the forefront of litigation which might expose them to infringements of their right to privacy,[134] or could expose them to risks of violence or even threats to life, survival and development.[135] Such decisions can be viewed as consistent with giving effect to the child's rights in terms of Articles 16(1), 19 and 6 UNCRC. Another aim may be to bring an action in such a way as to ensure that if the children decide to leave the litigation at some point, they are able to do so with minimal negative effects for the case. In making such decisions, the practitioners are also balancing the broader best interests of all children similarly situated, and ensuring the case reaches its conclusion effectively.

One practitioner explained their strategy as follows:

> **I know that a tactic of government to respond is to provide a little bit of relief to the individual who's challenging the system and then continue with the system, otherwise as normal. And so, we grouped cases together. So, we didn't have one client. We had say a group of three different cases and one appeal so it might have been like 15 clients and those clients were a group of children who were either detained at one centre and they were in different circumstances so we made it as hard as possible for the government to settle the whole thing if that makes sense.[136]**

134 AMP5 (n 69).
135 AMP2 (n 60).
136 OCP1 (n 59).

5.6 PARTICIPATION OF AND COMMUNICATION WITH CHILDREN

Participation of children in strategic litigation can be empowering and rewarding for them.[137] It is also crucial in terms of ensuring children enjoy their right to express their views and have those views given due weight in litigation in line with Article 12(1) UNCRC. The litigation process itself can provide children with the opportunity to exercise their right to freedom of expression in the litigation context (Article 13 UNCRC). The interviews provided a range of useful data, including explanations from litigators as to why they had not, to date, involved children in their early phase of their cases. Interviewees also shared some good examples of practice where children's rights were at the heart of the initial litigation process.

The participation of children in the scoping and design phase of the case did not feature strongly in the interviews. One interviewee stated that:

> **When it comes to child participation, we have not been very strong; let me frankly admit it. This is a territory where a lot still needs to be covered, and when it comes to prioritisation of urgency, child participation takes a back seat. Because it is the same dilemma, you have to make a decision whether to spend time consulting children, how much time and effort is it going to take, is it really worth it, do children really know much about it?**[138]

In contrast, other organisations are set up as child rights movements with children as key and active stakeholders in advocacy and litigation. This is evident from one interview in which the respondent stated:

> **Our organisation holds the involvement of children in high regard; because the children are the ones identifying the cases, they are part of the advocacy, in and out of the courtrooms. For example, when we draft legal documents, we also create popular materials that will be easy for the children to understand what is going on in the case for them to be part of it. Even after that, when we monitor the implementation of the outcome of cases, children are also part of it through their leadership structure in various schools.**[139]

(For more on child participation in advocacy surrounding CRSL, see Section 8(2)).

137 Patrick Geary, 'Children's Rights: A Guide to Strategic Litigation' (Child Rights Information Network 2009).
138 ASP2 (n 106)
139 AFP1 (n 61).

Gathering affidavits or statements from children is an important participatory element that can help shape the case. In a case that involved children facing exclusion from school due to language/race, lawyers consulted with the children in groups. This information was then compiled into an affidavit, which quoted the children anonymously, as the basis for children's intervention into the case, separately represented from their parents (who were respondents in the matter). The young people said: 'it gave us a voice'.[140] This is a useful example of child rights-consistent practice, in line with the rights to information, to be heard, and to freedom of expression. However it also reflects consideration of best interests (article 3(1), as the anonymity was a protective measure reflecting the fact that the children belonged to a language/race minority in the school, which potentially put them in a difficult position if the identity of the authors of each complaint could be identified. (This case is discussed further in Section 6.6).

CHILD PARTICIPATION

One interviewed practitioner observed that as a means of ensuring child participation, they visited a prison facility to get handwritten affidavits from children incarcerated within an adult prison to form the basis of their application which sought to remove the children from such facility. They adopted an approach of communicating to the court by making sure the affidavits were written 'by the kids, in their own language, describing their experiences and why they didn't want to be there and why they wanted to be transferred back to the age appropriate young justice facility'.[141]

This strategy was to ensure the participation of children in the case from the outset, by providing them with information (consistent with Article 17 UNCRC) allowing them to express their views (in line with Article 12(1) UNCRC), and then placing these views before the court, which would otherwise have been difficult to do in a situation where they would not necessarily appear in person.

The practitioner explained that the communication worked in two ways:

> ***There's two parts to it. One is us explaining to the kids about the chances of success, what the case is, what's going to happen with the case process, any risks for them. And then the other part is taking evidence from them to communicate what's happening to them to support the case in court. And so that's where we tried to do as much as possible in their words.***

140 Centre for Child Law University of Pretoria, Fochville Case Study Final (22 July 2020) <https://youtu.be/R8CYOa4Zt60> accessed 5 July 2022.

141 OCP1 (n 59).

Internal communication with children at the conceptualisation and scoping phase may require consideration of the use of digital technology communication platforms and messaging apps. Decisions about communicating with children often include deciding on suitable and accessible platforms from the outset. As one practitioner explained:

> **We set that up before the case started and we set up two Signal chats. One for legals and one for the media-related chats. On the media one we had our media advisors, on the legal one we had just the kids and the lawyers. Their parents were invited to join both chats, most of them stayed part of the chat and some of them left after a while.**[142]

It was clear from experiences shared by interviewees that setting up internal communications mechanisms at the outset allows for a two-way stream of information – where children are given provided with regular updates on their cases through provision of information (in line with Article 17) in a manner that they find accessible, and their ability to feed back their views into the ongoing litigation process.

In sum, the interviews with practitioners involved in CRSL in various regions highlighted a few examples of involving children in the initiating of cases, including through their direct involvement in drafting affidavits. The overall picture presents relatively limited involvement of children in the scope and design phase of CRSL. Internal communication with clients from the initial phase of the case also did not feature very much in the interviews, although the use of digital technology communication platforms and messaging apps was an interesting finding, which is further discussed in chapter 6. Most of those interviewed expressed an interest in working more directly with children in the future, including in the conceptualisation of the case, and this is certainly an area for development in the field of CRSL.

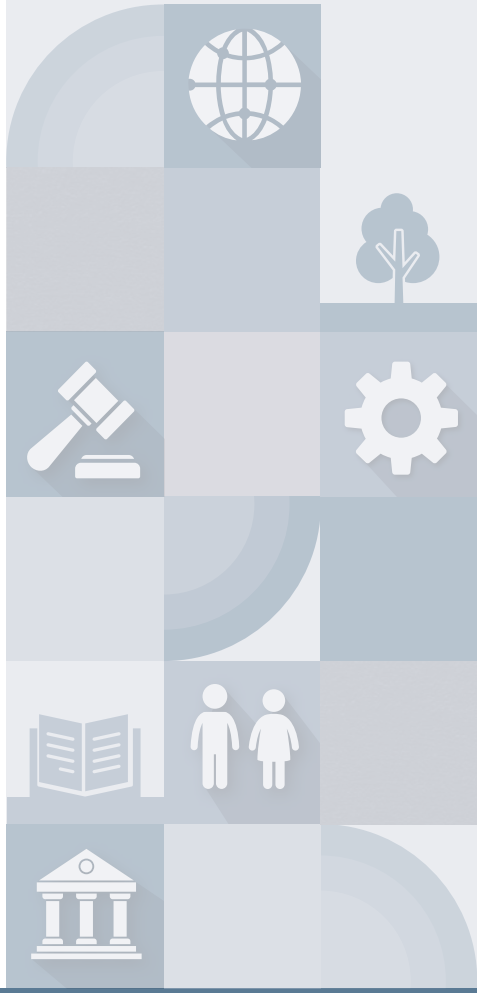
142 OCP2 (n 71).

5.7 CONCLUSION

This chapter has considered the conceptualisation and initiation phases of litigation, during which the scoping, planning and design of the litigation is determined. The interviews revealed that some CRSL practitioners carry out their work within one thematic area or across a selection of themes. This is often combined with an approach of scanning the horizon of current litigation to see opportunities to intervene, and in some cases, to head off litigation that would have negative impacts on children's rights. It was observed that organisations and practitioners that work consistently on children's rights, and are repeat players in that arena, are more likely to do their work in line with a holistic child rights approach (Article 4 UNCRC), prioritising a longer term strategy that will bear dividends for children's rights over short-term gains.

Client selection (in cases where children do not self-select) was also found to be occurring in a range of different ways, including through clinical work, professional and personal networking, or in a very deliberate manner through matching the 'ideal' client to the particular issue to be litigated. There were cogent reasons provided by practitioners for sometimes consciously selecting institutional clients or young adults as litigants, such as privacy (Article 16(1) UNCRC), protection of the child from physical or mental violence (Article 19 UNCRC) and physical and psychological recovery (Article 39 UNCRC). This demonstrated child rights-consistent practice in the balancing of best interests (Article 3(1) UNCRC) with children's right to be heard (Article 12(1) UNCRC).

There were a few good examples of participation of children in the early stages of cases. There was also clear evidence of the potential value of messaging apps and other digital communication platforms at the outset of a case in terms of facilitating internal communication in line with the rights to be heard and to receive information, so as to allow children to make informed decisions. However, practitioners acknowledged that they do not always involve children in the scoping and design phase of CSRL and this emerged as an area for improvement in terms of advancing child rights-consistent practice.



The positive examples of child rights-consistent practice outlined above, as well as the rights framework itself, serve as the basis for identifying key principles that should be borne in mind by CRSL actors when carrying out work around the scoping, planning and design of CRSL. These include:

choice of thematic areas and long-term strategic planning are relevant to child rights-consistent practice because they ensure a child rights perspective is dominant in the work over time;

where a decision is taken not to involve children in a particular case, this should be decided following an assessment of the risks and benefits to children's rights;

where there are children involved in a case, they should be engaged in identifying the rights issue(s) to be litigated in the case, the goals to be pursued by the litigation, and in the whole strategic planning of litigation;

children should be provided with the information necessary to understand and weigh up the opportunities/risks involved in litigation, from the outset;

CRSL litigators should ensure that their litigation work is always in children's best interests (which also requires explanations to children and consideration of their views);

litigators should be attentive to how CRSL work might impact on children's policy/advocacy agendas.

CHAPTER 6
THE OPERATIONALISATION OF CRSL

6.1 INTRODUCTION

This chapter focuses on the operationalisation of CRSL In doing so, it makes clear the role that children's rights can and should play in shaping decision-making around argumentation, priority-setting and messaging during the course of the litigation It examines the way in which litigators address children's need for support throughout (and possibly beyond) the strategic litigation process, how children's rights do and should frame practice around protection children from harm and retrauma, as well as the management of children's expectations and the issue of calling a halt to CRSL or agreeing to a settlement. The chapter also considers the question of according different weight to children's views as the litigation progresses before turning to the crucial issue of communication, participation, and empowerment of children in the operationalisation of CRSL. The chapter concludes with a discussion of the potential for child rights-consistent practice in work with partners.

6.2 AGENDA-SETTING

Strategic litigation of children's rights entails agenda-setting. In the planning of any case, there may be a range of angles or lines of argumentation, selection of different children's rights to focus on or decisions to be made about the characterisation of the case. Key rights that arise in these decision-making contexts include the child's rights to information and to be heard (Articles 17 and 12 UNCRC), as well as more protection-oriented provisions, such as best interests (Article 3(1) UNCRC), as well as the rights to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (Article 19 UNCRC) and to privacy (Article 16(1) UNCRC).

In this study, information came to light about how litigation argumentation was developed during litigation, how priorities were identified in the process and whether children were – or were not – involved in the agenda-setting in line with a child rights-consistent approach. The interviews provided a limited number of examples of practitioners actively seeking the views of children in the agenda-setting of their cases, raising questions about the extent to which practitioners were taking children's right to express their views and give those views due weight into account in their practice (Articles 12 and 13 UNCRC). In some instances where children were given the opportunity to participate, other factors such as the lack of confidence and understanding of child rights or litigation, impeded their effective participation in the agenda-setting at different junctures during the case. The research indicates that the if children are provided with accessible information (Article 17 UNCRC), this empowers them to participate in agenda-setting. Characterisation of the case involves 'pitching' the case in a way that is positive from an overarching child rights implementation perspective (Article 4 UNCRC). In cases involving sensitive issues, such characterisation can also be important for protecting children from negative perceptions. This aligns with rights to have their privacy respected (Article 16(1) UNCRC), to have their best interests considered (Article 3(1) UNCRC), and their right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (Article 19 UNCRC).

The importance of information was highlighted in an interview with a young person who had been involved in CRSL. They observed that while they and other children and young people were strongly involved in agenda-setting for advocacy, they were uncertain about the legal aspects of agenda-setting because they lacked confidence:[143]

> **Every now and again, I would be like, 'Can you please explain that again?' But at the same time, I have to be honest I didn't have that confidence level at that time to really … because to me, these are professionals. Who was I? I was this one random kid.[144]**

143 EUY1 (1 December 2021).
144 ibid.

This lack of confidence in part derived from the technical nature of the discussions around legal agenda-setting and argumentation, as well as the fact that when the young person joined the litigation process, 'it was already kind of in motion … I think they'd already had maybe three or four meetings beforehand. So, I had to try and not only catch up, but also understand what they were trying to say'.[145]

The young person flagged a number of potential solutions to this:

> **I think about like learning now and being at university, we always do a recap of the last lesson. And that's kind of how I realise that I learn. The more we go with things, the more, I'm like, 'Oh, okay. Yeah, I understand that. Maybe I didn't get that before, but now I get it that we've gone over it again.' So, a summary of this definitely I think would have helped … it's basically almost like a timeline process … what did we talk about before? Where are we at now? Where are we going? And if we did that at every meeting, I think then that would have been … I would have been able to catch up quite quickly.[146]**

They also felt that 'having another young person in that room would have also supported me … in a way that I wouldn't have felt like, because I was the only person and the youngest, and practically a child still really who didn't understand anything, I wouldn't have felt that like I was on my own in a sense. And because somebody else is there, I could have said, "Oh, do you understand that? Actually, we both didn't understand, and maybe we should ask them to clarify". So, more of a … it would have helped with confidence boost.'[147]

Agenda-setting also requires considering characterisation of the case which may be important to minimise any negative perceptions that may arise in relation to the case.

Agenda-setting also requires considering characterisation of the case which may be important to minimise any negative perceptions that may arise in relation to the case.

145 ibid.
146 ibid.
147 ibid.

Effective 'characterisation' of the case has been identified as an important success factor in litigation,[148] and entails communicating clearly what the case is about and what it is not about.

CHARACTERISATION CASE STUDY

In a South African example, in order to address the negative perception generated by the media in the context of litigation concerning consensual sex between adolescents, the applicants and their legal team made a conscious decision to characterise the case as decriminalisation of normative behaviour. They did so by coming up with several guidelines for the media on what the case was not about, including the following:[149]

- This case is not challenging the criminalisation of adult sexual engagement with children below the age of 16- these adults must be charged with the relevant crime, i.e., statutory rape, rape or sexual assault.
- This case is not challenging the criminalisation of non-consensual sexual crimes committed by children. These non-consensual sexual activities must remain criminalised.
- This case does not seek to lower the age of consent for sexual activities. Any child under the age of 12 is incapable of giving consent. All sexual acts committed with a child under the age of 12 will be rape or sexual assault.

This approach proved to be so successful as a strategy for explaining the case that it was also used by counsel in their arguments, which culminated in it being included in the opening paragraph of the Constitutional Court judgment.[150] This example is positive in terms of child rights-consistent practice because the legal practitioners and the organisations who were the institutional clients avoided negative characterisations of children and ensured that there was a continuity in the characterisation of the case, through from the original agenda-setting for the case, to work with the media, to legal argument – and this ultimately found its way through to the judgment itself.[151] Children's constitutional rights to dignity, privacy, equality and best interests featured strongly in the arguments in case, and the agenda-setting and characterisation reflected the same child rights values.

(For more on the role of media messaging and CRSL, see Chapter 8).

148 Budlender, Marcus and Ferreira (n 95).
149 Delany (n 119).
150 Centre for Child Law, '20 Years of Imagining Children Constitutionally – Strategic Litigation and Advocacy for Children's Rights in South Africa' (CCL 2018) 1, 25 <https://centreforchildlaw.co.za/wordpress21/wp-content/uploads/2019/03/CCL-20-Year-Publication-1.pdf> accessed 7 July 2022.
151 Delany (n 119) 23.

6.3 DESIGN OF REMEDIES

The UNCRC Committee has observed that if human rights are to have meaning, there must be effective remedies to address violations.[152] The Committee also highlights that where rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by Article 39 UNCRC. This guidance provides CRSL practitioners with a sense of what child rights-consistent remedies include.

Many CRSL practitioners recognised that in cases involving children there is a need to involve children in the design of remedies or the kind of response that the children want from the court.

Many CRSL practitioners recognised that in cases involving children there is a need to involve children in the design of remedies or the kind of response that the children want from the court.[153] In an interview with a child rights practitioner, he explained how he came to represent children living on the streets within the vicinity of the railway. The case was referred to him by a professor who spent hours and hours communicating these children. In the professor's brief to the practitioner, it was stated that whatever solution the petitioner was going to be seeking from the court had to be with the consent of the children.[154] This approach was consistent with children's rights as it gives effect to children's right to be heard (Article 12(1) UNCRC) in terms of design of remedies.

Designing remedies for CRSL entails different dimensions or aspects. One of the issues to consider is whether the remedy being sought can address the purpose of the litigation, resolve the problem that needs to be resolved, can reach the broadest possible group of children and whether it is reasonable or achievable. In designing a remedy, the practitioner must consider whether the court has the jurisdiction to grant such a remedy, as there may be limitations due to, for instance, a particular understanding of the separation of powers or the courts' inherent powers in a particular legal system. For example, Section 5.3 describes how children and young people interviewed for this study who brought litigation to lower the voting age were aware that the remedy would be only be declaratory, due to the remedial power limitations of the courts.[155] In this instance, lawyers and young adults involved in the movement bringing the litigation ensured that all the children involved understood the limited nature of the available remedy (and in doing so, their practice can be viewed as consistent with those children's right to information in terms of Article 17 UNCRC).

152 UN CRC, GC no. 5 (n 84) [24].
153 ASP2 (n 106); AFP3 (n 62).
154 ASP2 (n 106).
155 OCY1 (n 102).

When the study explored the extent to which practitioners involve children in discussions about remedy, almost all those interviewed acknowledged that it could be appropriate to have children participate in designing the remedies, but few gave examples where they had put this into practice.

There is evidence that many CRSL actors carefully consider remedies such as whether to seek a declaratory order only or to aim for a mandamus, and even for a supervisory order.[156] The literature review indicated a significant degree of creativity in remedy, particularly in litigation on the right to education.[157] However, when the study explored the extent to which practitioners involve children in discussions about remedy, almost all of those interviewed acknowledged that it could be appropriate to have children participate in designing the remedies, but few gave examples where they had put this into practice.

It is thus apparent that, while CRSL practitioners are in no doubt as to the importance of remedy and spend intellectual energy on this area of their work, it is a job left mostly to the lawyers. What is lacking is the involvement of those whose rights are at play in CRSL in the design of remedy. This shows that while CRSL practitioners place emphasis on remedy in their practice, they tend to overlook the right of children to be heard and have their views taken into account (Article 12(1) UNCRC).

6.4 PROVIDING SUPPORT TO CHILDREN THROUGHOUT THE LITIGATION PROCESS

Children participating in the litigation process require support. The interviews in this study make it clear that this support should take different forms, including psychological, social-economic, and emotional support. The provision of such support is consistent with a number of child rights such as the right to life, survival and development (Article 6 UNCRC), the right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (Article 19(1) UNCRC) and the right to appropriate measures to promote physical and psychological recovery (Article 39 UNCRC). It could also take the form of the provision of a social worker or support person or any other assistance that the child needs in the CRSL process, and possibly, beyond it.

156 AFP4 and AFP5 (n 57). Also see African Child Policy Forum, 'Training Manual on Strategic Litigation and Individual Complaints Mechanisms for Children in Africa' (African Child Policy Forum 2020) 28.

157 Open Society Justice Initiative, 'The Impact of strategic litigation on equal access to quality education' (Open Society Foundation 2015). Also see Faranaaz Veriava, *Realising the Right to Basic Education: The Role of the Courts and Civil Society* (Juta 2019).

SUPPORT FOR CHILDREN

An interview with a respondent from an Asia-based child rights organisation made clear the significance of support for children, especially child victims in the criminal justice system. The interviewee was of the view that the criminal justice process can sometimes be difficult for a traumatised child who has been through abuse.[158] As a result, the organisation operates a model where lawyers and social workers work together in tandem, for every case, because it allows the whole legal process and the psycho-social healing process to gel with each other and coordinate each other.

Through this approach children that need psychological support are provided with that support, and those who need social worker support are also provided that assistance.[159] This ensures that the litigation gives effect to, or is at least supportive of, children's rights to survival and development (Article 6(2) UNCRC), and the right of child victims to promotion of physical and psychological recovery (Article 39) UNCRC).

An interview with an organisation that works with migrant children also highlighted the significance of providing support to children as the need arises:

> **We engaged a child psychologist who will brief children and interview them about their past and the reason they left their country. Because of the sensitivity of this kind of questioning and the trauma that these children have experienced while running away from their country, such questioning should be handled with great sensitivity, and that is why we do hire child psychologists, to navigate that process.[160]**

A litigator involved in climate change CRSL also highlighted the importance of providing psychological support for children involved in such litigation:

> **We have been working in the climate movement for a number of years, and [climate grief and stress] affect a lot of people in the movement and it causes a lot of burnout for those working in the space. So, we engaged with a group who work specifically [on climate resilience], experienced psychologists who have thought a lot about climate anxiety, have done sessions on climate anxiety and grief, and have come up with ways to help people to do this work in a more sustainable way. So, we set the kids up with them to offer one-on-one sessions whenever they wanted it. And then we also organised group counseling sessions which focused on capacity building, team building, grief and stress management, and whatever else came up, and invited all of the litigants.[161]**

158 ASP1 (n 89).
159 ibid.
160 AFP4 and AFP5 (n 57).
161 OCP2 (n 71).

The interviewee later stressed that the lawyers were not involved in these sessions in order to allow the litigants and counsellors to speak freely.[162]

Providing support to children is significant in terms of ensuring both the protection and the active participation of children in the litigation process. Articles 6(2) and 39 of the UNCRC provide key normative bases for this kind of support. The good practice examples above demonstrate a child rights-consistent standard for CRSL actors to work towards in ensuring that children are provided with the needed support when the need arises.

Although the study did not seek to look at other kinds of support beyond the psycho-social, the research revealed that other, material support is often required. An article surveyed in the literature review starts with the author, a child rights lawyer, having to take money from her pocket to provide a bus fare to a girl who had just lost her child in a care dispute with welfare authorities.[163] Similar experiences were reported in other interactions with CRSL practitioners and discussed in work with the Child and Youth Advisory Group, who also identified travel costs, litigation costs such as obtaining documents, and communication costs such as mobile data as significant impediments to litigating in a child-supportive way.

6.5 THE RISK OF HARM OR (RE)TRAUMA IN (OR AS A RESULT OF) THE LITIGATION PROCESS

CRSL can sometimes pose a risk of harm and trauma to children who take part in the litigation process. This raises questions about children's enjoyment of their rights to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (Article 19 UNCRC), to physical and psychological recovery (Article 39 UNCRC) and, more generally, the extent to which CRSL action is consistent with the child litigants' best interests (Article 3(1) UNCRC).

The risk of harm can take different forms, including stress or trauma caused by having to think about or to repeat accounts of earlier harm. The risk of harm could also be in the form of impact on the children's time, their home life, their education and their right to rest and leisure. Physical harm or bullying may also be a risk in certain circumstances. These harms and attacks have become more prevalent in cyberspace, where the children can be trolled and subjected to many types of abuse and threats for being part of particular advocacy, movements or cases. (For more on this issue, see Section 8.3.1).[164]

162 Email from OCP2 to authors (5 July 2022).
163 Martha Matthews, 'Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children's Class-Action Cases' (1996) 64 Fordham L. Rev. 1435.
164 Jack McLean, Equity Generation Lawyers, and young litigants, on their litigation before the Australian courts focused on coal mine licensing (Presentation at ACRiSL Third Network Event: Engaging with Children and Young People in Child Rights Strategic Litigation (CRSL), 5 April 2022).

RISK OF HARM AND TRAUMA

A representative of an Africa-based child rights organisation highlighted the potential risks litigation may pose to children who are plaintiffs in the litigation process and how they have addressed this situation:

> "*Another thing we do is that, in spite of their willingness to bring a matter, we have to actively provide the opportunities for them to understand what the case is about, what are the possible effects, what risks are involved, just to ensure that they understand the entire case. That is why at some point they will say no they are no longer willing to participate as plaintiff, or are not willing to bring particular evidence to the court of law. In such situation, as an organisation you just have to work around and proffer a solution.*[165]"

Here, the litigator ensures that the children are afforded the information they need with regard to decision-making in line with Article 17 UNCRC, even where this may have implications for the pursuit of the litigation overall. This approach ensures that the child is able to express their views and have them taken into account in the CRSL context consistent with Article 12(1) UNCRC. While children's rights to protection from harm (Article 19 UNCRC) to physical and psychological recovery (Article 39 UNCRC) and their best interests (Article 3(1) UNCRC) are at the heart of decision-making around harm and retrauma, it is crucial that children's participation rights are also supported.

An Asia-based lawyer had the following to say in this regard:

> **We have cases where children suffered because of the lack of legal intervention, particularly in cases of complaints against the police. And one of the main reasons for this is the fear of retaliation against the children involved and their families seeking judicial intervention against the police. I invest a lot of time making children and their families realise how much actually they can count on me for their support, and whether or not they should take up the matter. Even if the issue is important, I have to make a choice between whether the issue is important and whether the child will be at risk. I will better not take up the issue and wait to fight some other way.**[166]

In some instances, as highlighted above, the harm could manifest in terms of the time the child plaintiff spent in the litigation process at the expense of other commitments. A young person with lived experience of CRSL had this to say:

> **Yeah. I started work at this point … and it was difficult. But the meetings were always … On a Monday. So, I just basically had asked my employer if I could always start … I'd have a Monday off or start much later because the meetings were always in the morning … It was hard trying to figure … to juggle everything. But where there's a will, there's always a way. So, I was willing to be involved. I was willing to work. I was willing to still continue to do my activities. And it was busy. A lot of my friends complained about never seeing me.**[167]

165 AFP2 (n 57).
166 ASP2 (n 106).
167 EUY1 (n 143).

In other instances, the risk of harm could be an impact on educational career of the children or a child involved in the litigation process. This is exemplified by the story of teen activist in the United States who dropped out of high school to focus on the climate crisis.[168] The teen is among 21 youth plaintiffs who sued the US Federal Government in relation to the climate crisis. His commitment to the cause could be viewed as having come at a cost to his formal educational career.

The risk of harm to the children involved in the litigation can come in the form or trauma or retraumatising the children. This concern was highlighted by child rights practitioners and the steps they took in addressing them. One of the interviewees had this to say:

> **I think that's also something we worry about a lot, especially in the context of when we're interviewing kids and making sure that we're setting their expectations, but also ensuring that our questions are not retraumatising. And so, we sometimes work with mental health experts who participate in our interviews or who give us advice generally about how to work in a trauma-informed way. One reason we haven't done more to keep kids engaged in litigation is because when kids have moved on from this difficult experience we don't want to bring up retraumatising memories and we don't want them to feel pressured to be involved**[169]

During an interview, a similar view was expressed by an organisation working with migrant children in Africa. Here, the interviewee stated that, as a result of the possibility of retrauma in the process of questioning the children about their past experiences and reasons why they left their countries, the organisation engages psychologists to interact with the children.[170]

In sum, the study shows how litigation can pose a risk of harm to children involved in the litigation process. Child rights-consistent CRSL requires litigators to be attentive to and seek to mitigate potential harms to children's right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (Article 19 UNCRC). It also requires them to be aware of less immediately visible rights harms such as to the child's right to education (Article 28 UNCRC) and right to rest and leisure (Article 31 UNCRC). However, balancing autonomy and protection requires that children be provided with information (Article 17 UNCRC) and to be supported to make their own choice. The good practices highlighted above demonstrate some examples of child rights-consistent approaches in practice and are exemplars that other practitioners may follow.

168 Zoya Teirstein, 'This Teen Activist Dropped out of High School to Focus on Climate' (*Grist*, 2018) <https://grist.org/article/this-teen-activist-dropped-out-of-high-school-to-focus-on-climate/> accessed 6 August 2022.
169 AMP1 (n 70).
170 AFP4 and AFP5 (n 57).

6.6 MANAGEMENT OF EXPECTATIONS

A child right consistent approach to CRSL requires management of the expectations of children involved in the litigation process. Management of expectations includes explaining to the child how the litigation process works and how long it will take to get a result from the court. This provision of information is in line with Article 17 UNCRC. The aim of the case and the prospects of success also need to be delineated, and it is necessary to keep in touch with children by updating them regularly as the case progresses and hearing their views about different aspects of it (Article 12(1) UNCRC), including settlement negotiations.[171] Such expectation management is even more important when the outcome of the case does not meet children's expectations, and careful explanation and follow-through are required in such circumstances.[172] One young person who had lived experience of CRSL, who initially lacked confidence regarding the legal aspects of the case, gained increased understanding of the case as all the options were clearly explained:

> **And so, with the Supreme Court being in this process, it was just how were we going to present our arguments to make sure that we win? But what I really loved, and this is where my understanding of the process starts to come into place a little bit, was that [name of practitioner] and the rest of the team went through every level that you could possibly think of. So, what it means to win, what it means to lose. And what do you do in both instances and how do you handle that situation? And that's when I think I started to finally be like, 'Oh, okay. So, you can lose and you can win.' And it's almost like it feels like it's clicking in place.[173]**

An interviewee from a CRSL practitioner working on climate change had this to say regarding managing expectations:

> **From the beginning, we did tell them that we're probably going to lose. And they weren't that much concerned about that. They wanted to fight to be heard. So, when we lost the first level, they were pretty much aware that this was a possibility and that it wasn't the end which we confirmed when we explained that yes, we're going ahead. We already told you this. They were like, 'yes. It's sad, but let's go'.[174]**

171 AMP6 and AMP7 (8 February 2022); EUP3 (n 81).
172 Legal Aid South Africa and Centre for Child Law (n 63).
173 EUY1 (n 143).
174 AMP6 (n 171).

MANAGING EXPECTATIONS IN A RIGHTS-CONSISTENT WAY

A case may have to be built around a particular child or group of children due to the requirements of the legal system in which it is brought. Highly experimental forms of litigation may be risky for cases involving children, as their expectations may be dashed if the experimental route is taken and is unsuccessful. This may raise issues in terms of children's right to freedom of exploitation (Article 36 UNCRC). At the same time, children may be able to understand this risk, if they are fully informed about it (Article 17 UNCRC).

In one African example, scholars involved in a case about exclusion due to language of tuition (and by proxy, race) found themselves in a situation where the main case about access to education failed, but one 'experimental' aspect of the case, relating to standing and legal representation, continued to the Supreme Court of Appeal, and established an important precedent for participation of children in litigation, expressly based on Article 12 UNCRC.[175]

In a video about their experience, the children said that although they were disappointed, they also felt that they 'were the first and the last' – in other words, the pioneers – and they were aware that the case had had a significant outcome, albeit different from what was initially envisaged. The children also explained that they were continuously informed, and that this 'was calming us down'. It appears, therefore, that good communication between the litigators and the clients can also help with choices of the type of action, and how to deal with the landscape of a case changing as it continues.[176]

Another practitioner stressed that they have always been realistic in explaining to children involved in litigation about the odds or possibility of losing a case, and the children have been very appreciative of the fact that they were told the truth.[177] A Europe-based CRSL practitioner stated that 'my experience as a lawyer tells me that the best thing to do is to tell the client the truth, that we will do our best but that there are things that are not in our hands'.[178]

The insights from the research are that children can cope with disappointment if they are well prepared for it and that this can be achieved if they are fully informed about the range of possibilities from the outset and are kept informed throughout the litigation. A child rights-consistent approach therefore engages aspects of Article 17 UNCRC (right to information) because it is apparent that if children are provided with the appropriate information prior to the case and during its trajectory, they will be able to participate in decisions that are made as the case develops, in accordance with their rights under Article 12(1) UNCRC. Relatedly, their expectations will be realistic and will adjust according to the developments in the case.

175 *Centre for Child Law v Governing Body of Hoërskool Fochville* [2015] ZASCA 155 [2015].
176 Centre for Child Law University of Pretoria (n 140).
177 AMP3 (n 72).
178 EUP3 (n 81).

6.7 CALLING A HALT TO LITIGATION/AGREEING TO A SETTLEMENT

In some CRSL cases, the exchange of initial papers in litigation leads to a settlement or agreement between the parties, before the hearing. In other litigation a settlement is reach only once the case is before the court. A settlement agreement can be used effectively in various ways, particularly if the remedy being sought is a medium to long-term one. However, any such settlement agreement, should be consistent with child rights. This will involve the necessary information being provided by the practitioner to the child (Article 17 UNCRC), as well as ensuring that the views of the child are conveyed to the practitioner and taken into consideration in decision-making about settlement (in line with Article 12(1)) UNCRC.

Interviews with various child rights organisations revealed that a settlement agreement is a tool they have used or are willing to engage with if the need arises or the opportunity presents itself. However, a child rights-consistent approach entails a consideration of whether the possible settlement offer extends benefits to the child or children involved in the litigation process, even though this may not be 'good' for the overarching aims of the case.

One representative of a children's rights organisation interviewed explained not only the importance of settlement but how they have effectively deployed it in some of their cases:

> **Through a settlement agreement, you can often get more than what you'd be able to get from the judge. Judges, for good reason, are reluctant to get into the weeds of telling the system how to work. But if you can work with the relevant actors and come up with a sensible way to manage the issues, you can get more in terms of reforming the system through a settlement. But it's still negotiated against the backdrop of what the court would likely order.**[179]

The interviewee went further to state that a settlement agreement in one of its cases set a framework for how children across the country who are in immigration custody are supposed to be treated: the settlement agreement set up a system of protection that was previously not there at all for children taken into immigration custody.[180]

179 AMP1 (n 70). See the same point made by Ann Skelton, 'Leveraging Funds for School Infrastructure: The South African 'Mud Schools' Case Study' (2014) 39 Int. J. Educ. Dev. 59.

180 AMP1 (n 70).

Another interviewee indicated how their organisation successfully used settlement agreements after the launch of litigation to ensure that school infrastructure was provided for learners in rural communities.[181] Where settlements are considered in cases involving children, the impact on their interests and the resolution of the issues in a manner that protects the children must be a primary consideration, and consulting with children in these contexts is likely to be necessary. Furthermore, while many practitioners were clear about the strategic risks and benefits of settlement, few of them were able to articulate the extent to which they sought the views of children, although they do consider the impact of settlement on their clients.

As one practitioner explained:

> **I think there's definitely a "do no harm" question in terms of the litigation itself and there are trade-offs. We try to think through those trade-offs and consult as many people as we can about the implications of various decisions. But there isn't a perfect solution when you're negotiating a settlement and you're not totally sure of all the consequences of agreeing to one system over another.[182]**

Beyond the strategic use of settlement agreements used by CRSL actors interviewed for this study, it is also important to recognise that the possibility of a settlement should also be factored in at an early stage. In this way, a strategy can be developed to permit individual settlements for particular children where these may be advantageous, while ensuring that the case can continue. One way in which this might be achieved is by having a sufficient number of clients or a variety of clients, some of which are institutional rather than individual, where the legal system permits this. A child rights-consistent approach would require a strategy that allows the individual child litigant(s) to benefit from the opportunity that a settlement may offer, while ensuring that the broader case is not abandoned. This requires a balancing of children's rights to have their best interests considered in terms of Article 3(1) UNCRC, together with their right to express their views and have them considered. However, it could lead to a discussion about short-term best interests over long-term best interests. A child who is engaged in discussions of this nature may be able to make decisions. However, this might also need the involvement of parental guidance, depending on their evolving capacities (Article 5 UNCRC).

181 AFP2 (n 57).
182 AMP1 (n 70).

6.8 ACCORDING DIFFERENT WEIGHT TO CHILDREN'S VIEWS AS LITIGATION PROCEEDS

As highlighted in this report, children's participation in CRSL is significant in terms of ensuring the integrity and credibility of the case, as well as enhancing child rights consistency by ensuring that the children participate in aspects of the litigation course. However, the level of involvement and the weight to be accorded to children's views in the litigation process may vary through the lifetime of the litigation. The need for CRSL practitioners to adjust their approach when dealing with children's views is consistent with Article 12(1) UNCRC's emphasis of the linkage between the age/maturity of the child and the weight to be accorded to their views. It is also consistent with Article 5 UNCRC and implications of children's 'evolving capacities' for adult support for them in relation to exercising their rights.

Parents are key supporters (and gatekeepers) in the CRSL context. A significant majority of the CRSL practitioners interviewed engaged with parents of the child whose rights were at issue in the case. Indeed, in some instances, litigators only engaged with parents.[183] Article 5 UNCRC suggests that as children grow older and become more mature (i.e., as their capacities evolve), CRSL practitioner reliance on parents/legal guardians' views on how children's rights should be secured must shift towards greater direct reliance on children's understandings of how their rights can best be ensured – both through and in litigation.

Litigators were clear that the weight that will be accorded to the views of children that can express themselves clearly will differ from the weight accorded to the views of children who are less capable of expressing themselves. This view was highlighted by one respondent as follows:

> **Once a child gets to a particular age you can talk to them about the issues that are going on, and they are very sharp and know exactly what is happening in their homes, who is hurting them, who is doing what, and whatnot. Depending on the child's age, I will adjust how I ask questions. For example, I am not going to tell a 5 years old child to tell me what is happening in the house. For older children, I do engage with them and ask them what I should go and tell the court.[184]**

Another dimension of this to note is that as children become older and their circumstances change, it might become difficult to keep them interested in the case. The situation has to be managed in such a way as not to jeopardise the interests of the child while trying to still pursue the strategic interest of the litigation. As there may be several children involved in the case, this can require balancing the rights (including the best interests in terms of Article 3(1) UNCRC) of different children in the group, and talking through the options with each child, thus providing information (Article 17 UNCRC) and allowing the expression and consideration of views (Article 12(1) UNCRC).

183 E.g., AMP5 (n 69).
184 AFP3 (n 62).

'When we first brought the case, she was absolutely engaged with it because it was about her identity and she wanted the protections. But I think it's gone on so long that it feels like it isn't her case anymore, although in my mind it still is'.

In a book published about the case of a former child involved in CRSL, this dissonance between the needs of the individual child whose view on the case has changed over time, and the ongoing broader strategic case is clearly revealed. The child observed that she was not sure if the lawyer was there for her or for the 'interest in the broader case'.[185] The lawyer, interviewed for the same book said: 'When we first brought the case, she was absolutely engaged with it because it was about her identity and she wanted the protections. But I think it's gone on so long that it feels like it isn't her case anymore, although in my mind it still is'.[186]

The findings of this part of the study indicate that child rights-compliance requires planning for the long haul and being prepared for the fact that children will grow older, and may move into adulthood, before the case is concluded. This requires a firm understanding of how children's rights rests on the concept of evolving capacities (Article 5 UNCRC) and a plan for managing the involvement – and where necessary, the departure – of child clients as they grow older and more mature.

6.9 COMMUNICATION, PARTICIPATION, AND EMPOWERMENT OF CHILDREN THROUGH LITIGATION

A child rights-consistent approach to CRSL requires communication with the children involved in litigation in language that they can understand. It also entails participation and empowerment of children through litigation. The diverse modalities of such communication and participation include digital communication technologies (social media, zoom, emails, WhatsApp, etc.). A significant majority of practitioners who were interviewed acknowledged the significance of children's participation in CRSL, including through effective communication, and some have managed this in a manner that is consistent with children's rights One interviewee stated:

We tried to explain as much as possible what every step of the process is about in plain English ... we brought the barristers to talk to the kids and they were really great at really simplifying things and getting to those really big concepts in a way that could be digested [by children and young people].[187]

185 Joanne Jowell, *Zephany: Two Mothers, One Daughter, An Astonishing True Story* (Tafelberg Publishers Ltd 2019) 114.
186 ibid 113.
187 OCP2 (n 71).

A similar view was expressed by a number of practitioners interviewed.[188] One child rights practitioner had this to say:

> **Firstly, right from the beginning you must explain to the child, even beyond explaining to the child, you must explain their rights to them, and the violations that have occurred ... Most times in doing so you discover that they might not be as comfortable with you in the beginning of your engagement. As such, having someone they are comfortable with while you engage with them is significant, because it helps them open up more and able to let you in on some of the issues. The other thing that we do specifically, the communities that we work with are rural communities, sometimes we find that the child need to have the issues translated into the local language. So you then speak to them in the local language, instead of sticking to English, just so that they will be able to understand some of the issues we need them to understand. The other thing also is to find them in an environment where they are comfortable, instead of bringing them to offices, or bringing them to the court of law.[189]**

With the development of social media, CRSL practitioners, have used social media as an advocacy tool, and have encouraged children in the litigation process to actively participate in the advocacy through the social media space. An organisation in Africa that promotes access to quality education for every child, has actively encouraged children associated with the organisation to engage social media as one its tool to highlights some of the educational challenges they encounter in their various schools.[190] (For more on social media and child litigants, see Section 8.4).

During the height of COVID-19 lock down, which made it impossible for in-person gatherings, one interviewee highlighted how the organisation leveraged technology to ensure child participation:

> **We had frequent Zoom calls, perhaps once every two weeks or so, depending on how much was happening in the case. When there was something big that happening in the case, we'd have a call, and we would also speak before any court hearings.[191]**

The interviews with practitioners show that participation through communication with child litigants is crucially important, and that information technology is playing a vital part in enabling this.[192]

188 AFP4 and AFP5 (n 57); AFP3 (n 62).
189 AFP2 (n 57).
190 AFP1 (n 61).
191 OCP2 (n 71).
192 ASP3 (25 November 2021); AFP1 (n 61).

THE ROLE OF TECHNOLOGY IN FACILITATING PARTICIPATION

A number of interviewees stressed the central role of messaging apps in ensuring effective communication and child participation in the operationalisation of litigation. One practitioner highlighted the central role that Signal played their CRSL efforts:

> *Because we realised very early on that group emails were just not going to work. It's not an effective mode of communication for a 15-year-old. It's still necessary to send certain documents, confirm instructions, and complete other formalities through email, but as far as keeping everyone abreast with what was going on, it just wasn't going to work. And so we started doing as much as possible over [encrypted] text. Which really forces you to be brief as well, which I think is good. And it also forces you to talk in language that is less formal. It's the kind of language that the kids are used to talking in every day. You know, they're not sending emails but they are texting all day. So, we kind of just adopted that. And it allows them to ask simultaneous questions, and allows us introduce legal concepts to them in a way they'll understand. You can also use humour a little bit more, it's a bit more dynamic. And you could also attach documents to a Signal chat as well.*[193]

Some organisations have involved children by having them engage directly in the collection and provision of evidence,[194] while others kept children informed about an important case in which they were tangentially involved.[195] These examples have child rights-consistent features, because children are being provided with information (Article 17 UNCRC), as well as having their views heard, and seriously considered, in the litigation process (Article 12(1) UNCRC). The use of technology appears to have increased during the COVID-19 pandemic, and this may have equipped adult practitioners with improved communication skills which will be beneficial in their work going forward.

The interviews demonstrate that practitioners have assisted effective participation of children by explaining the legal process to them in language they can understand in compliance with (Articles 12(1) and 13 of the UNCRC). The interviews also show how organisations and practitioners have engaged social media and other technological tools to ensure children are given appropriate information (Article 17 UNCRC) not just to ensure child participation in the litigation process but also as advocacy tools to facilitate children's participation in the social media space to campaign around the case they are involved in.

193 OCP2 (n 71).
194 AFP2 (n 57); AFP6 (n 106)
195 AMP1 (n 70).

6.10 WORKING WITH PARTNERS

Some CRSL features a collaborative effort with local partners in the communities where the problem that the litigation aims to resolve exists. Consequently, various organisations involved in strategic litigation have partnered with local groups to raise awareness, gather support, disseminate information, and consult with them on crucial issues. Furthermore, as made clear in Chapter 5, some CRSL may arise from these organisations themselves noticing some recurring or systemic issues that they have tried other means to resolve and failed. The interviews with CRSL practitioners revealed how some of them have worked with partners to gather support for strategic litigation.

One actor made clear that an existing campaign was fundamental to their work:

> **I do not litigate without a campaign supporting the cause. Even if I strongly believe it is a legitimate cause, I try to build a dialogue, and when there is a consensus to take the matter to court, then I take up the matter. Even if it is important, I will not do strategic litigation on my own. I acknowledge that I might not have enough historical knowledge about the cause, the struggle and issues involved. As such, it is better to be supported by a campaign, that way I will also feel protected as a child rights lawyer.**[196]

Interviews with a representative of a child rights organisation in Asia revealed how they work closely with other organisations towards a common goal.[197] The interviewee explained how various issues of interest pushed both child rights and human rights groups to come together despite their differences. This coalition came into play when it took a common position to oppose a case that was brought seeking to declare every child marriage void *ab initio* in India. The coalition intervened as a third party and argued that child marriage should be voidable but not void *ab initio*. This was because automatic voiding of marriages has unintended consequences such as criminalisation, changing the status of children born within the marriage, cutting off women from inheritance, as well as preventing girls and women from making their own choices about whether to leave or stay in a marriage that was concluded when they were below the legal age. The coalition took this position because they were of the view that declaring child marriage void *ab initio* will have a material impact on their work to support adolescent girls.[198]

A litigator based in Oceania observed that their model of operation is that of partnership with other organisations, including local ones, in their bid to promote and protect human rights.[199] The interviewee observed that several of the cases they have been involved in did not come through individual clients but through a referral from partner organisations that are on the ground.[200]

196 ASP2 (n 106).
197 ibid; ASP1 (n 89).
198 ASP1 (n 89).
199 OCP1 (n 59).
200 ibid.

The networking also provides platforms and partnerships for advocacy and for follow-up work in which children themselves can be involved, thus setting up a framework for child rights participation in terms of Article 12(1) UNCRC.

A respondent from an Africa-based organisation explained how they have partnered with local groups in the community to gather support in their CRSL work. The interviewee indicated that as part of their strategy, they reinforce legal action with community engagement, making alliances with local groups, and carrying out research so as to push issues that they are litigating or intend to litigate.[201] Another African respondent stressed how, as a law clinic, they partner with a social movement that is made of learners, parents, and other stakeholders, to gather support for their strategic litigation work.[202]

One practitioner interviewed highlighted their broad collaboration with local organisations across various countries:

> **Generally, we work with national lawyers. So, it's either individual lawyers or national NGOs who will get the cases, bring them to us and ask for our support in them. And that will come either at the Supreme Court, higher jurisdiction level, or they'll come right at the beginning and we actually help them phrase and frame the case from the get-go.[203]**

It is clear that CRSL actors are working in broad alliances, mostly at the domestic level, including at community level, in ways that enhance and support their work. They are able to come into contact with clients through these alliances and are able to develop child rights-consistent strategies through engaging with a network of children's rights organisations. Their alliances have demonstrated a collaborative approach through which child rights organisations can push back against regressive cases or trends that are negative towards children's rights, ensuring a common approach to work within a child rights framing. The networking also provides platforms and partnerships for advocacy and for follow-up work in which children themselves can be involved, thus setting up a framework for child rights participation in terms of Article 12(1) UNCRC. (For more on follow-up, see Chapter 7. For more on work with partners in the context of extra-legal advocacy, see Chapter 8).

201 AFP2 (n 57).
202 AFP1 (n 61).
203 EUP9 (16 November 2021).

6.11 CONCLUSION

This chapter has focused on the operationalisation of CRSL in relation to setting the agenda for argumentation and determination of the priorities during the process of litigation. The research provided insights into choices made regarding possible alternative lines of argumentation, and also revealed some examples of children's involvement in decision-making.

Characterisation of cases and the considerations that should be taken into account in order to ensure that negative perceptions are avoided were explored. The study made clear that children's rights to privacy (Article 16(1)) and to have their best interests considered (Article 3(1), may be important factors to guide the way in which a case is characterised.

Design of remedies was considered by practitioners to be an important feature of CRSL. However, while almost all acknowledged the relevance of children participating in the design of remedies (in line with Articles 17, 12 and 13 UNCRC) few examples were offered, showing that this is an area for development. The research made clear that children need support throughout (and possibly beyond) the strategic litigation process, which may engage Articles 6 (right to life, survival and development), 19 (right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation) and 39 (right to right to physical and psychological recovery). Similarly, the study uncovered examples that highlight the need to avoid, and if necessary mitigate, any harm or (re)traumatisation in the process of litigation, with the Convention rights at play in this regard including the right to life, survival and development (Article 6 UNCRC), the right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (Article 19 UNCRC) and the right to physical and psychological recovery (Article 39).

Management of expectations was an area where practitioners reported tough experiences of having to deliver bad news, and other more positive stories that demonstrated that if children are well prepared with adequate information (Article 17 UNCRC), and are afforded an opportunity to express their views (Articles 12(1) and 13 UNCRC) then they are able to deal with losses in litigation.

CRSL can take a long time, and thus calling a halt to or settling cases was examined, together with the extent to which children's views are considered in this phase of the case.

The study made clear that children's rights to privacy (Article 16(1)) and to have their best interests considered (Article 3(1), may be important factors to guide the way that a case is characterised.

As time advances during the litigation, children mature and their views should be given more weight in accordance with their evolving capacity (Article 5 UNCRC read with Article 12(1) UNCRC). The interviews made clear that sometimes children may wish to leave the litigation for various reasons. Communication with children throughout all stages of the case was flagged as crucial, with technology playing an increasing role (raising issues in terms of Articles 17, 12 and 13 UNCRC).

These findings, as well as the rights framework itself, serve as the basis for identifying key principles that are to be borne in mind by CRSL actors when operationalising CRSL:

agenda-setting and characterisation of CRSL should take into account children's rights to privacy and physical and psychological recovery;

where children are directly involved in the case, they should be engaged in the process of agenda-setting and characterisation of the case;

lawyers and others working with children on CRSL should engage with and effectively communicate with those children throughout the process, including through the use of language and communication technologies that are user-friendly for children;

remedies should be in line with the views and interests of the children affected, and children should be involved in the development of remedies as far as is possible;

settlement of cases should be done in a manner that considers the best interests of the child and in consultation with the children affected;

children should be supported to call a halt to litigation at any point that they wish to;

children should be made aware of possible outcomes and what those outcomes might mean in advance of judicial decisions so as to manage their expectations;

if litigation is protracted, as children grow older and become more mature, their views in relation to the litigation should be accorded increasing weight.

CHAPTER 7
FOLLOW-UP TO CRSL

7.1 INTRODUCTION

Outcomes of strategic litigation are an important part of the litigation process. Following a euphoric win, there is work to do to ensure that the decision is effectively communicated. There is often a media flurry and organising and supporting clients during this phase is crucially important. If the case was only partial win, or perhaps a loss, then even more work is required to assist and support clients. This is a situation where, if the clients are children (rather than children's rights organisations), more effort is required from practitioners and other CRSL actors around the child(ren) to ensure that any negative fallout is managed. This chapter considers how child rights should shape CRSL practitioners' efforts with regard to information and explaining litigation outcomes to children involved in litigation, the provision of ongoing support for children where necessary following the conclusion of the strategic litigation, and strategies for Implementation of court judgments.

7.2 INFORMING AND EXPLAINING LITIGATION OUTCOMES TO CHILDREN INVOLVED IN LITIGATION

Informing and explaining litigation outcomes to children involved in the litigation process is a crucial aspect of a child rights-consistent approach to CRSL. This is because it touches on the children's right to seek and receive information and ideas of all kinds either orally or written in accordance with (Article 17 UNCRC). This suggests that CRSL actors and practitioners are expected to explain the outcome or decision of the court, either positive or negative to the children involved.

Communicating such decisions to children is part of a two way flow of interaction: the provision of information to children in keeping with Article 17 and the opportunity for children to voice their concerns and disappointments in accordance with Article 12(1). Support for young people can be essential if the news is negative, as is avoidance of harm at this stage (consistent with Articles 19 and 39 UNCRC). If the news is good, providing information is necessary to ensure that children fully understand the decision so that they can communicate the essence of it effectively to others, including through the media. As court case outcomes are often part of a broader campaign or advocacy process for young people, it is important for them to have the opportunity to think through how this impacts on their broader campaign.

Interviews with various CRSL actors revealed some interesting reflections on informing children about outcomes of litigation.

An interview with a young person with lived experience of CRSL reveals how a general understanding was rendered much clearer by a careful 'line by line' explanation of the case following judgment in a winning case. They had this to say:

> **And there was a conversation amongst everybody, young people, adults, everybody as to what it [the judgment] meant for us. But already, I mean, I was kind of aware because we went to the judgment day. So, when it was said, I didn't really understand what was being said, but I was aware that we had somehow been victorious ... And then there was a breakdown of like line by line what the judgment said.[204]**

In some instances, the case may have been 'lost' but practitioners were able to report successful follow-up work with children. This was often because expectations had been well managed (see Section 6.6), and because there would be another phase of the case or campaign.

One Americas-based CRSL practitioner observed that as part of the effort to carry the children involved in the litigation along, they sat with children and explained to them about losing the case, and the next line of action to be taken (which in this case was to appeal the judgment).[205]

In one interview, the process of giving feedback to child clients turned out to be iterative. The lawyers had aimed to move children out of emergency housing to regular placements with better accommodation and access to services. However, many children expressed fear about being moved because they were not sure what effect that would have on their cases, and they preferred to be directly reunited with their families, even if that would take longer. The practitioner said that following up with children after the transfers had taken place revealed that children did express the view that the new placements were much better:

> **And so, I think that gave us a little bit more confidence that when kids actually are in a place with more services, they are happier to be there than where they were before. But before a transfer there is a fear of not knowing what's going to happen and worrying. At the same time, I think it did influence us in not making transfer the top priority and making sure that the top priority is release.[206]**

204 EUY1 (n 143).
205 AMP6 and AMP7 (n 171).
206 AMP1 (n 70).

This example demonstrates that allowing children to express their views in line with Article 12(1) entails really listening to them and ensuring that the ongoing litigation strategy is adjusted accordingly.

Despite there being several examples where practitioners could give accounts of this kind of follow-up work, the interviews also revealed that this area of work is often neglected by busy practitioners who have to move on to the next case, and who are not always able to do follow-up work. Indeed, such work is particularly challenging with certain types of litigation – for instance where children are on the move or are released from detention.[207]

Breaking negative news to child clients is often difficult. Even though there may be a positive long-term outcome foreseeable at the end of the process, the 'tough news' moments along the way can be harrowing.

One practitioner had the following to say about delivering disappointing news to children in prison:

> **I remember clearly we had three cases in the [name of court]. The cases were about creating youth prisons at adult maximum-security jails and placing children in those prisons. We won the first case, and the government settled and complied with the judgment by taking out all the children that were our clients out of the jail. We won that one for that group and we could not leave the other kids in there so we brought a second case and we won that. It was won on the basis of administrative law that the government had failed to properly consider human rights in deciding to create this youth prison an adult maximum security jail. So, we won, but the government immediately appealed as such, the judgment did not have any practical effect whatsoever. So, explaining that to kids was not fun. I had to travel to the prison and say to the kids, "You won but it makes no difference whatsoever to your practical situation. And we're going to sue them again we think." And I just remember one of the kids say, "What the F#$S? This is a F#$S%$G waste of time," and just walking off. And it's like, yeah. And then we went to the Court of Appeal and we won.** [208]

This demonstrates the complexity of balancing the needs and outcomes relating to the directly affected clients, while ensuring that broader strategic aim of changing the system or tackling the problem is achieved. As seen in this example, at times a 'win' may not immediately benefit the children directly involved in the litigation, but it will assist other similarly placed children in the future. This is particularly difficult where the loss has a direct impact such as continued detention or a decision to deport. It is therefore crucial to provide support to overcome this kind of disappointment, in line with the right to physical and psychological recovery (Article 39). However, it can be very difficult to do so when the children are under the control of state authorities.

207 AMP1 (n 70); OCP1 (n 59); ASP2 (n 106).
208 OCP1 (n 59).

The research has shown that following up with children about outcomes in CRSL is a key aspect of the work and should not be neglected. It is linked to managing expectations and dealing with 'fallout'. While some child clients displayed a level of comfort with hearing about negative outcomes, this will depend on the situation and if/how it has immediate and direct effects on them. It thus engages the rights in Articles 12(1) and 17 UNCRC by allowing children to express their views and by ensuring that they receive information. However, in some situations, particularly if there is bad news, it may engage Article 19 (right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation) and the need for support, in line with Article 39 UNCRC, which is discussed further in the next section.

7.3 ONGOING SUPPORT FOR CHILDREN WHERE LITIGATION IS UNSUCCESSFUL OR ONLY PARTIALLY SUCCESSFUL

When litigation fails or is only partially successful, there is frequently a need to provide support for children who were involved in the litigation. A child rights-consistent approach requires close attention to the child's best interests (Article 3) and may require psycho-social support in line with children's right to physical and psychological recovery (Article 39) in some cases where the outcome has a major impact on an individual or group. Interviews with various CRSL actors show that only a few of them actually provide ongoing support to children who were involved in cases that failed or were only partially successful.

In some fields, such as migration or detention, the provision of ongoing support is particularly challenging. One practitioner working on migration issues reflected as follows:

> **One thing that's challenging with that and with involving kids more in the litigation decision-making is that because of the nature of our work, kids are in custody for hopefully a short period of time. And then they leave and often are not particularly interested in revisiting their experiences in custody because they are just happy to be out and with their family and want to move on with their lives. And so, for that reason, we haven't done a lot of work with kids post-release.**[209]

209 AMP1 (n 70).

One interviewee expressed the view that the kind of support children will need is dependent on the age of the child at that particular moment.[210] The practitioner noted that there are some cases where it takes 10 years to get a final judgment from the court, and in many instances the child will be an adult by that time.[211] However that does not mean that ongoing support will not be needed even after the former child-client has turned 18.[212]

The study found that practitioners were unable to provide many examples of post-litigation support to children, whether they were still children at the conclusion of the litigation or had become young adults by then. Although the study identified groups of young people who continued to be supportive of each other beyond childhood in some cases, the examples were groups linked to successful outcomes,[213] or to winning/losing cases[214]. No examples of support groups following losing cases were mentioned by interviewees. This reveals an area of weakness in the child rights consistency of practice at this stage. If children have been involved in the litigation, many of their rights will be engaged at the point of a disappointing outcome. In particular, it will be important to provide them with information (Article 17) and allow them to express their views (Article 12(1)). It will also be vital to take steps to avoid negative consequences of the outcome, which in some cases could go beyond disappointment to even include reprisals, which would then engage the right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (Article 19 UNCRC). The need for support aligns with appropriate measures to promote physical and psychological recovery in an environment that fosters the health self-respect and dignity of the child (Article 39 UNCRC).

7.4 STRATEGIES FOR IMPLEMENTATION OF COURT JUDGMENTS

Implementation of a court judgment is a significant aspect of strategic litigation. An organisation involved in CRSL should not presuppose that because the court found in their favour, the outcome will be automatically implemented to achieve the desired outcome.[215] Consequently, there is a need to develop implementation strategies to ensure that court judgments are implemented. Following up on litigation may be a space for the involvement of children and other CRSL actors, and their involvement can itself demonstrate child rights-compliance through advancing the fulfilment of children's rights in a practical manner, while simultaneously providing a good platform for the provision of information (Article 17 UNCRC) and children's right to be heard (Article 12(1) UNCRC).

210 EUP9 (n 203).
211 ibid.
212 AFY1 (11 February 2022).
213 See, e.g., in the context of *R (Tigere)* (n 20).
214 See, e.g., the Make It 16 Campaign at 'Make It 16' *(Makeit16.org.nz)* <https://www.makeit16.org.nz/> accessed 18 July 2022.
215 African Child Policy Forum (n 156) 56.

One interview highlighted that:

> **Judgments can actually have no effect if there is no movement beyond the judgment. What we see in [name of country] is that a lot of judgments are ignored. It is only effective if the organisation that brought the litigation monitors the judgment to ensure that the court order is implemented, and holds the government accountable for implementing it. And goes back to court for contempt of court if the government doesn't. Also going beyond that, one also needs to educate the government on how to communicate judgments, because they do not tell their officials, so their officials at the front desk do not know anything about these judgments.**[216]

This study focused on whether practitioners are involved in the implementation of their court orders and to what extent this work is being done in a child rights-consistent way. One organisation related that their strategy includes involving children who were part of the litigation on the right to basic education cases in the monitoring of the implementation of the outcome of cases through their leadership structures in various schools.[217]

AN EDUCATION RIGHTS MOVEMENT USES LITIGATION AND MOVEMENT LAWYERING TO ADVANCE THE RIGHT TO EDUCATION

One of Equal Education's recent and very significant court cases concerning access to the National School Nutrition Programme for learners during the height of the COVID-19 pandemic, highlights how proper monitoring of the implementation of a court order can be undertaken to ensure that children who were directly involved in the litigation benefit from the outcome.[218] The state respondents in the matter were ordered to reinstate the National School Nutrition Programme, and to report progress to the court and file the same reports on the other litigants. Children were involved in providing information about whether the meals were being provided at their particular schools. This was then fed into the reports filed by the state respondents, highlighting the persistent gaps in compliance with the court order.

The interviewee explained child-led implementation of the court order as follows:

> *So, we run a monitoring programme to make sure that all the learners in the country are receiving school meals … We get reports that 50% of learners are not getting food on the days that they aren't at school, and so we are starting to have to advocate around the nitty-grittys [sic.] of how this programme is implement … We go into schools and into communities to put up posters around where do you go when you can't access school meals, who do you call, who is responsible?*[219]

This exemplifies practice that is consistent with a wide range of child rights. Ensuring that school meals reach all children, no matter where they are living, engages non-discrimination (Article 2 UNCRC), while implementation in this case involved active child participation (Article 12(1) UNCRC) as well as the sharing and receiving of information by children (Article 17 UNCRC).

216 AFP7 (n 89).
217 AFP1 (n 61).
218 See 'School Meals Monitoring' (*Equaleducation.org.za*) <https://equaleducation.org.za/category/resources/school-meals-monitoring/> accessed 5 July 2022.
219 Madubedube (n 99) [25:16].

Overall, however, few interviewees were able to provide feedback on direct child involvement in implementation. In cases where it is necessary to undertake law reform following judgments, it is important to ensure that the child-rights advancing gains made through the litigation are retained or built on in the next phase. This is captured in an interview with a practitioner from Asia, who highlighted the influence of the children's rights movement on law reform processes regarding the upper age limit for children accused of criminal offences.[220]

A published source that was consulted as part of the research sets out a useful observation concerning implementation of a CRSL judgment. Pursuant to the South African Constitutional Court order for law reform, good work was initially done to ensure the that the revised legislation would be fully reflective of the order:

> **In this case, there was active advocacy, and participation in, the legislative process following the judgment. The law was amended to reflect the rights of children, going beyond what was contained on the court orders. This was a clear victory, but the follow-up has been less successful since the Amendment Bill came into force … The nature of the work of civil society means that new issues arise constantly, requiring urgent attention and the sector to move on. That said, the positive relationships built through the work on these two cases has continued into new areas of work and different cases, such as the abolition of corporal punishment in the home.[221]**

This indicates that, particularly in the resource-constrained environment in which many practitioners operate when doing this kind of work, activities around implementation will have to be planned as part of the work from the outset. Within coalitions of organisations, shared responsibilities for different parts of the work can be an effective means of sharing the responsibility of ensuring child rights-consistent practice at this stage of the work.

220 ASP2 (n 106).
221 Delany (n 119) 66.

7.5 CONCLUSION

Chapter 7 considered how child rights should shape CRSL practitioners' efforts with regard to providing information and explaining litigation outcomes to children involved in litigation, the provision of ongoing support for children where necessary following the conclusion of the strategic litigation, and strategies for Implementation of court judgments.

Chapter 7 demonstrated that CRSL follow-up work engages the rights to be heard (Article 12(1)) and to information (Article 17 UNCRC). The examples provided by the interviewees indicated that children can cope with losing a case, if there is a two-way flow of information. In some situations, if there is bad news Article 19 (right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation) may be engaged – for instance, in situations where there could be reprisals. In these situations, support should be provided. A child rights-consistent approach requires close attention to the child's best interests (Article 3) and may require the provision psycho-social support in line with children's right to physical and psychological recovery (Article 39) in cases where the outcome has a major impact on an individual or group. Interviews with various CRSL actors show that only a few of them actually provide ongoing support to children. Strategies for implementation of court judgments were found in some examples provided by interviewees, pursuant to the right to information (Article 17 UNCRC) and children's right to be heard (Article 12(1) UNCRC). Although there were some good examples, it was found that few practitioners involve children directly in implementation.

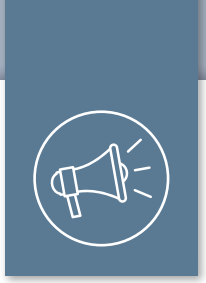
These findings, as well as the rights framework itself, serve as the basis for identifying key principles that should be borne in mind by CRSL actors when working on these issues:

lawyers and others working with children on CRSL must make sure that the children fully understand the judgments/rulings/decisions made;

children must be informed of subsequent developments following the judgment/ruling/decision;

ongoing support must be provided to children where necessary following the conclusion of the CRSL, particularly where that litigation is unsuccessful or only partially successful;

children should be invited to be involved in follow-up activities to judgments/rulings/decisions.



CHAPTER 8
ADVOCACY, MEDIA AND COMMUNICATIONS WORK

8.1 INTRODUCTION

A key element of CRSL work is extra-legal advocacy, which can take the form of: (i) political advocacy or other campaigning in collaboration with children and organisations; (ii) media work, and/or (iii) communication. Children's rights can serve as a framework for all of these activities and, very positively, existing CRSL practice provides useful examples of rights-consistent practice that can be used by those working in the CRSL space to shape their own work (albeit that said examples did not result from a rights-framed model of practice).

8.2 ADVOCACY AND OTHER CAMPAIGNING

As is clear from Chapter 5, CRSL is often rooted in or strongly links to pre-existing advocacy work of CRSL practitioners and partners, including children themselves. As such, extra-legal advocacy often taps into or builds on existing campaigns and activities aimed at changing law or policy. A frequent element of such work is general awareness-raising or public education-related efforts directed towards society as a whole. Such campaigns are generally not court-oriented but are aimed at law and policy-makers or other non-judicial audiences. Such advocacy links strongly with children's rights to freedom of expression and to be heard (Articles 12(1) and 13 UNCRC, respectively) – both in the context of CRSL and beyond. Indeed, ensuring that children's voices and views play a central role in informing and shaping such work is a key element of ensuring a child rights-consistent approach to this work.

EXTRA-LEGAL ADVOCACY ON THE STEPS OF THE COURT (AND BEYOND): THE UK *TIGERE* CASE

CRSL-related extra-legal advocacy is most often directed towards audiences beyond courts. However, the work of Just for Kids Law and the youth-led Let Us Learn movement around the *Tigere*[222] case provides an example of extra-legal advocacy work that included activities that, while not focused on directly influencing the legal outcome, could be viewed as court-oriented in the sense of providing the court with a sense of the human implications of their ruling in terms of the children and young people affected.

On the day of the hearing, a group of children and young people involved with Let Us Learn and Just for Kids Law demonstrated outside the Supreme Court, together with politicians, before the hearing and then went into court to attend it. One of the young people who had been in the litigation was later told by one of the judges that it was really unusual to be able to put a face to the name and to be able to see who the judgment had benefited. On the day of the judgment, there were around 30 young people in court to hear the judgment.[223] The presence of the children outside and in court was primarily aimed at generating media coverage[224] and ensuring a sense of ownership of the outcome of the process by the children and young people.

This is an example of CRSL-related advocacy that gave affect the rights of the children involved in the extra-legal campaign surrounding the CRSL to freedom of expression (Article 13 UNCRC) and have their views respected (Article 12(1) UNCRC).

Where litigation forms part of, or relates to, a broader political campaign, it may serve as a key hook for advocacy beyond the courts. Such advocacy has involved actions or campaigns targeted at parliamentarians and government decision-makers. These have ranged from pickets, petitions and marches[225] to seeking direct support on CRSL-related issues from individual parliamentarians and political parties.[226]

The importance of political advocacy has been evident in a number of CRSL cases, including several that have not ultimately resulted in a positive judicial outcome. One interviewee, for example, highlighted a campaign launched on the steps of the court as judgment was handed down which 'was spectacularly successful off the back of failed litigation' and ultimately resulted in a change in the political approach on the issue being litigated. [227]

222 *R (On the application of Tigere)* (n 20).
223 Chrisann Jarrett speaking in Just for Kids Law, 'Communications and Campaigns around Litigation' (17 May 2018) (04:20) <https://www.youtube.com/watch?v=cBeiyspHvQ8> accessed 5 July 2022.
224 Lisa Vanhala, 'Case Study of Just for Kids Law's Strategic Intervention in the UK Supreme Court. R (Tigere) v Secretary of State for Business, Innovation and Skills.' (Just for Kids Law, 2017) 17.
225 See, e.g., the work of Equal Education in South Africa on school infrastructure: 'School Infrastructure' (Equaleducation.org.za, 2022) <https://equaleducation.org.za/campaigns/school-infrastructure/> accessed 5 July 2022.
226 OCY2 (10 February 2022).
227 OCP1 (n 59).

CHANGING HEARTS AND MINDS: CAMPAIGNING AROUND A CLIMATE CHANGE LAWSUIT

This CRSL was brought following a longer-standing campaign focused on climate change and oil production in Norway. In 2016, the debate in Norway on the production of oil and gas and climate change 'was in a really bad place and we had to do something new – something to shake things up'.[228] When the Minister of Petroleum and issued 10 new licences by Royal Decree for drilling further North in the North Sea than ever before, Natur og Ungdom (Young Friends of the Earth Norway), a membership organisation for children and youth aged between 13–25, and Greenpeace launched a constitutional law action arguing that the issuing of the licences violated Article 112[229] and various human rights provisions of the Norwegian constitution. They lost at the District Court, the Court of Appeal and the Supreme Court. According to the Deputy Chair of Nature and Youth, 'it was heart-breaking to lose. But when we started it all, we didn't actually think we would win … we did it because we had to start a new momentum and to get the debate back to our premises and not the premises of the oil lobbyists, or their companies and such. And in that part we really succeeded'.[230]

Natur og Ungdom created a whole ground campaign, mobilising lots of different groups of people and creating a way for 'everyone' to become engaged in what was a technical and political issue. They did so through different sorts of festivals, demonstrations and debates, art projects and talks at school all across Norway.

A lot of different organisations and individuals became involved in the broader campaign: 'they weren't part of the plaintiffs but they were part of the campaign'. According to the Deputy Chair of Natur og Ungdom, '[now politicians] can't talk about climate mitigation policies without mentioning Norwegian oil'.[231]

Certainly, this was a key issue in the 2021 Norwegian elections, albeit that a key motivation for this was a UN report on climate change which was published in August,[232] the month before the election. While a follow-on action has now been brought to the European Court of Human Rights,[233] thus far, this instance of child and young person-driven CRSL – in the views of at least some of those involved in the litigation – has been more important in terms of the extra-legal campaign it gave rise to than the specific legal outcome in the Norwegian courts.[234]

This example illustrates the fact that it is not a condition of child rights-consistent CRSL that it necessarily results in a successful judicial outcome. As long as the children involved in the litigation have a clear understanding of the prospects of the litigation (both negative and positive), and their views have been taken into account in decision-making processes around the litigation and extra-legal advocacy, then that practice can be viewed as child rights-consistent.

228 Lea Nesheim, Deputy Chair, Natur og Ungdom (Young Friends of the Earth Norway), on itigation and advocacy focused on preventing the Norwegian government from issuing exploratory Arctic drilling permits (Presentation at the ACRiSL First Network Event: Current Issues in Child Rights Strategic Litigation (CRSL), 16 July 2021).

229 Article 112 of the Norwegian Constitution 1841 (Grl § 112) provides that: 'Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well. In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out. The authorities of the state shall take measures for the implementation of these principles.'

230 Nesheim (n 228).

231 ibid.

232 See, e.g., Richard Milne, 'Norway's Oil Rises to Top of Election Agenda as Climate Fears Grow' *Financial Times* (2021) <https://www.ft.com/content/1e2e6665-112b-4317-bdf5-366a915b15c6> accessed 5 July 2022.

233 *Greenpeace Nordic & Ors v Norway* App no 34068/21 (ECtHR, 16 December 2021).

234 The case has now been brought to the Strasbourg Court. While the six individual applicants are over 18, Natur og Ungdom is an institutional applicant.

CRSL-related campaigning can also contribute to the development of a community of change-makers who can work to ensure that any 'gaps' left by the litigation if the decision (and change) it results in proves to be narrow.[235] Indeed, one young person with lived experience of CRSL-related campaigning, stressed adult-child collaboration in terms of extra-legal advocacy around CRSL meant that strategic litigation could enable 'intergenerational connectivities'[236] to advance broader political goals. As such, while Chapter 5 made clear that the existence of a pre-existing movement can serve as a factor in the bringing of CRSL, CRSL can itself also serve as the basis for the development of a broader movement or political campaign.

The study made clear that a key part of successful extra-legal campaigning activity around CRSL is partnership work with NGOs, fellow litigants and other actors working on the issue at the heart of the CRSL (or related issues). This finding is unsurprising given the stress placed by interviewees on the importance of networks and collaboration in the context of the operationalisation of litigation itself (see Section 6.10).

One interviewee, speaking about litigation focused on ensuring sibling involvement in hearings directing where children might reside and with whom they may have contact, stressed the importance of collaborative action to achieving the desired legal reform. While the legal case was ultimately unsuccessful before the highest national court, the law changed (and indeed had done so to some degree during the lifetime of the case), with extensive engagement between the government, the litigators and other partners concerned about the issue. The interviewee stated:

> **The bit that I've not talked about – which we think was really, really important to get to that engagement that we had with the government to try to solve the issue – was that we had created a whole network of people talking about the issue and a coalition of organisations that were working with us to garner support politically and for other organisations understanding the issue.[237]**

Another interviewee stressed the fundamental importance of a public campaign by civil society organisations around the issue of migration detention in terms of driving political change where the courts had found against the litigants. In this instance, the litigating organisation deferred to the expertise and experience of the campaign leaders, including modalities of action and the decision to have the campaign 'under a neutral banner, not branded by any of our organisations that anyone can get behind anywhere in the country'. [238] The interviewee noted that, 'we're good at strategic litigation and good advocacy, not good at campaigning'.[239]

235 Jarrett (n 105) [31:18–31:40]. For more on 'We Belong', the migrant youth-led organisation and movement that developed around and following the Tigere case (n 20), see 'We Belong' (*Webelong.org.uk*) <https://www.webelong.org.uk/> accessed 5 July 2022.
236 ibid [29:55].
237 EUP1 (n 66).
238 OCP1 (n 59).
239 ibid.

One area of particular importance with regard to CRSL-related partnerships in the context of campaigning was linkage with child/youth-led or driven movements. This was a repeated theme in both interviews and broader literature related to climate change.[240]

8.3 MEDIA WORK

Although there are multiple forms of possible extra-legal advocacy in the context of CRSL, an issue that was raised repeatedly in interviews and other interactions with children, practitioners and other stakeholders was media work. Indeed, a number of interviewees noted that the media was particularly interested in litigation focused on children and their claims when compared to other strategic litigation efforts.[241] In the words of one practitioner, 'the media could not get enough of our clients'.[242] While one young person involved CRSL stressed that 'the media will eat up a whole bunch of 16- and 17-year-olds taking the government to court.'[243]

Media-related advocacy and other work raises a range of child rights-related issues – from the right to be heard (Article 12(1) UNCRC), to freedom of expression (Article 13 UNCRC) and to information (Article 17 UNCRC) to more protection-oriented rights such as the right to privacy (Article 16 UNCRC) and the right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (Articles 19 and 36 UNCRC). The objectives and concerns underpinning these rights (including respecting child agency and ensuring child protection) have shaped the approach of litigators and other CRSL stakeholders in their efforts to design media-related strategies in the CRSL context.

Some practitioners, children and young people interviewed had deliberately sought to engage with the media and to acquire public attention with regard to their CRSL efforts, leading to clear concrete benefits in some instances. One young person interviewee spoke about their youth movement's highly impactful extra-legal advocacy related to a case that, at the time of interview, had lost before the lower courts and was due to be heard by the national Supreme Court:

> **The publicity thing has been huge … That has been incredibly helpful both for raising awareness generally and for getting the attention of the government. We managed to get it as a question in one of the televised debates in elections last year … We've also managed to get the government to set up an independent electoral review which is looking at [the CRSL issue]. It's probably something that wouldn't have happened if we hadn't got the publicity … we got through the court case.[244]**

240 EUP6 (n 79); OCP2 (n 71).
241 See, e.g., AMP2 (n 60).
242 McLean (n 164) [10:08].
243 Liam Barnes, Make It 16 Aotearoa, (Presentation at the ACRISL Third Network Event on Current Issues in Child Rights Strategic Litigation: Engaging with Children and Young People, 5 April 2022 [18:50]).
244 OCY1 (n 102).

Another interviewee involved with the same movement and litigation stressed the link between media attention and political engagement: 'just in general getting that public opinion up, especially through media attention has been incredibly important because that's who the major parties will listen to in the end … the general public'.[245]

However, for others, their engagement and decision-making around the media was reactive. That is, it resulted from a situation in which the media had shown interest in the story, leading to those involved in CRSL developing an approach in response.

There is also the risk of the media being employed by powerful institutions or organisations concerned about the potential impact of CRSL, resulting in negative media stories aimed at discrediting the litigation or litigants. This was a particular issue for a litigant whose CRSL efforts challenged the interests of business entities in the education sphere:

They used media engagement and came up with a smear campaign to paint us in a bad light. You then start to defend your name and your organisation. Then the victims also start to question or doubt your capability to be able to push for some of those issues.[246]

While some CRSL practitioners engaged regularly with media, others were less enthusiastic about doing so:

We do engage with media, but we're very reluctant to encourage kids to talk to the media or to participate unless they want to. But sometimes, a kid with their family will be interested in that and then we have a journalist that we talk to. But that's it. It's pretty rare that we involve kids in media outreach just because we don't want to expose them to that attention unnecessarily.[247]

The research demonstrated that the factors affecting CRSL actor decision-making around media involvement were strongly context-specific. Several interviewees made clear that the risks and opportunities of media attention varied depending on the thematic issue: 'most of our cases have to do with children and education. And the children, they are not really criticised, I would say, as they would be in a case on criminal justice'.[248] One practitioner, working on climate change CRSL in Australia stressed that this area was very divisive in the national context. that the different media outlets treat the issue very differently and 'that there can be a lot of vitriol out there'[249] – something that had to be built into plans around media work related to the litigation.

245 OCY2 (n 226).
246 AFP2 (n 57).
247 AMP1 (n 70).
248 AMP5 (n 69).
249 McLean (n 164) [09:58].

Nor were the risks of the impact of media attention likely to be the same for all children involved in CRSL. One young person made clear that:

> **I personally didn't feel like it affected me. You might talk to another one of my colleagues who may have felt that like it affected her. But I also don't read the comments. I think that that's just something that's played well in my favour … And, yeah, she read the comments, and it really did affect her quite a fair bit where she had to, you know, people really had to try and encourage her.**[250]

While CRSL actors were concerned with ensuring child participation and effective child agency (or child and family agency) in the context of CRSL-related media-related activity, there was also evident appreciation on the part of those interviewed of to the need to weigh up the potential benefits and risks posed by such activity prior to deciding to carry it out. In the words of one practitioner:

> **Even where you invite the media to cover some of these cases, you ensure that this particular issue is in the best interest of the child.'**

8.3.1 Protection of children from harmful media attention

Practitioners outlined a range of examples of different ways in which they had sought to protect children from harmful media attention. Some of these focused on media attention surrounding the court proceedings themselves, with measures adopted including seeking anonymity for their clients and orders barring the media from hearings. Indeed, one notable successful CRSL case from South Africa entailed a challenge to the constitutionality of domestic legislation to the extent that it did not protect the identity of children as victims of crimes in criminal proceedings.[251] Amongst other things, this was found to be in an unconstitutional limitation on the best interests of children, as well as their rights to privacy and dignity. Other interviewees took steps to blur images of children that formed part of the evidence in CRSL, stressing that 'we really take seriously the exposure of children's images in our legal work'.[252]

250 EUY1 (n 143).
251 *Centre for Child Law and Others v Media 24 Limited and Others* (CCT261/18) [2019] ZACC 46.
252 AMP4 (n 75).

One interviewee spoke about getting an article, written by one of the children in a youth justice centre (the establishment of which at an adult high security prison was the subject of the CRSL in question) placed 'in the conservative tabloid press explaining the impact on him and why he didn't want to be in [name of prison]' ... the child himself 'was really keen to tell in his own words what was going on'

Litigators interviewed for the study displayed caution about exposing children by placing them at the forefront of particular types of cases. In an example drawn from the literature, certain provisions of the South African Sexual offences Act had criminalised consensual sexual activity between adolescents who both fell between the ages of 12 and 16 years. Due to the nature of the case managing the media and public discourse in the case was challenging. When the High Court declared the provision unconstitutional the media ran the story and outcome of the case with headlines such as the "kissing clause" and "let kids bonk, judge rules".[253] This demonstrates that the litigators had made a wise choice when they decided to have child rights organisations as the applicants, rather than individuals. The stories of the real life experiences of children were nevertheless told through affidavits, shielding identity.[254]

Nor was the lack of provision of an image/identity a bar to effective media engagement in a CRSL context. One interviewee spoke about getting an article, written by one of the children in a youth justice centre (the establishment of which at an adult high security prison was the subject of the CRSL in question) placed 'in the conservative tabloid press explaining the impact on him and why he didn't want to be in [name of prison]'.[255] The article was published under a pseudonym and the child's identity was protected under sub-national state law due to his age. As the child was detained, the practitioners spoke to him on the phone, wrote it up and then travelled to the detention centre to give it to him to check. The interviewee described the process as 'very controlled' and 'low risk in terms of like we didn't have to do training [as would have been the case for interviews], we didn't have to put him in front of a live camera or tv or anything like that'.[256]

In this instance, the article was something that the practitioners had identified as something they thought would be helpful but the child himself 'was really keen to tell in his own words what was going on'[257] with the practitioners 'trying to get the voices of the kids in their own words into the public domain if they wanted to do that'.[258]

Here, the practitioners took a range of necessary steps to ensure that the author of the piece enjoyed their rights to privacy and protection while making sure that their voice was heard.

253 Centre for Child Law (n 150) 40.
254 Delany (n 119) 64.
255 OCP1 (n 59).
256 ibid.
257 ibid.
258 ibid.

With regard to the issue of anonymity as a means of protecting children, the project research made clear that what is required, or indeed desirable, in terms of managing concerns about media attention for children may well change during the course of the CRSL process. For instance, one young person interviewed made clear that their desire not to be identified in a litigation context changed over time.[259]

Linked to the point above with regard to CRSL drawing significant media attention, one practitioner flagged that very high levels of media interest in their clients and stressed that 'that in itself creates a potential problem because we tried to be gatekeepers and stand between the media and our clients and try to make sure all requests come through us so we can judge the capacity of our clients.' [260] However, even with those efforts,

> **There's always issues of burn-out. There's always issues of critical media, trolling and the like.[261]**

These risks and their possible implications for children and their rights enjoyment need to be borne in mind by practitioners and when considering CRSL in the digital age.

The project research made clear that that the potential harm posed to children as a result of media attention was not just a result of hostile media reporting (i.e., work on the part of journalists) but could also arise indirectly through children reading responses to media stories, whether comments on articles (see above) or on social media. One child litigant, who had received media training both before and during the court case, flagged that 'from the perspective of the media, and as well as the public actually, a lot of the responses we got were quite negative. And I know for a lot of the litigants as well as for myself it was quite shocking as well as disappointing to see people doing that and sending private messages in our litigants [*sic.*]'[262] or 'badmouthing some of us or talking about us in a way we would never really thought would come from this. And that as 16 year olds we never thought that anyone would do in a public media place really'[263]. In this instance, the litigants leaned on each other and their lawyers and 'sharing it as a community'.

And I know for a lot of the litigants as well as for myself it was quite shocking as well as disappointing to see people doing that and sending private messages in our litigants.

259 AFY1 (n 212).
260 McLean (n 164)7 [10:10].
261 ibid.
262 Bella Burgemeister, youth litigant, on their litigation before the Australian courts focused on coal mine licensing (Presentation at ACRiSL Third Network Event: Engaging with Children and Young People in Child Rights Strategic Litigation (CRSL), 5 April 2022, [11:20]).
263 ibid [11:47].

A key finding of the project is that 'forewarned is forearmed' when it comes to media work, with practitioners and young people previously involved in CRSL stressing the importance of support for children where CRSL is intended, or is likely, to attract media attention. We turn to this now.

8.3.2 Decision-making and support around child engagement with the media

Many of practitioners interviewed stressed the importance that engagement with the media should only occur where the child chose to do so[264] – an approach consistent with giving effect to the child's right to have their views respected in a CRSL context (Article 12(1) UNCRC).

A range of different strategies were employed by practitioners in order to ensure that child litigants and other children associated with the CRSL were equipped to deal with media attention. There was strong practitioner emphasis on training for children involved in CRSL. Such training was often delivered by journalists or communications experts,[265] sometimes with particular thematic expertise (e.g., climate change)[266] rather than practitioners or other actors working with children in the day-to-day litigation context. A number of (generally larger and longer-established) organisations had a communications director or team that worked with the children. Several youth-led movements and organisations had young adults working in the press and communications context leading to 'intergenerational bridging' between children and an older adult audience. Some CRSL practitioners collaborated with external partners (both national and international) with more extensive media or communications experience, including such work with children. [267] Others supported children (and often their parents) by placing them in contact with 'friendly journalists'.[268] Several interviewees spoke of children (and those supporting them) benefitting from the growing number of youth advocacy trainings in different jurisdictions, particularly in the climate justice context.[269]

264 See, e.g., AMP1 (n 70) and OCP2 (n 71).
265 EUP5 (n 67).
266 OCP2 (n 71).
267 See, e.g., EUP6 (n 79) re UNICEF; AMP5 (n 69) re UNICEF.
268 See, e.g., EUP3 (n 81).
269 EUP5 (n 67); OCP2 (n 71).

Media trainings took a range of different forms (from in-person to virtual) and covered a diversity of issues but a representative sets of elements, included:

Messaging,

What to say and what not to say, how to talk to journalist, what to do if a journalist approaches you and you don't want to talk to them,

What to do if you get a nasty question,

How to phrase your answers in a way that projects confidence and gets the message across.'[270]

Beyond training, practitioners and others had developed a series of resources to support children in media work. These included a simple set of key points or messages in the form of a one or two-page document.[271] Another tool employed was a Google doc where the children could add any questions they thought of or questions that they had received on which they wanted more detail to enable them to answer effectively.[272] In its extensive work focused on supporting children and young people in relation to the broader advocacy around the *Tigere* case, Just for Kids Law developed so-called 'defensive briefings' – brief responses developed by anticipating what people might say if they wanted to attack the campaign.[273]

Unsurprisingly, given the earlier discussion in Section 6.8, messaging apps such as Signal and WhatsApp have played an important role in several more recent, developed media-related advocacy efforts involving children. A number of practitioners have used Signal or WhatsApp to communicate around media advocacy with children involved in litigation (and their parents).[274] The adeptness of messaging apps and the opportunities they afford for quick and easy communication was particularly significant in the context of media engagement where there could be a need for answers very quickly. One organisation had set up a specific 'media' Signal group for the child litigants and media advisors. The children's parents were invited to join this group also albeit that parental active involvement in the chat was very low. Their inclusion in the group meant, however, that parents were aware of discussions around media-related advocacy.[275]

It was clear that the form of media engagement varied significantly depending on the nature and aims of the litigation. For instance, in an instance involving transnational CRSL, the media marketing team internal to the law firm in question worked in conjunction with media outlets in the regions where the petitioners came from 'because it was so important for [the children], that what they were doing was amplified to the broader communities'.[276]

270 OCP2 (n 71).
271 EUP5 (n 67).
272 ibid.
273 For more, see Lisa Vanhala, Shauneen Lambe and Rachel Knowles, '"Let Us Learn": Legal Mobilization for the Rights of Young Migrants to Access Student Loans in the United Kingdom' (2018) 10(3) J. Hum. Rights Pract. 439, 453.
274 OCP2 (n 71); EUP5 (n 67).
275 OCP2 (n 71).
276 EUP6 (n 79).

The impact of such preparation was potentially very significant in terms of empowering children in the context of engagement with the media. One young person interviewed made clear that they had not found that the media attention affected them personally, 'just because, again, I think the comms team did such a wonderful job of really briefing us. We had training on key messages, training on how to answer questions'.[277] It was also clear that children and young people who had been involved in CRSL greatly appreciated the skills that they had got through media training: 'which I thought was really useful. Especially going into such a complicated process about what we were allowed to say and how we could say it in a way that was not going to get us into trouble in any sort of areas – which was good for me because I was very confused about that and I know a lot of the other litigants were as well'.[278]

However, even where clear and careful support is provided to child litigants, this will not always eliminate the risk of their being impacted on negatively by media attention (see Section 8.3.2),[279] something that needs to be factored into decision-making around media-related advocacy if it is to be child rights-consistent.

8.4 COMMUNICATION ABOUT CHILD LITIGANTS AND THEIR CASES FOR EXTERNAL AUDIENCES

The question of children's control over how they and their cases are presented to external audiences was a key issue raised in the context of extra-legal CRSL activities. CRSL practice in this area has particularly significant implications for children's rights to be heard and freedom of expression (Articles 12 and 13 UNCRC). Interviews made clear, that, depending on the approach adopted, it can either be greatly supportive of or undermining of children's rights.

A number of practitioners and children involved in CRSL stressed the importance of story-telling as a way of supporting those involved in litigation.280 In some instances, this involved working with children and young people involved in or affected by the litigation to identify 'spokespeople'. In doing so, Just for Kids Law, for instance, ensured that such spokespeople received particularly intense training and support.[281]

277 EUY1 (n 143).
278 Burgemeister (n 263) [11:00].
279 For more on dealing with the challenges of negative media-related backlash, see the work done by Just For Kids detailed in Vanhala, Lambe and Knowles (n 274) 452.
280 OCP1 (n 59).
281 See Vanhala, Lambe and Knowles (n 274).

A point raised by several interviewees was children's desire to control their own story in the communications around CRSL.[282] One interviewee described reading through press releases with their client:

> **[w]e always read what we were going to say to [client] because that was important. And we asked him if he wanted to be quoted. And he said no. And he said I'm happy for you to say what you're planning on doing. So yes, we absolutely told him what was coming and [asked] was he happy for us to use it more widely around the issue? And he was happy with that and he didn't want to be quoted himself.[283]**

Another, already-discussed, important aspect of this work was developing a share of set messages to used when engaging with different external audiences. (See above Section 8.3.2).

In a number of instances, child litigants were themselves active on social media, reinforcing the importance that they be supplied with accurate, clear information from practitioners about legal aspects of the case so that these could be reflected in the children's own communication and comments in relation to the CRSL, thereby supporting children's effective exercise of their right to freedom of expression (Article 13 UNCRC). It was clear from several interviews that the fact that child litigants were, in the words of one practitioner, 'very media-savvy'[284] did not mean that practitioners did not appreciate the need to ensure they were provided with support and training in dealing with external audiences.[285] Furthermore, given the potential for a diversity of perspectives on the issues at play both before the courts and beyond in relation to the aims of CRSL, and the risk of confusion and/or divergences in messaging, the identification of key messages (see Section 8.3.2 above) served to support children in their efforts to communicate around the case.

There were also significant efforts made to ensure that children's voices were at the forefront of communication around CRSL related to them. An important example of this was the way in which several practitioners worked to support children in producing opinion pieces or editorials aimed at the media – whether under their own name or anonymously.

What was clear from interviews and other interactions with CRSL actors in relation to communication (and indeed media work and political advocacy as well) was that practitioners were very much learning 'on the job'. The research suggests that there was a particularly sharp learning curve for those new to working with children, but there was no instance in which practitioners had not had to develop and refine their approach as their litigation progressed to some degree. This adaptive approach – responding both to the concerns and needs of child clients, as well as external factors and challenges – reflects a commendably flexible and imaginative approach.

282 OCP1 (n 59).
283 EUP1 (n 66).
284 OCP2 (n 71).
285 For more on child's 'communication competence' in the climate change litigation context, see Daly (n 116).

LEARNING FROM MISTAKES

In this instance, the practitioners interviewed had been working with a particular fundraiser in order to raise funds in relation to the case. A key part of this work was to develop a campaign related to an online fundraiser mechanism. The fundraiser had a particular style of communication focusing on the dramatic, 'human interest' element of the story based on research indicating which messages resonate with different audiences for the purposes of fund-raising – a style which one of the parents of the child litigants described as 'a sort of tabloidy approach'.[286]

The fundraiser produced a series of draft communications around the campaign, which were passed on by the practitioners to the children involved in CRSL and their families. This took place during a highly pressurised period in the litigation itself, and the practitioners were unable to give the time need to talk this through with the complainants and 'we were unconsciously sort of putting pressure on [the children and families]'.[287] The children and their families pushed back on the messaging, making clear 'they had their red lines and they basically told us, you know, these are our red lines, and if that doesn't work for [the fundraiser], go find money somewhere else. But we're not bending'.[288]

There was then a further interaction where a representative of the fundraiser worked directly with the group of children and families and asked them to draft their own paragraph on some key messages in line with what the fundraiser had in mind. However, having sent that in, what was returned by the fundraiser was almost exactly the same as the original draft 'and that, just like, that was meltdown moment'.[289] The children and their parents became concerned the practitioners were colluding with the fundraiser:

'what [the children and their families] told us was that we had changed' – prior to that point, 'they said that we were always making sure to get their authentic voice out'.[290]

The practitioners realised the seriousness of the situation and that the clients 'were absolutely right'.[291] They 'apologised profusely' to them and 'just put our hands up and we genuinely reflected on it and realised we'd got it wrong and we'd got it wrong at several points we kept on making the same mistake'.[292] A key part of this was their mediation between the fundraiser and their clients so 'we decided with their permission that we would step out from the middle rather than us, you know, trying to find the meeting point between two sides'.[293] Indeed, the practitioners noted that one of the things that emerged very clearly from this was that the children and their families 'were well able to stand up for themselves and we thought it would be a good idea that they convey their views to [the fundraiser]'.[294] As a result, senior people at the fund-raiser were brought into contact with the family. The fund-raiser subsequently told the practitioners that 'the whole experience had changed how they will do fundraising forever'.[295] The draft that was ultimately issues was far closer to that wanted by the children and their families. Thus, the failure to pay adequate attention to, and accord adequate weight to the views and preferences of the children and their families in this case resulted in a crisis for the litigation but also resulted in wide-ranging learning.

This was an example of where an interviewee saw a clear value-added to potentially framing future work around children's rights: 'what we ultimately got was a lesson in certain aspects of child rights from a group of children and young adults'.[296]

286 EUP5 (n 67).
287 ibid.
288 ibid.
289 ibid.
290 ibid.
291 ibid.
292 ibid.
293 ibid.
294 ibid.
295 ibid.
296 ibid.

8.5 CONCLUSION

This chapter has focused on extra-legal advocacy (political advocacy and campaigning, media work and communications related to CRSL. It has made clear the challenges faced by practitioners, particularly in relation to ensuring child agency and autonomy in relation to these activities while simultaneously ensuring that children are not exposed to avoidable harm. In all three of these areas, interviewees demonstrated an understanding of the importance of ensuring that children's voices and views were given effect to, in line with Articles 12(1) and 13 UNCRC, while ensuring that the privacy of children was maximised as needed to ensure that they were not subjected to negative impacts. These latter concerns are consistent with children's their rights to privacy (Article 16(1) UNCRC) and protection from physical and mental violence or other harm (Article 19 UNCRC).

Interviewees and the research more broadly provided examples of advocacy and campaigning aimed at diverse audiences, including politicians and the general public. Those practitioners who had involved, or collaborated with, children in advocacy, showed a strong concern with ensuring that children's voices and views play a central part in informing and shaping such work (consistent with Articles 12 and 13 UNCRC). Children and young people interviewed stressed the role that such advocacy had played in terms of advancing children's goals with regard to the CRSL even (and indeed particularly) where such litigation was not successful before the courts.

With regard to media work, interviewees demonstrated awareness of both the potential opportunities and risks of such work, particularly where children were involved directly. While rights language was not necessarily used by interviewees, the issues raised (and the methods used to address them) were very much in line with children's rights related to protection, privacy and voice. Practitioners flagged the key role of training, the development of information and other resources such as 'defensive briefings', as well as the potential of digital technology communication platforms and messaging apps to ensure effective child involvement in media work. Children and young people themselves highlighted the important role of these efforts. Interestingly, the research made clear that training and child engagement around media work was often carried out by partners rather than litigators. As such, it is evident that child rights-consistent CRSL practice does not require litigators to become experts in media (or indeed advocacy or communications); rather it may simply involve the identification of, and effective collaboration with, external partners to ensure that children are adequately supported in such work. With regard to communications aimed at external audiences, interviewees flagged a number of different strategies (story-telling, the development of key messages and support to children when dealing with external audiences in the context of social media) that served both to empower and protect children. A key finding of the research – which bodes well for the child rights consistency of future CRSL practice in this area – was the recognition on the part of CRSL practitioners of the need to be able to respond in an agile way to new challenges.

These findings, as well as the rights framework itself, serve as the basis for identifying key principles that should be borne in mind by CRSL actors when working on extra-legal advocacy (political campaigning, media work and communications). These include:

children's right to privacy should be respected at all times, which means the representations of practitioners to the court should take account of the child's right to privacy and seek to prevent reporting of the child's name or image or identity, unless the child specifically wants to be identified;

CRSL practitioners should be attentive to the risks of harmful media attention, ensure that children are aware of what such risks are, and must act to mitigate these to the greatest extent possible;

where media forms part of the CRSL-related advocacy, children should be provided with the support and training needed to engage with the media effectively (should they choose to do so);

children's views about how they/their cases should be presented to external audiences (including in publicity materials) should be given effect to by CRSL practitioners. This will involve working to ensure that partners/fundraisers/funders accord proper respect to children's views in their work around the CRSL.

CONCLUSION

KEY FINDINGS

This report has focused on child rights-consistent CRSL practice. In doing so, it has engaged with the theory and practice of CRSL. In addition to scholarly research, it has drawn directly on CRSL experience from 6 continents to assess the extent to which CRSL actors regard children's rights as a frame for their practice. It has demonstrated that while there is awareness of the potential implications of child rights for CRSL practice on the part of some of those working in this area, there are still relatively few CRSL actors who consciously use children's rights as a frame to shape decision-making and other elements of their work. There is, however, a large body of child rights-consistent CRSL practice from across the globe, even if it is not explicitly conceptualised in rights terms by those carrying it out.

The research has made clear that those CRSL actors who worked with children in the context of follow-up and extra-legal advocacy (political advocacy and other campaigning, media and communications work) were particularly aware of the need to ensure that their practice was aligned to child rights principles. Notably, there was generally less conscious integration of children's rights into CRSL practitioner efforts around scoping, planning, design and operationalisation of CRSL. While to some degree this is unsurprising given the technical and strategic challenges faced by litigators in relation to the litigation process, it was clear from the research that there is greater scope for child rights-consistent practice at these stages of CRSL than is currently the norm. CRSL is a rapidly moving field and it is clear that there is growing practitioner understanding of the challenges and opportunities it poses to children's rights enjoyment.

THE POTENTIAL OF PARTICIPATION

The key principles outlined in this report reflect the study's conclusions with regard to how CRSL actors can engage with the challenge of purposefully integrating children's rights into their practice. The reader may well be struck by the fact that many of these principles focus on child participation and engagement in CRSL decision-making. It was evident from the interviews that while many practitioners were familiar with issues relating to protection and privacy, there was considerably less CRSL practitioner experience in, and in some cases less comfort with, involvement of children in decision-making around the CRSL process.

As such, many of the key rights 'gaps' in terms of CRSL practice and the main opportunities for rendering such work more child rights-consistent centred on child participation and engagement.

Child rights-consistent practice does not require practitioners to become experts in child development, participation or protection. It does, however, require them where possible to look to those who do have that expertise in order to bring it to bear in their CRSL work with children.

This study does not suggest that child participation is appropriate in all aspects of CRSL work: sometimes it will be inappropriate, other times it may be impossible given the constraints within which practitioners operate. What is important is that there should be serious consideration given to how the children's rights to be heard, to freedom of expression and those rights necessary to ensure meaningful engagement of those rights (e.g., the right to information) can be accorded adequate attention within CRSL practice.

THE ROLE OF PARTNERS

The research also made clear that CRSL practitioners will often not be able to do everything needed to ensure their CRSL work is child rights-consistent on their own. As such, work with partners – where psychologists, social workers, media and communication experts, educators – may be very important for those seeking to advance their work in this area. Child rights-consistent practice does not require practitioners to become experts in child development, participation or protection. It does, however, require them where possible to look to those who do have that expertise in order to bring it to bear in their CRSL work with children.

A partnership-related issue that was raised in a small number of interviews but which was not addressed in great detail due to the study's focus on national level CRSL was the potential disconnects where cases are brought as part of a collaboration effort on the part of both international and local CRSL actors.[297] In these instances, while there may be strong concern with ensuring child rights-consistent practice on the part of one partner, it may not be shared by both. Where it is not, there is a risk that only some aspects of the CRSL will be child rights-consistent. This is an area that merits further research in future given the growing role of regional and international CRSL that is rooted in domestic work (see Chapter 3).

297 EUP7 (n 68).

A GAP: THE ROLE OF PARENTS

One area that was not explored in depth in the interviews was potential tensions between parental and child interests in terms of CRSL practice. This was despite the fact that parental consent is required in many instances for such action in the first instance, that parents serve as key gatekeepers between children and practitioners and that, in the case of younger children, parents may be the key articulators of their children's claims in CRSL. There is also the issue of parents and other adults potentially deploying child-centred CRSL to give effect to adult agendas. (See Section 5.2) There will undoubtedly be instances in which parental and children's interests potentially diverge around CRSL and practitioners will need to remain focused on the interests and views of children if their work is to be child rights-consistent. Again, this is an area that merits future attention.

FINAL THOUGHTS

CRSL practice is at a crucial juncture. It has expanded hugely in scope and ambition over the last thirty years. Given the enormous contribution made by CRSL in terms of securing the achievement of children's rights by a growing range of litigation targets, it is timely and important for litigators to look to the role that child rights under the UNCRC can and should play with regard to their own practice. This study has made clear the vibrant and creative past and present of CRSL work. There is no question that litigators will rise to this challenge.

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ANNEXE 1

KEY PRINCIPLES FOR CHILD RIGHTS-CONSISTENT CHILD RIGHTS STRATEGIC LITIGATION PRACTICE

Key principles that should be borne in mind by CRSL actors when carrying out work around **the scoping, planning and design of CRSL:**

- choice of thematic areas and long-term strategic planning are relevant to child rights-consistent practice because they ensure a child rights perspective is dominant in the work over time;
- where a decision is taken not to involve children in a particular case, this should be decided following an assessment of the risks and benefits to children's rights;
- where there are children involved in a case, they should be engaged in identifying the rights issue(s) to be litigated in the case, the goals to be pursued by the litigation, and in the whole strategic planning of litigation;
- children should be provided with the information necessary to understand and weigh up the opportunities/risks involved in litigation, from the outset;
- CRSL litigators should ensure that their litigation work is always in children's best interests (which also requires explanations to children and consideration of their views);
- litigators should be attentive to how CRSL work might impact on children's policy/advocacy agendas.

Key principles that should be borne in mind by CRSL actors when **operationalising CRSL:**

agenda-setting and characterisation of CRSL should take into account children's rights to privacy and physical and psychological recovery;

where children are directly involved in the case, they should be engaged in the process of agenda-setting and characterisation of the case;

lawyers and others working with children on CRSL should engage with and effectively communicate with those children throughout the process, including through the use of language and communication technologies that are user-friendly for children;

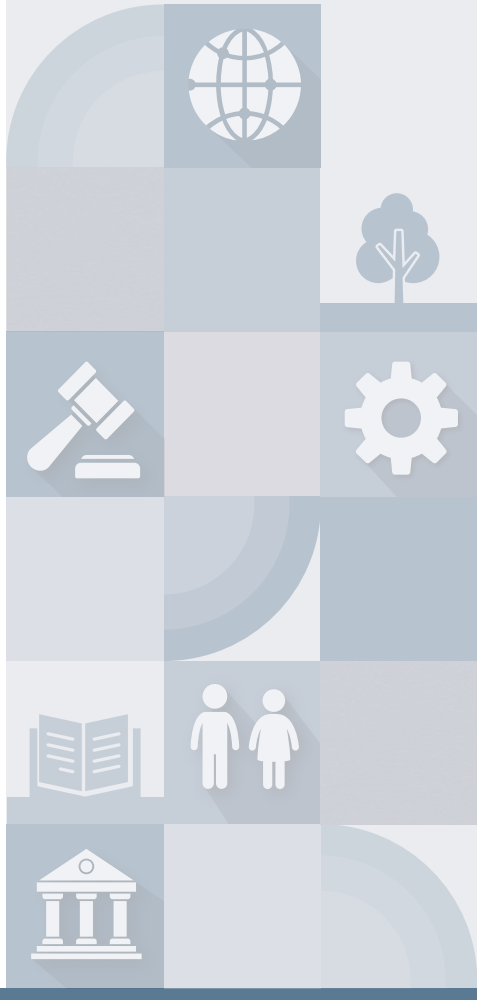
remedies should be in line with the views and interests of the children affected, and children should be involved in the development of remedies as far as is possible;

settlement of cases should be done in a manner that considers the best interests of the child and in consultation with the children affected;

children should be supported to call a halt to litigation at any point that they wish to;

children should be made aware of possible outcomes and what those outcomes might mean in advance of judicial decisions so as to manage their expectations;

if litigation is protracted, as children grow older and become more mature, their views in relation to the litigation should be accorded increasing weight.



Key principles that should be borne in mind by CRSL actors when working on **follow-up to CRSL, including implementation:**

Lawyers and others working with children on CRSL must make sure that the children fully understand the judgments/rulings/ decisions made.

Children must be informed of subsequent developments following the judgment/ruling/ decision.

Ongoing support must be provided to children where necessary following the conclusion of the CRSL. particularly where that litigation is unsuccessful or only partially successful.

Children should be invited to be involved in follow-up activities to judgments/ rulings/decisions.

Key principles that should be borne in mind by CRSL actors when working on **extra-legal advocacy (political campaigning, media work and communications):**

Children's right to privacy should be respected at all times, which means the representations of practitioners to the court should take account of the child's right to privacy and seek to prevent reporting of the child's name or image or identity, unless the child specifically wants to be identified.

CRSL practitioners should be attentive to the risks of harmful media attention, ensure that children are aware of what such risks are, and must act to mitigate these to the greatest extent possible.

Where media forms part of the CRSL-related advocacy, children should be provided with the support and training needed to engage with the media effectively (should they choose to do so).

Children's views about how they/their cases should be presented to external audiences (including in publicity materials) should be given effect to by CRSL practitioners. This will involve working to ensure that partners/fundraisers/funders accord proper respect to children's views in their work around the CRSL.

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