

Zurich University of Applied Sciences

**School of Management and Law**

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Bachelor's thesis

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**Countering Child Abuse at Home: Are Children  
sufficiently protected under International Chil-  
dren's Rights Law and Swiss Law?**

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## Management Summary

The United Nations Convention on the Rights of the Child (CRC) is the most widely ratified international law instrument. The CRC promises every child protection against violence, yet reports show that 3 in 4 children aged 2 to 4 years have repeatedly suffered physical punishment and/or psychological violence at the hands of parents and caregivers. This Bachelor's thesis investigates to what extent children are protected against abuse at home under the international and the Swiss legal framework and if there is a further need for action. The research focuses on the provisions of the CRC and their implementation by various actors, and respective norms of Swiss constitutional, criminal, and civil law as well as the jurisprudence of the Swiss Federal Supreme Court.

The results show that the Convention protects children from all forms of violence at home, however, without expressing an obligation to explicitly anchor this protection in domestic law. The CRC Committee solely emphasizes that corporal punishment by parents and caregivers, however light, is incompatible with the child's best interests and thus prohibited under the CRC. The State Party is required to take appropriate measures against child harm and establish mechanisms for the response to such harm. Despite conducting a periodic reporting process at the level of the CRC Committee, its recommendations toward States Parties to enhance their implementation of the CRC lack binding character and are thus challenging to enforce.

At the Swiss level, no similar code of children's rights exists. Nevertheless, the Constitution enshrines the right of children and young people to be afforded special protection, based on which legislative bodies have adopted respective laws. The Criminal Code punishes, i.a., perpetrators of acts of aggression that exceed what is accepted by social customs. The Swiss Federal Supreme Court, however, has not asserted an absolute prohibition of corporal punishment: The educational right of parents justifies acts of aggression insofar as they are not repeated and therefore not prosecuted *ex officio*. The lack of a legislative right to non-violent education has been heavily criticized by the CRC Committee as well as NGOs and led to unsuccessful parliamentary initiatives until such a right was finally accepted by the National Council in September 2021. This is a first step toward ensuring the physical integrity of children as guaranteed by the Constitution.

The Civil Code anchors the rights and duties of parents and caregivers toward their children, notably parental responsibility and the educational right of parents. For prevention rather than repression, it also sets forth a graduated set of child protection measures in case of parental misconduct, with parental responsibility being withdrawn as ultima ratio. Despite having sufficient laws, their enforcement remains difficult. There is a need for continuous educational training for those involved in child protection and more widespread awareness campaigns. Lastly, the prevalent focus on civil law measures rather than criminal liability needs to be rethought to prevent further child harm from reoccurring.

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## v. List of Abbreviations

AJP	Aktuelle Juristische Praxis
ARC	Action for the Rights of Children
art./arts.	article/s
BBl	Federal Gazette (German: Bundesblatt)
BGE	Decision/s of the Swiss Federal Supreme Court, official compilation (German: Bundesgerichtsentscheid/e, amtliche Sammlung)
BGer	Swiss Federal Supreme Court (German: Schweizerisches Bundesgericht)
BK	Berner Kommentar
BSK	Basler Kommentar
BV	Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101 (German: Bundesverfassung der Schweizerischen Eidgenossenschaft)
C	case
c.	consideration/s
ch.	chapter/s
cit.	cited
CRC	United Nations Convention on the Rights of the Child of 20 November 1989, SR 0.107
CRC Committee	Committee on the Rights of the Child
DCI	Defence for Children International
Diss.	dissertation
ed./eds.	editor/s
e.g.	for example (Latin: <i>exempli gratia</i> )
et seq./et seqq.	and following / and those following (Latin: <i>et sequens/sequentia</i> )
FamPra.ch	Die Praxis des Familienrechts
GC	General comment
HaKo	Handkommentar
i.a.	among other things (Latin: <i>inter alia</i> )
ICRIs	independent children's rights institutions
ICTs	Information and Communications Technologies

i.c.w.	in connection with (legal provisions)
i.e.	that is / in other words (Latin: id est)
KOKES	Konferenz für Kindes- und Erwachsenenschutz
lit.	letter (Latin: litera)
mn.	margin number/s
n	marginal note/s (in commentaries)
NGOs	Non-Governmental Organizations
NGO Group	NGO Group for the Convention on the Rights of the Child
NHRIs	national human rights institutions
no.	number
OFK	Orell Füssli Kommentar
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPIC	Optional Protocol to the Convention on the Rights of the Child on a communications procedure of 19 December 2011 (short: Optional Protocol No. 3)
para./paras.	paragraph/s
pp.	pages
SR	Systematic compilation of federal law (German: Systematische Sammlung des Bundesrechts)
StGB	Swiss Criminal Code of 21 December 1937, SR 311.0 (German: Schweizerisches Strafgesetzbuch)
UDHR	Universal Declaration of Human Rights of 10 December 1948
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNHRC/HRC	United Nations Human Rights Council
UNICEF	United Nations International Children's Emergency Fund
UPR	Universal Periodic Review
US	United States of America
v.	against (Latin: versus)
WHO	World Health Organization
ZBJV	Zeitschrift des bernischen Juristenvereins
ZGB	Swiss Civil Code of 10 December 1907, SR 210 (German: Schweizerisches Zivilgesetzbuch)

ZHAW

Zurich University of Applied Sciences

ZKE

Zeitschrift für Kindes- und Erwachsenenschutz

# 1 Introduction

## 1.1 Problem Statement

Every adult has fundamental rights. But so does the child. The 20<sup>th</sup> century marked a milestone in the history of children's rights. On 20 November 1989 (known as international children's rights day), the United Nations adopted the Convention on the Rights of the Child (hereinafter: CRC, or Convention) by unanimous vote. Since then, 197 States Parties have undertaken ratification. Solely the United States of America has signed, but not ratified the Convention. It remains by far not only the most widely but also the most swiftly ratified instrument in international law.<sup>1</sup> The CRC promises every child around the globe, i.a., the right to life and health, and it guarantees protection from violence. Yet, in many areas of the world, children are suffering from poverty, violence, war, and disease at this very moment. While children in countries of conflict and poverty are fighting day to day for survival, children in modern countries seem to live the life they were promised.

However, according to a report of the World Health Organization in 2020, nearly 3 in 4 children, or 300 million children, aged 2-4 years regularly suffer physical punishment and/or psychological violence at the hands of parents and caregivers. Additionally, 1 in 5 women and 1 in 13 men report having been sexually abused as a child aged 0-17 years.<sup>2</sup> The contention is that abusive acts against children continue because they are too often silenced, their voices seldom heard.<sup>3</sup> Mudaly and Goddard comment: "Child abuse stands apart from other life events in that children are harmed by other human actors behaving in ways that violate social norms. They become hostages in their own homes, entrapped by society's trust in parents to nurture and care for their children. Children are silenced as the only other witness to their trauma is an adult perpetrator."<sup>4</sup> Violence against children is already a violation of social norms, but when performed by parents who are entrusted by society to care for them, it becomes particularly urgent to act.

The questions arise: How well are children really protected? Are human rights and children's rights institutions doing enough to uphold the right to protection from all forms of

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<sup>1</sup> BIAGGINI, *Kinderrechte*, 26; FREEMAN, *Magna Carta*, 85; KILKELLY, 80 et seq.; SAUNDERS, 242.

<sup>2</sup> WHO, *Child maltreatment*, 8 June 2020, [www.who.int/news-room/fact-sheets/detail/child-maltreatment](http://www.who.int/news-room/fact-sheets/detail/child-maltreatment), last visited on: 04.03.2022.

<sup>3</sup> MUDALY/GODDARD, 258 et seq.

<sup>4</sup> MUDALY/GODDARD, 260.



violence as guaranteed by the Convention? Are the States doing enough? What is the role of the Convention's Committee? In Switzerland, there is no similar code of children's rights in domestic law. Are children nevertheless protected against child abuse at home, and if so, how far does the protection go?<sup>5</sup> Is there a need for further action?

## **1.2 Research Aim**

The research aim of this thesis is to analyze if and to what extent children are protected against any forms of child abuse at home. The research is conducted on an international as well as a national level (Switzerland). This thesis aims to evaluate whether the current state of legislation and international agreements regulating the right to protection against child abuse is sufficient, or if there is a need for action in some areas.

## **1.3 Academic Relevance**

The fundamental rights of human beings play a vital part in the functioning of a society and the legal system. The observance of human rights goes hand in hand with the observance of the rule of law which is anchored in modern democratic states. These human rights, including the rights of children, are regulated differently on an international and a national level. Since most current human rights treaties and legislation are directed at adults, it is relevant to know if and to what extent children, being vulnerable and prone to victimization<sup>6</sup> as well as often uneducated of their rights, can defend their rights.

## **1.4 Scope and Limitations**

The problem question is answered by establishing the international and national legal framework and by discussing relevant case law on the protection against child abuse by parents or caregivers. The thesis limits its research to child abuse experienced at home. The findings in the international context are particularly limited to the CRC and its Committee as well as relevant legislation and case law of Switzerland in the national context. Other relevant treaties, regulations, and jurisprudence are only mentioned. This thesis does not discuss the regional legal framework, such as that of the European Union. Importantly, the thesis focuses on the protection against child abuse rather than child exploitation. However, it strives to clarify the differentiation between these two notions.

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<sup>5</sup> WYTENBACH, *Gewalterfahrungen*, 129.

<sup>6</sup> MUDALY/GODDARD, 260; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 256.

## **1.5 Structure**

The thesis is divided into three parts: The international and national (Swiss) legal framework as well as the conclusion and recommendations. Part One (The International Legal Framework) starts with an introduction to international children's rights and the CRC. The respective norms of the prohibition of child abuse in the CRC are then dealt with and the implementation mechanisms of UN organs as well as other responsible organs examined. Part Two (The National Legal Framework) begins with yet another introduction to children's rights in Switzerland. Then, it shows the central matter of discussion by analyzing if respective children's rights are anchored in Swiss legislation and recognized in the jurisprudence of the Swiss Federal Supreme Court. Furthermore, it investigates how international agreements are incorporated into Switzerland's domestic law and to what extent they play a vital role in upholding children's rights on a national level. It also analyzes the different points of view of stakeholders regarding the current state of enforcement of international children's rights law in Switzerland. Part Three (Conclusion and Recommendations) concludes the thesis by summarizing the important findings of each part and by suggesting what actions on the national (and international) level are still required to ensure maximum protection of children against child abuse at home.

## **PART ONE: The International Legal Framework**

### **2 Legal Instruments of International Children's Rights Law**

This chapter introduces the reader to Children's Rights Law and deals with the content of the CRC in general as well as relating to the protection from child abuse.

#### **2.1 Introduction to International Children's Rights Law**

##### **2.1.1 The Origin of Children's Rights**

Where do children's rights come from? The 1948 Universal Declaration of Human Rights proclaimed that all human beings are born free and equal in dignity and rights. However, the drafters of the UDHR did not particularly acknowledge children to be comprised. There is also no definition of "dignity" in any international law document, yet this notion can be found in the CRC's preamble and several provisions.<sup>7</sup> According to Immanuel Kant, "dignity" is an absolute value enjoyed by all human beings who are not to be valued merely as a means. Kant explains that things that could not be understood in terms of their value could be said to have dignity. From the Kantian understanding originates the idea that human rights are rooted in the inherent dignity of a human person.<sup>8</sup> Ronald Dworkin emphasizes that children were not quite human, still "becomings", not yet "beings", which Freeman criticizes heavily.<sup>9</sup> The CRC, however, has been hailed as a "paradigm shift" from paternalism to the acknowledgment of children being both "beings" and "becomings".<sup>10</sup> With only the recognition as "becomings", the CRC would solely contain protection rights such as the rights to life or the protection from violence. But because children are also considered as "beings", they are given a voice, i.e., participation rights such as the freedom of expression, thought, and association.<sup>11</sup>

##### **2.1.2 Major Actors in Children's Rights**

Human rights and the rights of the child could not have been adopted and improved without the tireless activities of States, international organizations, and non-State actors. Examples include normative activities by States or intergovernmental organizations such as

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<sup>7</sup> FREEMAN, *Magna Carta*, 75 et seq.

<sup>8</sup> FREEMAN, *Magna Carta*, 77 et seq.

<sup>9</sup> FREEMAN, *Magna Carta*, 79 et seq.

<sup>10</sup> BIAGGINI, *Kinderrechte*, 25 and 30; VANDENHOLE/TÜRKELLI/LEMBRECHTS, Introduction n I.58.

<sup>11</sup> Arts. 13-15 CRC; FREEMAN, *Values of Children's Rights*, 27.

the UN that encompass proposing new international documents or amendments to existing ones. Furthermore, the protection of rights consists of the enforcement of a treaty by States on a national level or the implementation by specific treaty bodies such as the Committee on the Rights of the Child (hereinafter: CRC Committee, or Committee).<sup>12</sup>

### **2.1.2.1 The Role of States**

Being primary duty bearers of the obligation to implement international human rights treaties, States are the most significant actors. Ideally, States should incorporate human rights into their national legislation and define children's policy.<sup>13</sup>

### **2.1.2.2 The Role of International Organizations**

UN entities that are focused on the child or are involved are the United Nations International Children's Emergency Fund, the United Nations High Commissioner for Refugees, and the Office of the United Nations High Commissioner for Human Rights.<sup>14</sup> Ch. 3.1 deals with the role they play in implementing the CRC.

### **2.1.2.3 The Role of NGOs**

Non-governmental organizations are an important part of civil society organizations that are defined as "a third sector existing alongside and interacting with the State and private industry."<sup>15</sup> In fact, NGOs played a central role in the co-construction of children's rights as they emerged internationally in the late 1970s.<sup>16</sup> Almost thirty NGOs formed together into a group that provided a crucial buffer between the East and the West by establishing non-politicized NGO texts often being served as a starting point for deliberations. Although they could not directly propose, they would find a delegation to table it on their behalf.<sup>17</sup> Today, these NGOs are crucial since they monitor the implementation of the CRC often more efficiently than States do.<sup>18</sup>

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<sup>12</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 20 et seq.

<sup>13</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 20.

<sup>14</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 21 et seq. and 35.

<sup>15</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 22 et seq.

<sup>16</sup> MOODY, 161.

<sup>17</sup> COHEN, 192 et seq.

<sup>18</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 23 and 332.

#### 2.1.2.4 The Role of NHRIs

National human rights institutions for children (also referred to as independent children's rights institutions) are vital in the sense that they work directly with children to address their needs. They are founded on national legislation and financed by the State.<sup>19</sup> Although the Convention does not explicitly mention the obligation of States Parties to set up ICRI as part of the implementation, the CRC Committee nevertheless interpreted it this way.<sup>20</sup> It has "welcomed the establishment of NHRIs and children's ombudspersons/children's commissioners and similar independent bodies [...]"<sup>21</sup> and viewed it as an implementation measure of the CRC.<sup>22</sup> The essential element is independence. "The role of national human rights institutions is to monitor independently the State's compliance and progress towards implementation [...]"<sup>23</sup> Their duty is to promote and ensure the implementation of the CRC by considering complaints and petitions. They should also carry out investigations submitted by or on behalf of children and support them in taking cases to court.<sup>24</sup>

#### 2.1.3 Transnational Treaties on Children's Rights

The rights of the child started to emerge in the 20<sup>th</sup> century, the so-called "Century of the Child"<sup>25</sup>, with the earliest document being the **Declaration of the Rights of the Child**, adopted under the auspices of the League of Nations in 1924 and commonly known as the Geneva Declaration. It provided the foundations for international law on children.<sup>26</sup> Later in 1959, the **United Nations Declaration of the Rights of the Child** was adopted which contains a preamble and ten principles. The former, on the one hand, affirms the principles set out in the UN Charter and articulates the belief that children need special safeguards and care. The ten principles, on the other hand, encompass the basis on which rights were later formulated in the CRC.<sup>27</sup> Although a declaration is characterized as non-binding, the adoption of the Geneva Declaration nevertheless affirmed the willingness and commitment of all UN Member States to take steps toward the drafting of a binding

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<sup>19</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 24.

<sup>20</sup> Art. 4 CRC; FREEMAN, Magna Carta, 224; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 81 and 331.

<sup>21</sup> CRC/GC/2002/2, para. 1.

<sup>22</sup> REIF, 398.

<sup>23</sup> CRC/GC/2003/5, para. 65; see also VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 81.

<sup>24</sup> LUNDY/KILKELLY/BYRNE, 458.

<sup>25</sup> MOODY, 153.

<sup>26</sup> JANČIĆ, 3; KLINGLMAIR, 57; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 27.

<sup>27</sup> KLINGLMAIR, 57; LÜCKER-BABEL, 12; STEARNS, 14; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 27 and 42.

document for States Parties. Finally, in 1989, the legally binding **United Nations Convention on the Rights of the Child** was adopted, which entered into force in 1990 and recognized children as rights holders.<sup>28</sup> Today, the rights of the child are partially, either directly or indirectly, incorporated into other universal international human rights documents.<sup>29</sup> The slow process of adopting a treaty specifically devoted to the rights of the child can be attributed to the fact that many believed children to be sufficiently protected under the then existing human rights law. Up until now, some states are still not willing to adopt separate legislation on the rights of the child.<sup>30</sup>

#### **2.1.4 Terminology of Child Abuse**

As the title of this thesis suggests, it is crucial to define what child abuse constitutes. First and foremost, it must be pointed out that the terminology “child abuse” is used in various ways, comprising other notions, or being comprised by others. There are different categorizations made by the CRC Committee, by authors in doctrine, or by international organizations and NGOs. The subsequent paragraphs define abuse, neglect, and exploitation according to Action for the Rights of Children, a child rights-based training and capacity-building initiative established by UNHCR and the Save the Children Alliance.<sup>31</sup> In this way, the provisions of the CRC do not have to be mentioned.

Child abuse is defined as “an act of commission that is outside of accepted cultural norms.”<sup>32</sup> It can include:

- **physical abuse**, the deliberate use of force on a child’s body that may result in injury, e.g., hitting, shaking, and choking.
- **sexual abuse**, not only violent sexual assault but also other sexual activities such as inappropriate touching, where the child does not fully comprehend, is unable to give informed consent, or for which the child is not developmentally prepared.
- **emotional abuse**, persistent attacks on a child’s sense of self, e.g., constant belittling, taunting or humiliation, isolation, and intimidation.<sup>33</sup>

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<sup>28</sup> JANČIĆ, 3; KLINGLMAIR, 57; LÜCKER-BABEL, 12; SANDBERG, 15.

<sup>29</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 27 et seq.

<sup>30</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 27; see Switzerland on corporal punishment in ch. 5.3.

<sup>31</sup> ARC, Action for the Rights of Children.

<sup>32</sup> ARC, Abuse and Exploitation, 6 et seq. (“Definitions”).

<sup>33</sup> ARC, Abuse and Exploitation, 6 et seq. (“Definitions”).

Child neglect is rather “an act of omission, the failure to provide for the child’s basic needs.”<sup>34</sup> This can include:

- **physical neglect**, the failure to adequately meet the child’s needs, e.g., clothing, health care, and protection from harm.
- **emotional neglect**, the failure to satisfy the developmental needs of a child by denying the child an appropriate level of affection, care, education, and security.<sup>35</sup>

Child exploitation, lastly, is the abuse of a child where some form of remuneration is involved or whereby the perpetrators benefit in some way; monetarily, socially, or politically. Exploitation constitutes a form of coercion and violence and comes to the detriment of a child’s physical and mental health, development, and education.<sup>36</sup> Sub-categories include economic and sexual exploitation as well as child trafficking.<sup>37</sup>

## **2.2 CRC in General**

The CRC was drafted following a Polish initiative to mark the International Year of the Child in 1979 that was sponsored by the UN. The intention was, i.a., to adopt an instrument that would have binding legal effect in as many States as possible.<sup>38</sup> With the CRC, the definition of a child<sup>39</sup> has been universally agreed on and it encompasses all main traditional groups of human rights: economic, social, cultural, political, and civil.<sup>40</sup>

### **2.2.1 Overall Structure of the CRC**

The Convention contains a preamble and three parts. The preamble recalls basic human rights principles and reaffirms the dignity of the child. While Part I contains a catalog of rights and the implementation obligation of States Parties, Part II deals with the reporting obligations of States Parties and the monitoring activities of the CRC Committee. Lastly, Part III regulates technical questions.<sup>41</sup> Children’s rights under the CRC are commonly divided into three groups: protection, provision, and participation rights.<sup>42</sup>

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<sup>34</sup> ARC, Abuse and Exploitation, 7 (“Definitions”).

<sup>35</sup> ARC, Abuse and Exploitation, 7 (“Definitions”).

<sup>36</sup> ARC, Abuse and Exploitation, 7.

<sup>37</sup> See arts. 32-37 CRC.

<sup>38</sup> FREEMAN, *Magna Carta*, 90; KILKELLY, 81.

<sup>39</sup> Art. 1 CRC.

<sup>40</sup> Art. 4 CRC; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 48.

<sup>41</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 49.

<sup>42</sup> SANDBERG, 15.

## 2.2.2 Definition of the Child in International Law

For the first time in international law, the child is defined as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”<sup>43</sup> It also defines the personal scope of application of the Convention<sup>44</sup>: the element of time (“below the age of eighteen”) and the element of scope (“every”). However, what stood out to be controversial while drafting the CRC was the beginning of childhood, i.e., the minimum age of application.<sup>45</sup> The whole debate that arose among the drafters of the CRC revolved around the issue of abortion, with some States considering it acceptable and others not. As a result, the CRC avoids defining the beginning, but only defines the end of childhood. It is, nevertheless, inevitable to point out that the preamble of the CRC refers to the Declaration of the Rights of the Child of 1959 by articulating that the child needs special safeguards and care, before as well as after birth.<sup>46</sup>

## 2.2.3 Principles of the CRC relating to the Protection against Child Harm

There are four rights in the CRC serving as general principles without which every other right cannot be fully enjoyed:

- Art. 2 – the right to non-discrimination,
- Art. 3(1) – the respect for the best interests of the child,
- Art. 6 – the inherent right to life, survival, and development, and
- Art. 12 – the right of the child to participation.<sup>47</sup>

These four general principles are by their nature both substantive as well as procedural rights since they demand steps for implementation.<sup>48</sup> The next two sub-chapters only discuss the two general principles which are relevant to the protection against forms of abuse, i.e., the best interest principle and the inherent right to life, survival, and development.

### 2.2.3.1 Best Interest Principle (Art. 3(1) CRC)

Historically, children were considered as the chattels of their fathers and not as beneficiaries of rights, which was enshrined in the Roman doctrine of “*patria potestas*”, paternal

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<sup>43</sup> Art. 1 CRC; see also VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 56.

<sup>44</sup> JANČIĆ, 5; LÜCKER-BABEL, 13; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 1 CRC n 1.01; WYTTENBACH, *Gewaltverfahrungen*, 129.

<sup>45</sup> VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 1 CRC n 1.02.

<sup>46</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 85 et seq.

<sup>47</sup> FREEMAN, *Magna Carta*, 93; KILKELLY, 82.

<sup>48</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 91.



power. This notion essentially granted fathers exclusive control over their children. Gradually, this position has been substantially retreated from and led to the requirement of the best interests of the child being a parent's basic concern.<sup>49</sup>

**Art. 3(1) CRC** reads as follows: “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.” The CRC recognizes that children might have different interests than those of their parents or caregivers, but it is the “best interests of the child” that is the overriding consideration.<sup>50</sup> Practically speaking, parents ought to develop their understanding of their child's best interests in accordance with the other three guiding principles mentioned above.<sup>51</sup> They must also act consistently with other provisions such as the protection against all forms of violence.<sup>52</sup> From the best interest principle arise the principle of interpretation and the notion of predictability. According to the former, the best interests of the child are capable of change, relative to time and space. They are also considered to be subjective, depending on a specific moment in time and society as well as the child in question. The best interest principle is a complex and adaptable concept, and its content needs to be determined on a case-by-case basis.<sup>53</sup> Predictability, however, means that the best interest of the child is taken into account in advance and not only at the moment when a decision is due.<sup>54</sup> The Committee clarifies that decision-makers should adopt a rights-based approach and engage all actors, including children, to determine the children's best interests. This approach is closely related to the right of children to form their own views and the right to be heard.<sup>55</sup> As underlined by the Committee, the best interest principle contains a three-fold concept: a substantive right, a rule of procedure, and a fundamental interpretative legal principle.<sup>56</sup> It is also considered to be directly applicable and invocable before a court.<sup>57</sup>

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<sup>49</sup> Art. 18(1) CRC; CRC/C/GC/14, para. 25; TOBIN, 62; see also BIAGGINI, *Kinderrechte*, 25.

<sup>50</sup> HaKo-SCHMAHL, art. 3 CRC n 3; STEARNS, 15; WYTTENBACH, *Gewalterfahrungen*, 134; see also BIAGGINI, *Kinderrechte*, 26.

<sup>51</sup> Art. 2, 6 and 12 CRC; HAFELI, 66; TOBIN, 62.

<sup>52</sup> Art. 19 CRC; TOBIN, 62.

<sup>53</sup> CRC/C/GC/14, para. 32; JANČIĆ, 8; HaKo-SCHMAHL, art. 3 CRC n 9 and 12; RUGGIERO, 25.

<sup>54</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 98.

<sup>55</sup> Art. 12 CRC; HaKo-SCHMAHL, art. 3 CRC n 10; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 3 CRC n 3.12 and 3.28 et seq.

<sup>56</sup> CRC/C/GC/14, para. 6.

<sup>57</sup> RUGGIERO, 24 et seq.; HaKo-SCHMAHL, art. 3 CRC n 1; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 3 CRC n 3.06 et seq.

It is important to point out that the best interests of the child should not prevail and are not superior to the rights of other subjects since this would account for positive discrimination of children against other human groups. If looking closely at the words of the provision, the CRC makes it clear that the best interests of the child “shall be a primary consideration” and not “the” primary consideration.<sup>58</sup> According to art. 3(1) CRC and the Committee, the best interest principle only applies “in all actions concerning children”, i.e., concerning a child or having an effect on them.<sup>59</sup> Also, by adding the term “legislative bodies” to art. 3(1) CRC, lawmakers are obliged to make sure that children are effectively considered, and their best interests protected.<sup>60</sup> Furthermore, by addressing “private social welfare institutions”, a third-party effect is assumed.<sup>61</sup> Lastly, the legal wording “shall be” indicates strong obligations to States.<sup>62</sup> Due to the article’s broad wording, however, it remains difficult to understand what a child’s best interest consists of since a definition is missing. Nonetheless, an exhaustive list with core factors that apply to all factual situations at all times across all regions is impossible and impractical. Consequently, this principle has the potential to mean all things to people or mean anything at all.<sup>63</sup>

### **2.2.3.2 Inherent Right to Life, Survival, and Development (Art. 6 CRC)**

**Art. 6 CRC** is one of the shortest articles in the Convention, and yet it is indispensable. It forms the very basis for the child’s right to protection from all forms of harm as guaranteed under art. 19 CRC.<sup>64</sup> Para. 1, on the one hand, stipulates that “States Parties recognize that every child has the inherent right to life.” This right, which includes the principle of dignity, is at the core of children’s rights.<sup>65</sup> It is also the only right in the CRC described as “inherent”, which hints at its non-derogable status, even in times of war and public emergencies.<sup>66</sup> One of the key obstacles for the US to ratifying the CRC is the prohibition of capital punishment. However, with the US Supreme Court’s ruling in *Roper v. Simmons* in 2005, which suspended the death penalty for crimes committed as a minor, this obstacle has been removed.<sup>67</sup> Para. 2, on the other hand, specifies that “States Parties shall ensure to the maximum extent possible the survival and development of the

<sup>58</sup> HaKo-SCHMAHL, art. 3 CRC n 7; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 99 et seq.

<sup>59</sup> CRC/C/GC/14, paras. 17 and 20; FREEMAN, *Magna Carta*, 102; HaKo-SCHMAHL, art. 3 CRC n 4.

<sup>60</sup> CRC/C/GC/14, para. 31; HaKo-SCHMAHL, art. 3 CRC n 4; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 100.

<sup>61</sup> HaKo-SCHMAHL, art. 3 CRC n 6.

<sup>62</sup> CRC/C/GC/14, para. 36; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 3 CRC n 3.03.

<sup>63</sup> KILKELLY, 83; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 3 CRC n 3.09.

<sup>64</sup> SANDBERG, 18; VAGHRI, 35.

<sup>65</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 101 et seq.

<sup>66</sup> FREEMAN, *Magna Carta*, 116; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 6 CRC n 6.08.

<sup>67</sup> FREEMAN, *Magna Carta*, 88, 116 and 375; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 102.

child.” As opposed to para. 1, para. 2 constitutes a positive obligation, requiring States Parties to set up comprehensive legislative measures including in the fields of criminal law and family law.<sup>68</sup>

Under “survival” fall two distinct scenarios: The first set of scenarios includes catastrophic events such as natural disasters on which the State has no influence. However, there are also situations of distress, armed conflict, famine, chronic malnutrition, and poverty, for which States can be to some extent responsible. The effect of both is the same: a wide range of human rights violations, and thus an infringement of art. 6(2) CRC, such as i.a., physical, psychological, and sexual violence.<sup>69</sup> These causes may all lead to a disrupted development or the death of children. Therefore, the elimination of violence, poverty, and armed conflict will improve children’s ability to fully enjoy their rights to survival and development and will thus result in enhanced well-being.<sup>70</sup> The obligation of states to ensure the survival of the child is, i.a., elaborated in the right to recovery and rehabilitation.<sup>71</sup> Para. 2 also includes the term “development”, which is to be interpreted in its broadest sense as a holistic concept, encompassing the child’s physical, mental, spiritual, moral, psychological, and social development, in a manner compatible with human dignity.<sup>72</sup> The family of the child must ensure that children grow up in a secure environment free from threats, violence, abuse, and maltreatment. However, if the family itself is negligent and ill-treating their children, the responsibility falls on the community or the State, following the principle of subsidiarity. They are therefore obliged to take all protective measures possible to ensure maximum protection of the development of the child. This state’s obligation of undertaking all measures for the implementation of the recognized rights is closely related to art. 4 CRC.<sup>73</sup>

### **2.3 CRC Protection against Child Harm**

For this thesis, the terminologies “child harm” or “forms of harm” are used as umbrella terms to encompass every other relating notion. Different categorizations by the CRC Committee and authors in literary works are made clear.

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<sup>68</sup> VAGHRI, 32 and 35; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 6 CRC n 6.02.

<sup>69</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 102 et seq.

<sup>70</sup> VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 6 CRC n 6.03 et seq.

<sup>71</sup> Arts. 19 and 39 CRC; VAGHRI, 36 et seq.

<sup>72</sup> CRC/C/GC/13, para. 62; SANDBERG, 18; VAGHRI, 32; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 6 CRC n 6.12.

<sup>73</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 104 et seq.

### 2.3.1 Art. 19 CRC and Relating Provisions

Research indicates that the experience of many children in the home is often one of abuse and neglect and not one of a fairy-tale where protection from family is needed.<sup>74</sup> Art. 19 CRC is considered as the core provision for addressing and eliminating all forms of harm against children.<sup>75</sup> It particularly addresses the “actual educational failure of parents and other caregivers”.<sup>76</sup>

**Art. 19 CRC** reads as follows:

- “1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”

This provision, therefore, endorses the right of children to demand that the State ensure their protection against all forms of harm within the home. The CRC hereby adopts an ecological model, meaning that the protection from harm is focused on the prevention of family violence instead of repression by demanding that States take all necessary measures to address harm within a home.<sup>77</sup> It is up to the States to decide in which way they want to implement art. 19 CRC, whether through criminal or civil measures.<sup>78</sup> The Committee recommends that States support parents and caregivers to understand, embrace and implement child development programs.<sup>79</sup> Such work is preventative rather than intervening, making the child-parent relationship co-operative rather than coercive.<sup>80</sup>

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<sup>74</sup> TOBIN, 60.

<sup>75</sup> CRC/C/GC/13, para. 7(a); SANDBERG, 16; HaKo-SCHMAHL, art. 19 CRC n 1; WYTENBACH, Grund- und Menschenrechtskonflikte, 142.

<sup>76</sup> WYTENBACH, Gewalterfahrungen, 139.

<sup>77</sup> TOBIN, 60; WYTENBACH, Gewalterfahrungen, 140; WYTENBACH, Grund- und Menschenrechtskonflikte, 143.

<sup>78</sup> WYTENBACH, Gewalterfahrungen, 133; WYTENBACH, Grund- und Menschenrechtskonflikte, 143.

<sup>79</sup> CRC/C/GC/13, para. 47(i); TOBIN, 61.

<sup>80</sup> TOBIN, 61; WYTENBACH, Gewalterfahrungen, 147.

Art. 19 CRC is closely linked to the general principle of a child's right to life, survival, and development anchored in art. 6 CRC<sup>81</sup> (see ch. 2.2.3.2) and builds upon art. 4 CRC on the implementation of the Convention.<sup>82</sup> Additionally, art. 3(2) CRC provides the child with the right to protection and care necessary for his or her well-being and therefore to be free from any form of harm. Lastly, art. 37(a) CRC prohibits children to be subjected to torture or other cruel, inhuman, or degrading treatment or punishment.<sup>83</sup>

### **2.3.2 Protection against all Forms of Harm**

When reading art. 19(1) CRC, one comes across the words “all forms of”. This refers to the prohibition of all forms of violence against children, however light. Therefore, this provision does not leave room for any level of legalized violence against children. Frequency, the severity of harm, and intent to harm are not prerequisites for the application of this right.<sup>84</sup> The article intentionally does not define the terms “neglect” or “abuse” more precisely to leave room for a broad cultural interpretation.<sup>85</sup> In its General Comment no. 13, the Committee has chosen to use the umbrella term “violence” to comprise all forms of harm to children as listed in art. 19(1) CRC.<sup>86</sup> Although the term “violence” is mostly connected to physical and/or intentional harm, non-physical and/or non-intentional forms of harm, such as neglect and psychological maltreatment, are also significant.<sup>87</sup> It is not uncommon for a child experiencing one form to experience other forms as well.<sup>88</sup> Sandberg underlines that it is debatable whether using the term “violence” to cover all forms of maltreatment is useful in a child protection context. Instead, she uses the term “maltreatment” to emphasize that art. 19 CRC not only entails physical or mental violence but also neglect and sexual abuse.<sup>89</sup> For this chapter, the following categorization and explanations are made according to the CRC's General Comment no. 13.

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<sup>81</sup> WHALEN, 294.

<sup>82</sup> CRC/C/GC/8, para. 30; HaKo-SCHMAHL, art. 4 CRC n 1.

<sup>83</sup> SANDBERG, 16; WYTTENBACH, Gewalterfahrungen, 135 and 137.

<sup>84</sup> CRC/C/GC/13, para. 17; SANDBERG, 19; WHALEN, 299.

<sup>85</sup> WYTTENBACH, Gewalterfahrungen, 139.

<sup>86</sup> SANDBERG, 19; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 19 CRC n 19.05.

<sup>87</sup> CRC/C/GC/13, para. 4; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 19 CRC n 19.05; WYTTENBACH, Gewalterfahrungen, 138.

<sup>88</sup> ARC, Action for the Rights of Children; MUDALY/GODDARD, 263.

<sup>89</sup> SANDBERG, 20.

### 2.3.2.1 Physical Violence

This form includes fatal and non-fatal physical violence such as corporal punishment as well as other forms of torture, cruel, inhuman, or degrading treatment or punishment.<sup>90</sup> It also consists of physical bullying and hazing by others.

### 2.3.2.2 Mental Violence

Mental violence is often described as psychological maltreatment, mental abuse as well as emotional abuse, and neglect. It can include, i.a., persistent harmful interactions with the child, scaring, terrorizing, threatening, insulting, and denying mental health. It also consists of exposure to domestic violence, placement in solitary confinement, and other humiliating or degrading conditions of detention as well as psychological bullying and hazing by others.<sup>91</sup> Other authors consider neglect as a situation where parents willfully or due to incapacity fail to care for their child, jeopardizing his or her development. Mental abuse is interpreted as humiliation and degradation.<sup>92</sup>

### 2.3.2.3 Sexual Abuse and Exploitation

Sexual abuse is not only explicitly banned by art. 19(1) CRC but also by art. 34 CRC. If sexual abuse is committed by caregivers, it falls cumulatively under the former.<sup>93</sup> However, the latter also covers the prohibition of sexual exploitation by third parties.<sup>94</sup>

**Art. 34 CRC** reads as follows: “States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. [...] States Parties shall [...] take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.”<sup>95</sup>

Accordingly, sexual abuse consists of inducing or coercing a child to engage in any unlawful or psychologically harmful sexual activity, whereas sexual exploitation covers the

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<sup>90</sup> See art. 37(a) CRC.

<sup>91</sup> CRC/C/GC/13, para. 21.

<sup>92</sup> WYTTENBACH, Grund- und Menschenrechtskonflikte, 142.

<sup>93</sup> WYTTENBACH, Gewalterfahrungen, 143. Lex specialis according to HaKo-SCHMAHL, arts. 32-36 CRC n 14.

<sup>94</sup> HaKo-SCHMAHL, arts. 32-36 CRC n 14; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 257.

<sup>95</sup> See also FREEMAN, Magna Carta, 149; HaKo-SCHMAHL, arts. 32-36 CRC n 15; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 255.

exploitative use of children.<sup>96</sup> The latter also applies when using children in commercial sexual exploitation, in audio or visual images of child sexual abuse and child prostitution.<sup>97</sup> So, unlike sexual abuse, sexual exploitation has an economic component, with profits shared only partially or not at all with the children exploited.<sup>98</sup>

According to Freeman, there is no universally accepted definition of child sexual abuse. However, it is often defined as “the involvement of dependent, developmentally immature children and adolescents in sexual activities that they do not fully comprehend and to which they are unable to give informed consent or that infringe the social taboos of family roles.”<sup>99</sup> The UN Secretariat defines sexual abuse as “the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.”<sup>100</sup> Nowadays, the notion of sexual abuse has been extended to include non-penetrative acts such as masturbation, kissing, and touching outside of clothing as well as non-contact activities comprising watching sexual activities and encouraging children to behave in sexually inappropriate ways.<sup>101</sup> However, it is surprising how briefly and non-committally the CRC deals with the incidence of sexual exploitation. It contains neither a catalog of measures nor a call to criminalize the sexual exploitation of children.<sup>102</sup>

#### 2.3.2.4 Neglect or Negligent Treatment

Neglect is defined as the failure to meet children’s physical and psychological needs and protect them from danger. It includes, i.a.:

- **physical neglect**, the failure to protect a child from preventable harm such as through lack of supervision or lack of providing necessities including food, shelter, clothing, and basic medical care.
- **psychological or emotional neglect**, the lack of emotional support and love, abandonment, chronic inattention to the child, or exposure to intimate partner violence, or drug, or alcohol abuse.<sup>103</sup>

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<sup>96</sup> HaKo-SCHMAHL, arts. 32-36 CRC n 15; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 34 CRC n 34.01.

<sup>97</sup> CRC/C/GC/13, para. 25.

<sup>98</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 254 et seq.; WYTENBACH, Gewalterfahrungen, 142.

<sup>99</sup> FREEMAN, Magna Carta, 146 et seq.; see also VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 34 CRC n 34.02.

<sup>100</sup> VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 34 CRC n 34.02.

<sup>101</sup> FREEMAN, Magna Carta, 147.

<sup>102</sup> WYTENBACH, Gewalterfahrungen, 142 et seq.

<sup>103</sup> CRC/C/GC/13, para. 20; WHALEN, 299.

### 2.3.3 Distinction between Child Exploitation and Child Abuse

Child exploitation is not a new phenomenon, but its forms and methods enabling exploitation have taken on new shapes.<sup>104</sup> As mentioned in ch. 2.1.4, child exploitation includes abuse of a child where a form of remuneration is involved. Following the commercial nature of exploitation, it can be differentiated from other types of violence against children with the direct relationship between the abuse and financial gain. All forms of child exploitation are commonly featured with a high degree of violence, i.e., exploited children are often victims of multiple and repeated abuse as well as physical and emotional violence.<sup>105</sup> This is where the line between child exploitation and abuse is difficult to draw since child exploitation commonly contains child abuse. On the other hand, **art. 36 CRC** portrays an umbrella clause on the protection of children from exploitation not covered under other articles in the CRC<sup>106</sup>, reading as follows: “States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.” Therefore, types of exploitation that are not enumerated but endanger a child's welfare are covered by the protection against child exploitation under art. 36 CRC.<sup>107</sup>

### 2.3.4 Distinction between Corporal Punishment and Child Abuse

#### 2.3.4.1 Definition of Corporal Punishment

It is debatable whether corporal punishment and child abuse can be separated since much depends on how child abuse is defined. If understood broadly, corporal punishment is a form of abuse, if narrowly, only severe physical punishment meets the threshold. However, it is found that corporal punishment is a significant factor in 75 percent of substantiated child physical abuse.<sup>108</sup> As a result, the line between these two notions is unclear. Freeman comments as follows: “If we are concerned to eliminate the evil of child abuse, we must ultimately come to accept that corporal punishment of children is child abuse.”<sup>109</sup> The text of the CRC, however, has been criticized for not explicitly condemning corporal punishment. In its General Comment no. 8, based on, i.a., art. 19 CRC, the CRC Committee defines corporal or physical punishment as “any punishment in which physical

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<sup>104</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 250.

<sup>105</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 251.

<sup>106</sup> Arts. 32-35 CRC; HaKo-SCHMAHL, arts. 32-36 CRC n 1.

<sup>107</sup> VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 36 CRC n 36.01.

<sup>108</sup> SAUNDERS, 247.

<sup>109</sup> See quote in SAUNDERS, 245.



force is used and intended to cause some degree of pain or discomfort, however light.”<sup>110</sup> Such punishment usually involves hitting children with the hand or with an implement such as a whip or a stick. Moreover, it can also involve kicking or throwing children as well as pulling hair and scratching.<sup>111</sup> Because art. 19 CRC does not explicitly entail the terminology “corporal punishment”, the Committee follows a teleological interpretation, underlining that the protection from all forms of violence is equally applicable to the protection from corporal punishment. Its interpretation centered on the view that corporal punishment constitutes a specific sub-form of violence and that it thus falls under art. 19 CRC.<sup>112</sup> It is also covered under the specific right to protection from torture, inhuman or degrading treatment or punishment under art. 37 CRC.<sup>113</sup>

#### **2.3.4.2 The Controversies of Corporal Punishment**

It has long been argued that there may not be a more significant step to advance the protection of children than to outlaw the practice of corporal punishment. Adults’ use of corporal punishment is enabled by objectifying children and perceiving them as lesser beings. It is commonly misconstrued to be neither harmful nor abusive, resulting in a wrongful perception of it being a reasonable and appropriate response to children.<sup>114</sup> However, the right of a child to protection from violence demands that children shall not be subjected to any form of physical discipline. This may oppose traditional conceptions of the family whereby corporal punishment is seen to be a legitimate form of parental discipline.<sup>115</sup> Furthermore, the representatives of this view fear that parents would be penalized and that the State would have too great of an influence on the upbringing of children.<sup>116</sup> Violence in the framework of normative parental discipline is commonly minimized through language such as “smacking” or “spanking”. Some will argue that a smack is not violence, as it does not inflict injury, and can therefore not be qualified as abuse or maltreatment. There is, however, a confirmed association between a country’s legislative tolerance of physical punishment and a higher serious child maltreatment statistic.<sup>117</sup>

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<sup>110</sup> CRC/C/GC/8, para. 11; see also CRC/C/GC/13, para. 24; SAUNDERS, 242; HaKo-SCHMAHL, art. 19 CRC n 2; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 188.

<sup>111</sup> CRC/C/GC/8, para. 11.

<sup>112</sup> VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 19 CRC n 19.15.

<sup>113</sup> VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 19 CRC n 19.18.

<sup>114</sup> SAUNDERS, 239.

<sup>115</sup> TOBIN, 61.

<sup>116</sup> WYTENBACH, Grund- und Menschenrechtskonflikte, 143.

<sup>117</sup> SAUNDERS, 244 et seq.

According to Freeman, corporal punishment is a form of abuse.<sup>118</sup> The CRC Committee insists that such punishment can never be justified as it contradicts the best interest principle (see ch. 2.2.3.1) and the protection against “all forms of physical or mental violence.”<sup>119</sup> Therefore, the best interests of the child should never be a justification.<sup>120</sup> In its view, corporal punishment as a harmful practice is invariably degrading and therefore illicit under the CRC.<sup>121</sup> Any form of physical or psychological violence however light compromises the concept of dignity which demands that every child is recognized as a rights holder with individual interests. The prohibition of corporal punishment may therefore hold a symbolic value by recognizing children as autonomous beings whose dignity and bodily integrity are guaranteed and protected.<sup>122</sup> However, the Committee has not forbidden disciplinary techniques that are aligned with the rights of the children under the CRC<sup>123</sup>, although today’s abuse, sometimes even tragic cases of a death of a child, is frequently yesterday’s punishment. Nevertheless, fifty-two states have already outlawed hitting children<sup>124</sup>, with Sweden being the first country to ban corporal punishment in all settings in 1979<sup>125</sup> and the latest being Mongolia and Montenegro.<sup>126</sup> The recent attempts to outlaw physical punishment of children have been unsuccessful due to the compromise measures already put into operation. These are limits to which corporal punishment may be considered lawful, instead of completely banning it, i.e., age limits or limits to the body parts that may be subjected to corporal punishment.<sup>127</sup>

## **2.3.5 Harm under the Care of Parents and Caregivers**

### **2.3.5.1 Scope of Caregivers**

The CRC Committee considers that all humans below the age of 18 are or should be in the care of someone. The CRC defines “caregivers” as “parent(s), legal guardian(s) or any other person who has the care of the child.”<sup>128</sup> The provision includes a person that is legally or professionally responsible for the child, i.a., parents, foster parents, adoptive

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<sup>118</sup> FREEMAN, *Magna Carta*, 139 and 404.

<sup>119</sup> Arts. 19 and 37(a) CRC; CRC/C/GC/8, para. 18; CRC/C/GC/13, para. 61; JANČIĆ, 24; TOBIN, 61.

<sup>120</sup> FREEMAN, *Magna Carta*, 404; WYTENBACH, *Grund- und Menschenrechtskonflikte*, 143.

<sup>121</sup> Art. 37(a) CRC; CRC/C/GC/8, para. 11; CRC/C/GC/13, paras. 24 and 29; SANDBERG, 20; HaKo-SCHMAHL, art. 19 CRC n 2.

<sup>122</sup> VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 9 CRC n 9.14.

<sup>123</sup> TOBIN, 61; WYTENBACH, *Gewalterfahrungen*, 140.

<sup>124</sup> FREEMAN, *Magna Carta*, 139.

<sup>125</sup> FREEMAN, *Magna Carta*, 140 et seq.; SAUNDERS, 240; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 19 CRC n 19.17.

<sup>126</sup> FREEMAN, *Magna Carta*, 403.

<sup>127</sup> FREEMAN, *Magna Carta*, 142 et seq.

<sup>128</sup> Art. 19(1) CRC.

parents, caregivers, and guardians.<sup>129</sup> It may not seem obvious for this provision to also be applied to children with no primary or proxy caregiver. Nevertheless, the State Party is obliged to take responsibility as the de facto caregiver of the child concerned. The Committee insists that the State Party must ensure alternative care to a child that is temporarily or permanently deprived of his or her family environment.<sup>130</sup>

### **2.3.5.2 Separation from Parents**

States Parties have agreed on the protection of family unity, i.e., that the family, as a fundamental group of society, should be afforded the necessary protection to fully assume its responsibility within the community.<sup>131</sup> Although the CRC recognizes in its preamble this primary position of the family in the child's upbringing, it reinforces that separation from its parents may sometimes be deemed necessary for the child's best interests. The CRC explicitly mentions that separation as a measure of ultima ratio can apply in cases where the family unit is impossible or harmful to the child's safety and wellbeing.<sup>132</sup> According to **art. 9(1) CRC**, "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine [...] that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents [...]." States must therefore carry out a case-by-case best interests assessment and determination.<sup>133</sup>

### **2.3.6 Obligation to Take Measures against Child Harm**

"States Parties shall take all appropriate legislative, administrative, social and educational measures [...]"<sup>134</sup> The terms "shall take" imply that States Parties are not to have the discretion to undertake all appropriate measures, but they are rather under a strict obligation to do so.<sup>135</sup> The terms "all appropriate measures" refer to a measure being effective to prevent and respond to all forms of violence<sup>136</sup>, with prevention being at the very core<sup>137</sup>

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<sup>129</sup> CRC/C/GC/13, para. 33; WHALEN, 299.

<sup>130</sup> CRC/C/GC/13, para. 35; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 19 CRC n 19.07.

<sup>131</sup> Art. 9 CRC; HÄFELI, 67; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 9 CRC n 9.02.

<sup>132</sup> SANDBERG, 16 and 29; TOBIN, 61; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 9 CRC n 9.10; WYTTENBACH, Gewalterfahrungen, 145; WYTTENBACH, Grund- und Menschenrechtskonflikte, 141.

<sup>133</sup> JANČIĆ, 9 and 27; TOBIN, 61; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 9 CRC n 9.12; WYTTENBACH, Gewalterfahrungen, 145.

<sup>134</sup> Art. 19(1) CRC.

<sup>135</sup> CRC/C/GC/13, para. 37; WYTTENBACH, Gewalterfahrungen, 133.

<sup>136</sup> CRC/C/GC/13, para. 39.

<sup>137</sup> SANDBERG, 20; HaKo-SCHMAHL, art. 19 CRC n 3; WYTTENBACH, Gewalterfahrungen, 147.

(see below). The Committee, furthermore, emphasizes that child participation is essential in the development, monitoring, and evaluation of the measures taken.<sup>138</sup> It highlights the need for a child rights approach to child care and protection, i.e., children should be considered as rights holders, not as beneficiaries of adults' benevolence. It is deemed necessary to respect and encourage consultation and cooperation with children while taking account of their age and evolving capacities.<sup>139</sup> The following sub-chapters discuss the two types of measures: preventing and responding to measures.<sup>140</sup>

### **2.3.6.1 Preventing Forms of Child Harm: General and Individual Prevention**

The main way of protecting children from all forms of violence is to prevent them from occurring in the first place. Art. 19(1) CRC, firstly, includes the necessity to adopt legislative, administrative, social, and educational measures. Para. 2, additionally, requires the establishment of social programs and, importantly, the need for proactive prevention, as strongly emphasized by the Committee.<sup>141</sup> Prevention, generally, is aimed at combating the root causes of violence against children, e.g., poverty as a stress factor in the lives of families. Prohibition is a crucial part of prevention since it sends a clear message that violent acts against children are banned. With prohibition, lawmakers aim at deterring people from committing violence for fear of sanctions.<sup>142</sup>

Legislative measures include legislation as well as implementing and enforcing measures on all levels of government, i.e., national, provincial, and municipal laws and regulations. They should define frameworks, systems, mechanisms, and responsibilities of concerned agencies and officers.<sup>143</sup> Measures include, i.a., ensuring conformity with all domestic legislation and ensuring effective access to redress and reparation as well as enforcing the law and judicial procedures in a child-friendly way, including remedies.<sup>144</sup>

Administrative measures consist of establishing policies and programs as well as monitoring and supervision systems. At the national and sub-national government, the State

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<sup>138</sup> CRC/C/GC/13, para. 39.

<sup>139</sup> CRC/C/GC/13, para. 72(a); SANDBERG, 17.

<sup>140</sup> Art. 19 CRC; SANDBERG, 20.

<sup>141</sup> CRC/C/GC/13, para. 46; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 19 CRC n 19.12; WHALEN, 300.

<sup>142</sup> SANDBERG, 21 et seq.

<sup>143</sup> CRC/C/GC/13, para. 40; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 19 CRC n 19.10.

<sup>144</sup> CRC/C/GC/13, para. 41; WHALEN, 300.

Party shall, i.a., establish a government focal point to coordinate child protection strategies and support NHRIs. At the levels of governmental, professional, and civil society institutions, States shall develop and implement child protection policies, professional ethics codes, and promote research programs.<sup>145</sup>

Social measures comprise two groups: Social policy measures, on the one hand, are aimed at combatting difficult family situations where external factors play a role<sup>146</sup>, most notably poverty. Poor families are faced with the challenges of providing children with necessities such as food, clothing, and shelter. These situations may lead to parents neglecting children while away for work or even to physical violence and other forms of abusive behavior. Therefore, States should adopt poverty reduction strategies entailing financial and social support to families at risk as well as housing, employment, and education policies.<sup>147</sup> Social programs, on the other hand, support the child and its family to provide optimal positive child-rearing.<sup>148</sup> Examples include counseling support as well as therapeutic programs related to domestic violence or addictions to alcohol and drugs. Additionally, measures comprise pre- and post-natal services, child and youth groups as well as after-school care programs.<sup>149</sup>

Educational measures are aimed at changing attitudes in society to violence and harmful behavior toward children. They should “address attitudes, traditions, customs and behavioural practices which condone and promote violence against children.”<sup>150</sup> Particularly, awareness campaigns are a suitable way to promote positive child-rearing, which is repeatedly recommended to States in the Committee’s Concluding Observations.<sup>151</sup> Further measures include general and role-specific training of caregivers to children.<sup>152</sup>

However, sole general prevention is insufficient, but individual prevention is crucial, i.e., children at risk and signs of actual violence are identified. If done so immediately, appropriate intervention can be triggered as early as possible. Identification requires that “all who come in contact with children are aware of risk factors and indicators of all forms of

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<sup>145</sup> CRC/C/GC/13, para. 42.

<sup>146</sup> CRC/C/GC/13, para. 43(a).

<sup>147</sup> CRC/C/GC/13, para. 43(a, iii et seq.); SANDBERG, 22; see also WYTENBACH, *Gewalterfahrungen*, 147.

<sup>148</sup> CRC/C/GC/13, para. 43(b).

<sup>149</sup> CRC/C/GC/13, para. 43(b, i et seq.); SANDBERG, 23.

<sup>150</sup> CRC/C/GC/13, para. 44.

<sup>151</sup> Art. 42 CRC; SANDBERG, 23; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 81.

<sup>152</sup> CRC/C/GC/13, para. 44(d, i); SANDBERG, 24; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 80.

violence, have received guidance on how to interpret such indicators, and have the necessary knowledge, willingness, and ability to take appropriate action.”<sup>153</sup>

### **2.3.6.2 Responding to Forms of Child Harm: Reporting, Referral, Investigation, and Prosecution**

The response to forms of violence is outlined in art. 19(2) CRC, involving reporting, referral, investigation, treatment, follow-up, and judicial involvement, if appropriate.<sup>154</sup> The Committee strongly recommends States Parties to “develop safe, well-publicized, confidential and accessible support mechanisms for children, their representatives and others to report violence against children, including through the use of 24-hour toll-free hotlines and other ICTs”.<sup>155</sup> The obligation of whoever receives the report is to act upon it and, if necessary, refer it to the responsible agency. This is where training and support for personnel receiving the reports are needed to act upon them appropriately.<sup>156</sup> Additionally, professionals working within the child protection system are to be trained in inter-agency cooperation and protocols for collaboration.<sup>157</sup>

There are two forms of investigating a case of violence against children. On the one hand, there is the investigation within the child protection system that aims at assisting the child and its family. On the other hand, the investigation may take place within the criminal justice system to bring charges against the perpetrator. However, where prosecution may lead to a parent being imprisoned, this might not always be congruent with the best interests of the child<sup>158</sup>, following the principle of the unity of the family<sup>159</sup> (see ch. 2.3.5.2). The Committee requires extreme care to be taken to avoid subjecting the child to further harm through the investigation process, obliging all parties to give due weight to the child’s views<sup>160</sup>. In its General Comment on corporal punishment, the Committee states that the main point of investigation is to stop the violence through supportive and educational interventions, not to sanction the parents.<sup>161</sup>

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<sup>153</sup> CRC/C/GC/13, para. 48.

<sup>154</sup> SANDBERG, 26; WYTTENBACH, *Gewalterfahrungen*, 145; WYTTENBACH, *Grund- und Menschenrechtskonflikte*, 144.

<sup>155</sup> CRC/C/GC/13, para. 49; see also SANDBERG, 26.

<sup>156</sup> CRC/C/GC/13, para. 49; SANDBERG, 26.

<sup>157</sup> CRC/C/GC/13, para. 50; SANDBERG, 27.

<sup>158</sup> Art. 3(1) CRC.

<sup>159</sup> Art. 9(1) CRC.

<sup>160</sup> Art. 12 CRC.

<sup>161</sup> CRC/C/GC/8, para. 40; SANDBERG, 27 et seq.; VANDENHOLE/TÜRKELI/LEMBRECHTS, art. 4 CRC n 4.03.

The General Comment, furthermore, explicitly pronounces that “prosecuting parents is in most cases unlikely to be in their children’s best interests. It is the Committee’s view that prosecution and other formal interventions (for example, to remove the child or remove the perpetrator) should only proceed when they are regarded both as necessary to protect the child from significant harm and as being in the best interests of the affected child.”<sup>162</sup> Therefore, such measures should only be applied in the absence of alternative measures capable of protecting the health and development of the child.<sup>163</sup> This duty to assess the child’s best interests is to be imposed on the child protection authorities rather than the prosecution authorities, since the latter may not have sufficient training to do so.<sup>164</sup> In short, a delicate balancing exercise between, on the one hand, children’s rights to grow up in a family environment without state interference, and, on the other hand, protecting children from parental harm or family violence, is required.<sup>165</sup>

### **2.3.6.3 Treatment and Follow-up of Child Victims of Harm**

Along with preventative measures against the victimization of children, art. 19(2) CRC requires States Parties to establish effective procedures for the treatment of child victims.<sup>166</sup> This obligation is strongly connected to **art. 39 CRC** on the child’s right to rehabilitation, i.e., “to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse [...]” States Parties are required to adopt legislative provisions which provide for effective access to redress, remedies, and reparation to child victims of harm.<sup>167</sup> Additionally, this article stipulates that “recovery and reintegration shall take place in an environment which fosters the health, self-respect, and dignity of the child.”<sup>168</sup> In this matter, the holistic approach to the rights of the child becomes crucial (see ch. 2.2.3.2), which means, i.a., the best interests of the child must be a primary consideration and its maximum survival and development be ensured.<sup>169</sup> Attention must also be given to hearing the child’s views and giving them due weight.<sup>170</sup> Possible types of intervention include medical, mental health, social and legal services, and support as well as longer-term follow-up services to ensure that recovery

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<sup>162</sup> CRC/C/GC/8, para. 41.

<sup>163</sup> TOBIN, 61; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 9 CRC n 9.12.

<sup>164</sup> SANDBERG, 28.

<sup>165</sup> VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 9 CRC n 9.01.

<sup>166</sup> BISCHOF, 102; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 316 et seq. and 324; WYTENBACH, Gewalterfahrungen, 145.

<sup>167</sup> CRC/C/GC/13, paras. 41(f and i); BISCHOF, 101; SANDBERG, 28 et seq.; WYTENBACH, Grund- und Menschenrechtskonflikte, 144.

<sup>168</sup> Art. 39 CRC.

<sup>169</sup> Arts. 3(1) and 6 CRC; SANDBERG, 30; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 317.

<sup>170</sup> Art. 12 CRC; SANDBERG, 29; WYTENBACH, Gewalterfahrungen, 146.

goals are achieved. Additionally, services and treatment are to be made available for perpetrators of violence, especially child perpetrators.<sup>171</sup> “The term ‘follow-up’ requires that it is made clear who has responsibility for the child and the family through all the stages of a case and clarification of the aims of any actions taken.”<sup>172</sup> Also, contact of the child with both parents should be ensured, unless it contradicts the best interests of the child.<sup>173</sup>

#### **2.3.6.4 Judicial Involvement**

Art. 19(2) CRC also mentions the involvement of the judiciary. This involvement does not necessarily equal a criminal law response to child harm cases.<sup>174</sup> Judicial intervention may not only consist of juvenile or family court intervention but also family group conferencing, alternative dispute resolution mechanisms as well as restorative justice and kin agreements.<sup>175</sup> Wherever possible, the judicial process should be of a preventive nature and be child-friendly.<sup>176</sup> The provision requires judicial involvement only in cases “as appropriate”, referring to the regard to be given “to least intrusive intervention as warranted by the circumstances.”<sup>177</sup> However, a decision to separate a child from its family should always be subject to judicial review<sup>178</sup> (see ch. 2.3.5.2).

### **3 Enforcement of International Children’s Rights Law**

This chapter aims at illustrating the implementation mechanisms of responsible UN organs and other organizations upholding the rights of the child. It furthermore discusses the importance of the incorporation of the CRC in domestic law.

#### **3.1 Implementation Mechanisms of UN Organs**

The biggest contemporary challenge associated with the CRC is to secure its implementation. Without remedies, rights only have expressive value.<sup>179</sup> In fact, the issues of enforcement and implementation are the key to maximizing the potential of the CRC.<sup>180</sup> The drafters of the CRC were aware of this challenge and created **art. 4 CRC**, obliging States

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<sup>171</sup> CRC/C/GC/13, para. 52; SANDBERG, 29; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 19 CRC n 19.12.

<sup>172</sup> SANDBERG, 30.

<sup>173</sup> Arts. 3(1) and 9(3) CRC; CRC/C/GC/13, para. 53.

<sup>174</sup> VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 19 CRC n 19.12 et seq.

<sup>175</sup> CRC/C/GC/13, paras. 55(a) and 56; SANDBERG, 30 et seq.

<sup>176</sup> CRC/C/GC/13, para. 54(b et seq.); SANDBERG, 30 et seq.

<sup>177</sup> CRC/C/GC/13, para. 54; see also SANDBERG, 30.

<sup>178</sup> Art. 9(1) CRC; SANDBERG, 30.

<sup>179</sup> FREEMAN, Magna Carta, 220.

<sup>180</sup> KILKELLY, 85.



Parties to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.”<sup>181</sup> There is thus no space for states to decide whether or not they abide by this obligation.<sup>182</sup>

But what constitutes implementation? It is “the process whereby States Parties take action to ensure the realization of all rights in the Convention for all children in their jurisdiction.”<sup>183</sup> Although implementation upon ratification of the CRC is mandatory, its measures fall within each State’s discretion. One means of implementing the CRC is by incorporation, which means giving legal effect to the international agreement in domestic law, which the CRC Committee recommends to ensure direct invocation before national courts.<sup>184</sup> However, in addition to monitoring the implementation of the CRC at the national level, a system of accountability has been established at the international level.<sup>185</sup> The thesis does not go into detail about the work of the UNHCR, which is mainly based on immediate actions and direct assistance to protect the rights of refugees.<sup>186</sup> Rather, the following chapters deal with the implementation mechanisms of the CRC Committee, the Human Rights Council as well as NGOs and international organizations.

### **3.1.1 CRC Committee**

“Each of the nine UN core human rights treaties, including the CRC, has been endowed with its own monitoring body.”<sup>187</sup> The Convention requires the establishment of a Committee consisting of eighteen experts of high moral standing and recognized competence in the field covered by the CRC.<sup>188</sup> The following three sub-chapters entail the mandates.

#### **3.1.1.1 Reporting and Examining Process**

There is no international court for children’s rights, however, the implementation of the CRC at the domestic level is tracked by its Committee.<sup>189</sup> The Convention specifies one of the enforcement mechanisms in arts. 43 and 44 CRC that includes a reporting process providing for “a unique form of international accountability for how States treat children

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<sup>181</sup> See also LUNDY/KILKELLY/BYRNE, 442; HaKo-SCHMAHL, art. 4 CRC n 2.

<sup>182</sup> VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 4 CRC n 4.01.

<sup>183</sup> CRC/GC/2003/5, para. 1.

<sup>184</sup> KILKELLY, 87; LUNDY/KILKELLY/BYRNE, 445 et seq.; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 75.

<sup>185</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 335.

<sup>186</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 388.

<sup>187</sup> VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 43 CRC n 43.01.

<sup>188</sup> Art. 43(2) CRC; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 336.

<sup>189</sup> VANDENHOLE/TÜRKELLI/LEMBRECHTS, Introduction n I.39; see also BIAGGINI, Kinderrechte, 32.

and their rights.”<sup>190</sup> Following this process, all States Parties are obliged to report to the CRC Committee on the implementation of the CRC every five years.<sup>191</sup> NGOs and other interested bodies such as NHRIs may also submit alternative or shadow reports, which the Committee encourages.<sup>192</sup> Along with public dialog with the government delegation, the Committee examines these periodic reports, identifies shortcomings in the States’ performance, and produces a formal document known as Concluding Observations.<sup>193</sup> It contains recommendations as to how greater implementation might be achieved, therefore constituting a constructive process where States are asked to reflect on what obstacles prevent greater implementation. In short, it is an ongoing process of gathering information and discussions as well as awareness raising and actions to strengthen the implementation of the CRC.<sup>194</sup> The CRC Committee aims to persuade rather than force the State Party to take further action.<sup>195</sup> The state periodic reports as well as the Concluding Observations by the CRC are also made public, however, they are not binding.<sup>196</sup> In addition, the CRC Committee does not possess the powers of a court. It is not able to impose sanctions if its legally non-binding recommendations to States are not implemented, nor can it force the submission of the periodic report. Although the CRC establishes a comprehensive legal framework on children’s rights supported by a monitoring system, many principles embodied by the CRC remain insufficiently implemented and the rights of the children inadequately realized.<sup>197</sup> In short, the Committee adopts an advisory and non-adversarial approach, therefore relying on diplomacy rather than the force of sanction.<sup>198</sup>

### **3.1.1.2 Adoption of General Comments**

Another aspect of the Committee’s work, the adoption of statements on the interpretation of CRC provisions or the application to children in particular circumstances, known as General Comments, is not expressly referenced in the CRC. These statements are often drafted by the Committee in conjunction with international experts building on the current discussion of issues and are crucial to clarifying and assisting in the interpretation and

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<sup>190</sup> CRC/GC/2003/5, para. 71; see also KLINGLMAIR, 60; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 82.

<sup>191</sup> Art. 44(1b) CRC; KLINGLMAIR, 62; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 44 CRC n 44.01.

<sup>192</sup> CRC/GC/2003/5, para. 56; KLINGLMAIR, 62; VANDENHOLE/TÜRKELLI/LEMBRECHTS, Introduction n I.40 and art. 44 CRC n 44.05; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 82, 335 and 342.

<sup>193</sup> KLINGLMAIR, 62; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 44 CRC n 44.07.

<sup>194</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 342.

<sup>195</sup> FREEMAN, Magna Carta, 221; KILKELLY, 86.

<sup>196</sup> Art. 44(6) CRC; KLINGLMAIR, 62 et seq.; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 44 CRC n 44.07.

<sup>197</sup> VANDENHOLE/TÜRKELLI/LEMBRECHTS, Introduction n I.42.

<sup>198</sup> FREEMAN, Magna Carta, 221.

implementation of the CRC. The Committee's work contributes indirectly to the implementation in the sense that these statements are increasingly used by policy analysts at the national level to audit compliance with the CRC's provisions.<sup>199</sup> Moreover, General Comments often contain a wide range of suggestions and recommendations for legislative, social, and other measures that States should take. However, there is no systematic follow-up on the impact of the General Comments.<sup>200</sup>

### **3.1.1.3 Complaints Procedure under the OPIC**

As seen in the previous few paragraphs, a system of monitoring the implementation of human rights does not address individual cases of breaches of human rights. This is where the idea of remedial justice arises.<sup>201</sup> Resulting from the adoption of the Optional Protocol on the Rights of the Child on a communications procedure (hereinafter: OPIC, or Protocol), the Committee can receive and consider both individual and inter-state complaints concerning breaches of the rights of the child.<sup>202</sup> According to Suzanne Egan, the OPIC achieves a "certain parity of esteem for children vis-à-vis complainants under other core UN human rights instruments"<sup>203</sup> by providing a complaint mechanism for children.<sup>204</sup> Nevertheless, one of the flip sides to such a complaints procedure is the presumption that children know their rights, which they often do not due to a lack of human rights education. Besides, there remains another hurdle of the legal competence that children need to possess to access the system. Another requirement for a complaints procedure is the exhaustion of all domestic remedies<sup>205</sup>, i.e., the national legal system must not have been able to provide a remedy for the alleged violation.<sup>206</sup> This requirement is often accompanied by difficulties in getting adult representation, finding pro bono lawyers, and eliciting the support of children's organizations.<sup>207</sup> In the following, the two complaints procedures available under the OPIC, the Communications and the Inquiry Procedure, are described.

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<sup>199</sup> KILKELLY, 86.

<sup>200</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 356.

<sup>201</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 391.

<sup>202</sup> FREEMAN, Magna Carta, 222; STEARNS, 16.

<sup>203</sup> See quote in KILKELLY, 89.

<sup>204</sup> KILKELLY, 89.

<sup>205</sup> Art. 7(e) OPIC.

<sup>206</sup> Child Rights Connect, What is the OPIC?, <https://opic.childrightsconnect.org/what-is-opic/>, last visited on: 08.04.2022.

<sup>207</sup> FREEMAN, Magna Carta, 222 et seq.

The **Communications Procedure** under art. 5 et seq. OPIC entails an individual, a group of individuals, or their representatives who submit communications to the CRC Committee claiming to be a victim of breaches by the State Party of rights outlined in the CRC and its Optional Protocols.<sup>208</sup> As a representative, NGOs are also allowed to formulate petitions on behalf of victims.<sup>209</sup> The State Party must be able to be made accountable for an act or a failure to act, e.g., unfulfilled duties of protection. This requirement is related to the attribute of victimhood, demanding that the plaintiff be directly and personally affected by a particular act or failure to act of the State. This condition is not met when, e.g., the violation has already been eliminated or the matter appropriately resolved at the time of the petition.<sup>210</sup>

Submission of a communication has to take place within a year after domestic remedies have been exhausted unless the plaintiff can demonstrate that it was not possible.<sup>211</sup> It is interesting to remark that the Protocol does not use the term “child” to define this right only limited to children. If this was the case, a child victim, turning eighteen by the time all domestic remedies are exhausted, would be excluded from submitting a communication.<sup>212</sup> Also, the right to a communications procedure exists independent of whether the child concerned has the competence to act on the national level.<sup>213</sup> After reception of an admissible communication<sup>214</sup>, the CRC Committee is under an obligation to bring it to the attention of the State Party concerned.<sup>215</sup> It may also request the State Party to take interim measures to avoid irreparable damage to the victim or victims of the alleged violations.<sup>216</sup> It shall first try to reach a friendly settlement of the matter.<sup>217</sup> Although the Protocol does not require the hearing of people in person during the examination, a hearing of the child in person shall be considered in the light of giving due weight to his or her best interests.<sup>218</sup> After the communication has been examined, the Committee shall transmit its views on the communication with recommendations to the parties concerned.<sup>219</sup> As a follow-up

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<sup>208</sup> Art. 5(1) OPIC.

<sup>209</sup> WYTENBACH/SCHLÄPPI, 449.

<sup>210</sup> WYTENBACH/SCHLÄPPI, 449 et seq.

<sup>211</sup> Art. 7(h) OPIC; VANDENHOLE/TURKELLI/LEMBRECHTS, OPIC n OPIC.11.

<sup>212</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 397 et seq.; WYTENBACH/SCHLÄPPI, 450.

<sup>213</sup> WYTENBACH/SCHLÄPPI, 449.

<sup>214</sup> See requirements in art. 7 OPIC.

<sup>215</sup> Art. 8(1) OPIC.

<sup>216</sup> Art. 6(1) OPIC.

<sup>217</sup> Art. 9(1) OPIC.

<sup>218</sup> Art. 2 et seq. OPIC.

<sup>219</sup> Art. 10(5) OPIC.

within six months, the State Party shall submit to the Committee a written response with actions taken and envisaged.<sup>220</sup>

On the database of Child Rights Connect, a non-profit organization comprising more than 85 national, regional, and international organizations<sup>221</sup>, no admissible claim could be found that specifically revolves around the infringement of the right to the protection from child harm at home. This may be because only 48 states have ratified the OPIC<sup>222</sup>, and no communication shall be received if it concerns a State that is not a party to the OPIC.<sup>223</sup> Most of the petitions that are submitted to the CRC Committee are matters relating to deportation, asylum claims, or deprivation of liberty.<sup>224</sup>

In addition to hearing individual petitions, the OPIC also allows for an **Inquiry Procedure** under art. 13 et seq. OPIC when the Committee receives reliable information on grave and systematic violations by a State Party of the rights enshrined in the CRC and its Optional Protocols.<sup>225</sup> The Committee may invite the State Party to cooperate in the examination of this information and to submit observations.<sup>226</sup> This provision also allows NGOs and NHRIs to submit a communication requesting an inquiry.<sup>227</sup> As opposed to the Communications Procedure, the Inquiry Procedure does not necessitate the identification of individual victims.<sup>228</sup> After examining the findings of such an inquiry, they are to be submitted to the State Party concerned with recommendations.<sup>229</sup> The State Party is then obliged to submit its observations to the Committee within six months.<sup>230</sup>

### 3.1.2 UNHRC

The UNHRC's function is to, i.a., promote human rights education and learning, make recommendations to the UN General Assembly, and work closely with governments, NHRIs, and NGOs. Its most important duty is to monitor the implementation of human

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<sup>220</sup> Art. 11(1) OPIC; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 398.

<sup>221</sup> Child Rights Connect, Our mission, <https://childrightsconnect.org>, last visited on: 20.05.2022.

<sup>222</sup> Child Rights Connect, Ratification Status, <https://opic.childrightsconnect.org/ratification-status/>, last visited on: 08.04.2022.

<sup>223</sup> Art. 1(3) OPIC.

<sup>224</sup> Child Rights Connect, Child Rights Jurisprudence, <https://opic.childrightsconnect.org/jurisprudence-database/>, last visited on: 08.04.2022

<sup>225</sup> Art. 13(1) CRC; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 359.

<sup>226</sup> Art. 13(1) CRC.

<sup>227</sup> VANDENHOLE/TÜRKELI/LEMBRECHTS, OPIC n OPIC.28.

<sup>228</sup> See art. 7(a) CRC; VANDENHOLE/TÜRKELI/LEMBRECHTS, OPIC n OPIC.29.

<sup>229</sup> Art. 13(4) CRC.

<sup>230</sup> Art. 13(5) CRC; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 399.

rights via the **Universal Periodic Review**. This process involves the review of the performance of each UN Member State in the field of human rights over a period of four years. The basis for the UPR is the UN Charter and the UDHR. States are required to submit a report which declares what actions they have taken to improve the human rights situations in their countries and to fulfill their human rights obligations<sup>231</sup> (see the latest UPR of Switzerland in ch. 5.4). The UNHRC considers the report and concludes the process with a document containing its conclusions and recommendations.<sup>232</sup> It is the State's primary responsibility to implement the recommendations.<sup>233</sup> According to the UNHRC, the aim is to improve the human rights situation in all countries and address human rights violations wherever they occur. Currently, there is no other universal mechanism of this kind.<sup>234</sup> NGOs may also participate in the UPR process by submitting information that can be added to the "other stakeholders" report.<sup>235</sup>

### **3.2 Implementation by NGOs and other UN Specialized Agencies**

NGOs play a vital role as sources of information in the reporting and examining process as described above.<sup>236</sup> The CRC is the first human rights treaty that formally acknowledges NGOs as important partners of the Committee.<sup>237</sup> It explicitly mentions one of the UN specialized agencies, UNICEF, that can be involved in the work of the Committee.<sup>238</sup> The CRC, therefore, ensures a firm legal foundation of strong cooperation of the Committee with NGOs as well as UNICEF and other specialized agencies such as the WHO or the UNHCR.<sup>239</sup> Child Rights Connect, for example, actively facilitates information flows between NGOs and the Committee.<sup>240</sup>

#### **3.2.1 NGOs**

In its examining and reporting process, the CRC Committee does not solely rely on state reports, but also on information from other intergovernmental organizations and reports of NGOs. The NGO Group for the Convention on the Rights of the Child, a network of

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<sup>231</sup> UNHRC, Universal Periodic Review, [www.ohchr.org/en/hr-bodies/upr/upr-main](http://www.ohchr.org/en/hr-bodies/upr/upr-main), last visited on: 03.04.2022.

<sup>232</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 378 et seq.

<sup>233</sup> UNHRC, Basic facts about the UPR, [www.ohchr.org/en/hr-bodies/upr/basic-facts](http://www.ohchr.org/en/hr-bodies/upr/basic-facts), last visited on: 03.04.2022.

<sup>234</sup> UNHRC, Universal Periodic Review, [www.ohchr.org/en/hr-bodies/upr/upr-main](http://www.ohchr.org/en/hr-bodies/upr/upr-main), last visited on: 03.04.2022.

<sup>235</sup> UNHRC, Basic facts about the UPR, [www.ohchr.org/en/hr-bodies/upr/basic-facts](http://www.ohchr.org/en/hr-bodies/upr/basic-facts), last visited on: 03.04.2022.

<sup>236</sup> VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 45 CRC n 45.03.

<sup>237</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 48.

<sup>238</sup> Art. 45(a) CRC; VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 45 CRC n 45.01.

<sup>239</sup> VANDENHOLE/TÜRKELLI/LEMBRECHTS, Introduction n I.40; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 347 and 382.

<sup>240</sup> VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 45 CRC n 45.03.

80 international and national NGOs, is encouraged to draft their own reports referred to as alternative reports containing information that governments would prefer to keep out of public sight. They may be confidential or made public.<sup>241</sup> The close involvement with the CRC Committee allows NGOs to bring concerns about the status of implementation of the CRC. Furthermore, it is a unique opportunity for them to use the procedure to influence the child rights agenda of a country.<sup>242</sup> Another crucial role NGOs play in the reporting procedure is the facilitation of child participation. Children should have the opportunity to be consulted in the alternative reporting and therefore be a part of the dialog with the CRC Committee.<sup>243</sup>

One example of an NGO is Defence for Children International. It is a leading child rights-focused movement founded in 1979. Its mandate is to ensure the effective implementation of the CRC at the local, national, and international level.<sup>244</sup> In the context of violence against children, DCI is an active member of the Child Rights Connect's working group on Children and Violence. This group aims to advocate for the elimination of violence against children with the UN human rights mechanism and bodies in Geneva.<sup>245</sup>

### 3.2.2 UNICEF

The UN Children Emergency Fund is an international organization founded in 1946 to address the difficulties of millions of children affected by World War II. Since then, it has developed and implemented successful strategies and national programs to meet the emerging needs of children worldwide.<sup>246</sup> While UNICEF played a less significant role than other child rights organizations in the actual drafting of the CRC, it represents a key agency and at the same time the most important partner and ally in the implementation and monitoring of the CRC.<sup>247</sup> Due to intensive cooperation between UNICEF and the CRC Committee, closer contacts, and cooperation between these organizations and the UN High Commissioner for Human Rights have been established.<sup>248</sup> UNICEF's commitment to engagement in the implementation of the CRC is clearly defined in its mission

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<sup>241</sup> VANDENHOLE/TÜRKELLI/LEMBRECHTS, art. 45 CRC n 45.04.

<sup>242</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 344 et seq. and 348 et seq.

<sup>243</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 350 et seq.

<sup>244</sup> DCI, About us, <https://defenceforchildren.org/about-us/>, last visited on: 03.04.2022.

<sup>245</sup> DCI, Violence against Children, <https://defenceforchildren.org/violence-against-children-2/>, last visited on: 03.04.2022.

<sup>246</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 382.

<sup>247</sup> GOONESEKERE, 1 et seq.; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 386.

<sup>248</sup> Art. 45(a) CRC; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 383.

statement: “UNICEF is guided by the Convention on the Rights of the Child and strives to establish children’s rights as enduring ethical principles and international standards of behaviour towards children [...]”<sup>249</sup> Programs relating to the implementation of the CRC are carried out at the national level, with monitoring UNICEF offices in various countries. They not only assist governments in making reports to the CRC Committee, but they also submit their own reports to the Committee and support NGOs in developing alternative reports<sup>250</sup> (see ch. 3.1.1.1). Because knowledge of the existence of the CRC is low, and thus the rights relating to the protection of children are widely unknown, NGOs as well as UNICEF get involved at the domestic level in the creation and support of local educational programs in the fields of child rights. Therefore, UNICEF’s involvement does not take place in isolation, but in cooperation with States as primary partners of UNICEF as well as NGOs, institutes, universities, and health institutions. After all, a part of UNICEF funds is allocated for NGO projects.<sup>251</sup>

### 3.2.3 WHO

The WHO is a UN specialized agency founded in 1948 that connects nations, partners, and people to promote health.<sup>252</sup> Under the leadership of the WHO, a group of ten international agencies has developed and endorsed **INSPIRE**: Seven strategies to end violence against children. They are:

- Implementation and enforcement of laws (e.g., banning violent discipline);
- Norms and values change (e.g., altering norms that condone sexual abuse);
- Safe environments (e.g., identifying neighborhood “hot spots” for violence and addressing the local causes);
- Parental and caregiver support (e.g., providing parent training);
- Income and economic strengthening;
- Response services provision (e.g., ensuring access to effective emergency care and the reception of psychosocial support); and
- Education and life skills (e.g., ensuring that children attend school, and providing life and social skills training).<sup>253</sup>

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<sup>249</sup> See statement in VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 383.

<sup>250</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 384.

<sup>251</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 385.

<sup>252</sup> WHO, About WHO, [www.who.int/about](http://www.who.int/about), last visited on: 04.03.2022.

<sup>253</sup> WHO, Violence against children, 8 June 2020, [www.who.int/news-room/fact-sheets/detail/violence-against-children](http://www.who.int/news-room/fact-sheets/detail/violence-against-children), last visited on: 05.03.2022.



### 3.3 Monitoring by States: Incorporation of the CRC in Domestic Law

Incorporation in law is considered key to the implementation of the CRC. It is not simply the duty of international organizations and NGOs to monitor and review the compliance with children's rights, but it is rather the individual States' responsibility to translate the promises of the CRC into reality.<sup>254</sup> The Committee highlights that putting children's rights, notably the CRC's general principles (see ch. 2.2.3), at the heart of the legislative process is a necessary step toward implementing the Convention. It also welcomes the inclusion of children's provisions in national constitutions. Along with legislative measures, non-legal measures are deemed necessary for achieving effective implementation.<sup>255</sup> However, how treaties are given legal effect is contingent upon the legal system of a country. Two approaches to treaties are to be distinguished: the monist and the dualist approach. Under a **dualist approach**, which is usually found in common law systems, treaties apply only if transposed into the domestic legal order, whereas under a **monist approach**, usually to be found in civil law systems, treaties apply directly and become a part of national law, independent of any incorporation.<sup>256</sup> Therefore, in monist countries where the CRC is automatically incorporated into domestic law, it can form the basis of court action in a domestic court.<sup>257</sup> However, ratification of a treaty may not always automatically equate to the ability to invoke its provisions domestically, as seen in the case of dualist countries.<sup>258</sup> Nevertheless, it is often difficult to directly apply the provisions of the CRC due to its very broad and somewhat vague content.<sup>259</sup> Another question is if the CRC is justiciable and whether it shall be considered legally binding in courts.<sup>260</sup> For rights to be justiciable, i.e., to be able to claim rights through judicial means<sup>261</sup>, States must provide effective remedies to redress violations and ensure that child-sensitive procedures are available. Remedies include appropriate reparation, including compensation, and measures promoting physical and psychological recovery, rehabilitation, and reintegration<sup>262</sup> (see ch. 2.3.6.3).

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<sup>254</sup> LUNDY/KILKELLY/BYRNE, 442.

<sup>255</sup> CRC/GC/2003/5, paras. 1 and 9; KILKELLY, 88.

<sup>256</sup> GOONESEKERE, 6 et seq.; LUNDY/KILKELLY/BYRNE, 446.

<sup>257</sup> FREEMAN, Magna Carta, 221; TSCHANNEN, § 9 mn. 4.

<sup>258</sup> VANDENHOLE/TÜRKEKLI/LEMBRECHTS, Introduction n I.38.

<sup>259</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 75.

<sup>260</sup> LUNDY/KILKELLY/BYRNE, 446.

<sup>261</sup> VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 76.

<sup>262</sup> Art. 39 CRC; CRC/GC/2003/5, para. 24; VUČKOVIĆ ŠAHOVIĆ/DOEK/ZERMATTEN, 75.

## **PART TWO: The National Legal Framework**

### **4 Children's Rights under Swiss Law**

This chapter introduces the reader to children's rights under the Swiss legal framework and deals with the content of provisions protecting against child harm, be it in constitutional, criminal, or civil law. Lastly, it discusses how Switzerland stands on the enforcement of the CRC as seen by the government itself, the CRC Committee, and NGOs.

#### **4.1 Introduction to Swiss Children's Rights**

##### **4.1.1 Terminology of Children, Parents, and Family**

As opposed to the definition of a child in the international legal framework (see ch. 2.2.2), Swiss law differs the terminology according to the field of law. While the law of civil personal rights and constitutional law define the beginning of life with completed birth<sup>263</sup>, criminal law determines it with the start of birth, i.e., in the case of natural childbirth, the time of onset of opening contractions.<sup>264</sup> In civil law, childhood ends with the capacity to create rights and obligations through one's actions, i.e., through a capacity to act<sup>265</sup>, which includes the requirements of the age of 18<sup>266</sup> and the capability of judgment.<sup>267</sup> According to constitutional law, childhood ends with the completion of the 18<sup>th</sup> year of life<sup>268</sup>, which is a direct reference to art. 1 CRC defining a child as someone under 18.<sup>269</sup> For this chapter, the terms "children and young people" are used. Parents, lastly, are defined by civil law as people exercising parental responsibility<sup>270</sup>, i.e., adoptive, step, and foster parents, the partner of one parent, guardians as well as educational deputies. The terminology of a "family" in terms of family violence (see below) is thus not only limited to the family in the legal sense but also includes family-like relationships.<sup>271</sup>

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<sup>263</sup> BSK-BERETTA, art. 31 ZGB n 2; REUSSER/LÜSCHER, St. Galler Kommentar, art. 11 BV n 12.

<sup>264</sup> BISCHOF, 5; HaKo-GODENZI, art. 111 StGB n 1.

<sup>265</sup> Art. 12 et seq. ZGB.

<sup>266</sup> Art. 14 ZGB.

<sup>267</sup> Art. 16 ZGB.

<sup>268</sup> Arts. 11 and 67 BV; BISCHOF, 6; REUSSER/LÜSCHER, St. Galler Kommentar, art. 11 BV n 12.

<sup>269</sup> OFK-BIAGGINI, art. 11 BV n 2; WOLF, 132; WYTTENBACH, Grund- und Menschenrechtskonflikte, 299 et seq.

<sup>270</sup> Art. 296 et seqq. ZGB.

<sup>271</sup> BISCHOF, 7; MOSIMANN/VÖLGER WINSKY/PLÜSS, mn. 8.61; RYSER BÜSCHI, 4.

## **4.1.2 Terminology of Family Violence and Child Harm**

In Swiss legal literature and the practice of cantonal specialized agencies, the definition of domestic violence is prevailing. It is defined as cases in which “a person is harmed or endangered in his or her bodily, sexual or mental integrity, in his or her existing or dissolved family or partner relationship, either by the use or threat of violence or by multiple assaults.”<sup>272</sup> Since violence in the marital or partner relationship is more often associated with the term “domestic violence”, part two of this thesis uses the term “family violence” instead. Family violence can be referenced to constellations of violence within the family, also including children being the victim of such violence.<sup>273</sup> Ryser Büsschi defines family violence specifically against children and young people as violence that takes place in the close social sphere of a child, particularly in his or her home, by people responsible for his or her welfare, and who abuse this authority under the application of all forms of violence.<sup>274</sup> According to Däppen-Müller, child abuse is a terminology that is often associated with physical, mental, or sexual violence against children within the family.<sup>275</sup> She defines child abuse as “a violent, non-accidental physical or mental injury of a child by an act or failure to act of an adult caregiver.”<sup>276</sup> Sub-categories of child abuse include physical and mental violence, neglect, and sexual exploitation.<sup>277</sup> The following chapters give an overview of the protective systems that exist in the Swiss legislative framework.

## **4.2 Federal Constitution of the Swiss Confederation**

### **4.2.1 Scope of Fundamental and Human Rights Protection**

Following the Swiss Civil Code (hereinafter: Civil Code), “every person has legal capacity”<sup>278</sup>, and “every person has the same capacity to have rights and obligations.”<sup>279</sup> In addition, the Federal Constitution of the Swiss Confederation (hereinafter: Federal Constitution, or Constitution) defines every person as equal before the law.<sup>280</sup> Arguable, however, is whether children and young people have the maturity to defend and exercise their fundamental rights according to civil law<sup>281</sup> since they are minor and therefore sometimes

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<sup>272</sup> BISCHOF, 22.

<sup>273</sup> RYSER BÜSCHI, 4.

<sup>274</sup> RYSER BÜSCHI, 5.

<sup>275</sup> DÄPPEN-MÜLLER, 29.

<sup>276</sup> DÄPPEN-MÜLLER, 29.

<sup>277</sup> BISCHOF, 23.

<sup>278</sup> Art. 11(1) ZGB.

<sup>279</sup> Art. 11(2) ZGB.

<sup>280</sup> Art. 8(1) BV; BISCHOF, 61.

<sup>281</sup> Art. 17 ZGB; RYSER BÜSCHI, 47 et seq.

considered to be incapable of judgment.<sup>282</sup> The doctrine defends the view that despite being underage, children and young people are nevertheless able to exercise their rights in a graduated form. Graduated, because, in principle, they are required to hold the capacity to act, and with it, the requirement of age<sup>283</sup>, to defend their rights in court.<sup>284</sup> However, the Constitution underlines that children and young people personally exercise their rights to the extent that their power of judgment allows.<sup>285</sup>

According to **art. 35(2) BV**, the addressee of fundamental rights is by their nature “whoever acts on behalf of the state”.<sup>286</sup> However, family violence does not occur between the State and individuals, but between individuals themselves.<sup>287</sup> This is when **art. 35(3) BV** becomes relevant, stating that “the authorities shall ensure that fundamental rights, where appropriate, apply to relationships among private persons.” Schweizer speaks of an indirect horizontal effect of fundamental rights.<sup>288</sup> It describes the impact in the drafting of protective laws, i.a., of civil and criminal law, or in their interpretation among private parties in conformity with fundamental rights.<sup>289</sup> The State can fulfill this obligation by providing implementation mechanisms that aim at protecting fundamental rights, if appropriate, between individuals<sup>290</sup>, often in favor of the weaker party, e.g., children and young people. Since they are dependent on adults who may violate the children’s rights, legislative bodies must ensure protection from all forms of harm.<sup>291</sup>

## 4.2.2 Right to Life and Personal Freedom (Art. 10 BV)

### 4.2.2.1 Right to Life (para. 1)

“Every person has the right to life” states **art. 10(1) BV**. The right to life is an indispensable and central requirement of fundamental rights protection.<sup>292</sup> The equivalent is found in art. 6(1) CRC, the inherent right to life (see ch. 2.2.3.2). Protected is the entirety of the

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<sup>282</sup> Arts. 14 and 16 ZGB.

<sup>283</sup> Art. 13 et seq. ZGB.

<sup>284</sup> BISCHOF, 61 et seq.

<sup>285</sup> Art. 11(2) BV; RYSER BÜSCHI, 50.

<sup>286</sup> See also OFK-BIAGGINI, art. 35 BV n 5; RHINOW/SCHEFER/UEBERSAX, mn. 1153; RYSER BÜSCHI, 57; SCHWEIZER, St. Galler Kommentar, art. 35 BV n 34; BSK-WALDMANN, art. 35 BV n 23.

<sup>287</sup> WYTENBACH, Gewalterfahrungen, 130 et seq.

<sup>288</sup> SCHWEIZER, St. Galler Kommentar, art. 35 BV n 49 and 51; see also RHINOW/SCHEFER/UEBERSAX, mn. 1171.

<sup>289</sup> SCHWEIZER, St. Galler Kommentar, art. 35 BV n 51.

<sup>290</sup> BISCHOF, 63 et seq.; MOSIMANN/VÖLGER WINSKY/PLÜSS, mn. 8.20; RHINOW/SCHEFER/UEBERSAX, mn. 1166; SCHWEIZER, St. Galler Kommentar, art. 35 BV n 52 and 55; BSK-WALDMANN, art. 35 BV n 60; WYTENBACH, Grund- und Menschenrechtskonflikte, 327.

<sup>291</sup> RYSER BÜSCHI, 61 et seq.; WYTENBACH, Gewalterfahrungen, 132.

<sup>292</sup> RHINOW/SCHEFER/UEBERSAX, mn. 1263; SCHWEIZER, St. Galler Kommentar, art. 10 BV n 12; WYTENBACH, Gewalterfahrungen, 135.

physical and mental functions vital to a human being.<sup>293</sup> However, children and young people carry no direct entitlement to the right to life against their parents, but rather the State must implement the right to life by adopting legislation and other measures.<sup>294</sup>

#### **4.2.2.2 Right to Personal Freedom, Particularly the Right to Physical and Mental Integrity (para. 2)**

The right to personal freedom under **art. 10(2) BV** is characterized as a catch-all fundamental right.<sup>295</sup> The right to **physical integrity** protects the physical existence of a human being and transfers to the person a right to self-determination over his or her body.<sup>296</sup> In cases of family violence, physical integrity is targeted whenever there is an attack on the child's body, however light<sup>297</sup>, e.g., sexual assault, hitting, shaking, shouting at, or neglecting the child. There exists no clear line distinguishing an act as a form of abuse or interference with the physical integrity. Moreover, there is also a reference to the prohibition of corporal punishment. The State, and especially the police organs, must investigate suspected cases of physical injury and abuse. In the relationship between individuals, physical integrity is primarily protected by criminal law.<sup>298</sup> In addition, art. 10(2) BV also protects one's **mental integrity**, especially the right to self-determination of a person.<sup>299</sup> It particularly protects the state of the individual's freedom of will and decision, but not its content.<sup>300</sup> Emotional suffering is protected insofar as it elementarily violates an individual's personality. Examples include exposure, belittling, defamation, or humiliation. A violation of mental integrity cannot always be separated from a violation of physical integrity since physical injuries are often connected with psychological stress and consequential damage.<sup>301</sup> Furthermore, the Swiss Federal Supreme Court emphasizes that the right to personal freedom does not protect against each physical and mental discomfort, but only when the welfare of a human being is significantly impaired according to objective criteria.<sup>302</sup>

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<sup>293</sup> RHINOW/SCHEFER/UEBERSAX, mn. 1263; SCHWEIZER, St. Galler Kommentar, art. 10 BV n 12.

<sup>294</sup> BISCHOF, 74 et seq.

<sup>295</sup> MOSIMANN/VÖLGER WINSKY/PLÜSS, mn. 8.54; BSK-TSCHENTSCHER, art. 10 BV n 4 and 32.

<sup>296</sup> RHINOW/SCHEFER/UEBERSAX, mn. 1278; SCHWEIZER, St. Galler Kommentar, art. 10 BV n 23; BSK-TSCHENTSCHER, art. 10 BV n 51.

<sup>297</sup> RYSER BÜSCHI, 64.

<sup>298</sup> BISCHOF, 77 et seq.

<sup>299</sup> RHINOW/SCHEFER/UEBERSAX, mn. 1283; SCHWEIZER, St. Galler Kommentar, art. 10 BV n 25.

<sup>300</sup> BSK-TSCHENTSCHER, art. 10 BV n 53.

<sup>301</sup> BISCHOF, 78 et seq.; SCHWEIZER, St. Galler Kommentar, art. 10 BV n 26.

<sup>302</sup> BGE 130 I 65, c. 3.3; RHINOW/SCHEFER/UEBERSAX, mn. 1283; BSK-TSCHENTSCHER, art. 10 BV n 34.

#### 4.2.2.3 Prohibition of Torture and Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (para. 3)

**Art. 10(3) BV** enshrines the core content of physical integrity with the prohibition of torture and forms of cruel, inhuman, or degrading treatment or punishment. This provision states an absolute prohibition, i.e., it is not subject to any exceptions.<sup>303</sup> The doctrine assumes torture, inhuman treatment, and degrading treatment to stand in a step relationship to each other. While **torture** is defined as intentional treatment which elicits the most severe and cruel physical or mental suffering, **inhuman treatment** is considered to evoke severe suffering. In the case of **degrading treatment**, it is not the infliction of pain but the element of humiliation that is to the fore, i.e., a treatment infringes the dignity of the person concerned.<sup>304</sup> In addition, art. 10(3) BV guarantees the prohibition of **corporal punishment** as the core content of the constitutional protection of personality,<sup>305</sup> according to which repressive sanctions by the State may not be aimed directly against the body. The question of chastisement against children in connection with the prohibition of corporal punishment is heavily discussed (see ch. 2.3.4.2), but it is undisputed that corporal punishment is inadmissible if it intensively interferes with the physical and mental integrity of the child concerned. Consequently, the State is under constitutional duties to protect children and young people from it.<sup>306</sup> However, the doctrine speaks of an indirect third-party effect<sup>307</sup> rather than a direct effect, i.e., the State regulates parental behavior only indirectly via the State's duty to protection.<sup>308</sup> This duty also concerns the authorities applying the law. The content of the fundamental rights guarantees is realized by the legislature by adopting relevant norms of civil, criminal, and administrative law.<sup>309</sup>

#### 4.2.3 Protection of Children and Young People (Art. 11 BV)

The Federal Constitution anchors the right of minors to special protection in art. 11 BV. Its purpose is to protect and actively foster the mental and physical development of children and young people.<sup>310</sup> The fact that art. 11 BV is named after the right to life and

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<sup>303</sup> RHINOW/SCHEFER/UEBERSAX, mn. 1289 et seq.; SCHWEIZER, St. Galler Kommentar, art. 10 BV n 42; BSK-TSCHENTSCHER, art. 10 BV n 58 and 61.

<sup>304</sup> OFK-BIAGGINI, art. 10 BV n 25 et seq.; RHINOW/SCHEFER/UEBERSAX, mn. 1291 and 1296; RYSER BÜSCHI, 66; BSK-TSCHENTSCHER, art. 10 BV n 59 et seq.

<sup>305</sup> RHINOW/SCHEFER/UEBERSAX, mn. 1290.

<sup>306</sup> See also art. 19 CRC; BGE 129 IV 216 c. 2.3; MÜLLER/SCHEFER, 71; WYTTENBACH, Gewalterfahrungen, 149.

<sup>307</sup> Art. 35(3) BV, see ch. 4.2.1.

<sup>308</sup> BSK-TSCHENTSCHER, art. 11 BV n 20; WYTTENBACH, Grund- und Menschenrechtskonflikte, 292.

<sup>309</sup> RYSER BÜSCHI, 68 et seq. and 71.

<sup>310</sup> RHINOW/SCHEFER/UEBERSAX, mn. 1328; WYTTENBACH, Gewalterfahrungen, 130 and 132 et seq.; see also HÄFELI, 65.

personal freedom according to art. 10 BV could indicate that the drafters of the new Constitution wanted to emphasize the proximity of its content to the protection of physical and mental integrity.<sup>311</sup> Furthermore, the Swiss Federal Supreme Court confirms that art. 11 BV must be considered a fundamental right rather than a social objective under art. 41 BV.<sup>312</sup> **Art. 11 BV** reads as follows:

“1 Children and young people have the right to the special protection of their integrity and to the encouragement of their development.

2 They may personally exercise their rights to the extent that their power of judgement allows.”

The drafters of the Federal Constitution pursued, i.a., the purpose of guaranteeing the rights enshrined in the CRC in general form through the Constitution.<sup>313</sup> The objectives of art. 11 BV and those of the Convention are identical<sup>314</sup>, which is why case law on the CRC must be consulted for the concretization of art. 11 BV.<sup>315</sup>

#### **4.2.3.1 Best Interests of the Child on a Constitutional Level**

With art. 11(1) BV, the best interests of the child enjoy constitutional status and are regarded as the supreme maxim of the law relating to children in a comprehensive sense.<sup>316</sup> By drawing heavily on the best interest principle of the CRC (see ch. 2.2.3.1), the Swiss Federal Supreme Court in this judgment has to a certain extent imported art. 3(1) CRC into Swiss law and implicitly affirmed its direct applicability.<sup>317</sup> The parents are primarily responsible for ensuring the best interests of the child.<sup>318</sup> Their position is constitutionally protected, in particular by arts. 13 and 14 BV.<sup>319</sup> Official orders and decisions must also be based on the best interests of the child, i.e., State decision-makers are obliged to comprehensively clarify any interests of the child *ex officio* and to weigh these accordingly.<sup>320</sup>

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<sup>311</sup> WYTTEBACH, Grund- und Menschenrechtskonflikte, 286.

<sup>312</sup> BGE 126 II 377, c. 5d; WYTTEBACH, Grund- und Menschenrechtskonflikte, 297.

<sup>313</sup> BGE 126 II 377, c. 5b; RHINOW/SCHEFER/UEBERSAX, mn. 1332.

<sup>314</sup> BBI 1994 V 11 et seq.

<sup>315</sup> BGE 126 II 377, c. 5d; REUSSER/LÜSCHER, St. Galler Kommentar, art. 11 BV n 7 and 10; WYTTEBACH, Grund- und Menschenrechtskonflikte, 295.

<sup>316</sup> BGE 132 III 359, c. 4.4.2; 129 III 250, c. 3.4.2; BGer-Judgment 5C.158/2002 of 19 December 2002, c. 3.4.2; OFK-BIAGGINI, art. 11 BV n 3; ENGI, 296; REUSSER/LÜSCHER, St. Galler Kommentar, art. 11 BV n 8; RYSER BÜSCHI, 77; WOLF, 132; WYTTEBACH, Grund- und Menschenrechtskonflikte, 306.

<sup>317</sup> REUSSER/LÜSCHER, St. Galler Kommentar, art. 11 BV n 10; RYSER BÜSCHI, 77; WYTTEBACH, Grund- und Menschenrechtskonflikte, 306.

<sup>318</sup> WYTTEBACH, Grund- und Menschenrechtskonflikte, 264 et seq.

<sup>319</sup> ENGI, 294; REUSSER/LÜSCHER, St. Galler Kommentar, art. 11 BV n 8.

<sup>320</sup> ENGI, 296; WYTTEBACH, Grund- und Menschenrechtskonflikte, 265 and 307.

#### **4.2.3.2 Special Protection of their Integrity (para. 1, part 1)**

The first part of art. 11(1) BV guarantees the right of children and young people to special protection of their integrity, including the protection of physical and mental integrity. Although art. 10(2) BV already grants all human beings the right to personal freedom, particularly to physical and mental integrity (see ch. 4.2.2.2), art. 11(1) BV emphasizes that the State's duty of protection is increased with regard to one social group, namely children and young people.<sup>321</sup> Since they are usually defenseless in the face of attacks on their rights<sup>322</sup>, art. 11(1) BV directly provides them with an enforceable individual right to demand the State to actively take action in protecting them.<sup>323</sup> However, a State guarantee of maximum well-being is not contained in art. 11(1) BV, but the protection is to be concretized, i.a., in the regulation of parental responsibility<sup>324</sup>, in the protection of children under civil law<sup>325</sup>, and for the withdrawal of parental responsibility.<sup>326</sup> The protection duties may also apply in the interpretation of statutory law by the authorities applying the law.<sup>327</sup> For instance, the Swiss Federal Supreme Court has used the provision of art. 11 BV when interpreting the offense of acts of aggression.<sup>328</sup>

#### **4.2.3.3 Encouragement of their Development (para. 1, part 2)**

The second part of art. 11(1) BV anchors the right of children and young people to the encouragement of their development. The legislature is obliged to consider the interests of children and young people when adopting legislative acts, particularly as far as the formation and consolidation of their personality and the search for a place in society are concerned.<sup>329</sup> Müller and Schefer emphasize that authorities applying the law are required to safeguard the interests of children and young people in interpreting legislative norms.<sup>330</sup>

#### **4.2.3.4 Justiciability of Art. 11 BV**

In the doctrine, the question of whether art. 11 BV is justiciable is widely discussed, and opinions differ.<sup>331</sup> “Although placed in the fundamental rights section and formulated in

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<sup>321</sup> BGE 126 II 377, c. 5d; OFK-BIAGGINI, art. 11 BV n 4; REUSSER/LÜSCHER, St. Galler Kommentar, art. 11 BV n 14; WYTTEBACH, Gewalterfahrungen, 130; WYTTEBACH, Grund- und Menschenrechtskonflikte, 292 and 303.

<sup>322</sup> OFK-BIAGGINI, art. 11 BV n 4; WYTTEBACH, Grund- und Menschenrechtskonflikte, 291.

<sup>323</sup> BGE 126 II 377, c. 5d; MÜLLER/SCHEFER, 807 et seq.; RYSER BÜSCHI, 74.

<sup>324</sup> Art. 296 et seqq. ZGB; REUSSER/LÜSCHER, St. Galler Kommentar, art. 11 BV n 16.

<sup>325</sup> Art. 307 et seqq. ZGB; REUSSER/LÜSCHER, St. Galler Kommentar, art. 11 BV n 16.

<sup>326</sup> Art. 311 et seq. ZGB; REUSSER/LÜSCHER, St. Galler Kommentar, art. 11 BV n 16.

<sup>327</sup> BGE 126 II 377, c. 5d; REUSSER/LÜSCHER, St. Galler Kommentar, art. 11 BV n 10; RYSER BÜSCHI, 73 et seq.

<sup>328</sup> Art. 126 StGB; BGE 129 IV 216, c. 2.3; RYSER BÜSCHI, 74 et seq.; see also WYTTEBACH, Gewalterfahrungen, 151.

<sup>329</sup> RYSER BÜSCHI, 75; see also HÄFELI, 67.

<sup>330</sup> MÜLLER/SCHEFER, 812; see also BIAGGINI, Kinderrechte, 52; WYTTEBACH, Gewalterfahrungen, 133.

<sup>331</sup> REUSSER/LÜSCHER, St. Galler Kommentar, art. 11 BV n 30; RHINOW/SCHEFER/UEBERSAX, mn. 1342 et seq.



fundamental rights style, it is [...] not an independent fundamental right [...], but a concretization of other fundamental rights positions and a specification for the law-making and law-applying authorities.”<sup>332</sup> According to Wyttenbach, however, the allegation that the right to special protection is too little concrete to derive justiciable claims from it is to be denied.<sup>333</sup> In her view, art. 11(1) BV is not less concrete than the scope of protection of other fundamental rights.<sup>334</sup> In that sense, art. 11(1) BV is to be considered to be justiciable and may be applied in connection with other guarantees.<sup>335</sup> For the Swiss Federal Supreme Court, however, the norm requires concretization to a large extent, and it has not assessed the justiciability conclusively.<sup>336</sup>

Para. 1 also acts as an infringement title since it directly establishes a public interest for restricting the fundamental rights of third parties, insofar as such restrictions are provided for by law and are necessary for the protection of children.<sup>337</sup> For instance, the prohibition of sexual acts with children<sup>338</sup> can be based directly on the public interest in the special protection of children recognized in art. 11(1) BV. The interventive powers of child protection authorities against parents can also be justified as special protective measures.<sup>339</sup>

#### **4.2.3.5 Fundamental Rights Maturity (para. 2)**

According to art. 11(2) BV, children and young people exercise their rights to the extent that their power of judgment<sup>340</sup> allows, which serves the child’s self-determination.<sup>341</sup> Given the wording and systematic position, it is assumed that this provision describes the general maturity of fundamental rights, which merely presupposes the ability to judge.<sup>342</sup> The doctrine, however, is divided on the question of whether the scope of application of art. 11(2) BV is limited to fundamental rights particularly close to the child’s personality.<sup>343</sup> One view would include rights that have such profound or long-lasting effects on the child’s life that representation by third parties seems inappropriate, e.g., the right to

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<sup>332</sup> OFK-BIAGGINI, art. 11 BV n 4; approvingly RHINOW/SCHEFER/UEBERSAX, mn. 1343.

<sup>333</sup> WYTTEBACH, Grund- und Menschenrechtskonflikte, 297 et seq.

<sup>334</sup> Such as arts. 10, 13 or 14 BV; RYSER BÜSCHI, 75; WYTTEBACH, Grund- und Menschenrechtskonflikte, 297 et seq.

<sup>335</sup> OFK-BIAGGINI, art. 11 BV n 5; WYTTEBACH, Grund- und Menschenrechtskonflikte, 298.

<sup>336</sup> BGE 126 II 377, c. 5d; BIAGGINI, Kinderrechte, 52; REUSSER/LÜSCHER, St. Galler Kommentar, art. 11 BV n 31.

<sup>337</sup> See art. 36 BV on the restriction of fundamental rights; see also RHINOW/SCHEFER/UEBERSAX, mn. 1186 et seq.

<sup>338</sup> Art. 187 StGB.

<sup>339</sup> BSK-TSCHENTSCHER, art. 11 BV n 21; see also BIAGGINI, Kinderrechte, 52.

<sup>340</sup> Art. 16 ZGB; RHINOW/SCHEFER/UEBERSAX, mn. 1354.

<sup>341</sup> RHINOW/SCHEFER/UEBERSAX, mn. 1116 and 1352; SCHWEIZER, St. Galler Kommentar, art. 10 BV n 10; BSK-TSCHENTSCHER, art. 10 BV n 56; art. 11 BV n 24; WYTTEBACH, Grund- und Menschenrechtskonflikte, 314 et seq.

<sup>342</sup> REUSSER/LÜSCHER, St. Galler Kommentar, art. 11 BV n 45.

<sup>343</sup> REUSSER/LÜSCHER, St. Galler Kommentar, art. 11 BV n 44; RHINOW/SCHEFER/UEBERSAX, mn. 1356.

personality, physical and mental integrity as well as the right to private and family life.<sup>344</sup> The opposing view says that this approach is not compatible with the wording and the systematics of the Constitution, since such a restriction must have been formulated accordingly.<sup>345</sup> Para. 2, furthermore, only concerns the exercise of rights, not the legal entity or the content and scope of these rights.<sup>346</sup>

#### **4.2.4 Educational Right of Parents under the Constitution**

The Federal Constitution does not contain an explicit educational right of parents. Nevertheless, **art. 13(1) BV** confers on every person “the right to privacy in their private and family life and in their home.” In addition, **art. 14 BV** guarantees “the right to marry and to have a family.” While art. 14 BV includes the right to form a family and to have or not have children<sup>347</sup>, art. 13(1) BV guarantees respect for their private and family life. This provision, therefore, protects people from State interference in their voluntary, self-organized and autonomous co-existence and relationships. Moreover, this guarantee also protects family members from ordering disproportionate child protection measures.<sup>348</sup> The constitutional educational right of parents contains, i.a., the right to exercise parental responsibility.<sup>349</sup> These connections to children and young people represent an important, personal aspect of the parents and their way of living. In this respect, it is also an expression of their personal freedom. With that said, it is unclear if the educational right of parents falls under the protection of private or family life.<sup>350</sup>

#### **4.2.5 Encouragement of Children and Young People (Art. 67 BV)**

**Art. 67 BV** reads as follows:

“1 In fulfilling their duties, the Confederation and Cantons shall take account of the special need of children and young people to receive encouragement and protection.

2 The Confederation may supplement cantonal measures by supporting extra-curricular work with children and young people.”

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<sup>344</sup> RYSER BÜSCHI, 53 et seq.; WYTENBACH, Grund- und Menschenrechtskonflikte, 317.

<sup>345</sup> BSK-TSCHENTSCHER, art. 11 BV n 25.

<sup>346</sup> BIAGGINI, Kinderrechte, 52; OFK-BIAGGINI, art. 11 BV n 7.

<sup>347</sup> RHINOW/SCHÉFER/UEBERSAX, mn. 1412 and 1415 et seq.

<sup>348</sup> RHINOW/SCHÉFER/UEBERSAX, mn. 1358 and 1361; RYSER BÜSCHI, 116; WYTENBACH, Gewalterfahrungen, 151; WYTENBACH, Grund- und Menschenrechtskonflikte, 259 et seq. and 267; see also BISCHOF, 98, 103 and 106; MOSIMANN/VÖLGER WINSKY/PLÜSS, mn. 8.56 and 8.61.

<sup>349</sup> Art. 296 et seq. ZGB.

<sup>350</sup> WYTENBACH, Grund- und Menschenrechtskonflikte, 260.

Para. 1 is to be understood as a “mandate”, whereby it obligates the Confederation and the Cantons equally. In the open wording of para. 1, the provision has more the character of a general social objective which can be used to interpret other norms.<sup>351</sup> However, this “youth article” establishes neither competences nor individual claims, but an obligation to “accountability” that affects the Confederation and the Cantons.<sup>352</sup> Since art. 67(1) BV is a general concern for the encouragement of children and young people<sup>353</sup>, it relates to the same subject area as art. 11(1) BV.<sup>354</sup> Together, along with the social objectives of art. 41 BV, they form the constitutional basis of child and youth policy and contribute to the realization of the best interests of the child.<sup>355</sup> The encouragement and protection of young people are thus considered public interests in all areas.<sup>356</sup> The Confederation fulfills its encouragement and protection mandate in particular through financial aid.<sup>357</sup> One way Switzerland has taken action is with the ratification of the OPIC in 2017<sup>358</sup> (see ch. 3.1.1.3). Para. 2, furthermore, establishes an independent, optional (“may”) encouragement competence of the Confederation, the scope of which remains narrowly limited since the Confederation can only exercise it to “supplement cantonal measures”<sup>359</sup>, i.e., subsidiarily, which is why it is not considered a parallel competence.<sup>360</sup>

### 4.3 Swiss Criminal Code

Criminal law is primarily designed to punish behavior that is socially unaccepted or non-tolerated. Thus, it is usually only applicable when harm has already taken place.<sup>361</sup> In fact, between 2,300 and 2,700 children were victims of violent crimes reported by the cantonal police each year from 2014 to 2018.<sup>362</sup> They include offenses against physical integrity such as serious or common assault (art. 122 et seq. StGB), or offenses against sexual integrity (art. 187 et seqq. StGB). Moreover, the Criminal Code comprises offenses against liberty such as threatening behavior (art. 180 StGB) or coercion (art. 181 StGB) as well as offenses against personal honor such as insults (art. 177 StGB).<sup>363</sup>

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<sup>351</sup> See art. 41 BV; OFK-BIAGGINI, art. 67 BV n 2; GERBER, St. Galler Kommentar, art. 67 BV n 5.

<sup>352</sup> BIAGGINI, Kinderrechte, 50; OFK-BIAGGINI, art. 67 BV n 2; HÄFELI, 65 et seq.

<sup>353</sup> GERBER, St. Galler Kommentar, art. 67 BV n 7.

<sup>354</sup> REUSSER/LÜSCHER, St. Galler Kommentar, art. 11 BV n 11.

<sup>355</sup> GERBER, St. Galler Kommentar, art. 67 BV n 7.

<sup>356</sup> See arts. 5(2) and 36(2) BV; BSK-TSCHENTSCHER, art. 67 BV n 3.

<sup>357</sup> GERBER, St. Galler Kommentar, art. 67 BV n 10.

<sup>358</sup> WYTENBACH/SCHLÄPPI, 449; see also GERBER, St. Galler Kommentar, art. 67 BV n 12.

<sup>359</sup> Art. 67(2) BV.

<sup>360</sup> OFK-BIAGGINI, art. 67 BV n 3; BSK-TSCHENTSCHER, art. 67 BV n 5.

<sup>361</sup> LOPPACHER, Misshandlungen, 52.

<sup>362</sup> Combined fifth and sixth periodic reports, version of the Federal Council, 40.

<sup>363</sup> LOPPACHER, Misshandlungen, 52 et seq.; see also HÄFELI, 66.

Since Switzerland abolished the offense of abuse and neglect of a child in 1990, there is no explicit norm protecting against these offenses anymore. Despite the abolition, special attention is paid to protecting children and young people through other provisions of criminal law.<sup>364</sup> Physical and mental integrity is strengthened by the basis of the elements of the offense of felony or misdemeanor against minors, including abandonment (art. 127 StGB), sexual acts with children (art. 187 et seq. StGB), and neglect of duties of care, supervision, or education (art. 219 StGB).<sup>365</sup> Also, individual criminal acts turn from offenses prosecuted on complaint to such prosecuted ex officio as soon as minors are victims and the perpetrator has a duty of care, including common assault (art. 123 para. 2(3) StGB) and acts of aggression (art. 126(2) lit. a StGB).<sup>366</sup> The following few chapters focus on provisions that particularly protect the integrity of children and young people.

#### 4.3.1 Common Assault (Art. 123 StGB)

“1. Any person who wilfully causes injury to the person or the health of another in any other way shall be liable on complaint to a custodial sentence not exceeding three years or to a monetary penalty. [...]

2. The penalty is a custodial sentence not exceeding three years or a monetary penalty, and the offender is prosecuted ex officio,  
 [...],  
 if he commits the act on a person, and in particular on a child, who is unable to defend himself, or is under his protection or in his care. [...]”

According to the Swiss Federal Supreme Court, art. 123 StGB protects bodily integrity and health, both physical and psychological.<sup>367</sup> For a common assault to be given, the victim does not need to have suffered an attack on his or her physical integrity, but impairment of the victim’s mental integrity may suffice for the misdemeanor to be committed.<sup>368</sup> The Swiss Federal Supreme Court adds that “to justify the qualification of common assault, however, the harm must be of a certain importance.”<sup>369</sup> It is, therefore, necessary to take into account the type and intensity of the injury and its impact on the victim’s

<sup>364</sup> SCHWARZENEGGER/FUCHS/EGE, 241.

<sup>365</sup> LOPPACHER, *Misshandlungen*, 54; WYTTEBACH, *Grund- und Menschenrechtskonflikte*, 266; see also HÄFELI, 66.

<sup>366</sup> LOPPACHER, *Misshandlungen*, 54.

<sup>367</sup> HaKo-GODENZI, art. 123 StGB n 1.

<sup>368</sup> BSK-ROTH/BERKEMEIER, art. 123 StGB n 5.

<sup>369</sup> BGE 134 IV 189, c. 1.4; see also BSK-ROTH/BERKEMEIER, art. 123 StGB n 5; RYSER BÜSCHI, 149.

psyche. In particular, the effects of the injury must not only be assessed based on the victim's personal sensitivity but rather based on a person of average sensitivity in the same situation.<sup>370</sup> Attacks on physical integrity shall include any act that provokes a sick state, aggravates it, or delays its recovery, such as inflicting significant pain, uncomplicated bone fractures or concussions that heal quickly, wounds, bruises, abrasions, or scratches unless these injuries are only temporary and of an unimportant disturbance of the well-being.<sup>371</sup> Common assault is given if the perpetrator intentionally damages the victim's body in a way exceeding an act of aggression according to art. 126 StGB but not reaching the intensity of serious assault under art. 122 StGB.<sup>372</sup>

The offender commits a qualified form of common assault under art. 123 para. 2(3) StGB if he commits the act on a defenseless person or one who is under his or her care, namely a child. Therefore, if a parent abuses his or her child, the reason for the qualification lies in the legally assumed parental responsibility<sup>373</sup> toward that child. The obligation may derive from the law, contract, or a factual situation.<sup>374</sup> For the special protection of minors, the qualified common assault is not prosecuted only with the filing of a criminal complaint, but according to art. 123 para. 2(1) StGB *ex officio*.<sup>375</sup>

#### 4.3.2 Acts of Aggression (Art. 126 StGB)

“1 Any person who commits acts of aggression against another that do not cause any injury to the person or health shall be liable on complaint to a fine.

2 The offender is prosecuted *ex officio* if he commits the offence repeatedly:  
a. on a person under his protection or in his care, and in particular on a child [...]”

An act of aggression is defined as a minor and inconsequential attack on the body or health of another person.<sup>376</sup> The Swiss Federal Supreme Court stated that the application of art. 126 StGB presupposes an attack on the physical body, an impairment of the mental

<sup>370</sup> BGE 134 IV 189, c. 1.4; BSK-ROTH/BERKEMEIER, art. 123 StGB n 5.

<sup>371</sup> BGE 134 IV 189, c. 1.1; 103 IV 65, c. 2c; HaKo-GODENZI, art. 123 StGB n 2 et seq.; LOPPACHER, *Erziehung*, 34 et seq.; BSK-ROTH/BERKEMEIER, art. 123 StGB n 3 et seq., 8 and 57; RYSER BÜSCHI, 149; TRECHSEL/GETH, art. 123 StGB n 2.

<sup>372</sup> HaKo-GODENZI, art. 123 StGB n 2; LOPPACHER, *Erziehung*, 34 et seq.; RYSER BÜSCHI, 149; TRECHSEL/GETH, art. 123 StGB n 2.

<sup>373</sup> Art. 296 et seqq. ZGB.

<sup>374</sup> HaKo-GODENZI, art. 123 StGB n 9; LOPPACHER, *Erziehung*, 90; BSK-ROTH/BERKEMEIER, art. 123 StGB n 27 et seq. RYSER BÜSCHI, 153; SCHWARZENEGGER/FUCHS/EGE, 241 et seq.; TRECHSEL/GETH, art. 123 StGB n 10.

<sup>376</sup> BGE 103 IV 65, c. 2c; HaKo-GODENZI, art. 126 StGB n 1; BSK-ROTH/KESHELAVA, art. 126 StGB n 2; TRECHSEL/GETH, art. 126 StGB n 1.

integrity alone is at most punishable as a violation of honor.<sup>377</sup> Moreover, it adds that if the attack leads to damage to the body or health of the victim, it is no longer considered an act of aggression but a common assault (see above). Therefore, acts of aggression cover only the most insignificant attacks on the victim's body. However, very minor physical impacts are not subject to punishment because otherwise, the protection would be too excessive.<sup>378</sup> A physical impact is in any case in conflict with the social order if it causes physical pain to the victim. However, as a change of its jurisprudence, the Swiss Federal Supreme Court underlines that an attack that does not cause physical pain can also constitute an act of aggression, e.g., if the perpetrator throws his victim to the ground, but the latter can catch and does not hurt himself or herself. Therefore, an act of aggression according to art. 126 StGB is rather assumed in a case of a physical impact on a person that exceeds the generally customary and socially tolerated extent and that does not result in damage to the body or health. It is also sufficient to affirm an act of aggression if an encroachment on the physical integrity is capable of causing a disturbance of the well-being of a person of average resistance, constituting a weighty indication.<sup>379</sup>

The qualified form of assault under art. 126(2) lit. a StGB is likewise structured as an offense prosecuted *ex officio*. Accordingly, whoever repeatedly commits acts of aggression that do not result in bodily harm or damage to health on a person under his or her care or for whom he or she is responsible, namely on a child, is prosecuted *ex officio*.<sup>380</sup> Repeated acts of aggression shall be deemed to have occurred if they occur more than once<sup>381</sup>, i.e., when an act is committed several times on the same victim and shows a certain habit.<sup>382</sup> Trechsel considers there to be a repeated act of aggression as soon as the perpetrator acts at least twice within a relatively short period of time.<sup>383</sup>

#### **4.3.2.1 Example: BGer-Judgment 6S.273/2004 of 24 September 2004**

In a non-published judgment of the Swiss Federal Supreme Court, the partner of the mother of three daughters exercised *de facto* custody over her children. He engaged in

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<sup>377</sup> BGE 117 IV 14, c. 2a/bb; HaKo-GODENZI, art. 126 StGB n 1; BSK-ROTH/KESHELAVA, art. 126 StGB n 6; TRECHSEL/GETH, art. 126 StGB n 1.

<sup>378</sup> LOPPACHER, *Erziehung*, 34; BSK-ROTH/BERKEMEIER, art. 123 StGB n 8.

<sup>379</sup> BGE 134 IV 189, c. 1.2; 119 IV 25, c. 2a; 117 IV 14, c. 2a/bb; BSK-ROTH/KESHELAVA, art. 126 StGB n 3; RYSER BÜSCHI, 148 et seq.; TRECHSEL/GETH, art. 126 StGB n 1.

<sup>380</sup> HaKo-GODENZI, art. 126 StGB n 2 et seq.; BSK-ROTH/KESHELAVA, art. 126 StGB n 8.

<sup>381</sup> SCHWARZENEGGER/FUCHS/EGE, 242.

<sup>382</sup> BGE 134 IV 189, c. 1.2; 129 IV 216, c. 3.1; RYSER BÜSCHI, 153.

<sup>383</sup> BGE 129 IV 216, c. 3; BSK-ROTH/KESHELAVA, art. 126 StGB n 9; TRECHSEL/GETH, art. 126 StGB n 8.

acts of abuse, mainly against one daughter, to whom he gave blows that clearly exceeded what is useful and adequate to correct a child who commits some mischief. During the investigation by the child protection authority who conducted educational assistance, the partner was subjected to a credibility test, the result of which was not tangible.<sup>384</sup> The Swiss Federal Supreme Court asserted that physical attacks which exceed what is acceptable according to social customs, even if they do not cause any pain nor bodily harm or damage to health, are to be classified as acts of aggression within the meaning of art. 126 StGB. Slapping, punching, kicking, or hitting someone must be considered acts of aggression.<sup>385</sup>

#### **4.3.2.2 Distinction between Common Assault and Act of Aggression**

In the case of hitting or other impacts on the body of a child, both an act of aggression and common assault are considered. The distinction between these two can be difficult, especially when the injury is limited to bruises, abrasions, scratches, or contusions. The decisive factors in these borderline cases are the degree of pain caused<sup>386</sup> and the duration of healing.<sup>387</sup> An act of aggression occurs only in the case of minor interference with physical integrity that only results in a temporary impairment of well-being, e.g., a scratch on the nose with a bruise, a bruise on the arm, and a sore jaw without a bruise. If the harm causes temporary disturbances that are equivalent to a pathological condition or a significant impairment of the appearance, common assault may be given. Furthermore, a punch to the face causing significant bruising or a fracture of the jaw, teeth, or nasal bone as well as marks in the eye area can be qualified as common assault. For all the reasons mentioned above, the judge should be given a certain margin of appreciation.<sup>388</sup> It is largely undisputed in doctrine and jurisprudence that the educational right cannot justify interventions in physical integrity if these reach the intensity of a common assault.<sup>389</sup>

#### **4.3.3 Endangerment and Abandonment (Art. 127 StGB)**

“Any person who exposes a helpless person under his protection or care to a life-threatening danger or to a serious and immediate danger to health, or abandons the person to

<sup>384</sup> BGer-Judgment 6S.273/2004 of 24 September 2004, facts of the case.

<sup>385</sup> BGer-Judgment 6S.273/2004 of 24 September 2004, c. 2.1; BSK-ROTH/KESHELAVA, art. 126 StGB n 3.

<sup>386</sup> BGE 107 IV 40, c. 5c; BSK-ROTH/BERKEMEIER, art. 123 StGB n 8.

<sup>387</sup> BGE 119 IV 25, c. 2a; BSK-ROTH/BERKEMEIER, art. 123 StGB n 8.

<sup>388</sup> BSK-ROTH/BERKEMEIER, art. 123 StGB n 8; BSK-ROTH/KESHELAVA, art. 126 StGB n 5; RYSER BÜSCHI, 151.

<sup>389</sup> BGE 134 IV 189, c. 1.3; 107 IV 40, c. 5c; LOPPACHER, *Erziehung*, 34 et seq.

such a danger shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.”

The provision of endangerment and abandonment protects the life and health of helpless people.<sup>390</sup> The offender may be anyone who holds a position of a guarantor, in particular parents<sup>391</sup>, which also justifies the equivalence of an active endangerment or an abandonment.<sup>392</sup> The obligation to protection or care may be based on law, contract, or a factual situation, whereby short-term guardianship is not sufficient.<sup>393</sup> In addition, the victim must be “helpless”. The French text “une personne hors d’état de se protéger elle-même”<sup>394</sup> expresses the notion of helplessness more clearly: The victim must be unable to help himself or herself, i.e., he or she is dependent on outside help to ward off or avoid danger. The victim may also not be aware of the danger and not recognize it.<sup>395</sup> Additionally, the perpetrator must cause a concrete danger or do nothing to eliminate it. A concrete danger requires that the occurrence of damage is imminent, i.e., that “according to the usual course of events, there is the probability or the near possibility of a violation of the protected legal right.”<sup>396</sup> A serious or immediate danger is only required with regard to health, not life.<sup>397</sup> The wording of art. 127 StGB demands that the threat of damage to health is at a minimum severe.<sup>398</sup> In terms of concurrent sentencing, the perpetrators of arts. 219 and 127 StGB may be of the same nature. The unlawful content is thus fully covered by the sole application of the latter.<sup>399</sup>

#### 4.3.4 Sexual Acts with Children (Art. 187 StGB)

“1. Any person who engages in a sexual act with a child under 16 years of age, or, incites a child to commit such an activity, or involves a child in a sexual act, shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

<sup>390</sup> BSK-MAEDER, art. 127 StGB n 8.

<sup>391</sup> BSK-MAEDER, art. 127 StGB n 12.

<sup>392</sup> BSK-MAEDER, art. 127 StGB n 10 et seq. and 24; SCHWARZENEGGER/FUCHS/EGE, 243.

<sup>393</sup> LOPPACHER, Erziehung, 90.

<sup>394</sup> Art. 127 StGB, French version.

<sup>395</sup> BSK-MAEDER, art. 127 StGB n 16.

<sup>396</sup> BSK-MAEDER, art. 127 StGB n 18.

<sup>397</sup> BSK-MAEDER, art. 127 StGB n 19.

<sup>398</sup> BSK-MAEDER, art. 127 StGB n 20.

<sup>399</sup> LOPPACHER, Erziehung, 156; BSK-MAEDER, art. 127 StGB n 41.



2. No penalty may be imposed if the difference in age between the persons involved is three years or less.
3. If the offender has not reached the age of 20 at the time of the act or the first of the acts, [...], the responsible authority may dispense with prosecution, referral to the court or the imposition of a penalty. [...]"

The sexual integrity of children and young people is protected by the special provision of art. 187 StGB. The aim is to prevent the endangerment of the sexual development of children under the age of 16, i.e., up to a point when he or she has reached the necessary maturity to consent to sexual acts on his or her responsibility. The focus here is on the risk to mental, i.e., psycho-emotional, development.<sup>400</sup> Derived from para. 2, a perpetrator is someone more than three years older than the victim.<sup>401</sup> It is not necessary to prove concrete danger or damage in a case because even consensual sexual contact with children under the age of 16 is punishable.<sup>402</sup> However, the Swiss Federal Supreme Court emphasizes that “behavior that does not have a direct sexual connotation based on its external appearance is not sexual. Sexual acts [...] are behaviors that are clearly sexually related to an outsider according to their outward appearance.”<sup>403</sup> Moreover, it adds that “the concept of the sexual act can only extend to conduct that is significant concerning the protected legal interest.”<sup>404</sup> What should be excluded from being punishable are the “merely indecent, inappropriate, offensive, tasteless, unseemly, repulsive.”<sup>405</sup> In cases of doubt, the relevance is to be determined according to the individual circumstances, for instance, the age of the victim or the age difference to the offender.<sup>406</sup>

The provision contains three types of sexual acts with children: The first type, engagement in a sexual act with children, requires physical contact between the offender and the victim, i.e., the offender touches the child or vice-versa.<sup>407</sup> The second type, incitement of children to commit a sexual act, does not involve physical contact between the perpetrator and the victim, but the latter commits a sexual act on his or her own body, on the

<sup>400</sup> RYSER BÜSCHI, 161.

<sup>401</sup> BSK-MAIER, art. 187 StGB n 4 et seq.

<sup>402</sup> BSK-MAIER, art. 187 StGB n 7 and 9; RYSER BÜSCHI, 161; SCHWARZENEGGER/FUCHS/EGE, 243 et seq.

<sup>403</sup> BGE 125 IV 58, c. 3b; see also RYSER BÜSCHI, 161.

<sup>404</sup> BGE 125 IV 58, c. 3b; see also RYSER BÜSCHI, 163.

<sup>405</sup> BGE 125 IV 58, c. 3b; see also RYSER BÜSCHI, 163.

<sup>406</sup> BGE 125 IV 58, c. 3b; RYSER BÜSCHI, 163.

<sup>407</sup> Art. 187 para. 1(1) StGB; BSK-MAIER, art. 187 StGB n 10.

body of another person, or with an animal. This means that the victim is psychologically influenced by the perpetrator to perform sexual manipulations.<sup>408</sup> Involvement of children in a sexual act, lastly, stipulates that the perpetrator performs sexual acts in front of the child while there is no touching between them. The child is thus involved in the sexual act through purposeful behavior as a bystander and is made the sexual object.<sup>409</sup>

Art. 187 StGB can also be committed by failure to act, i.e., if the offender as a guarantor is obliged to take care of the child's welfare. For instance, a mother may be liable for prosecution if she allows her husband to sexually abuse her daughter on several occasions.<sup>410</sup> In addition, sexual abuse can often cause physical harm to children. These interventions in their physical integrity may constitute assault pursuant to art. 122 et seqq. StGB. However, because sexual acts and assault affect different legal interests, they are to be applied in conjunction.<sup>411</sup> Art. 187 para. 3 StGB, furthermore, states the case when the perpetrator, e.g., the parent of the child, has not yet reached the age of 20 at the time of the sexual act. In this case, a prosecution may be dispensed, for instance, if the legal interest of endangering the sexual development of children is not or hardly affected.<sup>412</sup>

An act that is directed against the sexual integrity of the child may in no case be done for educational reasons, i.e., an educational right of parents can in no case justify such an act.<sup>413</sup> The doctrine, with reference to BGE 126 IV 136, consistently assumes that art. 187 StGB takes precedence in relation to the neglect of duties under art. 219 StGB. The protected legal interest is the same for both. A perpetrator who has been imposed a duty of care or education and who exploits this relationship of trust and closeness to perform sexual acts with the child is thereby endangering not only the sexual but also the physical or psychological development of the child.<sup>414</sup>

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<sup>408</sup> Art. 187 para. 1(2) StGB; BSK-MAIER, art. 187 StGB n 13.

<sup>409</sup> Art. 187 para. 1(3) StGB; BSK-MAIER, art. 187 StGB n 17.

<sup>410</sup> BSK-MAIER, art. 187 StGB n 44.

<sup>411</sup> RYSER BÜSCHI, 168.

<sup>412</sup> BSK-MAIER, art. 187 StGB n 31.

<sup>413</sup> LOPPACHER, *Erziehung*, 50.

<sup>414</sup> LOPPACHER, *Erziehung*, 157 et seq.; TRECHSEL/ARNAIZ, art. 219 StGB n 7.

### 4.3.5 Sexual Acts with Dependents (Art. 188 StGB)

“1. Any person who commits a sexual act by exploiting his or her relationship with a minor over the age of 16 who is dependent on him due to a relationship arising from the minor's education, care or employment or another form of dependent relationship,  
any person who encourages such a minor to commit a sexual act by exploiting such a relationship,  
shall be liable to a custodial sentence not exceeding three years or to a monetary penalty. [...]”

The undisturbed sexual development of adolescents and their right to sexual self-determination are protected by art. 188 StGB.<sup>415</sup> It punishes a sexual act committed on young people between 16 to 18 years old if the perpetrator takes advantage of a relationship of education, trust, work, or one of dependence of another nature or encourages the minor to commit the said act.<sup>416</sup> If the victim is less than 16 years old, art. 187 StGB (see above) takes precedence.<sup>417</sup> In the context of family violence, cases of art. 188 StGB involve a minor over the age of 16 who is dependent on parents, grandparents, adoptive parents, foster parents, or the partner of one parent. It is emphasized that the dependency must be of a certain extent, meaning that the inferiority must be such that a minor over the age of 16 does not dare to resist the sexual act precisely because of it.<sup>418</sup>

In BGE 126 IV 136, the Swiss Federal Supreme Court asserted that although the legal interests protected in arts. 188 and 219 StGB are the same, the former only protects the dependent's sexual development, whereas the latter covers any act and neglect likely to endanger the development of the minor. Therefore, art. 188 StGB is *lex specialis* to art. 219 StGB.<sup>419</sup> The Swiss Federal Supreme Court adds that “art. 188 StGB does not apply if the perpetrator did not take advantage of his dominant position to commit the sexual act. This is a limitation intended by the legislator, who thought that otherwise the right of young people to make up their minds from the age of sixteen in sexual matters would be too restricted.”<sup>420</sup>

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<sup>415</sup> BSK-MAIER, art. 188 StGB n 1.

<sup>416</sup> BGE 126 IV 136, c. 1d; BSK-MAIER, art. 188 StGB n 2 et seq.; RYSER BÜSCHI, 169.

<sup>417</sup> BSK-MAIER, art. 187 StGB n 56.

<sup>418</sup> BSK-MAIER, art. 188 StGB n 5; RYSER BÜSCHI, 169.

<sup>419</sup> BGE 126 IV 136, c. 1d; LOPPACHER, *Erziehung*, 159; BSK-MAIER, art. 188 StGB n 26.

<sup>420</sup> BGE 126 IV 136, c. 1d; see also LOPPACHER, *Erziehung*, 159.

### 4.3.6 Neglect of Duties of Care, Supervision, or Education (Art. 219 StGB)

“1 Any person who violates or neglects his or her duties of supervision and education towards a minor and thus endangers the minor's physical or mental development, shall be liable to a custodial sentence not exceeding three years or to a monetary penalty. [...]”

#### 4.3.6.1 Violation of Duty or Failure to Fulfill Obligation

Art. 219 StGB is a misdemeanor and covers all forms of maltreatment: physical, mental, and sexual harm as well as neglect.<sup>421</sup> The legal asset protected by this provision is the physical and mental development of a minor.<sup>422</sup> The perpetrator must have violated his or her duty of care, supervision, or education or failed to do so.<sup>423</sup> In the first case, the perpetrator positively violates his or her duty, e.g., by mistreating the minor. In the second case, the perpetrator passively fails to fulfill his or her obligation, e.g., by abandoning or neglecting the child, or by not taking the necessary safety measures in the face of danger.<sup>424</sup> Care involves the satisfaction of various needs, such as i.a., food, clothing, shelter, affection, or love, whereas education comprises a considerable influence on the integration of the minor into society.<sup>425</sup> When assessing the facts of art. 219 StGB, it is necessary to rely on the concretization made under civil law with regard to the concept of the duty of care and education, notably arts. 301 and 302 ZGB.<sup>426</sup>

**Failures to fulfill this obligation** include many forms of neglect, e.g., when parents insufficiently care for their child, for instance, by feeding their child inadequately or withholding necessary medical care from him or her.<sup>427</sup> A central aspect is the neglect of the duty of supervision so that the child does not do anything harmful to his health.<sup>428</sup> **Positive violations of duties** can include parents engaging in sexual acts with their children or regularly hitting them after receiving poor school grades.<sup>429</sup> In addition to regularly yelling at the child, constant verbal belittling can also be considered a positive violation. In this respect, one can speak of a guarantor position, and only such a position may justify

<sup>421</sup> LOPPACHER, *Misshandlungen*, 54 and 58.

<sup>422</sup> BGE 125 IV 64, c. 1a; BSK-ECKERT, art. 219 StGB n 2; RYSER BÜSCHI, 210; HaKo-WOHLERS, art. 219 StGB n 1.

<sup>423</sup> BSK-ECKERT, art. 219 StGB n 8; TRECHSEL/ARNAIZ, art. 219 StGB n 3; HaKo-WOHLERS, art. 219 StGB n 3.

<sup>424</sup> BGE 125 IV 64, c. 1a; LOPPACHER, *Erziehung*, 69.

<sup>425</sup> BSK-ECKERT, art. 219 StGB n 8; TRECHSEL/ARNAIZ, art. 219 StGB n 3.

<sup>426</sup> LOPPACHER, *Erziehung*, 93.

<sup>427</sup> LOPPACHER, *Misshandlungen*, 55 et seq.; WYTENBACH, *Gewalterfahrungen*, 148.

<sup>428</sup> LOPPACHER, *Erziehung*, 109 et seq.

<sup>429</sup> LOPPACHER, *Misshandlungen*, 55 et seq.

the equal treatment of an active violation or a passive failure to maintain duty.<sup>430</sup> It is essential that certain acts per se, even a one-time act, can violate the duty of care and education. While a one-time sexual act with the child according to art. 187 et seqq. StGB is deemed a violation of the obligation, one-time labeling of the child as “stupid” may not reach the threshold. Moreover, a one-time slap that reaches the intensity of an act of aggression under art. 126 StGB constitutes a violation of the duty of care since this provision protects the physical integrity of the minor.<sup>431</sup> The content and scope of the duty of care or education are determined by the relationship between the offender and the victim or according to their legal basis, which must be examined in each specific case.<sup>432</sup>

#### **4.3.6.2 Example 1: BGer-Judgment 6S.339/2003 of 12 November 2003**

In a non-published judgment of the Swiss Federal Supreme Court, a man living in cohabitation with his partner and her three daughters was accused of having sexually assaulted one daughter and having abused all three and his son.<sup>433</sup> According to the Swiss Federal Supreme Court, the circle of offenders does not only include parents, but also those who have a duty of care toward a minor, i.e., protection, or a duty of education, i.e., to ensure the child’s physical, mental, and psychological development. This obligation can be based on law<sup>434</sup>, an authorial decision, a contract, or a factual situation. In each case, it must be assessed whether the perpetrator is under a duty of care toward the minor.<sup>435</sup> A guarantor position can be considered to exist if the relationship between the perpetrator and the child is of a certain duration, solidity, and intensity.<sup>436</sup> In this case, the partner considered the three daughters as his own children and provided for their education, thus assisting his partner in their upbringing. Therefore, it must be accepted that he was in a guarantor position based on a factual situation and can also be a perpetrator.<sup>437</sup>

#### **4.3.6.3 Example 2: Cohabitation**

Although the status of cohabiting partners is not regulated in the Civil Code, they should have a duty of care and education toward the minor based on this fact alone. Cohabitation

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<sup>430</sup> BSK-ECKERT, art. 219 StGB n 3; LOPPACHER, *Erziehung*, 69 et seq.

<sup>431</sup> LOPPACHER, *Erziehung*, 101 et seq.; LOPPACHER, *Misshandlungen*, 55 et seq.

<sup>432</sup> LOPPACHER, *Erziehung*, 92; LOPPACHER, *Misshandlungen*, 55; RYSER BÜSCHI, 211; HaKo-WOHLERS, art. 219 StGB n 2.

<sup>433</sup> BGer-Judgment 6S.339/2003 of 12 November 2003, facts of the case.

<sup>434</sup> Namely parents, step and adoptive parents according to art. 296 i.c.w. art. 301 et seqq. ZGB, see ch. 4.4.1 and 4.4.2.

<sup>435</sup> BSK-ECKERT, art. 219 StGB n 3; LOPPACHER, *Erziehung*, 70 et seq.; RYSER BÜSCHI, 211; TRECHSEL/ARNAIZ, art. 219 StGB n 1.

<sup>436</sup> BSK-ECKERT, art. 219 StGB n 4 et seq.; RYSER BÜSCHI, 211; TRECHSEL/ARNAIZ, art. 219 StGB n 1.

<sup>437</sup> BGer-Judgment 6S.339/2003 of 12 November 2003, c. 2.2; RYSER BÜSCHI, 211.

exists if there is a relationship between two people that “has already lasted five years”<sup>438</sup> and “the relationship between the two parties is so close and stable that the [...] cohabiting partner can expect support and assistance from his new cohabiting partner in a possible emergency as from a spouse.”<sup>439</sup> However, since neither content nor scope of the duty of care and education in factual situations is defined in law, it is difficult to define to what extent such a duty has existed, not to mention breached. A duty of care and education will thus only be assumed with reservation in a factual situation.<sup>440</sup> Nevertheless, this obligation may arise if a cohabiting partner lives in a household with the guardian, notably the child’s parent, and the child.<sup>441</sup>

#### **4.3.6.4 Endangerment of the Child’s Physical or Mental Development**

Despite violating or neglecting the duties in art. 219 StGB, the provision is not yet fulfilled. In addition, the violation or the neglect of the duties must have had the effect of endangering the physical or mental development of the child. It was explicitly renounced to presuppose a “severe” endangerment to fulfill art. 219 StGB.<sup>442</sup> Since this provision is an offense of concrete endangerment, the perpetrator’s behavior does not need to lead to a result, i.e., to an injury to the physical or mental integrity of the minor.<sup>443</sup> Nevertheless, the mere abstract possibility of an injury is insufficient, but such an injury must rather appear at least probable<sup>444</sup>, i.e., when it is more likely that the child’s physical or mental development will be delayed or will not conform to the norm than that of normal physical development.<sup>445</sup> The Swiss Federal Supreme Court defines a concrete endangerment as “a condition due to which, according to the ordinary course of events, there is the probability or the near possibility of a violation of the protected legal right.”<sup>446</sup>

#### **4.3.6.5 Example: BGE 125 IV 64**

In a published decision of the Swiss Federal Supreme Court, a pupil at a school inflicted severe and repeated sexual abuse on a schoolgirl. Her classroom teacher, and later principal of the school, did not put any measures in place after being informed about the abuse

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<sup>438</sup> BGE 114 II 295, c. 1b.

<sup>439</sup> BGE 114 II 295, c. 1b.

<sup>440</sup> LOPPACHER, *Erziehung*, 100.

<sup>441</sup> LOPPACHER, *Erziehung*, 86 et seq.

<sup>442</sup> LOPPACHER, *Erziehung*, 120; RYSER BÜSCHI, 212; TRECHSEL/ARNAIZ, art. 219 StGB n 4.

<sup>443</sup> BSK-ECKERT, art. 219 StGB n 10.

<sup>444</sup> BGE 125 IV 64, c. 1a; TRECHSEL/ARNAIZ, art. 219 StGB n 4.

<sup>445</sup> LOPPACHER, *Erziehung*, 125; LOPPACHER, *Misshandlungen*, 56; RYSER BÜSCHI, 212; TRECHSEL/ARNAIZ, art. 219 StGB n 4.

<sup>446</sup> BGE 94 IV 60, c. 2.

by a therapist. Subsequently, the pupil raped another schoolgirl, and the principal again refrained from intervening.<sup>447</sup> The Swiss Federal Supreme Court asserted that “the appellant's failure to take the necessary measures to prevent such abuse from recurring, which appeared more than presumable, was thus likely to encourage the risk to be feared. The appellant's behavior, therefore, had the effect of endangering the physical or psychological development of the other minors in her care.”<sup>448</sup>

#### **4.3.6.6 Connection to other Criminal Provisions**

It should be noted that the number of convictions relying on art. 219 StGB are relatively low, because of, on the one hand, the non-logical classification of the article in the sixth title of the Criminal Code on felonies and misdemeanors against the family. The article is thus located far from the other provisions in the first title protecting the physical integrity of individuals.<sup>449</sup> On the other hand, the article is applied with restraint due to the difficulty in defining the content of the terms “duty of supervision and education” and “endangerment of physical or mental development”.<sup>450</sup> Therefore, the doctrine is disagreeing on whether art. 219 StGB, in cases of child abuse, is subordinate to likewise fulfilled offenses against life and limb or sexual integrity<sup>451</sup> (see below).

#### **4.3.6.7 Concurrent Sentencing of Art. 219 StGB with Regard to Common Assault and Act of Aggression**

Art. 219 StGB is referred to as a catch-all provision. If a stepfather had merely been convicted of multiple acts of aggression within the meaning of art. 126(2) lit. a StGB, although he had yelled at his stepchild almost daily, the yelling would not have been covered by the conviction for an act of aggression. In this sense, the totality of the actions is qualified as the neglect of duties of care, supervision, or education under art. 219 StGB.<sup>452</sup> Furthermore, in practice, art. 219 StGB is regularly applied when caregivers commit acts against children and young people that cannot be subsumed under any other offense or when acts occur frequently or over a longer period of time. It is difficult to distinct between art. 123 para. 2(3) StGB as well as arts. 126(2) lit. a and 219 StGB.<sup>453</sup> However,

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<sup>447</sup> BGE 125 IV 64, 66 et seq. (facts of the case); LOPPACHER, *Erziehung*, 113.

<sup>448</sup> BGE 125 IV 64, c. 1d; see also LOPPACHER, *Erziehung*, 120 et seq.

<sup>449</sup> Art. 111 et seqq. StGB.

<sup>450</sup> LOPPACHER, *Misshandlungen*, 56 et seq.

<sup>451</sup> BSK-ECKERT, art. 219 StGB n 13; SCHWARZENEGGER/FUCHS/EGE, 244 et seq.; TRECHSEL/ARNAIZ, art. 219 StGB n 4.

<sup>452</sup> LOPPACHER, *Erziehung*, 107 et seq. and 200.

<sup>453</sup> LOPPACHER, *Erziehung*, 115.

authorities applying the law only convict the perpetrator for violating art. 219 StGB in extreme cases.<sup>454</sup> However, a part of doctrine assumes that acts of aggression within the meaning of art. 126 StGB as a contravention is covered by the misdemeanor of art. 219 StGB.<sup>455</sup> The Swiss Federal Supreme Court has not yet dealt with this question. According to Loppacher, and to whom Ryser Büsschi agrees, arts. 126 and 219 StGB should be applied in conjunction in cases of acts of aggression that reach a certain degree or a certain duration and regularity, because they could, in addition to interfering with the child's physical integrity, also endanger his or her physical and mental development.<sup>456</sup>

In a non-published decision of the Swiss Federal Supreme Court, a mother committed numerous acts of physical and psychological abuse on one of her children. The child's father, the husband of the mother, was held to have known about the abuse, but he had not taken any measures to prevent it.<sup>457</sup> According to the Swiss Federal Supreme Court, the misdemeanors of arts. 123 and 219 StGB must be applied in conjunction because their protected legal interests, although similar, do not coincide completely. While the former protects the physical and mental integrity, the latter covers the physical and mental development of the minor.<sup>458</sup> It points out that "harming the physical integrity of a child does not necessarily threaten his or her development, even less so in the case of isolated acts."<sup>459</sup> Moreover, it adds that "the abuse of a child, which has [...] a certain duration and intensity, not only affects the physical and mental integrity of the child, but also his or her physical or mental development."<sup>460</sup> However, the majority of the doctrine assumes that serious and common assault under art. 122 et seq. StGB as "injury offenses" take precedence over art. 219 StGB as an "endangerment offense".<sup>461</sup>

### **4.3.7 Educational Right of Parents as a Justification Ground**

Despite fulfilling the facts of the offense objectively and subjectively, a conduct is not yet deemed unlawful. Rather, it must be examined whether there is a justification and

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<sup>454</sup> LOPPACHER, *Erziehung*, 201.

<sup>455</sup> TRECHSEL/ARNAIZ, art. 219 StGB n 7.

<sup>456</sup> LOPPACHER, *Erziehung*, 155; RYSER BÜSCHI, 214.

<sup>457</sup> BGer-Judgment 6S.736/2000 of 28 November 2000, facts of the case.

<sup>458</sup> BGer-Judgment 6B\_1256/2016 of 21 February 2018, c. 1.4; LOPPACHER, *Erziehung*, 154; RYSER BÜSCHI, 213; TRECHSEL/ARNAIZ, art. 219 StGB n 7.

<sup>459</sup> BGer-Judgment 6S.736/2000 of 28 November 2000, c. 1d.

<sup>460</sup> BGer-Judgment 6S.736/2000 of 28 November 2000, c. 1d.

<sup>461</sup> LOPPACHER, *Erziehung*, 153; RYSER BÜSCHI, 213.



finally whether the person concerned has also acted culpably (the thesis does not address the latter). There are criminal, non-criminal, and supra-legal justification grounds.<sup>462</sup>

#### 4.3.7.1 Permissibility of Acts of Aggression (Art. 126 StGB)

Parents have the right to educate their children on the basis of parental responsibility under art. 296 ZGB. The scope of their educational right is specified in art. 301 et seqq. ZGB, whereby they have a wide margin of discretion. From this follows that certain acts which may constitute an offense in an objective and subjective manner, notably corporal punishment, may be justified by the educational right of parents and thus constitute a ground for justification outside criminal law. The issue is whether parents are allowed to slap their child.<sup>463</sup> A part of the doctrine and the Swiss Federal Supreme Court regard acts of aggression (see ch. 4.3.2) as covered by the right to chastise, and thus as justified behavior on the part of the parents, insofar as they are not repeated according to art. 126(2) lit. a StGB. In two decisions (see below), the Swiss Federal Supreme Court has extended the parents' right to chastise at least up to the point until the prosecuting authorities must prosecute the repeated assaults *ex officio*. It is therefore no longer conceivable that a prosecution can be opened *ex officio*, but that this behavior is then justified by the right to chastise.<sup>464</sup> Similarly, the educational right of parents is not suitable as a justification when it comes to many acts performed in a short period of time, which reach the intensity of an act of aggression.<sup>465</sup> The Federal Council, furthermore, emphasized: "Repeated, so to speak habitual or systematically inflicted beatings clearly exceed the right of education and chastisement."<sup>466</sup> However, today's findings from the fields of medicine, psychology, and pedagogy deny a general right to chastisement since it is incompatible with the best interests of the child.<sup>467</sup> In this view, it does not seem appropriate to accept physical chastisement as a ground for justification under criminal law.<sup>468</sup> It is surprising to note that there is a clear discrepancy between the opinions in criminal and civil law. While the criminal doctrine disagrees on whether physical chastisement is permissible, a large majority of civil doctrine denies that right, even though the educational right of parents as a ground for justification in criminal law is based on civil law.<sup>469</sup> Nevertheless, the doctrine

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<sup>462</sup> LOPPACHER, *Erziehung*, 30 et seq.; RYSER BÜSCHI, 214 et seq.

<sup>463</sup> LOPPACHER, *Misshandlungen*, 57 et seq.; RYSER BÜSCHI, 220; TRECHSEL/GETH, art. 126 StGB n 7.

<sup>464</sup> FASSBIND, 554; RYSER BÜSCHI, 221; WYTENBACH, *Gewalterfahrungen*, 148.

<sup>465</sup> LOPPACHER, *Erziehung*, 35 et seq.; BSK-ROTH/KESHELAVA, art. 126 StGB n 11; RYSER BÜSCHI, 220 and 223.

<sup>466</sup> BBI 1985 II 1033; see also BSK-ROTH/KESHELAVA, art. 126 StGB n 9; TRECHSEL/GETH, art. 126 StGB n 8.

<sup>467</sup> RYSER BÜSCHI, 222.

<sup>468</sup> LOPPACHER, *Misshandlungen*, 58.

<sup>469</sup> LOPPACHER, *Erziehung*, 36 et seq.; RYSER BÜSCHI, 221.

agrees that a right of chastisement as a justification may apply in the case of an act of aggression, but not in cases of assault according to art. 122 et seq. StGB.<sup>470</sup>

#### **4.3.7.2 Example 1: BGE 129 IV 216**

In this case, a stepfather had slapped, kicked, and regularly pulled the ears of his partner's children more than ten times over a period of three years. After the biological father filed a criminal complaint, the perpetrator claimed that his behavior was covered by the educational right of parents and that his actions did not meet the criterion of repetition. The Swiss Federal Supreme Court, however, in concretization of art. 126(2) StGB, decided that repetitive slaps and kicks violate the physical integrity and the dignity of the child concerned, which is compatible with neither arts. 10 and 11 BV nor art. 19 CRC.<sup>471</sup> Therefore, the court emphasizes that ten slaps in the face within three years and kicks in the buttocks of a child constitute a "repeated act" and would in any case exceed the parental right to inflict corporal punishment.<sup>472</sup> However, it left open whether infrequent, light corporal punishment is also prosecuted by law.<sup>473</sup> Nevertheless, the judgment contains a clear commitment against the use of systematic physical violence in parental education.<sup>474</sup> In this context, the CRC has recently gained greater weight in the interpretation and application of Swiss law in conformity with international law. For example, the Swiss Federal Supreme Court used art. 19 CRC to limit the right of parents to raise children.<sup>475</sup>

#### **4.3.7.3 Example 2: BGer-Judgment 6S.178/2005 of 22 June 2005**

In a non-published judgment, the Swiss Federal Supreme Court recalled international conventions aimed at protecting children against all forms of harm and degrading treatment. It also referred to arts. 10 and 11 BV granting the integrity of children and young people special protection (see ch. 4.2.2 and 4.2.3). The Swiss Federal Supreme Court thus considered the right to correction to be excluded in cases of repeated acts of aggression and assault, referring to the published decision mentioned above. Parents could therefore not use an instrument that could cause bodily harm.<sup>476</sup> In the present case, the appellant had regularly hit his children, also using instruments like belts and electric wires likely to

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<sup>470</sup> BSK-ROTH/KESHELAVA, art. 126 StGB n 11; RYSER BÜSCHI, 221.

<sup>471</sup> BGE 129 IV 216, c. 2.2 et seq.; WYTTENBACH, Grund- und Menschenrechtskonflikte, 309.

<sup>472</sup> BGE 129 IV 216, c. 2.5; End Violence Against Children/End Corporal Punishment; LOPPACHER, Erziehung, 36; RYSER BÜSCHI, 153 et seq.

<sup>473</sup> BGE 129 IV 216, c. 2.4; BGer-Judgment 6S.178/2005 of 22 June 2005, c. 3.1; RYSER BÜSCHI, 220.

<sup>474</sup> WYTTENBACH, Grund- und Menschenrechtskonflikte, 309.

<sup>475</sup> BGE 129 IV 216, c. 2.2; WYTTENBACH/SCHLÄPPI, 447 et seq.

<sup>476</sup> BGer-Judgment 6S.178/2005 of 22 June 2005, c. 3.1.

cause bodily harm. The Swiss Federal Supreme Court decided that his behavior went far beyond what could be considered as a possible right to inflict light corrections and that his acts did not serve the well-being of the children. It based its considerations, i.a., on art. 302 ZGB, according to which parents have a duty to bring up their children in such a way as to protect their physical, mental, and moral development.<sup>477</sup>

#### **4.3.7.4 Permissibility of Insults (Art. 177 StGB)**

Art. 177 StGB punishes attacks on the honor of another person through words, writing, pictures, signs, or acts of aggression.<sup>478</sup> It protects the sense of honor, i.e., a feeling of being a respectable, honorable person and being evaluated as such by others. Even small children with no or only a slight sense of honor are protected by art. 177 StGB. However, the attack on honor must be significant, meaning that relatively insignificant exaggerations or discourtesies remain unpunished.<sup>479</sup> Moreover, no insult is a mere violation of elementary rules of decency.<sup>480</sup> The most common method of punishment used by parents is scolding. An insult can contain passing a value judgment on the child concerned, i.e., when the child is called a pig, a whore, or similarly. Parents, however, have a certain amount of discretion, within which insults can be justified by the educational right of parents if used proportionately.<sup>481</sup> For instance, if a child eats in an ill-mannered way, this could tempt parents to tell the child that he or she eats like a pig. Such statements may be appropriate in the light of education. However, verbal violence, i.e., constantly calling a child “stupid”, “dumb”, or other names can have the same consequences as sexual or physical violence.<sup>482</sup> Therefore, this act is deemed inappropriate since it only revolves around degrading the child, resulting in a violation of the duty of care and education under art. 219 StGB<sup>483</sup> (see ch. 4.3.6). Due to the deviating scope of protection, arts. 177 and 219 StGB are to be applied in conjunction.<sup>484</sup> In addition, it should be noted that insults and acts of aggression (see ch. 4.3.2) are close to each other. Art. 177(3) StGB<sup>485</sup> therefore “allows the judge to exempt one or both offenders from punishment if an insult has been

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<sup>477</sup> BGer-Judgment 6S.178/2005 of 22 June 2005, c. 3.2; RYSER BÜSCHI, 221 et seq.

<sup>478</sup> LOPPACHER, *Erziehung*, 43.

<sup>479</sup> BSK-RIKLIN, art. 177 StGB n 2 and 7; RYSER BÜSCHI, 203.

<sup>480</sup> BSK-RIKLIN, art. 177 StGB n 9.

<sup>481</sup> LOPPACHER, *Erziehung*, 43 et seq.; RYSER BÜSCHI, 203 et seq. and 224.

<sup>482</sup> LOPPACHER, *Erziehung*, 44.

<sup>483</sup> LOPPACHER, *Erziehung*, 105.

<sup>484</sup> LOPPACHER, *Erziehung*, 163.

<sup>485</sup> “If there is an immediate response to the insult by way of a retaliatory insult or act of aggression, the court may dispense with imposing a penalty on either or both offenders.”

directly reciprocated with an insult or an assault.”<sup>486</sup> If the act of aggression is based on an insulting intention, art. 177 StGB rather than art. 126 StGB applies.<sup>487</sup>

#### **4.3.7.5 Permissibility of Threatening Behavior (Art. 180 StGB)**

Another popular punishment is the threat of beatings, grounding, or deprivation of affection. To consider is the misdemeanor of threatening behavior under art. 180 StGB, according to which any person shall be liable who “places another in a state of fear and alarm by making a serious threat”.<sup>488</sup> The article protects the freedom to form knowledge and guarantees each person the free development of his or her psyche as well as the general sense of security from massive shock.<sup>489</sup> The victim’s mind must be violently shaken<sup>490</sup>, but an impairment of the victim’s will is not required.<sup>491</sup> In particular, when threatening to deprive a child of love, it can be assumed that the child is put in fear. Therefore, it must be examined whether the threats serve an educational purpose and are used proportionately.<sup>492</sup> If not, a violation of the duty of care and education under art. 219 StGB may be given.<sup>493</sup> The protected legal interests in arts. 180 and 219 StGB are similar, but not congruent, which is why both are to be applied in conjunction.<sup>494</sup>

#### **4.3.7.6 Permissibility of Coercion (Art. 181 StGB)**

Coercion takes place if a person, “by the use of force or the threat of serious detriment or other restriction of another’s freedom to act compels another to carry out an act, to fail to carry out an act or to tolerate an act [...]”.<sup>495</sup> The protected legal interest is the freedom of action and the freedom to form and exercise one’s will.<sup>496</sup> The intensity of the coercive action does not have to lead to the victim becoming incapable of resistance. The Swiss Federal Supreme Court underlines that for the assumption of the use of force, it is sufficient that the type and intensity of the perpetrator’s force are capable of breaking the free will of the victim.<sup>497</sup> In addition, there is a threat of serious detriment if the perpetrator holds out the prospect of inflicting evil on the victim and creates the impression that the

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<sup>486</sup> BSK-ROTH/KESHELAVA, art. 126 StGB n 6.

<sup>487</sup> BSK-RIKLIN, art. 177 StGB n 34; BSK-ROTH/KESHELAVA, art. 126 StGB n 16.

<sup>488</sup> Art. 180(1) StGB.

<sup>489</sup> BSK-DELNON/RÜDY, art. 180 StGB n 5 and 10; RYSER BÜSCHI, 196.

<sup>490</sup> RYSER BÜSCHI, 196.

<sup>491</sup> BSK-DELNON/RÜDY, art. 180 StGB n 11.

<sup>492</sup> LOPPACHER, *Erziehung*, 44 et seq.; RYSER BÜSCHI, 197.

<sup>493</sup> LOPPACHER, *Erziehung*, 105 et seq.

<sup>494</sup> LOPPACHER, *Erziehung*, 162.

<sup>495</sup> Art. 181 StGB.

<sup>496</sup> BSK-DELNON/RÜDY, art. 181 StGB n 7; RYSER BÜSCHI, 192.

<sup>497</sup> BGE 101 IV 42, c. 3a; BSK-DELNON/RÜDY, art. 181 StGB n 23; RYSER BÜSCHI, 193.

occurrence of the evil is dependent on his or her will.<sup>498</sup> With that said, a threat of violence in the form of physical force that reaches the intensity of an act of aggression under art. 126 StGB is an inadmissible means of coercion. In contrast, the threat of locking the child in the room to clean it up or to do schoolwork may be permissible, since this threat pursues an educational purpose. Thus, it will have to be weighed in each case whether the parental act falls under art. 181 StGB.<sup>499</sup> If an act of aggression occurs in the course of coercion, it is covered by art. 181 StGB.<sup>500</sup> However, if assault under art. 122 et seqq. StGB is used during coercion, the norms are applied in conjunction.<sup>501</sup> Moreover, due to the different scope of protection, it is assumed that arts. 181 and 219 StGB are also to be applied in conjunction.<sup>502</sup>

#### **4.4 Swiss Civil Code**

In addition to the State's duty to intervention to protect the child in some circumstances, the rights of the parents must also be observed. If the State intervenes in favor of the threatened rights of children, the fundamental rights of one party collide with the protection rights of the other. Various conflicts may arise between the child's right to physical integrity, the State's protection mandate, and the parents' educational right. In these cases, the State is called upon to weigh up the interests of the parties while taking account of the child's best interests.<sup>503</sup> The protection of children under civil law is supplemented by protection under criminal law which is less preventive than repressive.<sup>504</sup> The Cantons are required to ensure effective cooperation between the authorities and official bodies in the area of child protection under civil law by establishing regulations.<sup>505</sup>

##### **4.4.1 Parental Responsibility (Art. 296 et seqq. ZGB)**

“Until such time as they attain the age of majority, children remain the joint parental responsibility of their father and mother”, states art. 296(1) ZGB.<sup>506</sup> Parental responsibility includes, i.a., the decision on the child's place of residence<sup>507</sup> as well as the educational

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<sup>498</sup> BSK-DELNON/RÜDY, art. 181 StGB n 25; RYSER BÜSCHI, 193.

<sup>499</sup> LOPPACHER, Erziehung, 47 et seq.; RYSER BÜSCHI, 194 et seq. and 224.

<sup>500</sup> BSK-DELNON/RÜDY, art. 181 StGB n 69.

<sup>501</sup> RYSER BÜSCHI, 195.

<sup>502</sup> LOPPACHER, Erziehung, 163.

<sup>503</sup> ENGI, 297; RYSER BÜSCHI, 115 and 120; WYTENBACH, Gewalterfahrungen, 151; WYTENBACH, Grund- und Menschenrechtskonflikte, 246.

<sup>504</sup> BSK-BREITSCHMID, art. 307 ZGB n 9; CANTIENI/BLUM, mn. 15.11; WYTENBACH, Gewalterfahrungen, 147.

<sup>505</sup> Art. 317 ZGB; CANTIENI/BLUM, mn. 15.5.

<sup>506</sup> RYSER BÜSCHI, 117 et seq.; BSK-SCHWENZER/COTTIER, art. 296 ZGB n 8b.

<sup>507</sup> Art. 301a(1) ZGB.

right of parents<sup>508</sup> (see below). Additionally, parental responsibility is a most personal right that is neither renounceable, transferable nor inheritable.<sup>509</sup> However, the exercise of parental responsibility may be partially or in its whole transferred to third parties.<sup>510</sup>

#### 4.4.2 Educational Right of Parents (Art. 301 et seqq. ZGB)

At the level of civil law, the comprehensive right and duty of parents to provide for the upbringing of their children is enshrined in **art. 301(1) ZGB**, according to which “the parents raise and care for a child with his or her best interests in mind and take all necessary decisions unless the child has capacity to act.”<sup>511</sup> This provision clarifies the primary decision-making authority of the parents toward the child, third parties, and the State.<sup>512</sup> The educational right of parents is considered as part of parental responsibility.<sup>513</sup> Para. 2, furthermore, obliges the parents, according to how mature the child is, to allow him or her the freedom to shape his or her life, wherever feasible.<sup>514</sup> In addition, **art. 302(1) ZGB** confers on parents the duty to “raise the child according to their circumstances and encourage and safeguard the child's physical, mental and moral development.” This obligation, therefore, restricts the exercise of the educational right of parents.<sup>515</sup> Moreover, parents have to provide for the legal, social, and economic well-being of their children. The Civil Code leaves it to the parents to determine the methods and aims of upbringing within the framework of the legal and moral order.<sup>516</sup> However, the exercise of the educational right of parents is subject to the partial independence of children and young people. Growing in judgment and maturity, they increasingly define their best interests themselves. The closer a question of life is to their personality, the greater must be the scope of autonomy or the power of co-decision of the child capable of judgment.<sup>517</sup>

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<sup>508</sup> Art. 301 et seqq. ZGB; BSK-SCHWENZER/COTTIER, art. 296 ZGB n 2.

<sup>509</sup> However, see art. 312 ZGB.

<sup>510</sup> See art. 299 et seq. ZGB; BSK-SCHWENZER/COTTIER, art. 296 ZGB n 4.

<sup>511</sup> LOPPACHER, *Erziehung*, 94; RYSER BÜSCHI, 130 et seq. and 222; BSK-SCHWENZER/COTTIER, art. 301 ZGB n 2; see also ENGLI, 295; HÄFELI, 62.

<sup>512</sup> See also art. 272 ZGB; HÄFELI, 62; BSK-SCHWENZER/COTTIER, art. 301 ZGB n 2; WYTENBACH, *Grund- und Menschenrechtskonflikte*, 262 et seq.

<sup>513</sup> RYSER BÜSCHI, 117; BSK-SCHWENZER/COTTIER, art. 296 ZGB n 2.

<sup>514</sup> HÄFELI, 65; RYSER BÜSCHI, 118.

<sup>515</sup> LOPPACHER, *Erziehung*, 32 et seq.; BSK-SCHWENZER/COTTIER, art. 302 ZGB n 1; WYTENBACH, *Gewaltverfahrungen*, 146.

<sup>516</sup> LOPPACHER, *Erziehung*, 33; RYSER BÜSCHI, 118 et seq.; WYTENBACH, *Grund- und Menschenrechtskonflikte*, 263.

<sup>517</sup> See also arts. 10(2) and 11(2) BV; WYTENBACH, *Grund- und Menschenrechtskonflikte*, 264.

### 4.4.3 Child Protection Measures (Art. 307 et seqq. ZGB)

#### 4.4.3.1 Impairment of the Child's Best Interests

The best interests of the child as the highest maxim must not be restricted<sup>518</sup> since they are the decisive guideline for the exercise of parental responsibility.<sup>519</sup> Not only do these interests represent a legitimacy of intervention, but they also determine the type and intensity of a child protection measure.<sup>520</sup> Although the protection of children against endangerment and abuse is initially the parents' duty, the State is held responsible for the parents if the latter endanger or harm the child.<sup>521</sup> The child's best interests are threatened, if, according to the circumstances, "the serious possibility of an impairment of the child's physical, moral, mental, or psychological well-being can be foreseen."<sup>522</sup> The child protection authority may therefore only then order the appropriate measures if a serious and objectively tangible impairment of the child's best interests caused by parental misconduct is foreseeable. Therefore, the impairment does not need to have already taken place, nor do the parents have to be responsible for it.<sup>523</sup> Examples include physical injuries, sexual abuse, or strong neglect. With minimal interference with parental rights and family structure, the aim is to ensure or restore the respect of the child's best interests despite a menacing situation.<sup>524</sup> In fact, in 2019, 42,720 child protection measures were evoked in Switzerland. This amounts to 27.7 cases for every 1,000 children.<sup>525</sup>

#### 4.4.3.2 Request for Child Protection Measures and Weighing of Interests

Child protection authorities usually only become active after receiving requests of a menace.<sup>526</sup> However, child protection measures are then ordered *ex officio* if the circumstances have become known to the authorities, e.g., by requests made by a parent or the child<sup>527</sup> or by notices made by relatives, neighbors, teachers, or medical professionals. After a request, the parents and the child are invited to an appointment, during which matters are clarified and parental insights into the limits of their educational possibilities

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<sup>518</sup> Art. 298a ZGB.

<sup>519</sup> LOPPACHER, *Erziehung*, 32; BSK-SCHWENZER/COTTIER, art. 296 ZGB n 8a; art. 301 ZGB n 4.

<sup>520</sup> Art. 307 et seqq. ZGB; RYSER BÜSCHI, 222; WYTENBACH, *Gewalterfahrungen*, 147; WYTENBACH, *Grund- und Menschenrechtskonflikte*, 265.

<sup>521</sup> BSK-BREITSCHMID, art. 307 ZGB n 4; CANTIENI/BLUM, mn. 15.10 et seq.; HÄFELI, 61; RYSER BÜSCHI, 133.

<sup>522</sup> WYTENBACH, *Grund- und Menschenrechtskonflikte*, 265; see also ENGI, 297; HÄFELI, 67; WYTENBACH, *Gewalterfahrungen*, 146.

<sup>523</sup> BSK-BREITSCHMID, art. 307 ZGB n 4; CANTIENI/BLUM, mn. 15.10 et seq.; FASSBIND, 551 et seq.; HÄFELI, 67; RYSER BÜSCHI, 133.

<sup>524</sup> BSK-BREITSCHMID, art. 307 ZGB n 4; RYSER BÜSCHI, 129 and 131 et seq.

<sup>525</sup> KOKES statistics.

<sup>526</sup> CANTIENI/BLUM, mn. 15.18.

<sup>527</sup> Art. 310(2) ZGB.

are made clear. The child protection authority then decides whether it deems it necessary to initiate proceedings that also require prospects of proving adequate.<sup>528</sup>

Child protection measures have to respect the educational right of parents as much as possible (see ch. 4.4.2), i.e., every intervention in the educational right of parents under civil or administrative law must satisfy the usual requirements of art. 36 BV.<sup>529</sup> They must, therefore, i.a., be suitable and necessary to effectively counter a threatening situation.<sup>530</sup> The co-existence of private and state responsibility leads to the following principles of child protection, all of which concretize the principle of proportionality<sup>531</sup>:

- Prevention: Initially, mild measures shall be ordered to prevent escalations.
- Subsidiarity: Measures may only take place if voluntary parental efforts and help requests were insufficient.
- Complementarity: They must complement the existing abilities of the parents, i.e., compensate for any parental deficits rather than take the place of parental efforts.
- Proportionality: They must be adapted to the menace, i.e., the mildest measure promising success in the individual case shall be taken.<sup>532</sup>

The Civil Code specifies four types of child protection measures of varying intensity that are discussed in the following chapters: Ordering appropriate measures (art. 307 ZGB) as the mildest intervention<sup>533</sup>, deputyship (art. 308 et seq. ZGB), revocation of the right to decide on the place of residence (art. 310 ZGB), and, as ultima ratio, withdrawal of parental responsibility (art. 311 et seq. ZGB).<sup>534</sup> Although not explicitly stated in the law, several measures can be combined, which often occurs in practice.<sup>535</sup>

#### **4.4.3.3 Reminder, Instruction, and Educational Support (Art. 307(3) ZGB)**

A reminder is the mildest child protection measure. It entails reminding parents or the child of their duties in a general way and enables those affected to make use of facilities

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<sup>528</sup> BSK-BREITSCHMID, art. 307 ZGB n 4; RYSER BÜSCHI, 132.

<sup>529</sup> RHINOW/SCHEFER/UEBERSAX, mn. 1186 et seq.; see also BISCHOF, 136; RYSER BÜSCHI, 121.

<sup>530</sup> WYTENBACH, Grund- und Menschenrechtskonflikte, 329 et seq.

<sup>531</sup> BSK-BREITSCHMID, art. 307 ZGB n 4; CANTIENI/BLUM, mn. 15.20; HÄFELI, 67 et seq.

<sup>532</sup> BSK-BREITSCHMID, art. 307 ZGB n 5-8; CANTIENI/BLUM, mn. 15.21-15.24; HÄFELI, 67 et seq.; see also BISCHOF, 137 et seq.; WYTENBACH, Grund- und Menschenrechtskonflikte, 266.

<sup>533</sup> BSK-BREITSCHMID, art. 307 ZGB n 14; CANTIENI/BLUM, mn. 15.30.

<sup>534</sup> BSK-BREITSCHMID, art. 307 ZGB n 2; WYTENBACH, Gewalterfahrungen, 146; WYTENBACH, Grund- und Menschenrechtskonflikte, 266.

<sup>535</sup> BISCHOF, 141; CANTIENI/BLUM, mn. 15.27.



such as youth welfare offices and educational counseling.<sup>536</sup> The aim is to bring about a noncoercive cooperation focused on the protection of the family.<sup>537</sup> In the case of light acts of aggression against children (see ch. 4.3.2), parents are reminded that corporal punishment for disciplinary reasons is not permitted. Moreover, the child protection authority may “issue specific instructions regarding care, upbringing or education and appoint a suitable person or agency with powers to investigate and monitor the situation.”<sup>538</sup> This person or agency may then report observations to the child protection authority and can request further measures. Instructions, as opposed to reminders, have binding character and can be criminally enforced on the basis of disobedience.<sup>539</sup> However, instructions can restrict the ability of the parents to act, which is why they are limited by excessive interference with the parents’ personal rights.<sup>540</sup> The three measures mentioned in art. 307(3) ZGB are not conclusive, which allows for discretion on the part of the child protection authority.<sup>541</sup> Another reasonable measure can be mediation, also in addition to other measures, particularly when the communication between the parents is seriously disturbed.<sup>542</sup> Therapies or addiction counseling can also be useful, provided they are necessary to eliminate a child’s endangerment. Additionally, educational programs against violence or programs on the improvement of parental skills may be meaningful for future child protection. It seems plausible to inform parents of any sanctions for disregarding measures or not attending counseling and programs, e.g., fines or the following more drastic child protection measures.<sup>543</sup>

#### **4.4.3.4 Deputyship (Art. 308 et seq. ZGB)**

The child protection authority may “appoint a child deputy whose function is to help the parents look after the child by providing advice and practical support.”<sup>544</sup> This may come into consideration if measures under art. 307 ZGB are insufficient or if there are deficiencies in the parents’ ability to raise their child given a state of weakness such as addiction issues or mental illnesses.<sup>545</sup> In fact, in 2019, 34,296 measures of deputyship were evoked

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<sup>536</sup> BISCHOF, 138 et seq.; CANTIENI/BLUM, mn. 15.31; HÄFELI, 69.

<sup>537</sup> BISCHOF, 135.

<sup>538</sup> Art. 307(3) ZGB; see also BSK-BREITSCHMID, art. 307 ZGB n 15 and 22.

<sup>539</sup> See art. 292 StGB; BISCHOF, 139; CANTIENI/BLUM, mn. 15.32; HÄFELI, 69; RYSER BÜSCHI, 134.

<sup>540</sup> CANTIENI/BLUM, mn. 15.35.

<sup>541</sup> BISCHOF, 140; CANTIENI/BLUM, mn. 15.33; HÄFELI, 68; RYSER BÜSCHI, 134.

<sup>542</sup> BSK-BREITSCHMID, art. 307 ZGB n 21; RYSER BÜSCHI, 135 et seq.

<sup>543</sup> RYSER BÜSCHI, 134 et seq.

<sup>544</sup> Art. 308(1) ZGB; see also LOPPACHER, Erziehung, 76.

<sup>545</sup> CANTIENI/BLUM, mn. 15.39 et seq.; see also BISCHOF, 140; HÄFELI, 67 and 70 et seq.

in Switzerland, constituting the highest amount of all child protection measures.<sup>546</sup> The child protection authority may also assign special powers to the deputy which may be accompanied by a corresponding limitation of parental responsibility<sup>547</sup>, allowing the deputy to influence the educational activities of the parents actively, authoritatively, and continuously.<sup>548</sup> It is difficult to answer the question of whether a duty of care and education under art. 219 StGB (see ch. 4.3.6) can be derived from the deputyship. In each case, the specific circumstances and the form of the deputyship must be taken into account.<sup>549</sup>

#### **4.4.3.5 Revocation of the Right to Decide on Place of Residence (Art. 310 ZGB)**

“Where there is no other way to avert a threat to the child’s best interests, the child protection authority must remove the child from the parents [...] and place the child in a suitable location.”<sup>550</sup> This more drastic measure only comes into question if less intrusive measures were unsuccessful or offer little prospect of proving adequate.<sup>551</sup> Condition for revocation of this right is that the hazardous situation of the child is significantly related to the place of residence, particularly in cases of repetitive physical and sexual abuse. However, it is inevitable to carry out a careful examination before executing this measure to prevent greater damage to the child.<sup>552</sup> As a consequence of this measure, it is the child protection authority that decides on the child’s place of residence, resulting in the parents’ responsibility regarding care and education for the child to be restricted or to drop entirely in the event of educational deficiencies.<sup>553</sup> Although this measure is a serious interference with the rights of parents, it can effectively protect children from physical, psychological, and sexual abuse as well as other violent educational methods and is therefore taken in case of incorrect parenting behavior.<sup>554</sup>

#### **4.4.3.6 Withdrawal of Parental Responsibility (Art. 311 et seq. ZGB)**

The most incisive and extremely rare child protection measure is the revocation of parental responsibility, which can only be ordered if the aforementioned measures have failed

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<sup>546</sup> KOKES statistics.

<sup>547</sup> Art. 308(2 et seq.) ZGB; BISCHOF, 141; HÄFELI, 71; LOPPACHER, *Erziehung*, 76.

<sup>548</sup> CANTIENI/BLUM, mn. 15.78; HÄFELI, 70 et seq.; see also BISCHOF, 140; RYSER BÜSCHI, 137.

<sup>549</sup> LOPPACHER, *Erziehung*, 76 et seq.

<sup>550</sup> Art. 310(1) ZGB.

<sup>551</sup> BSK-BREITSCHMID, art. 310 ZGB n 3; CANTIENI/BLUM, mn. 15.87; see also BISCHOF, 142; HÄFELI, 76 et seq.

<sup>552</sup> CANTIENI/BLUM, mn. 15.89 et seq.; see also BISCHOF, 142.

<sup>553</sup> BSK-BREITSCHMID, art. 310 ZGB n 5 and 7; CANTIENI/BLUM, mn. 15.86; RYSER BÜSCHI, 139 et seq.

<sup>554</sup> CANTIENI/BLUM, mn. 15.86; HÄFELI, 76; see also BISCHOF, 142; RYSER BÜSCHI, 141.

or offer little prospect of proving adequate, resulting in the withdrawal to be *ultima ratio*.<sup>555</sup> It is considered to be the most profound interference with the autonomy of the parents, equivalent to the loss of an elementary personal right. Therefore, according to the Swiss Federal Supreme Court, a “particularly strict standard” must be applied to the requirements.<sup>556</sup> In fact, in 2019, there were 273 withdrawals of parental responsibility in Switzerland, constituting only 0,64% of all child protection measures.<sup>557</sup> The child protection authority shall revoke parental responsibility, “if the parents are unable to exercise parental responsibility as required on account of”<sup>558</sup>, i.e., violent behavior, or, “if the parents have not cared for the child to any meaningful degree or have flagrantly violated their duties towards the child.”<sup>559</sup> In both cases, the withdrawal is in principle indefinite and “effective in respect of all the children, including those born subsequently”<sup>560</sup>, unless ordered otherwise.<sup>561</sup> Finally, “where parental responsibility is withdrawn from both parents, a legal guardian is appointed for their children.”<sup>562</sup> The guardian is under an obligation to comply with the duty of care and education under art. 301 et seqq. ZGB, based on an authorial decision.<sup>563</sup> In addition to the ordinary withdrawal of parental responsibility, art. 312 ZGB provides for the simplified withdrawal that takes place if the parents so request or if they have consented to child adoption.<sup>564</sup> However, it should be clarified that parental responsibility is fundamentally indispensable, which is why high requirements must be placed on the withdrawal with the parents’ consent.<sup>565</sup>

#### 4.4.3.7 Prevention with Counseling

Because child protection measures according to civil law are based on the principle of subsidiarity (see ch. 4.4.3.2), measures must only be ordered when there are no (successful) voluntary parental efforts and help requests. Counseling as a preliminary stage to child protection measures has become increasingly important in practice since it has a preventive effect, possibly resulting in improved child protection.<sup>566</sup>

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<sup>555</sup> Art. 311(1) ZGB; BGer-Judgment 5C.207/2004 of 26 November 2004, c. 3.2.1; BSK-BREITSCHMID, art. 311 ZGB n 3; CANTIENI/BLUM, mn. 15.115; HÄFELI, 67 and 81.

<sup>556</sup> BGer-Judgment 5C.207/2004 of 26 November 2004, c. 3.2.1; CANTIENI/BLUM, mn. 15.115.

<sup>557</sup> KOKES statistics.

<sup>558</sup> Art. 311(1) para. 1 ZGB; see also BSK-BREITSCHMID, art. 311 ZGB n 7; CANTIENI/BLUM, mn. 15.115.

<sup>559</sup> Art. 311(1) para. 2 ZGB; see also BSK-BREITSCHMID, art. 311 ZGB n 8; CANTIENI/BLUM, mn. 15.115; HÄFELI, 81.

<sup>560</sup> Art. 311(3) ZGB.

<sup>561</sup> BSK-BREITSCHMID, art. 311 ZGB n 3 and 14; CANTIENI/BLUM, mn. 15.117.

<sup>562</sup> Art. 311(2) ZGB; see also BSK-BREITSCHMID, art. 311 ZGB n 12; RYSER BÜSCHI, 142.

<sup>563</sup> LOPPACHER, *Erziehung*, 75 et seq.

<sup>564</sup> BSK-BREITSCHMID, art. 311 ZGB n 5 and 10; CANTIENI/BLUM, mn. 15.118; HÄFELI, 81.

<sup>565</sup> CANTIENI/BLUM, mn. 15.118; see also HÄFELI, 62.

<sup>566</sup> RYSER BÜSCHI, 143 et seq.

## **4.5 Coordination between Child Protection in Civil and Criminal Law**

An optimal reciprocal relationship with the best possible interactions must be established between child protection under civil and criminal law while maintaining the primacy of child protection under civil law. Therefore, criminal law can only be applied as a last resort (*ultima ratio*) and must not hinder the efforts of the more suitable authorities and institutions entrusted with the protection of children in the civil law system. Criminal law should only be supportive as a means of coercion to enforce dutiful parental behavior except in cases of serious child harm. Family-centered solutions that criminal law cannot and does not have to offer must be given preference in the interest of safeguarding the child's best interests, however, without granting parents the right under criminal law to use violence against children.<sup>567</sup> Parental conduct that does not constitute bodily harm, and is thus not prosecuted *ex officio* according to art. 126(2) lit. a StGB (see ch. 4.3.2), must always first trigger child protection measures under civil law. A meaningful gradual sequence of measures is explained above.<sup>568</sup> With that said, since a violation or the neglect of the duties of care and education of children may have negative effects on society, the sequence of steps, with prosecution as *ultima ratio*, is not appropriate in every case.<sup>569</sup> In Loppacher's words: "Society relies on those entrusted with and obligated to educate children to fulfill their duties. If they fail to do so, law enforcement must come into play, otherwise, the consequences for society would be unthinkable."<sup>570</sup> Prevention may suffice in the best cases, but when a perpetrator is not sanctioned after a criminal act occurred, further harm against the child concerned may not be too unlikely.

## **5 Enforcement of International Children's Rights in Switzerland**

This chapter addresses the question of whether Switzerland meets the requirements of the CRC and how it implements it. It evaluates to what extent there is a need for improvement in securing the right of children to their protection from harm. The views of the government *per se* as well as those of NGOs and other stakeholders are considered.

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<sup>567</sup> FASSBIND, 554; LOPPACHER, *Erziehung*, 202; WYTTENBACH, *Gewalterfahrungen*, 147.

<sup>568</sup> FASSBIND, 554 et seq.; LOPPACHER, *Erziehung*, 202.

<sup>569</sup> LOPPACHER, *Erziehung*, 202 et seq.

<sup>570</sup> LOPPACHER, *Erziehung*, 203.

## 5.1 Direct Application of International Law and its Precedence

With the ratification of the CRC and the OPIC, Switzerland has undergone the obligation under international law to respect and implement the respective provisions. The Constitution obliges the Confederation and the Cantons to respect international law<sup>571</sup>, which the Swiss Federal Supreme Court and the other judicial authorities are to apply.<sup>572</sup> Since Switzerland follows a monist approach to international agreements (see ch. 3.3), international treaty law simultaneously implies domestic validity, i.e., the CRC and the Protocols are applicable upon ratification.<sup>573</sup> Therefore, its provisions may be alleged to be violated in domestic courts and judicial authorities, provided they satisfy the Swiss Federal Supreme Court's standards of self-execution.<sup>574</sup> The provision must:

1. concern the rights and obligations of an individual;
2. be justiciable, i.e., it is sufficiently specific and clear to form the basis of a decision in the individual case; and
3. be addressed to the authorities applying the law rather than the legislator.<sup>575</sup>

It is incumbent upon the law-applying authorities to decide on the direct applicability of the individual provisions of the CRC in the specific case. The classic rights of freedom contained in the CRC may be classified as directly applicable.<sup>576</sup> However, both articles dealing with violent acts against children, namely arts. 19 and 34 CRC (see ch. 2.3), are not considered to be directly applicable since these provisions only oblige the State to take all appropriate measures without defining the rights and specific measures concretely.<sup>577</sup> In contrast, art. 3(1) CRC (see ch. 2.2.3.1) is considered self-executing and is therefore directly applicable.<sup>578</sup>

If international treaty law and such at the level of a federal law contradict each other, the Swiss Federal Supreme Court has ruled in favor of the primacy of the federal law, provided that “the legislature has deliberately deviated from a state treaty obligation and has

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<sup>571</sup> Art. 5(4) BV; TSCHANNEN, § 9 mn. 13.

<sup>572</sup> Art. 190 BV; TSCHANNEN, § 9 mn. 27.

<sup>573</sup> BGE 105 II 49, c. 3; BIAGGINI, *Kinderrechte*, 35; MOSIMANN/VÖLGER WINSKY/PLÜSS, mn. 4.4; TSCHANNEN, § 9 mn. 5; WOLF, 130.

<sup>574</sup> MOSIMANN/VÖLGER WINSKY/PLÜSS, mn. 4.3; TSCHANNEN, § 9 mn. 8; WOLF, 130; WYTTEBACH/SCHLÄPPI, 431 and 447.

<sup>575</sup> BGE 124 III 90, c. 3a; BIAGGINI, *Kinderrechte*, 41 et seq.; MOSIMANN/VÖLGER WINSKY/PLÜSS, mn. 4.3.

<sup>576</sup> BBI 1994 V 20 et seq.; BIAGGINI, *Kinderrechte*, 42 et seq.; WYTTEBACH, *Gewalterfahrungen*, 133; WOLF, 131.

<sup>577</sup> WYTTEBACH, *Gewalterfahrungen*, 133.

<sup>578</sup> HaKo-SCHMAHL, art. 3 CRC n 5.

thus accepted the violation of international law<sup>579</sup> (so-called Schubert practice).<sup>580</sup> Nevertheless, it asserted that “in case of doubt, domestic law must be interpreted in conformity with international law, i.e., in such a way that there is no conflict with the latter.”<sup>581</sup> In more recent decisions, the Swiss Federal Supreme Court underlines international law to basically enjoy precedence.<sup>582</sup> It has relativized the federal law to the effect that the Schubert practice does not apply if human rights obligations conflict with it.<sup>583</sup>

## **5.2 Reporting and Examining Process between Switzerland, the CRC Committee, and Child Rights Network Switzerland**

As seen in ch. 3.1.1.1 on the reporting and examining process, Switzerland as a State Party to the CRC is obliged to submit periodic reports to the Committee on the status of the implementation of the CRC. Since ratifying the CRC in 1997<sup>584</sup>, Switzerland has reported three times to the CRC Committee on the status of implementation. In November 2019, the Committee requested Switzerland to present in writing answers to the list of issues prior to submitting the combined fifth and sixth periodic reports, which it did in December 2020. Switzerland shall also take into consideration the Committee’s recommendations in its Concluding Observations adopted in January 2015.<sup>585</sup> In a shadow report of 2021, Child Rights Network Switzerland, an association of more than 50 Swiss NGOs that campaigns for the recognition and implementation of the CRC, presents their views on the implementation status of the CRC in Switzerland.<sup>586</sup> The report, furthermore, comments on the list of issues defined by the Committee.<sup>587</sup> The following sub-chapters deal with the latest reporting and examining process between Switzerland, the CRC Committee, and Child Rights Network Switzerland in the years 2019 to 2021.

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<sup>579</sup> MOSIMANN/VÖLGER WINSKY/PLÜSS, mn. 4.4.

<sup>580</sup> BGE 99 Ib 39, c. 3; HANGARTNER/LOOSER, St. Galler Kommentar, art. 190 BV n 34; TSCHANNEN, § 9 mn. 33.

<sup>581</sup> BGE 99 Ib 39, c. 3; see also TSCHANNEN, § 9 mn. 30 and 36 et seq.

<sup>582</sup> See arts. 5(4) and 190 BV; OFK-BIAGGINI, art. 190 BV n 16; HANGARTNER/LOOSER, St. Galler Kommentar, art. 190 BV n 36; TSCHANNEN, § 9 mn. 13, 21 and 31.

<sup>583</sup> BGE 125 II 417, c. 4.3; OFK-BIAGGINI, art. 190 BV n 16; MOSIMANN/VÖLGER WINSKY/PLÜSS, mn. 4.4; TSCHANNEN, § 9 mn. 34.

<sup>584</sup> BIAGGINI, Kinderrechte, 36; RYSER BÜSCHI, 94; WYTTEBACH/SCHLÄPPI, 447; WYTTEBACH, Grund- und Menschenrechtskonflikte, 151.

<sup>585</sup> CRC/C/CHE/QPR/5-6, para. 1.

<sup>586</sup> BEUTLER CHRISTIAN, NGOs criticise lack of national strategy on protecting children, 8 June 2021, [www.swissinfo.ch/eng/ngos-criticise-lack-of-national-strategy-on-protecting-children/46686752?utm\\_campaign=teaser-in-article&utm\\_source=swissinfoch&utm\\_medium=display&utm\\_content=o](http://www.swissinfo.ch/eng/ngos-criticise-lack-of-national-strategy-on-protecting-children/46686752?utm_campaign=teaser-in-article&utm_source=swissinfoch&utm_medium=display&utm_content=o), last visited on: 24.04.2022.

<sup>587</sup> NGO-Report, 9.

## **5.2.1 List of Issues, Submission of the Fifth and Sixth Periodic Reports, and NGO Shadow Report**

In the context of child harm, the CRC Committee listed two sets of issues in section D, titled “Violence against children (arts. 19, 24 (3), 28 (2), 34, 37 (a) and 39)”.<sup>588</sup> In the following, two issues are discussed, based on the combined fifth and sixth periodic reports by Switzerland, which were translated and issued in April 2021 by the Committee.

### **5.2.1.1 Prohibition of all Forms of Corporal Punishment in all Settings (para. 15a)**

In para. 15a of its list of issues, the Committee requests Switzerland to provide information on “the measures taken to prohibit explicitly all forms of corporal punishment in all settings.”<sup>589</sup> The Federal Council distinguishes between measures on the civil and the criminal level. Regarding the former, it summarizes the parental responsibility and the upholding of the child’s best interests under the Civil Code (see ch. 4.4.1 and 4.4.3.1). Furthermore, it points out that violence against children will evoke child protection measures, including the withdrawal of parental responsibility as a last resort<sup>590</sup> (see ch. 4.4.3.6). Additionally, the Federal Council refers to new provisions, in force since 2019, according to which every person, including those who are subject to professional confidentiality, has the right to report to the child protection authority if the physical, psychological, or sexual integrity of a child appears to be at risk. Professionals having regular professional contact with children and who are not subject to professional confidentiality are even obliged to make a report.<sup>591</sup> Regarding the measures at the criminal level, the Federal Council refers to the contravention of repeated acts of aggression to namely children (see ch. 4.3.2). It expresses the opinion that Switzerland fulfills the requirements of art. 19 CRC with this regulation as well as with the criminal liability of common assault (see ch. 4.3.1). The Federal Council considers the introduction of a specific criminal offense neither appropriate nor meaningful. In its view, this “would be contrary to the spirit of the Criminal Code, would be redundant, and would create problems in defining the limits of existing offenses.”<sup>592</sup> It repeatedly asserted in its answers to various parliamentary initiatives that it was not necessary to anchor an explicit ban on cor-

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<sup>588</sup> CRC/C/CHE/QPR/5-6, paras. 15 and 38.

<sup>589</sup> CRC/C/CHE/QPR/5-6, para. 15a.

<sup>590</sup> CRC/C/CHE/5-6, para. 91 et seq.

<sup>591</sup> Arts. 314d(1) and 314e(2) ZGB; CRC/C/CHE/5-6, para. 92.

<sup>592</sup> CRC/C/CHE/5-6, para. 93.

poral punishment in the Civil Code. The Federal Assembly supported this view and considered the existing laws sufficient.<sup>593</sup> Lastly, the Federal Council emphasizes the importance of a well-developed child and youth welfare system for preventing and combating violence. The government supports cantonal programs with financial aid for the establishment and further development of child and youth policy. The Cantons offer various advisory and support services.<sup>594</sup>

The NGO shadow report states that half of all children in Switzerland today experience physical and/or psychological violence in their upbringing, and one in five even endures severe violence.<sup>595</sup> Because the most common forms such as psychological and physical violence, neglect, or sexual abuse in the family environment tend to be discovered very late, children often suffer physical and psychological damage. In fact, 1,500 children are treated annually in pediatric emergency departments in hospitals as a result of child abuse. Physical chastisement according to the Swiss Federal Supreme Court is only prohibited if it goes beyond what is accepted by society<sup>596</sup> (see ch. 4.3.2.1). Since it is unclear how the measure is defined, Child Rights Network Switzerland recommends the right to non-violent upbringing to be clearly anchored in the Civil Code. An explicit ban on violence in education would lead to a reduction in corporal punishment.<sup>597</sup>

### **5.2.1.2 Strategy for Prevention and Intervention (para. 15c)**

Moreover, Switzerland is requested to inform the Committee on “[...] the development of a comprehensive strategy for prevention and intervention in cases of violence against children.”<sup>598</sup> The Federal Council stated that “several cantons have improved their child and youth protection systems by developing a cantonal prevention and intervention strategy”<sup>599</sup>, mentioning national programs developed to support professionals or a child protection strategy for women’s shelters nationwide.<sup>600</sup>

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<sup>593</sup> CRC/C/CHE/5-6, para. 95; End Violence Against Children/End Corporal Punishment; see more in ch. 5.3.

<sup>594</sup> CRC/C/CHE/5-6, para. 94.

<sup>595</sup> See also BEUTLER CHRISTIAN, NGOs criticise lack of national strategy on protecting children, 8 June 2021, [www.swissinfo.ch/eng/ngos-criticise-lack-of-national-strategy-on-protecting-children/46686752?utm\\_campaign=teaser-in-article&utm\\_source=swissinfoch&utm\\_medium=display&utm\\_content=o](http://www.swissinfo.ch/eng/ngos-criticise-lack-of-national-strategy-on-protecting-children/46686752?utm_campaign=teaser-in-article&utm_source=swissinfoch&utm_medium=display&utm_content=o), last visited on: 24.04.2022.

<sup>596</sup> BGer-Judgment 6S.273/2004 of 24 September 2004, c. 2.1.

<sup>597</sup> NGO-Report, 43.

<sup>598</sup> CRC/C/CHE/QPR/5-6, para. 15c.

<sup>599</sup> CRC/C/CHE/5-6, para. 100.

<sup>600</sup> CRC/C/CHE/5-6, para. 102 et seq.



According to a news article on [swissinfo.ch](http://swissinfo.ch), Child Rights Network Switzerland views children's rights in Switzerland as insufficiently enforced. Therefore, it has launched a campaign titled "Children have rights!" to raise awareness of the issue among the public and politicians.<sup>601</sup> It also criticizes the major differences between the Cantons in terms of prevention and early detection services. This means that a family's place of residence and socio-economic background determine whether children and parents have access to low-threshold support services and whether they receive timely and competent help in the event of a threat or an endangerment to a child's well-being.<sup>602</sup> Therefore, according to the NGO shadow report, it is recommended to develop a national strategy to protect children from violence in cooperation with the Cantons, including prevention, early detection, and intervention. Moreover, it recommends raising awareness and providing training to professional groups working with children on all forms of violence against children. Child Rights Network Switzerland lastly requires private and public institutions to undergo internal screenings when recruiting individuals working directly with children.<sup>603</sup>

## **5.2.2 Concluding Observations on the Fifth and Sixth Periodic Reports**

In September 2021, the CRC Committee adopted the following Concluding Observations regarding child harm on the combined fifth and sixth periodic reports of Switzerland.<sup>604</sup>

### **5.2.2.1 Corporal Punishment (para. 26 et seq.)**

The Committee expresses regrets over the legality and social acceptance of corporal punishment in Switzerland. It criticizes the State Party's "persistent position that an explicit prohibition of corporal punishment in the Civil Code is not necessary because existing laws on violence and abuse are sufficient in protecting children from corporal punishment."<sup>605</sup> The Committee views a clear ban as essential and therefore strongly urges Switzerland to "explicitly prohibit, as a matter of priority, corporal punishment in law in all settings, including in the home [...]."<sup>606</sup> It furthermore impulses the State Party to allocate

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<sup>601</sup> See also Child Rights Network Switzerland, *Kinder haben Rechte!*, [www.netzwerk-kinderrechte.ch/projekte-kampagnen/kampagne-kinder-haben-rechte](http://www.netzwerk-kinderrechte.ch/projekte-kampagnen/kampagne-kinder-haben-rechte), last visited on: 20.05.2022.

<sup>602</sup> BEUTLER CHRISTIAN, *NGOs criticise lack of national strategy on protecting children*, 8 June 2021, [www.swissinfo.ch/eng/ngos-criticise-lack-of-national-strategy-on-protecting-children/46686752?utm\\_campaign=teaser-in-article&utm\\_source=swissinfoch&utm\\_medium=display&utm\\_content=o](http://www.swissinfo.ch/eng/ngos-criticise-lack-of-national-strategy-on-protecting-children/46686752?utm_campaign=teaser-in-article&utm_source=swissinfoch&utm_medium=display&utm_content=o), last visited on: 24.04.2022.

<sup>603</sup> NGO-Report 44.

<sup>604</sup> CRC/C/CHE/CO/5-6, para. 1.

<sup>605</sup> CRC/C/CHE/CO/5-6, para. 26.

<sup>606</sup> CRC/C/CHE/CO/5-6, paras. 26 and 27a.

sufficient resources to awareness-raising campaigns aimed at promoting non-violent upbringing while highlighting the adverse consequences of corporal punishment.<sup>607</sup>

### **5.2.2.2 Violence and Abuse (para. 28)**

In addition, while referring to its General Comment no. 13 (see ch. 2.3.6), the Committee recommends that the State Party develops a federal strategy and action plan for preventing, combating, and monitoring all forms of violence while cooperating with the Cantons<sup>608</sup> as well as strengthen coordination among cantonal authorities and child protection specialists.<sup>609</sup> Lastly, the Committee advises the Swiss government to “strengthen efforts, including through increased human, technical and financial resources, to train professionals concerned to identify and adequately respond to cases of violence and child abuse, including psychological abuse, and establish reporting guidelines.”<sup>610</sup>

## **5.3 Parliamentary Initiatives on Prohibition of Corporal Punishment**

Questions concerning the prohibition of corporal punishment or the right to a non-violent education have repeatedly been the subject of parliamentary initiatives in recent years.<sup>611</sup> The Federal Council has consistently denied the need for action, most recently in spring 2020 in its rejection of Motion 19.4632<sup>612</sup> (see below).

### **5.3.1 Parliamentary Motion 19.4632**

In December 2019, National Councilor Bulliard-Marbach submitted Motion 19.4632, instructing the Federal Council to “include an article in the Swiss Civil Code in which the right to non-violent education is anchored for children”<sup>613</sup>, adding that “their children must be protected from physical punishment, psychological injuries, and other degrading measures.”<sup>614</sup> She explains that the abolition of parents’ right to correction in 1978 was a first step toward protecting the physical integrity of the child, however, regretting that the

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<sup>607</sup> CRC/C/CHE/CO/5-6, para. 27b; End Violence Against Children/End Corporal Punishment.

<sup>608</sup> CRC/C/CHE/CO/5-6, para. 28a.

<sup>609</sup> CRC/C/CHE/CO/5-6, para. 28b.

<sup>610</sup> CRC/C/CHE/CO/5-6, para. 28d.

<sup>611</sup> End Violence Against Children/End Corporal Punishment; Parliamentary Motion Marchand-Balet Géraldine (18.3603) “Anchoring a ban on corporal punishment and other degrading acts against children in the Civil Code” of 14 June 2018; Parliamentary Motion Galladé Chantal (15.3639) “Abolition of corporal punishment” of 18 June 2015; Motion Feri Yvonne (13.3156) “In support of upbringing without violence” of 20 March 2013.

<sup>612</sup> NGO-Report, 43.

<sup>613</sup> Parliamentary Motion Bulliard-Marbach Christine (19.4632) “Anchoring non-violent education in the Civil Code” of 20 December 2019.

<sup>614</sup> Parliamentary Motion Bulliard-Marbach Christine (19.4632) “Anchoring non-violent education in the Civil Code” of 20 December 2019.

use of violence against children still seems justifiable in their society. Therefore, she requests art. 11 BV to be concretized, namely in the Civil Code. Slaps or pats humiliate and degrade a child, thus being harmful to its development. An article for the right to non-violent education would in the longer term lead to a change of mind in society. This can be seen in Switzerland's neighboring countries, where the level of violence has dropped significantly since the prohibition was introduced. By signing the CRC and committing itself to protect children from all forms of abuse by their parents and caregivers, Switzerland shall offer appropriate prevention and treatment programs as well as a legally enshrined right to non-violent education. Until now, Switzerland has already been reprimanded three times by the Committee for not having taken appropriate steps.<sup>615</sup>

### **5.3.2 Statement of the Federal Council**

In 1978, art. 278 of the Civil Code 1907 which anchored the parental right of correction over their children was abolished. In its message on the reform of the Civil Code, issued in 1974, the Federal Council confirmed that parental authority includes the right to correct the child to the extent that his or her education requires, but it considered it unnecessary to explicitly mention this right in the law.<sup>616</sup> In recent parliamentary initiatives, the Federal Council consistently asserted that the parent's right to correction is no longer compatible with the child's best interests today. Moreover, children are protected under criminal law and reporting rights and obligations exist. In February 2020, the Federal Council took a position on the most recent parliamentary motion mentioned above. While parents have the duty of protecting and educating their children, they must be guided by their children's best interests. However, the way parents are to behave when executing their duties can hardly be satisfactorily described in a legal rule. Such a rule would also fuel fears of state interventionism. The Federal Council, therefore, continues to have reservations about the required amendment to the Civil Code, while considering it "important above all to have a well-developed child and youth welfare system as well as prevention through active awareness-raising measures and programs implemented by the cantons and temporarily supported by the Confederation through financial aid [...]."<sup>617</sup> However, referring to the position paper of the Federal Commission for Child and Youth Affairs entitled "The right

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<sup>615</sup> CRC/C/CHE/QPR/5-6, para. 15a; Parliamentary Motion Bulliard-Marbach Christine (19.4632) "Anchoring non-violent education in the Civil Code" of 20 December 2019.

<sup>616</sup> End Violence Against Children/End Corporal Punishment.

<sup>617</sup> Federal Council Statement of 26 February 2020 to Parliamentary Motion Bulliard-Marbach Christine (19.4632) "Anchoring non-violent education in the Civil Code" of 20 December 2019.

of the child to an education without violence”, the Federal Council is prepared to examine in a report how best to meet the demands expressed in the parliamentary motion. Overall, however, the Federal Council proposes that the parliamentary motion be rejected.<sup>618</sup>

### **5.3.3 Parliamentary Postulate 20.3185**

In response to the statement of the Federal Council, the National Council passed parliamentary postulate 20.3185 instructing the Federal Council to present a report on how the protection of children against violence in education can be anchored in the Civil Code in May 2020.<sup>619</sup> The Federal Council proposed the acceptance in July 2020.<sup>620</sup>

### **5.3.4 Acceptance of Motion 19.4632 by the National Council**

On 30 September 2021, the National Council passed Motion 19.4632 to the Council of States by 111 votes to 79 with three abstentions. This request seeks to anchor the right to special protection of the integrity of children and young people under art. 11 BV in the Civil Code. Child Rights Network Switzerland expressly welcomes this important step.<sup>621</sup> In February 2022, the Committee for Legal Affairs of the Council of States concluded to await the above-mentioned report of the Federal Council before making a decision.<sup>622</sup>

## **5.4 Universal Periodic Review of Switzerland**

The latest UPR of Switzerland’s human rights record took place in 2017 as part of the third cycle examination by the UNHRC (see ch. 3.1.2). The national report of Switzerland stated that “the Civil Code currently in effect does not expressly prohibit the corporal punishment of children, but it conforms with the widespread view that corporal punishment is no longer a method of upbringing compatible with the well-being of the child. Switzerland, therefore, believes that it is not necessary to explicitly incorporate this principle in the Civil Code or to amend the criminal law [...]”<sup>623</sup> Additionally, it asserts the

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<sup>618</sup> CRC/C/CHE/5-6, para. 95; Federal Council Statement of 26 February 2020 to Parliamentary Motion Bulliard-Marbach Christine (19.4632) “Anchoring non-violent education in the Civil Code” of 20 December 2019.

<sup>619</sup> CRC/C/CHE/5-6, para. 95; NGO-Report, 43; Parliamentary Postulate Bulliard-Marbach Christine (20.3185) “Protection of children from violence in education” of 4 May 2020.

<sup>620</sup> Federal Council Statement of 1 July 2020 to Parliamentary Postulate Bulliard-Marbach Christine (20.3185) “Protection of children from violence in education” of 4 May 2020.

<sup>621</sup> Child Rights Network Switzerland, Nationalrat spricht sich für das Recht auf gewaltfreie Erziehung aus, 7 October 2021, [www.netzwerk-kinderrechte.ch/aktuell/2021/nationalrat-spricht-sich-fuer-das-recht-auf-gewaltfreie-erziehung-aus](http://www.netzwerk-kinderrechte.ch/aktuell/2021/nationalrat-spricht-sich-fuer-das-recht-auf-gewaltfreie-erziehung-aus), last visited on: 25.04.2022.

<sup>622</sup> Federal Assembly, Gesetzliche Verankerung der gewaltfreien Erziehung: Kommission möchte Auslegeordnung des Bundesrates abwarten, 18 February 2022, [www.parlament.ch/press-releases/Pages/mm-rk-s-2022-02-18.aspx?lang=1031](http://www.parlament.ch/press-releases/Pages/mm-rk-s-2022-02-18.aspx?lang=1031), last visited on: 21.05.2022.

<sup>623</sup> A/HRC/WG.6/28/CHE/1, para. 22.

reliance on a support system for children and young people combined with active awareness-raising measures at the federal and cantonal level.<sup>624</sup> The consequent report of the working group on the UPR recognized the amendment of the Civil Code of 2014 that included domestic violence against children among the reasons justifying the withdrawal of parental responsibility<sup>625</sup> (see ch. 4.4.3.6). The report extended two recommendations related to the protection from child harm. Firstly, Switzerland shall “prohibit all practices of corporal punishment of children (Kyrgyzstan)”<sup>626</sup>, which it supports. Secondly, Switzerland is required to “adopt legislation which explicitly prohibits corporal punishment of children in all settings, including in the home (Sweden)”<sup>627</sup>, which it noted.<sup>628</sup>

## **5.5 Enforcement Measures by the Swiss Government**

### **5.5.1 Federal Council Report on Measures Implementing the Recommendations of the CRC Committee**

For the first time, the Federal Council adopted a package of measures in December 2018 to implement the recommendations of the CRC Committee of February 2015. All relevant agencies at the inter-cantonal and the national level were involved. However, this internal administrative coordination structure lacks institutional backup.<sup>629</sup>

### **5.5.2 Federal Council Ordinance on Protection Measures**

In 2010, the Ordinance on Measures for the Protection of Children and Young People and the Strengthening of Children's Rights<sup>630</sup> (hereinafter: Ordinance), based on, i.a., arts. 19 and 34 CRC, entered into force. With this ordinance, the Federal Council has created the basis for implementing or financially supporting programs and projects<sup>631</sup> to protect children and young people from physical and mental violence and to prevent violent behavior by young people.<sup>632</sup> Measures include programs, regular activities, and projects<sup>633</sup> whose aims are, i.a., prevention, sensitization, further training, research, and evaluation.<sup>634</sup>

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<sup>624</sup> A/HRC/WG.6/28/CHE/1, para. 23.

<sup>625</sup> Art. 311(1) para. 1 ZGB; A/HRC/37/12, para. 16.

<sup>626</sup> A/HRC/37/12, para. 146.103.

<sup>627</sup> A/HRC/37/12, para. 148.61.

<sup>628</sup> End Violence Against Children/End Corporal Punishment.

<sup>629</sup> NGO-Report 17.

<sup>630</sup> German: Verordnung über Massnahmen zum Schutz von Kindern und Jugendlichen sowie zur Stärkung der Kinderrechte vom 11. Juni 2010, SR 311.039.1.

<sup>631</sup> Art. 7 et seqq. Ordinance.

<sup>632</sup> REUSSER/LÜSCHER, St. Galler Kommentar, art. 11 BV n 18.

<sup>633</sup> Art. 3(1) Ordinance.

<sup>634</sup> Art. 3(2) Ordinance.

## **PART THREE: Conclusion and Recommendations**

### **6 Conclusion**

Children's rights are a relatively new phenomenon, but they are not less established than the rights of adults. By ratifying the CRC, 197 States Parties have agreed on upholding the rights of children and giving them a primary consideration in every decision-making. Art. 19 CRC grants them the right to protection from all forms of violence, including corporal punishment, however light. The Committee demands periodic reports by States Parties tracking the status of the implementation of the CRC at the domestic level. By establishing a complaints procedure, children may submit complaints to the Committee alleging a breach of their rights. Lastly, NGOs and other international organizations are strongly cooperating with the Committee for the effective implementation of the CRC.

In Switzerland, art. 11 BV enshrines the right of children and young people to be afforded special protection of their integrity and the encouragement of their development, based on which legislative bodies have adopted respective laws, i.a., in civil and criminal law. The Swiss Federal Supreme Court, however, has not asserted an absolute prohibition of corporal punishment: Acts of aggression that are not repeated and thus not prosecuted *ex officio* are justified by the educational right of parents. The CRC Committee and NGOs have repeatedly criticized this practice. After numerous unsuccessful parliamentary initiatives, a right to non-violent education under civil law has been accepted by the National Council in September 2021, marking the first step away from child violence.

### **7 Recommendations**

The CRC, although widely ratified, does not sufficiently oblige States Parties to explicitly prohibit all forms of child harm in law due to its open-ended wording. This makes it more likely for States to have the discretion to decide on whether to tolerate a certain degree of violence toward children by parents as part of their educational right. The Concluding Observations by the Committee in the reporting and examining process are not binding, leading to those recommendations being poorly implemented by States Parties. This leaves children with weak or no legal protection against violent behavior. International organizations can contribute to ensuring the rights of children through media campaigns and public awareness. Because protection from abuse at the international level is difficult

to achieve, it becomes even more essential to secure the child's right to protection against violence at the national level. After all, States are the primary bearer of children's rights.

The Swiss legal framework consists of sufficient norms, notably in the Criminal Code and the Civil Code protecting children from inflicting harm on them. With that said, there is no need for more legal provisions, especially if the Federal Assembly will enshrine the child's right to a non-violent education in the Civil Code. Following various decisions by the Swiss Federal Supreme Court, it has not yet dealt with the admissibility of acts of aggression regarding such that are not repeated and therefore not prosecuted *ex officio* as well as such that do not exceed what is acceptable by social norms. It is thus recommended to close this gap and declare any physical attack on a minor as unlawful rather than justified by the educational right of parents. However, this gap will likely be closed if the prohibition of corporal punishment is anchored in civil law.

Yet, there are deficits in the Swiss legal system in the sense that the existing laws remain difficult to enforce. There is particularly a need for organizational measures in the context of child protection under civil law. Continuous educational training for those involved in the protection of children, such as, but not limited to, the police, child protection authorities, deputies, pediatricians, and teachers, is an indispensable part of making the whole system work. In addition, child harm can little be prevented from happening unless inciting parents and caregivers to a non-violent education. As repeatedly urged by NGOs and the CRC Committee, campaigns that raise awareness of the dangers of corporal punishment and the non-acceptability of such in society can be vital to preventing child harm. Every parent and caregiver, regardless of his or her place of residence and socio-economic background, shall have access to low-threshold support services and competent help in the event of a threat or an endangerment to a child's well-being.

Moreover, the Civil Code sets forth a graduated set of child protection measures in case of parental misconduct. If other less intrusive child protection measures are insufficient or offer little prospect of proving adequate, parental responsibility may be withdrawn as *ultima ratio*. However, the prevalent focus on civil law measures rather than criminal liability leaves the impression that perpetrators of child violence are sometimes given too much trust and understanding. Instead, the likelihood of further harm needs to be assessed in every case, and, if necessary, the subsidiarity of criminal law to civil law waived.

## 8 Appendix

### Declaration Statement

I hereby declare that I have written this thesis independently, without the assistance of third parties, and using only the sources indicated.

I have read and understood the information sheet on avoiding plagiarism.

At the same time, I acknowledge that the ZHAW has the exclusive right to use this work. The right to cite the authorship remains unaffected.

Uerikon, 25 May 2022

Carry Tang

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