**Balancing Pragmatism and Principle:**

**UNICEF, Child Rights and Child *Génocidaires***

Jastine Barrett[[1]](#footnote-1)\*

**ABSTRACT**

Following the 1994 genocide, more than 4,500 children were held in Rwandan prisons, most accused of genocide-related crimes. Based on field research, this article examines how UNICEF negotiated the tension between pragmatism and principle in its approach to child *génocidaires*. It profiles the contextual approach adopted by UNICEF in interpreting international juvenile justice standards, drawing out tensions within UNICEF and between UNICEF and other actors over how best to implement the Convention on the Rights of the Child (particularly as regards detention). It then evaluates whether there was risk of weakening the normative content in the desire to implement the standards in a socially-sensitive and context-specific way. I argue that, by adopting a pragmatic yet principled approach, UNICEF was, to some extent, able to enhance the rights of child perpetrators in the difficult context of post-genocide Rwanda.

**KEYWORDS:** child rights, human rights, juvenile justice, child perpetrators, post-conflict justice, Rwanda

# Introduction

In ‘The Dark Sides of Virtue’, Kennedy comments that humanitarian work (which includes human rights activism) often requires ‘*strategizing* about the law’. This includes considering whether rules should be strictly or flexibly interpreted and whether the neutrality of norms should be stressed in preference to a focus on ‘their pragmatic link to political realities’.[[2]](#footnote-2) He argues that, in the work of the United Nations High Commissioner for Refugees (UNHCR) (his case study), such strategising has not always resulted in ‘imaginative pragmatism in response to refugee flows’, decisions being based on ‘fealty to coherence of the doctrinal structure’ as opposed to responding to the needs of refugees.[[3]](#footnote-3) In another work, Kennedy criticises human rights organisations, contending:

[T]o maintain the claim to universality and neutrality, the human rights movement practices a systematic lack of attention to background sociological and political conditions that will determine the meaning a right has in particular contexts, rendering the evenhanded pursuit of “rights” vulnerable to all sorts of distorted, and distinctly non-neutral outcomes.[[4]](#footnote-4)

In stark contrast to Kennedy’s assertions, and his findings regarding the UNHCR,[[5]](#footnote-5) in this article I illustrate that UNICEF Rwanda[[6]](#footnote-6) imaginatively interpreted international juvenile justice standards, taking account of the context and realities of post-genocide Rwanda, when seeking to enhance the rights of children accused of participating in the genocide. I begin by briefly providing the context, before outlining UNICEF’s role, as lead UN agency for children in conflict with the law, in safeguarding child rights as stipulated in the Convention on the Rights of the Child (CRC).[[7]](#footnote-7) Drawing on an analysis of archival material and the results of semi-structured qualitative interviews with key stakeholders,[[8]](#footnote-8) I then examine the pragmatic approach adopted by UNICEF Rwanda in the interpretation of international standards, drawing out the contention within UNICEF and the friction between UNICEF Rwanda and other actors over how best to implement the CRC. Finally, I evaluate this approach, considering whether there was risk of weakening the normative content in the desire to implement the standards in a socially-sensitive and context-specific way. I argue that, whilst there continued to be many violations of children’s rights in Rwanda’s treatment of child perpetrators of genocide, UNICEF broadly achieved an appropriate balance of principle and pragmatism and was, to some extent, able to ensure some basic protections for child *génocidaires*[[9]](#footnote-9) in the difficult context of post-genocide Rwanda.

# The context

Following the 1994 genocide, the new Rwandan government adopted a maximalist approach to accountability, which included criminal prosecution of minors.[[10]](#footnote-10) In 1998, more than 4,500 children under the age of 18 were held in prisons, most of them accused of genocide-related acts. The war and genocide had devastated all areas of Rwandan life, including the social fabric and judicial system. Revenge attacks towards alleged perpetrators of genocide were widely reported[[11]](#footnote-11) and significant pressure was on the Rwandan government to provide justice to victims. There was, however no functioning judicial system: infrastructure and equipment had been destroyed and many lawyers and judicial personnel had been killed, fled the country or were themselves implicated in the genocide. Dealing with the significant number of people arrested would have been beyond the capacity of any judicial system, let alone one that had been decimated. With the assistance of donors, international agencies and non-governmental organisations (NGOs), Rwanda began to rebuild its judicial system and, from 1996, began to try alleged *génocidaires*, including juveniles (over 14 – the age of criminal responsibility) before the formal courts. For children under 14, the response was to place them in re-education centres. When it became clear that it would not be possible to process the huge number of suspects through the formal courts, Rwanda established the *gacaca* jurisdictions, a quasi-traditional dispute resolution mechanism, that began operating in 2002 and tried the majority of perpetrators.

As a state party to the CRC, Rwanda was obliged to comply with international standards relating to children in conflict with the law. The CRC does not preclude the prosecution of children for crimes but does contain juvenile justice standards.[[12]](#footnote-12) A comprehensive review of these standards is beyond the scope of this article, but in short the CRC requires special treatment of children at all stages of the judicial or administrative process (from investigation through to detention or alternative measures) that takes account of their age and the desirability of promoting their reintegration into society, prohibits certain sanctions for juveniles (the death penalty and life imprisonment without parole), requires states to establish a minimum age of criminal responsibility and to put in place juvenile-specific laws, procedures and institutions, and establishes minimum procedural guarantees. A key principle underlying all of these standards is the obligation to act in the best interests of the child. The CRC is supplemented by non-binding instruments that expand on these rights, including the Beijing Rules,[[13]](#footnote-13) the Havana Rules[[14]](#footnote-14) and the Riyadh Guidelines.[[15]](#footnote-15)

None of these instruments specifically address crimes that are committed in the context of a conflict or genocide. However, the applicability of juvenile justice standards to children accused of atrocities has been affirmed by the UN, most notably through the Machel report of 1996,[[16]](#footnote-16) as well as by many states through their endorsement of the Paris Commitments and Principles.[[17]](#footnote-17) Indeed, Machel, with specific reference to the Rwandan genocide, comments: ‘The severity of the crime involved … provides no justification to suspend or to abridge the fundamental rights and legal safeguards accorded to children under the Convention on the Rights of the Child.’[[18]](#footnote-18)

The implementation of juvenile justice standards can prove difficult even in a non post-conflict situation: Hamilton and Harvey highlight public opinion towards juveniles as being a major challenge,[[19]](#footnote-19) and Odongo notes that the lack of financial and human resources is often raised as an impediment to implementation.[[20]](#footnote-20) Rwanda, emerging from genocide, faced these issues as well as multiple other challenges in the reconstruction process, rendering full compliance with juvenile justice standards arguably impossible. Clearly, the state has primary responsibility for complying with its international obligations. However, other actors also have a role in providing assistance, and thus an opportunity to enhance the rights of child perpetrators.

# UNICEF and the Convention on the rights of the child: a framework for action

The CRC provides for a role for UNICEF (and other bodies) in its Article 45: UNICEF is entitled to be represented when state reports are being considered, may be invited to submit reports and provide expert advice to the Committee on the Rights of the Child (CRC Committee) and may also receive requests to provide technical assistance. It is thus envisaged under the CRC that UNICEF will play an important role in the promoting of and advising on the rights of the child. Further, as an operational organisation with national presence, at the country level UNICEF seeks to translate the principles of the CRC into practical programmes, the aim being to enhance a state’s implementation of and compliance with the CRC.

The CRC thus provides UNICEF with a framework on which to base its interventions. In 1992, UNICEF’s Executive Board manifested its intention that all of UNICEF’s work be ‘aimed at supporting the implementation of the Convention’[[21]](#footnote-21) and 1996 saw the adoption of the UNICEF Mission Statement that described UNICEF as ‘guided by’ the CRC, committing UNICEF to formulating policies and programmes firmly grounded in children’s rights.[[22]](#footnote-22) UNICEF thus adopted a rights-based approach, the CRC becoming a ‘semiofficial statement of principles’ or ‘an unofficial constitution of UNICEF, with almost every facet of its operations directed toward the convention’s implementation’.[[23]](#footnote-23)

Cantwell, however, asserts that CRC’s ‘limitations’ as a treaty must be recognised: it may provide a ‘common reference point’ or a ‘springboard for programme response’, but it should not be considered a blueprint.[[24]](#footnote-24) Further, UNICEF should not engage in an ‘ideological’ campaign on children’s rights: governments should be allowed to navigate their own way in achieving compliance with the CRC.[[25]](#footnote-25) Arguably this includes the decision on whether or not to hold minors accountable. Petty and Brown comment that child rights agencies should not ‘pass judgment’ on the extent to which children committed war crimes voluntarily or on personal culpability. Rather, agencies should ‘monitor and promote action on the part of national authorities that is in accordance with … international standards … and promote the reintegration of children by giving them the skills and motivation to join mainstream society’.[[26]](#footnote-26) As noted above, Rwanda took the decision to prosecute all those responsible for genocide and, as will be discussed in more detail in the next section, UNICEF Rwanda, after becoming involved with child *génocidaires* upon discovering minors already in detention, worked within this overall approach, seeking to steer Rwanda into greater compliance with international standards. The post-conflict situation, however, presented UNICEF with significant challenges in how best to operationalise the CRC, particularly as regards detention.

# UNICEF’s involvement with child *génocidaires*

## Child *Génocidaires*: An Unprecedented Undertaking

Following the genocide, international actors (including UN agencies, the International Committee of the Red Cross and international NGOs) provided significant support to Rwanda in its reconstruction process, in particular, the rehabilitation of its justice system (including the penitentiary system). Whilst for most of these organisations children’s rights were not the main focus, their activities did include child *génocidaires* within their scope. UNICEF, however, was the key player in all issues relating to child perpetrators.

UNICEF first became involved with child *génocidaires* in November 1994 after international observers visited prisons and reported that children were amongst those detained. Dealing with child *génocidaires* was a first for Rwanda, for UNICEF and for the international community as a whole. UNICEF’s remit had included ‘children in especially difficult circumstances’ (CEDC) from the mid-1980s, but the main focus in this category had been street children: juvenile justice had not officially been on UNICEF’s agenda.[[27]](#footnote-27) Additionally, CEDC, or ‘child protection’ as it became known, was considered a sensitive issue by some UNICEF staff members well into the 1990s, concern being that involvement in human rights issues could compromise impartiality.[[28]](#footnote-28) Children in detention also did not fall within the remit of the agreements initially concluded between UNICEF and the Rwandan government.[[29]](#footnote-29) Cantwell reports that, after discovering the existence of children in Kigali prison, UNICEF Rwanda debated ‘whether or not it should work in this sphere … and if so, how’.[[30]](#footnote-30) Additional complicating factors were the lack of any functioning judicial system and the social context, UNICEF Rwanda noting that the national perception of child suspects would have an ‘important impact on the amplitude of movement of UNICEF’.[[31]](#footnote-31) Chorlton summed up the challenges as follows:

There were no legal precedents, no references, no expertise. Ahead lay the challenges of legal status and treatment, specific protection and basic rights as well as institutionalisation issues. For UNICEF, too, it would be an undertaking without precedent: how to support a Government to protect and safeguard the rights of children who were, in public opinion, held guilty for one of humanity’s worst crimes.[[32]](#footnote-32)

UNICEF Rwanda did, however, take up the challenge. In the absence of capacity on the part of the government and the lack of a strong, independent civil society, UNICEF Rwanda’s involvement in matters pertaining to minors in the justice and penitentiary systems was significant (Matthes referred to it as ‘unprecedented’[[33]](#footnote-33)). It worked very closely with the Rwandan government, cooperating also with other international actors, as well as local NGOs, on specific projects. Given the lack of formal institutional guidance, it was mainly through the individual initiative of UNICEF Rwanda staff within the ‘child protection’ programme (which included children in conflict with the law) that approaches and policies were developed and implemented.[[34]](#footnote-34)

After identifying child perpetrators as an issue requiring a response, UNICEF established a joint project with the Ministry of Justice (MINIJUST) in 1995[[35]](#footnote-35) with the aims of strengthening the enforcement of the CRC by ensuring that the rights of children in conflict with the law were protected and by assisting with their reintegration into the community. The project’s objectives targeted detention conditions, judicial and legal issues and community-based actions.[[36]](#footnote-36) Over the following years, UNICEF Rwanda undertook a number of activities working towards these objectives, including: providing a consultant to draft rules and regulations for children in detention on the basis of the Havana Rules;[[37]](#footnote-37) building or rehabilitating facilities for the re-education of children under 14 and for the detention of those aged 14 to 18; identifying the under-fourteens in prisons and *cachots* and requesting their transfer to re-education centres; providing supplies, education and psycho-social activities to children in detention; providing support to NGOs to train prison directors on child rights; advocating for minors’ benches within the formal courts and training minors’ judges and court clerks; advocating for the acceleration of juvenile trials and training judicial police inspectors and prosecutors to deal specifically with juvenile cases; providing legal assistance to juveniles; monitoring trials before the formal courts; advocating for the release of minors held without formal charge; assisting with the community reintegration of the under-fourteens; and conducting or assisting with community sensitisation and social mobilisation.[[38]](#footnote-38) Much of this work took place before the introduction of the *gacaca* system.

In relation to the *gacaca* jurisdictions, UNICEF Rwanda advocated for an express minimum age of criminal responsibility in the laws governing the *gacaca* courts; for the provision of legal assistance to minors; for minors to be prioritised before the *gacaca* courts; for minors to do community service appropriate to their age (as opposed to remaining in detention); for training to be provided to *gacaca* judges on child rights; and for a handbook to be produced for paralegals to be able to explain the *gacaca* process to minors.[[39]](#footnote-39) Its interventions during this phase were thus more advocacy-based, although it was also involved in community sensitisation, in which key child rights were explained to local communities.[[40]](#footnote-40) However, whilst the *gacaca* legislation explicitly provided for a minimum age of criminal responsibility of 14, the other recommendations do not appear to have been taken on board (although community service was introduced ultimately as a partial sentence for most genocide offenders).[[41]](#footnote-41) Further, once the *gacaca* courtsstarted operating, UNICEF Rwanda’s involvement with child perpetrators appears to have diminished. A child protection staff member suggested that this was because child protection was not a priority for UNICEF.[[42]](#footnote-42) However, it is also possible that UNICEF Rwanda’s attention shifted to other matters, given that genocide minors would have been over 25 when tried by *gacaca*[[43]](#footnote-43) and given competing priorities facing UNICEF Rwanda.[[44]](#footnote-44) Also, the Rwandan government exercised tight control over *gacaca,* including the *gacaca-*related activities of international (as well as domestic) actors, particularly once the jurisdictions began operating. One UNICEF Rwanda staff member’s personal view was that, once *gacaca* began to be rolled out, the government did not ‘give us the space to do much other than being interested’.[[45]](#footnote-45)

## Pragmatic Interpretation of the Normative Content

As noted above, UNICEF adopted the CRC as the basis for all of its activities in the mid-1990s, around the exact time that UNICEF Rwanda became involved with child *génocidaires*. In Rwanda, the CRC was used as ‘a tool for planning, implementing and monitoring child protection programmes’, and making the CRC ‘a reality’ for children was ‘at the centre’ of UNICEF Rwanda’s programming.[[46]](#footnote-46) In addition to the CRC, some of the non-binding child rights instruments deal exclusively with juveniles in conflict with the law, and these were also utilised by UNICEF Rwanda.

The CRC has a holistic nature, all rights being interrelated and being applicable to all children (including those in detention) at all times. It is not proposed to examine all of these rights; rather this section draws on a limited number of standards that exemplify UNICEF Rwanda’s approach. As noted earlier, an overriding principle that applies to all actions concerning children is the obligation to act in the best interests of the child. The relevant provision, Article 3, provides that the child’s best interests shall be ‘a’ primary consideration rather than ‘the’ primary consideration in such actions and thus does not require the best interests of the child to trump all other considerations although they will prevail unless it can be proved that other interests should take precedence.[[47]](#footnote-47) The principle can be used ‘to support, justify or clarify a particular approach’ and as ‘an aid to construction’ in implementing other rights. It can also be used to resolve conflicts between different rights within the CRC.[[48]](#footnote-48) As will be illustrated, it was predominantly through the application of the best interests principle that UNICEF Rwanda interpreted substantive provisions in a non-restrictive way so as to adapt to the Rwandan reality.

### Institutionalisation of child genocide suspects

Perhaps the most contentious of UNICEF Rwanda’s decisions, and one which would have an impact on its overall approach to child *génocidaires*, was to support the institutionalisation of children. This decision was not made lightly, one commentator referring to the ‘soul-searching’ that went on within UNICEF Rwanda,[[49]](#footnote-49) and was made only after careful consideration of the potential consequences of supporting institutionalisation or of insisting on the release or other treatment of child suspects.

The CRC provides that a child must not be unlawfully or arbitrarily deprived of liberty,[[50]](#footnote-50) that detention or imprisonment of a child ‘shall be used only as a measure of last resort and for the shortest appropriate period of time’[[51]](#footnote-51) and that alternatives to institutional care should ‘be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence’.[[52]](#footnote-52) Additionally, for children below the state’s minimum age of criminal responsibility, the CRC Committee commented, albeit in 2007 and thus some time after the genocide, that ‘special protective measures’ may be taken if necessary in the child’s best interests.[[53]](#footnote-53)

Before the genocide was over, arrests began of suspected *génocidaires*, including minors. In 1995, approximately 1,600 minors were in detention, with the number increasing over the years to reach a peak of 4,533 in 1998.[[54]](#footnote-54) Children under the age of 14 were amongst those detained, a seven-year-old boy seen in Kigali prison in 1995[[55]](#footnote-55) and over 500 detainees in 1999 being under 14 at the time of the genocide.[[56]](#footnote-56) As mentioned earlier, UNICEF first became aware of children in detention towards the end of 1994 and this led to its involvement with child *génocidaires*. It advocated for the respect of minors’ rights based on the existing age categories in Rwandan law that provided that the under-fourteens could not be held criminally responsible and those aged between 14 and 18 could be prosecuted but would benefit from reduced sentences.

UNICEF Rwanda’s conceptual starting point, based on the CRC, was that minors should not be detained. It focused initially on the removal of the under-fourteens from prisons and *cachots* (temporary detention facilities) doing ‘a lot of lobbying’ with the government for their release.[[57]](#footnote-57) However, the government’s response was that they would not be safe. UNICEF Rwanda initially thought the government was ‘stalling’, but reassessed its position after the release of a study by Save the Children Federation-USA (SCF-USA).[[58]](#footnote-58) This had found that the general attitude towards children who had killed during the genocide was that they should receive the death penalty, participants in one group of the study responding that, if the Rwandan state did not impose the death penalty, they would kill the children themselves.[[59]](#footnote-59) For crimes other than murder, the feeling was that children should be punished severely.[[60]](#footnote-60) Children who had committed genocidal acts were considered responsible for those acts, irrespective of their age.[[61]](#footnote-61) As a result, UNICEF Rwanda became cognisant both of the ‘enormous’ risk of acts of revenge against these children as well as the feeling of impunity their release would engender. Even though the under-fourteens could not be held criminally responsible, there was still the view that they would need to be held accountable ‘in some way or another’ and go through some process, given the nature of the crime and to ‘give the community or the survivors the feeling that some justice was done’.[[62]](#footnote-62) As Torres (a UNICEF Rwanda Child Protection Officer) commented at the time: ‘A liberation of an unjudged child, not publicly recognized as innocent would have been seen by the families of the victims and by the public opinion in general as an injustice: impunity is being granted to murderers.’[[63]](#footnote-63) There was also the problem that many of these children did not have a family to return to (family members having been killed, imprisoned or having fled Rwanda), and for those that did, they risked rejection.[[64]](#footnote-64) And there was the perceived need to protect the community from ‘additional dangers’ that the return of the child might pose,[[65]](#footnote-65) as well as the requirement to provide appropriate educational measures and psychosocial support to rehabilitate the children, given the ideological basis of these crimes and the trauma that they had experienced after being ‘pushed to take part in extremely violent acts’.[[66]](#footnote-66)

The decision was thus taken to restore a re-education centre for the under-fourteens (the Gitagata Re-education Centre[[67]](#footnote-67)) and secure their transfer to this facility where they would receive rehabilitation and support and where steps would be taken to facilitate their reintegration. As for the over-fourteens, the focus was on improving detention conditions by restoring or building minors’ wing in existing prisons and accelerating the processing of their cases.

Alternatives to institutional care were considered by UNICEF Rwanda, but ruled out. Although UNICEF Rwanda had listed the promotion of ‘the replacement of prison sentences by substitutive community work sentences’ as a specific objective in 1995,[[68]](#footnote-68) given the gravity of the crime, the hostility of the community to these children and the lack of infrastructure, it felt unable to push for such alternatives.[[69]](#footnote-69) Castrogiovanni highlighted the distinction between minor and very serious crimes, commenting that even in a ‘normal’ context (i.e. not post-genocide) if a child was accused of a very serious crime, it might be difficult to find an alternative to detention, such as a placement in a foster family or in a small ‘open’ home, as this would require both resources and a receptive community. Whilst hesitant to conclude that detention was the best solution, she emphasised that alternative measures require a sophisticated social welfare system if ‘the best alternative care’ is to be provided; these services cannot be provided in a ‘vacuum’, however, such as was prevailing in Rwanda.[[70]](#footnote-70) Later, UNICEF Rwanda advocated for community work for juveniles in the context of discussions on the *gacaca* jurisdictions, but it does not appear that juveniles were treated any differently than other *génocidaires* in this regard.

Toole spoke of the ‘internal churning’ coming to the decision not to press for the release of minors. He noted the concern that building facilities could result in more people (including children) being arrested, and that a separate facility might make it easier to justify longer internment and facilitate recruitment of child soldiers if the conflict re-ignited. He also stressed that UNICEF Rwanda ‘felt and knew’ detention was ‘wrong’. Given the ‘very tough context’, however, it was considered the best way forward.[[71]](#footnote-71) A newspaper reporting in 1997 noted the dilemma faced by UNICEF Rwanda: ‘It is a bitter first for humanitarian groups known for feeding and schooling children, not jailing them. But after fierce internal debate, UNICEF officials decided they had no legal or moral grounds to seek blanket amnesty for minors accused of crimes against humanity.’[[72]](#footnote-72)

In a report from 1995 on its joint project with MINIJUST, UNICEF Rwanda noted that the Rwandan context had necessitated a different approach for minors accused of genocidal acts than for those accused of ‘common law’ (ordinary) crimes:

UNICEF promotes the de-institutionalization of children in conflict with the law in compliance with the Convention on the Rights of the Child. Nevertheless, given the particular situation of children accused of genocide in Rwanda, an immediate liberation cannot be envisaged. Therefore UNICEF is promoting the rehabilitation of reeducation centers as a temporary measure taking into account their need for special protection. This does not apply to children accused of common law crimes for which swift liberation is advocated for [sic].[[73]](#footnote-73)

For most common law cases, ‘deprivation of liberty will not be necessary to secure criminal proceedings, or to protect witnesses or the general public’ and, in the absence of state-run facilities other than prisons, it was recommended that juveniles accused of less serious common law crimes be released on condition that they were housed in an approved NGO-run centre.[[74]](#footnote-74) In respect of child genocide suspects, however, Matthes commented that, even though their rights had been clearly violated by their prolonged detention without any arrest warrant or court order, advocating for their release was ‘not an option’. This was given the severity of the crimes as well as the political climate.[[75]](#footnote-75) Chorlton similarly notes the impossibility of advocating for the ‘outright release’ of all children on the basis that their rights were being violated. In her view:

UNICEF’s role in safeguarding the rights of these children … as stipulated within the *Convention on the Rights of the Child*could not go beyond helping to move children away from adult prisoners into an environment where re-education programmes can be organised for them and they can eventually [be] reintegrated into Rwandan society, and facilitating the due process of law by supporting the justice system.[[76]](#footnote-76)

The decision of UNICEF Rwanda to support the institutionalisation of both the under-fourteens and those aged 14 to 18 was highly controversial: within UNICEF, the broader human rights community and Rwandan society. In UNICEF Rwanda, there was ‘deep disagreement’, some local staff being opposed to helping anyone accused of genocide, including child *génocidaires* who they found difficult to perceive as still being children.[[77]](#footnote-77) From a more substantive perspective, Torres spoke of going against UNICEF’s general policy not to get involved with detention centres: as a matter of principle, UNICEF considers that it should not participate in the detention of minors (i.e. in terms of rehabilitating or providing materials to detention facilities), as this is perceived as ‘contributing’ to their detention and thus could undermine UNICEF’s reputation as a child protection agency. The perception was, at least initially, that UNICEF wanted no involvement with detention centres (including the creation of separate wings) for children: ‘It was completely no-go.’[[78]](#footnote-78) There was also concern that donors would not be supportive.[[79]](#footnote-79) Torres considered, however, that there was a ‘moral imperative’ to adopt the position he and others in UNICEF Rwanda had adopted. In his view, it is necessary to ‘start being pragmatic at some point’ and look at something objectively rather than persisting with one organisational policy ‘when it results in denying support to children in grave danger to their health, growth and development: it’s really about basic human rights’.[[80]](#footnote-80) Castrogiovanni similarly felt that getting involved with improving detention conditions was not ‘going in the direction of typical UNICEF work’, but given the appalling detention conditions and the impossibility of advocating for release of the children, ‘something needed to be done’.[[81]](#footnote-81) Indeed, UNICEF Rwanda argued in 1996 that, based on the CRC and other international standards, it had the responsibility ‘within its mandate’ to contribute to improving detention conditions where an immediate liberation was not viable. It further, and correctly, asserted that detention is not contrary to the CRC.[[82]](#footnote-82)

Toole, whilst not recalling any specific ‘opposition’ did recall UNICEF Rwanda’s concern that they would face this, and thus took measures to ensure they had ‘strong buy-in’ from the top. This included, for example, taking high-level visitors from UNICEF New York to prisons to see the conditions children were held in, before informing them that UNICEF Rwanda had decided to construct alternative facilities.[[83]](#footnote-83) Cantwell also referenced the concerns of some in UNICEF that the Rwandan office was taking too much of a micro rather than macro approach in becoming involved with children in prison: ‘To this day, there are still murmurs … in some quarters of the agency that … UNICEF was overstepping its mandate and spending undue amounts on a few hundred children.’ He commented that, given its inexperience in this area, UNICEF Rwanda could have successfully (and justifiably in the eyes of many) avoided the issue, but this would have constituted an ‘unconscionable step backwards’. Instead, UNICEF Rwanda ‘[t]o its considerable credit … took the plunge with, overall, a probably satisfactory outcome’.[[84]](#footnote-84)

There was also external opposition from NGOs, Torres noting ‘an extremely negative reaction’ to what UNICEF Rwanda was trying to do. Only one NGO (MSF[[85]](#footnote-85) Belgium) was initially on board and willing to assist with the Gitagata project.[[86]](#footnote-86) Some NGOs ‘criticized UNICEF for building what they considered to be a prison’ and which they saw as a violation of the best interests of the child.[[87]](#footnote-87)An expatriate ASF lawyer who visited the Gitagata Centre in 1998 questioned what UNICEF was doing, given the conditions that the children were being held in, believing them to have been effectively abandoned and also questioning their ‘rehabilitation’ which she considered somewhat haphazard.[[88]](#footnote-88) However, it would appear that even those who were opposed to institutionalisation were not coming up with any concrete alternative proposals.[[89]](#footnote-89)

As regards Rwandan society, the arguments here were not about safeguarding the rights of child *génocidaires* but about respect for victims’ (including child victims) rights. As previously noted, some in UNICEF considered that the focus on child *génocidaires* was unjustifiable given their small number. The feeling was much stronger amongst the Rwandan population. There was resentment towards organisations perceived as providing a lot of assistance to *génocidaires* rather than to victims and survivors.[[90]](#footnote-90) Specifically in relation to the under-fourteens, there was resentment at the attention, funding and support that Gitagata received from donors and international actors, the perception being that the needs of other children, not implicated in the genocide, were being overlooked.[[91]](#footnote-91) To put this in context, based on a report from 1997 approximately 300,000 children were killed during the genocide and 120,000 were orphaned with many more unaccompanied children living in centres, foster families or child-headed households.[[92]](#footnote-92) Many were against these child *génocidaires* being housed in separate installations and having a ‘relatively comfortable lifestyle’ given that they were considered guilty of genocide and thus deserved to be punished severely.[[93]](#footnote-93) For some, a period spent in Gitagata failed to deal adequately with the alleged crimes, it being ‘like you did nothing’.[[94]](#footnote-94) Castrogiovanni spoke of the difficulty in devising programmes that would do justice both to children who had allegedly committed genocide-related crimes and to the victims.[[95]](#footnote-95) The opening of a school at Gitagata, attended by local children as well as Gitagata residents, was hoped, to some extent, to mitigate the perception of these children being granted preferential treatment as well as promote social integration.[[96]](#footnote-96)

Placing the under-fourteens in re-education centres and improving the detention conditions of the over-fourteens by building or restoring minors’ wings was considered to be the most appropriate way of balancing the different interests whilst also working within the framework of the CRC, in the particular context. Cantwell’s 1997 study of UNICEF Rwanda’s approach remains a valuable and, in my view, accurate evaluation. He considered that the decision to send the under-fourteens to Gitagata was an ‘excellent example’ of the application of the best interests principle in determining how to implement the rights of a particular group of children. Given the perceived risk to their personal security, as well as the need to ‘prepare’ them for their return to society, ‘it was deemed to be in their best interests that their right not to be held criminally responsible be given effect in this manner’.[[97]](#footnote-97) He mooted: ‘Whatever the age of criminal responsibility, no country would allow children accused of a serious crime simply to return to the outside world without any form of treatment or follow-up.’[[98]](#footnote-98) The approach was thus also in line with community interests.[[99]](#footnote-99) Rwandans who had worked in this area agreed that releasing the under-fourteens directly into society would not have been appropriate, referring to the security risk arising from being labelled a ‘*génocidaire*’ (irrespective of guilt) and the need for re-education.[[100]](#footnote-100) Whilst Cantwell was largely supportive, he expressed concerns that the ‘full child rights ramifications of the use of “protective custody” for these children have not been thought through in sufficient depth’. He also expressed concerns regarding the right to privacy,[[101]](#footnote-101) given the extreme media attention Gitagata attracted, and suggested that it would have been ‘more in keeping with the CRC to have taken this initiative in a less publicity-oriented manner’.[[102]](#footnote-102)

As regards the rehabilitation or construction of minors’ wings in existing prisons (the aim being to separate those aged between 14 and 18 from adult detainees – see below), Cantwell asserted that, whilst this might at first glance be seen as ‘running diametrically counter to the treaty’s philosophy’, the policy was in fact inspired by the CRC.[[103]](#footnote-103) He suggested that, given that it was likely that many juveniles would later be convicted of genocidal acts and possibly sentenced to long custodial sentences, UNICEF Rwanda’s involvement to improve conditions in advance might be considered more reasonable than reacting at that later stage.[[104]](#footnote-104)

The emphasis in the CRC and the related instruments is on alternatives to detention, but the CRC does not prohibit custodial measures being imposed on children:[[105]](#footnote-105) detention should be a measure of last resort. Whilst there were significant problems in the Gitagata Centre and also in prisons, UNICEF Rwanda’s actions must be considered in light of the prevailing conditions and context of the time. Having gone through the various options open to it, UNICEF Rwanda came to the conclusion that institutionalisation was the best option for these children. In my view, it thus appears that detention was, in effect, the ‘last resort’ in this case, at least in the first few years after the genocide. Whilst the majority of minors were arrested and detained in violation of procedures (a breach of international and domestic law), UNICEF Rwanda considered that demanding an immediate release was not appropriate; meaningful progress could be made only incrementally. UNICEF came to its decision by the application of the best interests principle: paradoxically detention was largely being used as a protective measure for these children and to assist with their reintegration.

 It is arguable that, over time, some of the challenges diminished. Possibly the greatest challenge facing the government and UNICEF Rwanda was the perceived security risk to the children. The general perception was that society gradually became more receptive to the releases and the risk of revenge attacks thus declined.[[106]](#footnote-106) It is possible that, at some stage – although it is difficult to pinpoint when – UNICEF Rwanda could have pushed more forcefully for the provisional release of juveniles in prisons,[[107]](#footnote-107) for open facilities, or for alternatives to detention (noting, of course, the resource implications of such measures). This would have been more in line with the emphasis in the CRC on the rehabilitation of juveniles. As outlined earlier, UNICEF Rwanda did advocate for minors to do community service when discussions were taking place on *gacaca*. However, it appears that minors did not benefit from any preferential treatment in this regard. Further, as regards UNICEF Rwanda, it seems that regrettably, by this time and for whatever reason, other areas of child protection had taken priority.

### Conditions of detention

Having taken the decision to support institutionalisation, UNICEF Rwanda then sought to improve the conditions within which children were detained. The CRC provides that children must be separated from adults in detention facilities unless it is considered in the child’s best interest not to do so.[[108]](#footnote-108) This was interpreted by the CRC Committee in 2007 as requiring a child to be placed in separate, distinct facilities with child-centred staff and policies and not in an adult prison.[[109]](#footnote-109) Also, given the holistic nature of the CRC, other provisions such as the right to education and the right to medical assistance and health care also apply to child detainees.[[110]](#footnote-110) These rights are fleshed out in the non-binding instruments, in particular the Havana Rules.

As noted earlier, the number of child genocide suspects in prisons and *cachots* increased from around 1,600 in 1995 to 4,533 in 1998. The total prison population also increased over the years, peaking at between 125,000 and 135,000 in 1998.[[111]](#footnote-111) The number of detainees, even shortly after the genocide, far exceeded prison capacity, some prisons housing almost eight times their capacity by 1995.[[112]](#footnote-112)

Children were initially held together with adults in most prisons. Even where there were separate minors’ wings, access for adults was often not restricted. Castrogiovanni, who visited prisons first on behalf of the UN Human Rights Field Operation in Rwanda (UNHRFOR) and then UNICEF Rwanda, commented that it was impossible to move those aged over 14 into separate facilities.[[113]](#footnote-113) It was for this reason that UNICEF Rwanda took the decision to restore or build minors’ wings within existing prisons to house juveniles, which (as discussed above) proved to be highly contentious. Toole commented that he would ‘probably go down in history as the only UNICEF representative to have ever built a child prison’ but felt that the only way to protect children, given the horrific prison conditions, was to physically separate them.[[114]](#footnote-114) By 2000, six out of 18 prisons had minors’ blocks[[115]](#footnote-115) but 1,097 minors continued to be detained with adults.[[116]](#footnote-116)

A complicating factor was that many genocide minors turned 18 whilst in pre-trial detention. Given the particular context – the overwhelming number of prisoners and extremely harsh conditions – UNICEF Rwanda advocated for the continued separation from adults of these genocide ‘minors’ on the basis that it would be in their best interests, both in terms of being protected from abuse and harsh conditions and having access to reintegration activities.[[117]](#footnote-117) It remained cognisant, however, of the need to balance the interests of these now adults with the interests of younger children, noting that there could be a need for further separation where resources allowed.[[118]](#footnote-118) UNICEF Rwanda had come to this approach by relying on the Havana Rules and the CRC which allow detention of juveniles with those aged over 18 if it is in the formers’ best interest. It was argued that, where keeping the under-eighteens and those who had turned 18 together was the only alternative to mixing the latter with adults, it was in the interests of the under-eighteens as they too would benefit from this policy once they reached 18.[[119]](#footnote-119) Its approach preceded by some years the CRC Committee’s explicit recommendation that, whilst there is no requirement to retain separation for those reaching 18, it should be made possible where it is in that person’s best interests and is not contrary to the best interests of the younger children in the facility.[[120]](#footnote-120) In practice, there was no uniform approach, it largely depending on the prison as to whether separation was maintained for the over-eighteens, but some genocide minors certainly continued to be held in minors’ wings.[[121]](#footnote-121) Further, it would appear that UNICEF Rwanda’s advocacy left some impression: participants at a workshop held in 1998 to discuss ‘Model Internal Regulations for Minors’ Wings based on the United Nations Rules for the Protection of Juveniles Deprived of their Liberty’ agreed that genocide minors over 18 should remain with juveniles in separate facilities from adults and suggested that the term ‘youth wing’ be used instead of ‘minors’ wing’ to reflect this.[[122]](#footnote-122)

As regards other rights of children in detention, UNICEF Rwanda engaged a Child Protection Legal Consultant to prepare draft ‘Rules and Regulations for Children, Juveniles and Adolescents in Rwanda’. In the introduction to his report, Matthes referred to the need to be ‘realistic’ when considering the implementation of international standards. He wrote:

To just put standards in writing that are probably too high given the Rwandan detention reality and the resources available is not to *implement* them. *Implementation* is achieved when standards are actually being applied, which will only be the case if they are somewhat realistic. Thus, without compromising the principles, concessions will have to be made in order to make the feasible possible.[[123]](#footnote-123)

In the preface to his second report that contained the draft standard rules, Matthes noted that whilst the Havana Rules were used as the foundation, some of the recommendations were not adopted on the basis that ‘they did not seem appropriate in the context of the Rwandan detention reality’ or because they were too verbose to use for practical rules.[[124]](#footnote-124) Further, many of the standards were adapted to fit the Rwandan context. For example, Rule 38 of the Havana Rules stipulates that education should be provided outside the place of detention wherever possible, but in any event by qualified teachers. The equivalent draft Rule 18 provides that children should receive education from qualified teachers ‘where available’, and draft Rule 21 refers to the use of qualified detainees from adult facilities where teachers cannot be recruited from outside the prison. Similar adaptations were made to the rule relating to healthcare.[[125]](#footnote-125) In relation to discipline, Rule 71 of the Havana Rules provides that juveniles should not be responsible for disciplinary functions except in the supervision of specified social, educational or sports activities. Draft Rule 32 adapts this to allow for the selection of a leader within a group of 20-30 detainees who could admonish verbally other detainees. This is to reflect the particular prison structure in Rwanda, in which prisoners themselves play a key role in the day-to-day running of the prison. In some cases, the Havana Rules were expanded. For example, draft Rule 29 that relates to visits specifies that individual visits should not be shorter than 10 minutes and the total length per month should be at least one hour. It also provides for visits by relatives detained in adult sections of the same facility. These details are not contained in the Havana Rules (Rule 60 providing for ‘regular and frequent visits’ from family) but reflect the context, in that prison visits were generally extremely brief, and that many members of the same family were often detained for genocide crimes. As mentioned above, a workshop was held in 1998 on regulations for minors’ wings. Although it has not been possible to determine the outcome of this workshop (which was intended to formalise a set of model rules), it nonetheless indicates that UNICEF Rwanda’s outputs were shaping discussions amongst key stakeholders.

In drafting the Rules and Regulations, Matthes clearly took note of the particular conditions prevailing in Rwanda, which is in compliance with Rule 16 of the Havana Rules requiring the rules to be implemented in ‘the context of the economic, social and cultural conditions prevailing in each Member State’. It was impractical, even impossible, for children to receive education or medical care from outside the prison, partly given the administrative implications, but also given that many professionals had either been targeted during the genocide or were imprisoned themselves. The pragmatic solution was thus to work with the structures in place when drafting the rules.

###  Reintegration

An over-arching principle of the CRC (and the related non-binding instruments) is the requirement for juvenile justice systems to promote the reintegration of a child who comes into conflict with the law. In addition to the requirement to provide care, treatment and education or vocational training (all of which facilitate a return to society), the Havana Rules expressly stipulate that juveniles should be provided with special services to assist with their return to society and to ‘lessen prejudice’ against them.[[126]](#footnote-126)

Ingabire observed that, due to the ‘high level of sensitivity’ of genocide cases, the reintegration of children accused of participating in the genocide (including those under the age of criminal responsibility) was significantly challenging.[[127]](#footnote-127) UNICEF Rwanda was involved in the reintegration of the under-fourteens much more than the over-fourteens. Most of the former were placed in the Gitagata Re-education Centre and were either released on an *ad hoc* basis or *en masse* in 2000, when they attended a special solidarity camp[[128]](#footnote-128) together with other genocide minors under 14 who had continued to be detained in prisons or *cachots*. A further solidarity camp was held in 2001 for those under-fourteens who had not been released in 2000. These solidarity camps were organised by the National Unity and Reconciliation Commission and MINIJUST with support from UNICEF. Less detailed interventions were undertaken in respect of the over-fourteens, who again were either released on an *ad hoc* basis or after solidarity camps (one in 2005 being specifically for such juveniles). UNICEF Rwanda, however, does not appear to have been involved with these camps.

Castrogiovanni recalled discussions with NGOs and donors about reintegrating the under-fourteens, in particular a debate on whether re-education centres should be closed or open centres. UNICEF Rwanda’s initial approach was to argue in favour of an open centre (in line with detention as a last resort and to facilitate community integration) and of returning the children as soon as possible back to the community. However, she commented: ‘Then we realised that none of these things was actually possible in the aftermath of the genocide.’[[129]](#footnote-129) The compromise struck was to support a centre that, although nominally ‘open’ was in practice closed (in that although Gitagata was not fenced in, the children were not free to leave) but, as mentioned earlier, to open a school that would cater for both Gitagata children and children from the local community to facilitate interaction and subsequent reintegration. Additionally, UNICEF Rwanda supported a reintegration programme in Gitagata that included civic education activities for the children as well as reintegration measures such as family tracing, mediation between the child and family, or child and community members, and community sensitisation. It was only after a committee was satisfied that the child was ready to be returned to society, taking into account the child’s own views, psychological status and behaviour and also the community’s openness to his return, that the child was reintegrated. There was then follow-up to evaluate the reintegration.

As regards the solidarity camps for the under-fourteens in 2000 and 2001, it has not been possible to ascertain the extent of UNICEF Rwanda’s involvement or indeed obtain much information on what happened at these solidarity camps, other than that the children received counselling, education and training sessions.[[130]](#footnote-130) Human Rights Watch reported, however, that UNICEF Rwanda had been informed of the 2001 camp only one week before it took place,[[131]](#footnote-131) and it is thus likely that its support was largely financial.

For those who remained in prisons, UNICEF Rwanda was authorised to run an emergency education programme from May 1995 in the main prisons and also supported a project that provided vocational training and other skills to minors, the aim being to prepare them for life outside. Sensitisation of communities and follow-up monitoring after reintegration also formed part of this project. Given the decision to support institutionalisation, the lack of human resources and the social context, this was considered the most appropriate way of approximating the requirements of the CRC and the Havana Rules.

### Child-specific procedures and institutions

Pursuant to Article 40(3) of the CRC, states must ‘seek to promote the establishment of laws, procedures, authorities and institutions’ that apply specifically to juveniles[[132]](#footnote-132) and the CRC Committee has recommended that juvenile courts be established or, where not immediately possible, specialised judges be appointed.[[133]](#footnote-133)

Before the genocide, there were no juvenile courts or judges in Rwanda. It was one of UNICEF Rwanda’s stated objectives to create juvenile courts within the existing judicial system and to introduce provisions reflecting child rights standards into Rwandan criminal law and procedure.[[134]](#footnote-134) However given the lack of resources – human, financial, material and organisational – UNICEF Rwanda had to scale back its designs for a juvenile justice system. An internal UNICEF Rwanda document from March 1996 referred to the latest version of the Genocide Law[[135]](#footnote-135) that did not contain any special provisions for minors, and suggested that wording be incorporated to provide for juvenile chambers.[[136]](#footnote-136) The document explained that specialised chambers would only be created if UNICEF Rwanda covered the costs of training judges, their salaries and *per diems*.[[137]](#footnote-137) UNICEF Rwanda also expressed its interest in training judges so as to contribute to creating a ‘whole juvenile justice system’ that would be capable of dealing with the anticipated rise in juvenile delinquency because of the number of children with social or psychological problems following the conflict.[[138]](#footnote-138) It pushed for separate chambers (and thus implicitly a separate procedure) in discussions with the government, although specifics and practical considerations were not discussed at that stage.[[139]](#footnote-139) The result was the inclusion of a provision requiring minors’ magistrates within the Specialised Chambers established to hear genocide cases, which many attribute directly to UNICEF Rwanda’s advocacy.[[140]](#footnote-140) In practice, these benches were operational in some tribunals but not all. No separate procedure was included in the Genocide Law, however, and thus the training that was provided by UNICEF Rwanda to judges and prosecutors focused on ‘concrete options for applying Rwandan statutory law in accordance with international standards for juvenile justice’.[[141]](#footnote-141)

It was thus in this way that UNICEF Rwanda sought to enhance compliance with this requirement for juvenile-specific institutions and procedures at the trial stage before the formal courts. Evidently, it falls short of meeting the requirements of the CRC and the criticism can also be made that UNICEF Rwanda did not develop or carry through its approach sufficiently, failing to discuss the practical considerations of juvenile judges with the government at an early stage. Indeed, there were many elements within the trial process itself that contravened fair trial guarantees (including, for example, the right to have the matter heard without delay, the right to privacy and, in some cases, the right to legal assistance). However, given the lack of alternatives available (on the basis that the release of child suspects was considered to be out of the question) and given the significant resource constraints, it is arguable that UNICEF Rwanda at least took some steps towards ensuring the implementation of these international standards. Speaking of establishing a juvenile justice system, MINIJUST and UNICEF Rwanda noted in 1997: ‘This process is still very much one of transition from a crisis situation to a period of more durable development. Many of the existing structures are temporary responses to immediate problems, while longer-term solutions are actively being debated and prioritized.’[[142]](#footnote-142) Over time, Rwanda did seek to advance its compliance with the CRC, specialised chambers for juveniles in ordinary courts (i.e. no longer just for genocide cases) being established in 2004.[[143]](#footnote-143)

As regards the *gacaca* jurisdictions, as referenced above, UNICEF Rwanda did push for minors to be prioritised before the *gacaca* courts (in addition to advocating for other child-rights issues within the *gacaca* process), but there is no evidence to suggest that it recommended a different procedure or different judges, and it does not appear to have been involved in training the *gacaca* judges. However, the position on the applicability of some of the international standards to juveniles who have attained majority by the time of trial is ambiguous.[[144]](#footnote-144) Further, given the Rwandan government’s tight control over the *gacaca* jurisdictions, it is not clear how much scope UNICEF Rwanda had to engage in the process.

# Evaluation and conclusions

Having to deal with child *génocidaires* in the extreme context of post-genocide Rwanda presented UNICEF with unprecedented challenges. As UNICEF Rwanda itself stated: ‘For the first time, UNICEF has to deal not only with the criminal responsibility of children and its consequences … but also with the societal responsibility of those children, the cultural perception of guilt and responsibility of children on [sic] a crime that affected an entire nation.’[[145]](#footnote-145) The Machel report, whilst affirming that the CRC applied to children accused of genocidal acts, noted that the dilemma of dealing with such children ‘illustrates the complexity of balancing culpability, a community’s sense of justice and the “best interests of the child”’.[[146]](#footnote-146) In addition to taking account of perceived risks to the child’s personal security linked to society’s demand for justice, the severity of crimes and the detention reality when operationalising international juvenile justice standards, other factors that necessarily had an impact on UNICEF Rwanda’s approach included the Rwandan government’s desire to put an end to impunity (which dictated the overall approach to the accountability of child *génocidaires*) and the lack of resources – financial, human, material and organisational.

As illustrated above, UNICEF Rwanda sought to improve the situation for child *génocidaires* by adopting a non-restrictive, contextual approach when interpreting the standards set out in the CRC and other instruments. The decisions it took were not made lightly. Indeed, it was clear from discussions with many people who had worked on juvenile justice that the practical implementation of universal standards presented them with a formidable challenge, both professionally and personally: they were quite clear what the standards said, and indeed what UNICEF’s global policy was, but the difficulty was in reconciling these rights with the specific context. Whilst they continued to advocate for the respect of all rights of child perpetrators, it was considered that rights had to be applied contextually. The internal tension was not lost on the Rwandan government, a former official who worked closely with UNICEF Rwanda noting its reticence towards institutionalisation of the under-fourteens, but commenting that ‘it was theoretical reticence that had to give way to the concrete reality. People had to abandon their principles to find solutions to serious problems.’[[147]](#footnote-147) However, could it be argued that UNICEF Rwanda did abandon its principles and that its pragmatic approach weakened the normative content of the CRC? Did UNICEF Rwanda give too much weight to the local context?

In contrast to the non-binding instruments which allow for context and resources to be taken into account in respect of all standards,[[148]](#footnote-148) the CRC allows for consideration of resources only in respect of economic, social and cultural rights and makes only fleeting reference to culture in its preamble. However, various CRC provisions are considered to be indeterminate, and it is reasoned here that this lack of precision allows for local conditions to be taken into account.

If we take as an example UNICEF Rwanda’s support for institutionalisation, the relevant provision in the CRC provides the flexibility required when seeking to apply the text to a concrete situation. The CRC provides that detention or imprisonment ‘shall be used only as a measure of last resort and for the shortest appropriate period of time’. It is clear from the wording that detention *can* be used as a last resort, and the use of the word ‘appropriate’ allows for some flexibility in terms of duration (although long-term pre-trial detention likely exceeds any such inherent flexibility and would also conflict with other provisions, such as the presumption of innocence). Similar modifying words and phrases are found in the CRC’s other juvenile justice provisions.[[149]](#footnote-149) As Price Cohen explains: ‘The purpose of the modifying phrase is to make allowances for local conditions.’[[150]](#footnote-150)

Further, as illustrated, UNICEF Rwanda clearly drew on the best interests principle when interpreting the requirements of the CRC. Torres commented that the issue of how UNICEF Rwanda could and should defend the best interests of children accused of genocide was ‘the central point of debate inside UNICEF Rwanda and outside our office with our governmental and non governmental counterparts’.[[151]](#footnote-151) The best interests principle was consequently used as a ‘master’ principle that could, if circumstances required it, even allow for making exceptions from apparently strict and exception-less requirements. A case in point is the decision to support the institutionalisation of minors despite them having been arrested and detained in breach of arrest and detention procedures. In contrast to the provision requiring detention to be a measure of last resort, the prohibition on unlawful or arbitrary detention is precise, allowing for no variation. Had UNICEF Rwanda followed a strict interpretation of this provision, it should arguably have insisted on the release of child suspects from detention, irrespective of the possible consequences.[[152]](#footnote-152) However, it chose not to pursue this course of action, relying on the best interests principle to support its approach. The best interests principle should not be used to justify a violation of a CRC provision, but it is a substantive right in itself and can also be used to resolve conflicts between rights. In this particular example, given the perceived risk to the safety of children accused of genocide, it appears that UNICEF Rwanda was giving effect to the best interests principle and also giving precedence to the right to life[[153]](#footnote-153) and the protection of the child from all forms of physical or mental violence[[154]](#footnote-154) over the right not to be arbitrarily or unlawfully detained. In my view, it is therefore legally sound. In any event, there are strong policy reasons to support this approach, at least in the first few years after the genocide when the risk of revenge attacks appeared more acute. Insistence on compliance with this one provision could have led, to borrow Kennedy’s term, to a ‘distorted’ outcome. Further, in coming to the decision to support institutionalisation and in the development of subsequent programmes, UNICEF Rwanda took account of the severity of the crime and the need to rehabilitate and reintegrate the children, and the interests of others in society (including child victims), all of which are valid factors.

UNICEF Rwanda further relied on the best interests principle when constructing minors’ wings. As noted earlier, it asserted that it had a responsibility under its mandate as well as the CRC to improve the physical conditions of children in detention, contending that failure to do so would be contrary to the best interests of these children. It could be argued, however, that the construction of minors’ wings is at variance with the CRC. UNICEF’s global policy is to focus on diversion and alternative measures, rather than solely or mainly on ‘isolated initiatives’ to improve detention conditions.[[155]](#footnote-155) Clearly this would be the preferred approach in a normalised situation. However, given the resource constraints, the social context and the lack of a social welfare system, alternatives to detention and diversion were not feasible, and it is difficult to see how else UNICEF Rwanda could have intervened in a positive way. As Cantwell noted, UNICEF Rwanda could have avoided the issue of children in detention entirely, but I agree with him that this would have constituted an ‘unconscionable step backwards’. It must also be recalled that, in addition to the restrictions on the use of detention, the CRC contains various other provisions relevant to detained children. UNICEF Rwanda was thus seeking to enhance implementation of and compliance with these rights, and relied on the best interests principle to support its overall approach to detention conditions. This would seem legitimate, although there is an argument that prioritisation of rights is not envisaged under the CRC.

As will be recalled, the best interests of the child must be a factor in all decisions relating to children, but other interests (such as interests of justice and the broader society) can also be taken into account. Indeed, as Cantwell propounds, using the best interests principle as ‘a kind of general trump card … that eliminates the need to take account of external factors’ is a ‘misreading’ of the CRC.[[156]](#footnote-156) And Alston comments that the use of the indefinite article in Article 3 of the CRC – the bests interests of the child shall be ‘*a* primary consideration’ (emphasis added) – was to ‘ensure that there is sufficient flexibility, at least in certain extreme cases, to enable the interests of those other than the child to prevail’.[[157]](#footnote-157) It is possible that the application of the principle could unjustly allow for other interests to be prioritised over those of the child or may permit cultural considerations to be foregrounded at the expense of the substantive rights. The best interests principle, however, provides the elasticity to allow local conditions to be taken into account when implementing the substantive provisions and, in my view, was used appropriately in the Rwandan context. Although other factors were taken into account by UNICEF Rwanda, it appears that concern for the safety of the children was, in practice, the prevailing consideration.

The CRC thus contains language that allows for contextual application of the standards. Various scholars have identified the inherent flexibility within human rights treaties and argue that this enables practical application. For example, Charlesworth asserts that human rights treaties ‘have strong elements of pragmatism ... allow[ing] considerable leeway in national translation of their standards’.[[158]](#footnote-158) And Galligan and Sandler argue that human rights standards are often ‘open-ended’, with the result that the state has discretion as to their interpretation as well as how to implement them.[[159]](#footnote-159) States are thus able to ‘tailor abstract human rights standards to local values, social structures and institutional capacities’.[[160]](#footnote-160) Galligan and Sandler aver that this flexibility to decide how international standards apply in the domestic context is ‘fundamental’ to the human rights regime and that this ‘is the compromise between the universalist claims of human rights and the imperatives of local culture’.[[161]](#footnote-161) However, whilst they accept that some variation is perhaps necessary during implementation, they reject the idea that standards are ‘wholly subject to local interpretation’ and consider that differences are not so much based on normative incompatibility but rather on issues that arise between ‘universal standards and particular conditions’ during implementation.[[162]](#footnote-162)

This last point raises the issue of whether contextualisation amounts to relativity, calling into question the universality of human rights. Veale asserts that ‘there are inevitable tensions between an international tool that aims to make universal claims on behalf of all children, and such a tool being sufficiently meaningful to the localised experiences of children across the globe’.[[163]](#footnote-163) In my view, this does not, however, call into question the universality of child rights, and more specifically juvenile justice standards. Rather, the issue is one of enforcement and universal implementation.[[164]](#footnote-164) I would thus agree with Donnelly that ‘[t]he moral universality of human rights, which has been codified in a strong set of authoritative international norms, must be in the end realized through the particularities of national action’.[[165]](#footnote-165) In his view, interpreting and implementing rights ‘within the range of variation consistent with the overarching concept’ is a ‘matter of legitimate variation’.[[166]](#footnote-166)

However, whilst a number of UNICEF Rwanda’s interventions can be said to fall within the range of variation permitted by the CRC, some of its approaches could be seen as technically incompatible with the CRC’s express wording or overall nature. As illustrated earlier, UNICEF Rwanda accepted that some rights could not be achieved immediately, choosing to focus on those rights where it considered it could have more immediate, positive, influence, and thus prioritising some rights over others. As will be recalled, it focused on enhancing the rights to education, health and humane conditions for children in detention and their separation from adults, accepting that alternatives to detention were not feasible at that point, although it did continue to advocate for, and work towards, the removal of minors from prisons.

As previously indicated, the CRC allows resources to be a factor in the implementation of, and thus introduces the concept of ‘progressive realisation’ for, economic, social and cultural rights only. This is on the premise that these rights are resource-demanding and require positive action, whilst civil and political rights are considered not to be resource-intensive and to be negative in nature. There is also no derogation provision in the CRC. This suggests that civil and political rights can be implemented in full, immediately, in any situation. Additionally, the CRC is considered to be holistic, with all rights being indivisible and interdependent. However, in a post-conflict situation like Rwanda, where all types of resources (financial, human, material and organisational) are deficient, the prospects for full implementation of either set of rights are slim. As Tully asserts, ‘there is little difference between protecting civil and political rights and protecting economic and social rights in that they both require countries with limited resources to enact positive law and to expend limited resources’.[[167]](#footnote-167) Indeed, White and Klaasen perceptively comment: ‘In the practical world, claiming that all rights are immediately applicable in a post-conflict situation may well result in none being adequately protected.’[[168]](#footnote-168)

There is thus a strong policy argument for the prioritisation of rights in practice and for working towards implementation and compliance. This means that international actors may have to accept that some rights (including civil and political) cannot be realised immediately and adapt their policy development and advocacy accordingly. Howen states:

Human rights field officers will often face difficult trade-offs between insisting that the best global human rights safeguards must be put in place, and encouraging or acquiescing in a step that is short of the human rights standards, to achieve at least a modicum of protection. What compromises are acceptable? .... Response will require a complex balancing of principle and pragmatism, understanding the human rights ‘bottom line’ and in some cases encouraging immediate achievable action while working for the ultimate human rights goal.[[169]](#footnote-169)

A UNICEF Rwanda staff member commented that, although the CRC establishes minimum standards, in a certain context ‘that minimum can be an ideal that is still very far away’. The staff member referred to the numerous juvenile justice standards in the Convention, noting that, in a post-genocide situation, it is ‘simply not possible’ to ask the government to comply with all the standards overnight: attention should be drawn to the standards, but it must be accepted that they can be implemented only incrementally. This does not mean that the principles and standards in the CRC should be adapted: rather, it is a question of ‘how’ UNICEF approaches their realisation in a given context, and this may require emphasising some rights over others.[[170]](#footnote-170) Todd Howland, the former Head of the Legal and Human Rights Promotion Unit of UNHRFOR, asserted that, whilst the use of a progressive realisation discourse is less usual in the context of civil and political rights, it was what was required in a situation of mass violations. For him, the most useful approach was to use the standards as the starting point for discussions and consider how to move ‘in the direction’ of these standards. It was essential to recognise the ‘reality’ of what Rwanda was facing and it was ‘obvious’ that the Rwandan government was not in a position to comply fully with the CRC. The ‘pragmatic path’ was not to point to violations and insist that ‘from today to tomorrow’ the government must create whole systems; rather partnerships must be created to work towards standards over a longer period.[[171]](#footnote-171)

Progressive realisation or contextualisation might provide ‘convenient excuses’ for failing to promote and protect children’s rights.[[172]](#footnote-172) On the other hand, engaging with the domestic authorities to achieve some progress that falls short of the CRC standards, but which nonetheless improves the child’s human rights situation, is arguably preferable to insisting on full compliance and risk making no progress. As Pedersen notes, in ‘the most difficult contexts, the alternative to incremental change will often be no change at all’.[[173]](#footnote-173) Oestreich’s review of UNICEF’s position on child labour suggests that UNICEF has taken this approach in other areas. UNICEF ‘implicitly accepted’ that the elimination of child labour could only be achieved progressively, ‘despite the requirements of the CRC’. This context-sensitive approach was considered ‘an asset rather than a liability in pursuing human rights goals’.[[174]](#footnote-174) Of course in Rwanda, as time progressed and UNICEF Rwanda’s policy shifted from an emergency response to longer-term considerations and some of the challenges diminished, UNICEF Rwanda could conceivably have insisted on greater compliance, in particular exploring to a greater extent alternatives to detention. However, it is not clear what alternatives, other than simply releasing the children, could have been advanced, at least in the first few years after the genocide.

In summary, I consider a contextual approach to be not only useful in operationalising international standards, but necessary. Failing to take account of the context and specific challenges when designing a policy approach could result in more harm than good. White, who is stressing the importance of local acceptance of human rights values, comments:

If universal standards are merely transposed into the context of post-conflict situations, with broken state structures and economies, and little or non-existent justice, education or health systems, then they are unlikely to have any positive sustainable effect. It should be recognised that such interventions can be harmful or counterproductive. The UN must ensure that in its actions it goes beyond the rhetoric of human rights. The UN ought to translate human rights standards into the local context in its operations.[[175]](#footnote-175)

This inevitably means considering what can realistically be achieved in light of the prevailing conditions and tailoring the norms set out in the CRC to the particular society. The challenge then for international actors is to seek to enhance implementation and compliance in a manner that remains true to principles and standards, whilst also remaining cognisant of and sensitive to the context. In this particular case, whilst there was a risk of weakening the normative content in the desire to operationalise the standards in a socially-sensitive and context-specific way, I consider that this risk was not borne out. UNICEF Rwanda’s interpretation and application of CRC provisions on balance fell within the range of variation permitted by the inherent flexibility of the CRC and, to the extent that this was not the case, there are strong policy arguments to support UNICEF Rwanda’s contextual approach. I would thus argue that, although UNICEF Rwanda’s approach was not a panacea and there remained serious violations of the rights of child perpetrators, on the whole UNICEF Rwanda met the challenge of balancing pragmatism and principle.

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1. \* Postdoctoral Researcher, Kent Law School, University of Kent, Canterbury. [↑](#footnote-ref-1)
2. Kennedy, *The Dark Sides of Virtue* (2005) at 199 (original emphasis). [↑](#footnote-ref-2)
3. Ibid. at 229 and 233. [↑](#footnote-ref-3)
4. Kennedy, ‘The International Human Rights Movement: Part of the Problem?’ (2002) 15 *Harvard Human Rights Journal* 101 at 110. [↑](#footnote-ref-4)
5. Cf. the analysis of UNHCR in Verdirame and Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism* (2005), which reaches a very different conclusion. [↑](#footnote-ref-5)
6. This term is used to distinguish the Rwandan field office from the global agency or New York headquarters. Note also the importance of individual initiatives within the field offices given UNICEF’s decentralised structure. This article very much focuses on these individual initiatives. [↑](#footnote-ref-6)
7. Convention on the Rights of the Child 1989, 1577 UNTS 3 (CRC). [↑](#footnote-ref-7)
8. Note that individuals interviewed for the purposes of this study were questioned in a personal capacity although their roles and institutional affiliation are given. [↑](#footnote-ref-8)
9. Note that the three terms ‘*génocidaires*’, ‘genocide minors’ and ‘child perpetrators of genocide’ are used interchangeably and in a neutral sense as to innocence or guilt (unless specified). The term ‘*génocidaire*’ is widely used in Rwanda without distinction between those accused and those convicted of genocide crimes (although it must be stressed that some of those accused of genocide, and who spent years in pre-trial detention, were later acquitted). [↑](#footnote-ref-9)
10. The terms ‘minors’ and ‘children’ are used interchangeably to mean anyone under the age of 18, and ‘juvenile’ is used to mean anyone aged over 14 but under 18. Note that age refers to age at the time of the alleged commission of the act unless otherwise stated. [↑](#footnote-ref-10)
11. See, for example, African Rights, *Rwanda: Death, Despair and Defiance* (1995 revised edn) at 1181; and Prunier, *The Rwanda Crisis: History of a Genocide*(1995) at 332. [↑](#footnote-ref-11)
12. See Articles 37 and 40 CRC. The International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR) (also ratified by Rwanda) contains some juvenile justice standards in Articles 10 and 14, but the CRC is more detailed. [↑](#footnote-ref-12)
13. UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Res 40/33, 29 November 1985, A/RES/40/33. [↑](#footnote-ref-13)
14. UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), Res 45/113, 14 December 1990, A/RES/45/113. [↑](#footnote-ref-14)
15. UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), Res 45/112, 14 December 1990, A/RES/45/112. [↑](#footnote-ref-15)
16. Machel, *Impact of Armed Conflict on Children*, Report of the Expert of the Secretary-General Submitted Pursuant to GA Res 48/157, 26 August 1996, A/51/306 (the ‘Machel report’). [↑](#footnote-ref-16)
17. The Paris Commitments and Principles were adopted at an international conference in 2007 and are based on international law and standards. [↑](#footnote-ref-17)
18. Machel, supra n at para 251. [↑](#footnote-ref-18)
19. Hamilton and Harvey, ‘The Role of Public Opinion in the Implementation of International Juvenile Justice Standards’ (2004) 11 *The International Journal of Children’s Rights* 369. See also UNICEF, *Innocenti Digest No3: Juvenile Justice* (1998) at 17. [↑](#footnote-ref-19)
20. Odongo, *The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context* (PhD thesis, University of the Western Cape, South Africa, 2005) at 419-22. [↑](#footnote-ref-20)
21. UNICEF, Executive Directive: Role of UNICEF in the Implementation of the Convention on the Rights of the Child, 2 July 1992 at 1. [↑](#footnote-ref-21)
22. UNICEF Mission Statement, Decision 1996/1, 26 January 1996, annexed to Report on the First, Second and Third Regular Sessions and Annual Session of 1996, E/ICEF/1996/12. [↑](#footnote-ref-22)
23. Oestreich, ‘UNICEF and the Implementation of the Convention on the Rights of the Child’ (1998) 4 *Global Governance* 183 at 184 and 186-7. See also Black, *Children First: The Story of UNICEF, Past and Present* (1996) at 281-2. [↑](#footnote-ref-23)
24. Cantwell, *Starting from Zero: The Promotion and Protection of Children’s Rights in Post-Genocide Rwanda: July 1994 – December 1996* (1997) at 5 and 21. [↑](#footnote-ref-24)
25. Ibid. at 78. [↑](#footnote-ref-25)
26. Petty and Brown (eds), *Justice for Children:* *challenges for policy and practice in sub-Saharan Africa* (1998) at 107. [↑](#footnote-ref-26)
27. van Krieken, *Rwanda: Children in Conflict with the Law – A Case Study*, Röling Foundation, September/October 2000 at 5. [↑](#footnote-ref-27)
28. Landgren, ‘Protection: The United Nations Children’s Fund Experience’ in O’Flaherty (ed), *The Human Rights Field Operation: Law, Theory and Practice* (2007) 183 at 188. [↑](#footnote-ref-28)
29. Cantwell, supra n at 86. [↑](#footnote-ref-29)
30. Ibid. [↑](#footnote-ref-30)
31. UNICEF Rwanda, *Children in Conflict with the Law, and Women with Children in Prison: Penitentiary, Reeducation and Production Centers*, Project Submitted to the Dutch Government, February 1996 at 2 (on file with author). [↑](#footnote-ref-31)
32. Chorlton, *Retrieving Childhood: A Report of the Children in Especially Difficult Circumstances (CEDC) Programme in Rwanda 1994-1996*, October 1996 at 27-8 (draft report on file with author). [↑](#footnote-ref-32)
33. Matthes, *Consultancy Report: 20 April – 25 May 1996*, May 1996 at 3 (on file with author). [↑](#footnote-ref-33)
34. See also Cantwell supra n at 77, commenting that UNICEF Rwanda’s technical advisory activities lack a clear policy or ‘full-fledged organizational stand’, which meant reliance on ‘personal experience and interpretations’; and UNICEF Rwanda, *Rwanda Emergency Programme: Progress Report 3, January to December 1996*, November 1996 at 34 (on file with author). [↑](#footnote-ref-34)
35. The MINIJUST/UNICEF Children in Conflict with the Law Project. [↑](#footnote-ref-35)
36. UNICEF Rwanda, *Protection of Children in Conflict with the Law Project 1995* (1995) (on file with author). [↑](#footnote-ref-36)
37. See below at section 4B(ii). [↑](#footnote-ref-37)
38. See UNICEF Rwanda, *UNICEF Country Programme in Rwanda: Progress Report 6, January to December 1999*, July 2000 (on file with author). [↑](#footnote-ref-38)
39. Skype interview with a former UNICEF Rwanda child protection staff member, 15 October 2014. [↑](#footnote-ref-39)
40. Ibid.; and Skype interview with former UNICEF Rwanda Programme Officer, 31 October 2014. [↑](#footnote-ref-40)
41. It appears that the government’s intention had been to prioritise juvenile cases before *gacaca* jurisdictions, but ultimately they were not prioritised over all other categories of defendants. See Government of Rwanda and UNICEF Rwanda, *Master Plan of Operations 2001-2006: A Programme of Cooperation between the Government of Rwanda and UNICEF* (2001) at 13 (on file with author). [↑](#footnote-ref-41)
42. Interview with former UNICEF Rwanda child protection staff member, supra n . [↑](#footnote-ref-42)
43. It is arguable that not all the rules in the CRC (in particular some of the procedural rules such as special court procedures or the right to have parents/guardians present during procedures) apply to juveniles who have attained majority. [↑](#footnote-ref-43)
44. In the area of child protection, competing priorities included child-headed households, orphans and child soldier demobilisation. [↑](#footnote-ref-44)
45. Skype interview with a former UNICEF Rwanda child protection staff member, 19 November 2014. This staff member also referred to the government as ‘very much in control’ of the process. [↑](#footnote-ref-45)
46. UNICEF Rwanda, supra n at 4 and 23. [↑](#footnote-ref-46)
47. See the negotiating history of this provision in Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (1999) at 91; and Alston, ‘The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights’ in Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) 1 at 12-13. [↑](#footnote-ref-47)
48. Alston ibid. at 15-16. [↑](#footnote-ref-48)
49. Cantwell, supra n at 91. [↑](#footnote-ref-49)
50. Article 37(b). [↑](#footnote-ref-50)
51. Ibid. [↑](#footnote-ref-51)
52. Article 40(4). [↑](#footnote-ref-52)
53. Committee on the Rights of the Child (CRC Committee), General Comment No 10: Children’s rights in juvenile justice, 25 April 2007, CRC/C/GC/10 at para 31. [↑](#footnote-ref-53)
54. United Nations Development Group (UNDG), *Common Country Assessment 1999-2000, Paper 11: Child Protection* (2000) at 5. [↑](#footnote-ref-54)
55. Report on the Situation of Human Rights in Rwanda Submitted by the Special Rapporteur of the Commission on Human Rights, Mr René Degni-Ségui, under Paragraph 20 of Resolution S-3/1 of 25 May 1994, 28 June 1995, E/CN.4/1996/7 at paras 70 and 72. [↑](#footnote-ref-55)
56. Avocats Sans Frontières (ASF), *Justice pour tous au Rwanda, Rapport d’activités: 1er Janvier – 30 Juin 1999* (1999) at 13 (on file with author). See also UNICEF Rwanda, supra n at 3, which noted an increase of more than 100% (from 207 to 430) in the number of under-fourteens in prison between 29 March 1995 and 9 May 1995. [↑](#footnote-ref-56)
57. Skype interview with Daniel Toole, former Deputy Resident Representative and Resident Representative of UNICEF Rwanda, 16 May 2013. [↑](#footnote-ref-57)
58. Ibid*.* [↑](#footnote-ref-58)
59. SCF-USA, *Children, Genocide and Justice: Rwandan Perspectives on Culpability and Punishment for Children Convicted of Crimes Associated with Genocide* (1996) at 12. Note: a version of the study was released in French in 1995. For ease, this article refers to a revised version in English from 1996. [↑](#footnote-ref-59)
60. Ibid. at 13-14. [↑](#footnote-ref-60)
61. Ibid. at 10. [↑](#footnote-ref-61)
62. Skype interview with Isabella Castrogiovanni, former UNHRFOR Human Rights Field Officer and former UNICEF Rwanda Consultant, 21 August 2013. [↑](#footnote-ref-62)
63. Torres, *The Protection and Best Interests of Children in Conflict with the Law in Rwanda: CEDC Focal Points Meeting, Kigali, 5-6 November* (1995) at 6 (on file with author). [↑](#footnote-ref-63)
64. Interview with a staff member of ASOFERWA (a Rwandan NGO), Kigali, Rwanda, 27 September 2013; and UNICEF Rwanda, *Children and Women of Rwanda: A Situation Analysis of Social Sectors* (1997) at 87 (on file with author). [↑](#footnote-ref-64)
65. Skype interview with Castrogiovanni, 28 November 2013; and interview with Immaculée Mukarurangwa, former Coordinator of ASOFERWA, Kigali, Rwanda, 24 September 2013. [↑](#footnote-ref-65)
66. Torres, supra n at 8; and UNICEF Rwanda, supra n at 86. This was also the view of some research participants (interviews with ASOFERWA staff member supra n , Castrogiovanni supra n and Mukarurangwa ibid). [↑](#footnote-ref-66)
67. Note: the Gitagata Centre was for boys. This article focuses on male rather than female child perpetrators given that the number of males was significantly higher and there is very little information on female child perpetrators. [↑](#footnote-ref-67)
68. UNICEF Rwanda, supra n at 3. [↑](#footnote-ref-68)
69. See, for example, UNICEF Rwanda, supra n at 86 (noting that Rwandan public opinion did not accept the use of re-educative measures given the seriousness of the crimes). [↑](#footnote-ref-69)
70. Interview with Castrogiovanni, supra n . [↑](#footnote-ref-70)
71. Correspondence with Toole, 25 September 2014. [↑](#footnote-ref-71)
72. Drogin, ‘Children Accused of Genocide’, *Sun Sentinel*, 25 February 1997. See also Matloff, ‘Rwanda’s Bind: Trying Children for Genocide’, *The Christian Science Monitor*, 28 January 1997. [↑](#footnote-ref-72)
73. UNICEF Rwanda supra n at 6. [↑](#footnote-ref-73)
74. Matthes, *Consultancy on Rules and Regulations for Children, Juveniles and Adolescents in Rwanda: First Report: General Assessment of Present Conditions of and Legal Framework for Detention; Propositions for Basing Regulations in Rwandan Statutory Law; Propositions for the Process of Drafting, Implementation and Follow-Up*, 17 December 1997 at 10-12 (he referred to NGO centres that offered reintegration programmes for street children) (on file with author). [↑](#footnote-ref-74)
75. Matthes, *Report on Children and Women with Infants in Detention* (1996) at 1 (on file with author). See also Matthes, supra n at 7. [↑](#footnote-ref-75)
76. Chorlton, supra n at 42 (original emphasis). [↑](#footnote-ref-76)
77. Interview with Toole, supra n . [↑](#footnote-ref-77)
78. Interview with Ray Torres, former UNICEF Rwanda Child Protection Officer, Kigali, Rwanda, 28 September 2013. [↑](#footnote-ref-78)
79. See e.g. Drogin, supra n (citing concerns raised by Torres regarding donors’ perception of the decision to build minors’ wings). [↑](#footnote-ref-79)
80. Telephone interview with Torres, 16 April 2013. [↑](#footnote-ref-80)
81. Interview with Castrogiovanni, supra n . [↑](#footnote-ref-81)
82. UNICEF Rwanda, *Protection and Rights of the Child Unit: Policies and Strategies – Draft proposal for Discussion and Comments* (1996) at 20 (on file with author). [↑](#footnote-ref-82)
83. Correspondence with Toole, 25 September 2014. [↑](#footnote-ref-83)
84. Cantwell, supra n at 91-2. [↑](#footnote-ref-84)
85. Médecins Sans Frontières. [↑](#footnote-ref-85)
86. Interview with Torres, supra n . [↑](#footnote-ref-86)
87. Torres, supra n at 6. [↑](#footnote-ref-87)
88. Doulliez, *Rapport de Mission, 27 juin 1998 – 1 août 1998* (1998) at 18 (on file with author). [↑](#footnote-ref-88)
89. Confirmed by former UNICEF Rwanda Programme Officer, interview, supra n . [↑](#footnote-ref-89)
90. Interview with Benoit Kaboyi, former Executive Secretary of IBUKA (umbrella organization for survivor associations), Kigali, Rwanda, 21 February 2013. [↑](#footnote-ref-90)
91. See Cantwell, supra n at 49; Hackel, ‘When Kids Commit Genocide’, *Christian Science Monitor*, 5 December 1995; and Matloff, supra n (reporting that the Gitagata children ‘live better than some free Rwandans’). [↑](#footnote-ref-91)
92. MINIJUST and UNICEF, *Juvenile Justice in Rwanda: A Case Study*, presented to Innocenti Global Seminar on Children Involved with the System of Juvenile Justice (1997) at 2-3 (on file with author). [↑](#footnote-ref-92)
93. Chorlton, supra n at 45. [↑](#footnote-ref-93)
94. Interview with Kaboyi, supra n . [↑](#footnote-ref-94)
95. Interview with Castrogiovanni, supra n . [↑](#footnote-ref-95)
96. See Chorlton, supra n at 44-5; and Matthes, supra n at 13. [↑](#footnote-ref-96)
97. Cantwell, supra n at 23. [↑](#footnote-ref-97)
98. Ibid. at 48-9. [↑](#footnote-ref-98)
99. Ibid. at 23. [↑](#footnote-ref-99)
100. Interview with former judicial defender, Kigali, Rwanda, 28 August 2013. [↑](#footnote-ref-100)
101. Provided for in Article 40(2)(b)(vii) CRC. [↑](#footnote-ref-101)
102. Cantwell, supra n at 49. [↑](#footnote-ref-102)
103. Ibid. at 35. [↑](#footnote-ref-103)
104. Ibid. at 50. In the event, many minors were kept in detention without trial for many years. [↑](#footnote-ref-104)
105. Indeed, various other provisions of the CRC stipulate what treatment should be accorded to children deprived of their liberty, and the Havana Rules that deal specifically with juveniles in detention were adopted after the entry into force of the CRC*.*  [↑](#footnote-ref-105)
106. See UNICEF Rwanda, supra n ; and Briggs, *Innocents Lost: When Child Soldiers Go to War* (2005) at 32. [↑](#footnote-ref-106)
107. It seems that children at the Gitagata centre were generally released at the earliest opportunity following an assessment of the child’s readiness for release and the receptiveness of the family/community. [↑](#footnote-ref-107)
108. Article 37(c). [↑](#footnote-ref-108)
109. CRC Committee, supra n at para 85. [↑](#footnote-ref-109)
110. The CRC Committee sets out what is required by states to comply with these provisions in respect of children in detention in its General Comment No 10. See ibid*.* at para 89. [↑](#footnote-ref-110)
111. The figures vary considerably, the UNOHCHR putting the prison population at around 125,000 (see Report of the United Nations High Commissioner for Human Rights on the Human Rights Field Operation in Rwanda, 11 September 1998, A/53/367 at para 32) and the Office of the President of the Republic at around 135,000 (see Report on the Reflection Meetings Held in the Office of the President of the Republic from May 1998 to March 1999, August 1999 at 74). [↑](#footnote-ref-111)
112. Supra n at para 71. [↑](#footnote-ref-112)
113. Interview with Castrogiovanni, supra n . [↑](#footnote-ref-113)
114. Interview with Toole, supra n . [↑](#footnote-ref-114)
115. UNDG, supra n at 5. [↑](#footnote-ref-115)
116. UNDG, *Common Country Assessment 1999-2000, Paper 6: Governance, Justice, Human Rights and National Reconciliation* (2000) at 14. [↑](#footnote-ref-116)
117. See Cantwell, supra n at 50; and Matthes, supra n at 5 and 18-21. [↑](#footnote-ref-117)
118. Matthes, ibid at 18-21. See also Human Rights Watch (HRW), *Rwanda Lasting Wounds: Consequences of Genocide for Rwanda’s Children*, March 2003 at 35-6. [↑](#footnote-ref-118)
119. Matthes, ibid. [↑](#footnote-ref-119)
120. See CRC Committee, supra n at para 86. [↑](#footnote-ref-120)
121. See, for example, Tertsakian, *Le Château: The Lives of Prisoners in Rwanda* (2008) at 174 and 182; and Report of the Special Representative of the Commission on Human Rights on the Situation of Human Rights in Rwanda, 4 August 2000, A/55/269 at para 114. This was also confirmed by a former prison director (interview with Faustin Murigo, Kigali, Rwanda, 6 September 2013). [↑](#footnote-ref-121)
122. Referenced in Biseruka, *A Socio-Legal Analysis of Juvenile Justice in Post-Genocide Rwanda* (BA thesis, Faculty of Law, National University of Rwanda, Butare, 1999) at 25. [↑](#footnote-ref-122)
123. Matthes, supra n at 1 (original emphasis). [↑](#footnote-ref-123)
124. Matthes, *Consultancy on Rules and Regulations for Children, Juveniles and Young Adults in Detention in Rwanda: Second Report: Draft Standard Rules for Juveniles, Adolescents and Young Adults in Detention – Against the Background of the UN Rules for the Protection of Juveniles Deprived of their Liberty (JDLs)*, 17 December 1997 at 3 (on file with author). [↑](#footnote-ref-124)
125. Rule 49 of the Havana Rules stipulates that medical care should be provided in the local community where possible; draft Rule 25 refers to medical care ‘inside the facility’. [↑](#footnote-ref-125)
126. Rule 80. [↑](#footnote-ref-126)
127. Skype interview with Anita Ingabire, former Coordinator of MINIJUST/UNICEF project, 19 February 2014. [↑](#footnote-ref-127)
128. These camps provided civic education to facilitate unity and reconciliation. [↑](#footnote-ref-128)
129. Interview with Castrogiovanni, supra n . [↑](#footnote-ref-129)
130. Observations and Recommendations Concerning Recent Human Rights Developments in Rwanda of the Special Representative of the Commission on Human Rights, Michel Moussalli, Following his Visits to Rwanda in October 2000 and February/March 2001, 21 March 2991, E/CN.4/2001/45/Add.1, appendix at para 29. [↑](#footnote-ref-130)
131. HRW, supra n at 30. [↑](#footnote-ref-131)
132. Article 40(3). [↑](#footnote-ref-132)
133. CRC Committee, supra n at para 93. [↑](#footnote-ref-133)
134. UNICEF Rwanda, supra n at 4. See also Torres, supra n at 7 (referring to a ‘Court of Justice for children’). [↑](#footnote-ref-134)
135. Organic Law 08/1996 of 31 August 1996 on the Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed since 1 October 1990. [↑](#footnote-ref-135)
136. Matthes, *Proposal for the Creation of Specialized Juvenile Chambers for Genocide Cases* (1996) at 4-5 (on file with author). Copies of earlier drafts of the Genocide Law (on file with author) similarly do not contain any reference to minors. [↑](#footnote-ref-136)
137. Matthes, ibid*.* at 2. [↑](#footnote-ref-137)
138. Ibid*.* [↑](#footnote-ref-138)
139. Skype interview with Jens Matthes, former UNICEF Rwanda Child Protection Legal Consultant, 28 November 2013. [↑](#footnote-ref-139)
140. In addition to UNICEF Rwanda itself claiming that the provision was included as a result of successful lobbying (see, for example, UNICEF Rwanda, supra n at 29), Daniel de Beer (former Director of Belgian NGOs, RCN and ASF and former adviser to MINIJUST) was also firmly of the view that the provision was included as a result of UNICEF Rwanda’s intervention (interview, Brussels, Belgium, 15 October 2014). [↑](#footnote-ref-140)
141. UNICEF Rwanda, *FACT SHEET: Child trials and children in detention in Rwanda*, September 1997 (on file with author). [↑](#footnote-ref-141)
142. MINIJUST and UNICEF, supra n at 3. [↑](#footnote-ref-142)
143. Article 9, Organic Law No 07/2004 of 25 April 2004 Determining the Organisation, Functioning and Jurisdiction of Courts. [↑](#footnote-ref-143)
144. See footnote . [↑](#footnote-ref-144)
145. UNICEF Rwanda, supra n at 2. [↑](#footnote-ref-145)
146. Machel, supra n at para 250. [↑](#footnote-ref-146)
147. Interview with Straton Nsanzabaganwa, former Director General, Ministry of Labour and Social Affairs and former Director, Ministry of Local Administration, Social Affairs and Community Development, Kigali, Rwanda, 10 October 2013. [↑](#footnote-ref-147)
148. Rule 16 of the Havana Rules, Rule 1.5 of the Beijing Rules and Guideline 8 of the Riyadh Guidelines. [↑](#footnote-ref-148)
149. See, for example: Article 40(3)(b) – diversion should be used ‘whenever appropriate and desirable’; Article 40(3) – states shall ‘seek to promote’ juvenile-specific laws and institutions; and Article 40(4) – alternative measures should be available for juveniles to be treated in a manner ‘appropriate’ to their well-being and ‘proportionate’ to their circumstances and the offence. [↑](#footnote-ref-149)
150. Price Cohen, ‘Elasticity of Obligation and the Drafting of the Convention on the Rights of the Child’ (1987) 3 *Connecticut Journal of International Law* 71 at 81. [↑](#footnote-ref-150)
151. Torres, supra n at 3. [↑](#footnote-ref-151)
152. It is worth noting that, with the exception of resolutions from the UN General Assembly and the Commission on Human Rights (which by their nature were not detailed), there is no evidence of other actors calling for the release of child *génocidaires.* [↑](#footnote-ref-152)
153. Article 6 CRC (one of the CRC’s key general principles). [↑](#footnote-ref-153)
154. Article 19 CRC. [↑](#footnote-ref-154)
155. According to its mandate in the Toolkit on Diversion and Alternatives to Detention, ‘UNICEF should … limit as much as possible direct assistance in the improvement of physical conditions in closed institutions, and refrain from contributing to the building of new ones.’ [http://www.unicef.org/tdad/index\_55676.html – last accessed 20 April 2017]. [↑](#footnote-ref-155)
156. Cantwell, ‘Are Children’s Rights Still Human?’ in Invernizzi and Williams (eds), *The Human Rights of Children: From Visions to Implementation* (2011) 37 at 49 (he also stresses that using it to ‘override rights’ considered dispensable is a misreading of the CRC). [↑](#footnote-ref-156)
157. Alston, supra n at 12-13. [↑](#footnote-ref-157)
158. Charlesworth, ‘Author! Author!: A Response to David Kennedy’ (2002) 15 *Harvard Human Rights Journal* 127 at 130. [↑](#footnote-ref-158)
159. Galligan and Sandler, ‘Implementing Human Rights’ in Halliday and Schmidt (eds), *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context* (2004) 23 at 27-8. Although Galligan and Sandler are speaking of a state’s implementation, the same considerations can be applied to international agencies seeking to enhance implementation by the state. [↑](#footnote-ref-159)
160. Ibid. at 32. [↑](#footnote-ref-160)
161. Ibid. at 27-8. [↑](#footnote-ref-161)
162. Ibid. at 32. [↑](#footnote-ref-162)
163. Veale, ‘War, Conflict, Rehabilitation and Children’s Rights in Rwanda’ (1999) *Trocaire Development Review* 105 at 106. [↑](#footnote-ref-163)
164. See also Grover, ‘A Response to K.A. Bentley’s “Can There Be Any Universal Children’s Rights?”’ (2007) 11 *The International Journal of Human Rights* 429 at 432-3 (commenting that child protection rights are universal conceptually and morally, even if they are not universally enforced). [↑](#footnote-ref-164)
165. Donnelly, *Universal Human Rights in Theory and Practice* (2013) at 210. [↑](#footnote-ref-165)
166. Ibid. at 103. [↑](#footnote-ref-166)
167. Tully, ‘Human Rights Compliance and the Gacaca Jurisdictions in Rwanda’ (2003) 26 *Boston College International and Comparative Law Review* 385 at 387. [↑](#footnote-ref-167)
168. White and Klaasen, ‘An Emerging Legal Regime?’ in White and Klaasen (eds), *The UN, Human Rights and Post-Conflict Situations* (2005) 1 at 3. [↑](#footnote-ref-168)
169. Howen, ‘The Fundamental Protection Function of the Human Rights Field Operation’ in O’Flaherty (ed), *The Human Rights Field Operation: Law, Theory and Practice* (2007) 31 at 43. [↑](#footnote-ref-169)
170. Interview with former UNICEF Rwanda child protection staff member, supra n . [↑](#footnote-ref-170)
171. Skype interview, 7 February 2014. [↑](#footnote-ref-171)
172. See discussion in Himes, *The United Nations Convention on the Rights of the Child: Three Essays on the Challenges of Implementation*, *Innocenti Essays No. 5* (1993) at 8. [↑](#footnote-ref-172)
173. Pedersen, ‘The Theoretical Case for Principled Engagement’ in Pedersen and Kinley (eds), *Principled Engagement: Negotiating Human Rights in Repressive States* (2013) 13 at 32. [↑](#footnote-ref-173)
174. Oestreich, supra n at 189. [↑](#footnote-ref-174)
175. White, ‘Towards a Strategy for Human Rights Protection in Post-Conflict Situations’ in White and Klaasen (eds), *The UN, Human Rights and Post-Conflict Situations* (2005) 463 at 473 (references omitted). [↑](#footnote-ref-175)