

# Advancing Child Rights-Consistent Strategic Litigation Practice Executive Summary



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For more information on the ACRiSL project and to join the ACRiSL Network, please see [www.acrisl.org](http://www.acrisl.org).





# BACKGROUND, INTRODUCTION AND METHODOLOGY

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

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

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

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

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



## PART A

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

### CHAPTER 1 DEFINING CRSL

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



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

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

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



who are the litigants and/or the litigators?



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

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

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

## CHAPTER 2 CRSL IN ACTION – AN OVERVIEW

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### Key themes in three decades of CRSL

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

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

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

### Geographical expansion of CRSL

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



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

## CHAPTER 3 THE POTENTIAL FOR ‘CHILD RIGHTS-CONSISTENT’ CRSL PRACTICE

### Scope for child rights-consistent CRSL practice and potential challenges












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

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

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

# CHAPTER 4 CHILDREN’S RIGHTS THAT ARE RELEVANT TO CRSL

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

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

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

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



## PART B

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



the scoping, planning and design of CRSL;



the operationalisation of CRSL;



follow-up to CRSL, including implementation;



extra-legal advocacy (political advocacy and other campaigning, media and communications work).

### Chapter 5 The Scoping, Planning and Design of CRSL

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



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

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

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



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## **CHAPTER 6 THE OPERATIONALISATION OF CRSL**

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

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

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

the study uncovered examples that highlight the need to avoid, and if necessary, mitigate, any harm or (re)traumatisation in the process of litigation, with the Convention rights at play in this regard including the (right to life, survival and development (Article 6 UNCRC), the right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (Article 19 UNCRC) and the right to physical and psychological recovery (Article 39 UNCRC).



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

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



## CHAPTER 7 FOLLOW-UP TO CRSL

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

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



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## CHAPTER 8 ADVOCACY, MEDIA AND COMMUNICATIONS WORK

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

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

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



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



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





## CONCLUSION

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

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

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



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