

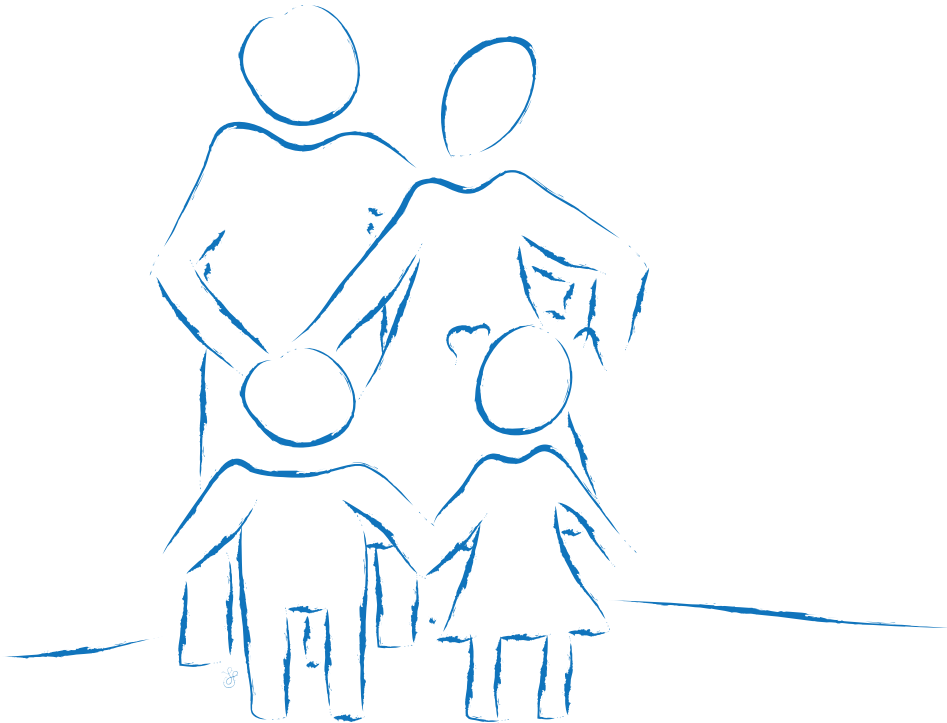


المجلس الوطني لحقوق الإنسان
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Conseil national des droits de l'Homme

المملكة المغربية
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Kingdom of Morocco

The Creation of the Advisory Council on Family and Children

Opinion of the Council on Bill No. 78-14



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THE CREATION OF THE ADVISORY COUNCIL ON FAMILY AND CHILDREN OPINION OF THE COUNCIL ON BILL NO. 78-14

I. FOUNDATIONS AND REFERENCES OF THE COUNCIL'S OPINION

The National Council for Human Rights,

Considering the request for an opinion submitted on 23 November 2015 by the President of the House of Representatives and received by the Council November 24, 2015;

Considering the Rules of Procedure of the House of Representatives, in particular Article 234;

Considering the Dahir Number 1-11-19 of 25 Rabi' I 1432 (1 March 2011) establishing the National Council for Human Rights, in particular Article 16;

Given the principles of Belgrade on the relationship between national institutions of human rights and parliaments, including the principles 22, 24, 25 and 28;

Considering the Memorandum of Understanding concluded on December 10, 2014 between the House of Representatives and the National Council for Human Rights, in particular Article 2;

Pursuant to the Constitution, including its preamble and Articles 19, 32, 159, 160, 164 and 169;

Considering the Convention on the Rights of the Child in particular Articles 3 (§ 1), 4 and 12 (§1), as commented on by the Committee on the Rights of the Children in its General Comment No. 14 on the best interest of the child¹, No. 5 on general measures of implementation of the Convention on the Rights of the Child², No. 12 on the Right of the Child to be Heard³ as well as the project on General Comment No. 16 on Public Spending and the Rights of the Child⁴;

Considering the Resolution 67/142 on the preparations for and observance of twentieth anniversary of the International Year of the Family adopted by the United Nations General Assembly on 20 December 2012, in particular paragraphs 3, 4, 5, 7, 8 and 16⁵;

Considering the Resolution 68/136 on the Preparations for and observance of the twentieth anniversary of the International Year of the Family, adopted by the United Nations General Assembly on 18 December 2013, in particular paragraphs 4, 5, 6, 7 and 9⁷;

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Considering resolution 66/126 on the preparation and celebration of the twentieth anniversary of the International Year of the Family, adopted by the United Nations General Assembly on 19 December 2011, in particular paragraphs 3, 4, 5 and 6 ;

Given the Council's memorandum on the creation of the Advisory Council on Family and Children issued in December 2013;

The National Council for Human Rights presents its opinion on Bill Number 78.14 on the creation of the Advisory Council on Family and Children.

II. REMINDER OF ELEMENTS TO BE CONSIDERED IN THE DESIGN OF THE LAW WHICH WILL DECIDE ON THE COMPOSITION, ORGANIZATION, POWERS AND RULES OF OPERATION OF THE ADVISORY COUNCIL OF FAMILY AND CHILDREN (THE CONSTITUTIONAL VOCATION OF THE SAID COUNCIL)

6 1. Considering that it is the duty of the legislature, in accordance with Article 171 of the Constitution, to decide by law on the composition, organization, powers and rules of the Advisory Council on Family and Children, the subject of this very notice, the Council wishes it to be recalled that a few elements ought to be taken into consideration in the development process and discussion of Bill Number 78.14.

To this end, it should be recalled that the Constitution established a distinction between the concerned institutions in Articles 161 to 170 and thus created three categories: Institutions for the protection and promotion of human rights, institutions for good governance and regulation, and institutions for the promotion of sustainable human development and participatory democracy. This distinction, of a constitutional nature, obeys the principles of coherence and complementarity of the missions (protection and promotion of human rights, regulation and control, consultation, monitoring and evaluation of public policies). If the independence of these institutions and bodies is guaranteed under the first paragraph of Article 159 of the Constitution, it is, however, incumbent on the legislator to clarify its scope and terms.

2. The National Council for Human Rights justifies its position by referring to three considerations in decisions of the Constitutional Council.

Indeed, the Constitutional Council specified in the preamble to its decision Number 817 of 13 October 2011 that «the Constitution is self-complementary in its principles and its objectives⁸. « This legitimate consideration, in the opinion of the CNDH, is a systemic

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reading of the provisions of the Constitution mentioned in the citations of this opinion. The Constitutional Council has also devoted through its Decision Number 932/14 of 30 January 2014⁹ on the review of the constitutionality of the organic law on the Economic, Social and Environmental Council the principles of coherence, differentiation and complementarity of objectives of the constitutional bodies as prescribed in sections 161 to 170 of the Constitution.

In this respect, the considerations behind the decision should be recalled : «the Constitution recognizes that, pursuant to Article 159, the independence of these three councils and institutions [in this case the High Authority for Audiovisual Communication, the Competition Council, and the National Council for Integrity and Anti-Corruption] as they are part of good governance and regulatory bodies, assigns to said institutions of constitutional tasks relating to the control, the regulation and the implementation of monitoring in accordance with Articles 165,166 and 167,a fact that distinguishes them from other bodies and advisory councils in the Constitution.The Constitutional Council further considered that» the independence vested in these institutions and the nature of their skills do not prevent them, under the laws governing them, to consider cooperative relations in all shapes, with the Economic, Social and Environmental council the way that allows it to effectively exercise these missions. However, this cooperation should be conducted in the manner that the law of each instance provides for decision-making and issuing opinions without any interference between the organic institutions. «The Constitutional Council has concluded, therefore, that» the Organic Law of the Economic, Social and Environmental Council, by opening membership in the Council to the presidents of these three constitutional bodies did not take into account the nature, functions and the purpose of creating these bodies.»

3. The Constitutional Council stated in its Decision Number 924 of 22 August 2013, that the scope and purpose of the independence of institutions and bodies provided for in Articles 161 to 170 of the Constitution, including the Advisory Council on family and Children subject of this opinion. The Constitutional Council considered that «the consolidation and strengthening of the institutions of a modern state is a constitutional purpose as stated in the preamble to the Constitution.This aim implies that the institutions and bodies established by the Constitution must enjoy independence even allow them to fulfill the tasks and powers that the Constitution has conferred on them. It is up to the legislature to define the scope and conditions of this independence in compliance with the constitutional provisions.¹⁰»

Starting from the aforementioned constitutional jurisprudence, the Council considers that Bill Number 78.14 must reflect the legal nature of the Advisory Council on Family and Children as a body promoting human sustainable development and participatory democracy.The particularity of each instance must be taken into account particularly in

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the design of the missions, responsibilities and respective composition of these bodies.

4. The National Council for Human Rights considers that the contours of the jurisdiction of the Advisory Council on family and children can be defined through the detailed brought upon by the general observations of United Nations treaty bodies, resolutions of the General Assembly and the United Nations Council of Human Rights , as well as the general comments of the accreditation sub-committee under the International Coordinating Committee of National Institutions for the Promotion and Protection of Human rights.

5. The tasks entrusted to the Advisory council of Family and Children under Article 169 of the Constitution may, in the opinion of the National council for human rights, be broken down into allocations by meeting two requirements:

■ A national institutional requirement under which the Advisory Council on family and children has a consultative nature and the design of its missions is part of the institutional framework of the «promoting bodies of sustainable human development and participatory democracy»;

■ A requirement that stems from the design of public policies for the family, as defined in the international law of human rights, knowing that each family member has rights.

If the first requirement has been sufficiently demonstrated in particular by the Constitutional Court, the second requirement should be detailed in light of the general comments of the treaty bodies, the resolutions of the United Nations General Assembly and those of the United Nations Human Rights Council.

6. It should first be noted that the status of various components of the family as the holders of rights recognized by the international human rights law. As such, the Human Rights Council Resolution 29/4 on the Elimination of Discrimination against Women¹¹ recognizes that «all members of the family are equal before the law.» Another resolution of the Council of Human Rights, resolution 23/7¹² puts into perspective the issue of empowerment and promotion of the rights of women and girls by committing states to adopt «a coherent set of gender-responsive social and economic policies directed at the family, the workplace and the marketplace, and by addressing poverty and social exclusion in order to overcome the structural barriers and inequalities they face and to thereby ensure their long-term and sustainable participation in political and public life.”

7. This vision which highlights the respective rights of the various components of the family while promoting the establishment of public policies intended to «improve the well-being of families» is the basis of several resolutions of the General Assembly of the United Nations, taken in the context of the preparation and celebration of the twentieth

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anniversary of the International Year of the family.

Indeed, the United Nations General Assembly demanded in its resolution 67/142 entitled «Preparations for and observance of the twentieth anniversary of the International Year of the Family¹³» from its member states to «ensure that 2014 is marked by the adoption of policies, strategies and effective national programs that will actually improve the well-being of families.» In the same context, the General Assembly encouraged its member States to «continue to develop policies and programs that fight against family poverty and social exclusion, reconciling work and family life and addressing intergenerational issues, and to share good practices in these areas.» The same resolution encouraged the member States «to promote the provision of services focused on the family, such as social protection programs and financial assistance to fight against family poverty and preventing that poverty is transmitted from generation to generation. «The importance of resolution 67/142 is that it defines the objectives of public policy for families. These objectives are based on «social integration» and «solidarity between generations» goals that can be achieved through «social protection mechanisms». The eighth paragraph of the resolution specifically binds public policies for families with the rights of individual members within them. The General Assembly: «urges its member States to create a conducive environment to strengthen and support all families, recognizing that equality between women and men and respect for all the human rights and fundamental freedoms of all family members are essential to family well-being and to society at large, noting the importance of reconciliation of work and family life and recognizing the principle of shared parental responsibility for the upbringing and development of the child.»

8. Resolution 68/136¹⁴ of the United Nations General Assembly offers variations of public policies for families according to different groups as family members (elderly, people with disabilities, youth, etc. ...) while indicating a series of measures such as social protection programs, and control measures: «that address family poverty, social exclusion, domestic violence¹⁵,” “policies that strengthen social integration and intergenerational solidarity « and other measures such as « housing assistance, child benefits, old age pensions, cash transfers, social protection and social transfer programs¹⁶. « Finally, resolution 66/126 of the United Nations General Assembly calls on its member states to «stimulate public debate and consultations on family-oriented and gender- and child-sensitive social protection policies.

9. It is, therefore, appropriate to consider the scope of the first paragraph of Article 10 of the International Covenant on Economic, Social and Cultural Rights which recognizes that the protection and assistance accorded to the family, in light of the respective statutes of family members as rights holders.

10. Based on the above, the National Council for human rights considers that the mission

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of the Advisory Council on Family and Children in the monitoring of public policies relating to family and children requires prior recognition of family members as right holders. This conclusion is justified by a reading that goes beyond the «interpretative relationship» established between the provisions of Articles 32 and 169 of the Constitution to include, as part of a systemic reading of the provisions of the above Articles in relation to Articles 19, 31, 33 and 34 of the Constitution. The National Council for Human Rights also recalls that the Advisory Council on Family and Children is a consultative institution, which is not invested with mandates usually devolved to national institutions of human rights. Therefore, the Advisory Council on Family and Children, because of the nature of its competencies, its composition and its functioning, is not bound by the Paris Principles.

11. The National Council for Human Rights also believes that the structural concept of the best interests of the child must be the fundamental basis for the attributes of the Advisory Council on Family and Children as far as the monitoring of the welfare of children and the national policies focusing on them.

As such, the National Council for Human Rights recalls that the Committee on the Rights of the Child underlined in its General Comment Number 14 that this concept is a threefold concept: a substantive right, a fundamental interpretative legal principle, and as a rule of procedure. The Committee also stated that « the obligation of the States to duly consider the child's best interests is a comprehensive obligation encompassing all public and private social welfare institutions, courts of law, administrative authorities and legislative bodies involving or concerning children¹⁷. « It appears from the above paragraphs that the concept of the best interests of the child must be the structuring principle for the missions of the Advisory Council on Family and Children.

III. RECOMMENDATIONS REGARDING CERTAIN PROVISIONS OF BILL NO. 78. 14 ON THE ADVISORY FAMILY AND CHILDREN'S COUNCIL

12. The following recommendations are designed to address the following challenges:

■ The Consecration of the constitutional vocation of the Advisory Council on Family and Children as an entity promoting sustainable human development and participatory democracy by reframing its attributes around:

- The monitoring of the situation of the family in all its components and that of children, regardless of their familial situation, in accordance with Articles 32 and 169 of the Constitution;

- The monitoring and evaluation of public policies concerning families and children.

■ Ensuring better coherence of the powers of various bodies of participatory democracy.

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I. Recommendations for Certain General Provisions of the Bill

13. The National council for Human Rights proposes to introduce under the first article of the bill a paragraph that will literally repeat the constitutional mission of the Advisory Council on Family and Children as provided by the Constitution, namely the ability to monitor the situation of the family and that of children, to issue opinions on national plans for these areas, to lead lively public debates on family policy, and to monitor the achievement of national programs initiated by different departments, structures and entities. This recommendation will, if adopted, ensure a better logical interconnection between the missions and functions of the Advisory Council on Family and Children.

14. The National council for Human Rights also recommends that a new article be introduced between Article 1 and Article 2 of the bill that will be devoted to a series of overarching principles that should, in the opinion of the National Council for Human Rights, form the basis of powers that will be exercised by the Advisory Council on Family and Children. These principles have been identified following a systematic reading of the provisions of the Constitution and the instruments relating to human rights that the Kingdom has ratified or to which it has acceded. It is proposed for this purpose that the members of the Advisory Council on Family and Children take into account the following elements in the exercise of their functions:

- The status of the various family members as rights holders and bondholders;
- The equality of family members before the law;
- The issues of gender parity at the different stages of life as well as with regards to disability;
- The best interests of the child;
- The question of vulnerability in all its forms, both at the family level and at the level of the various components of the family;
- Taking into account the specific situations of certain groups particularly early age childhood, adolescence, minors in situations of abandonment and abuse and children victims of abuse, violence and exploitation, senior citizens, the disabled, single-parent households and those households composed of two working parents with young children;
- Intergenerational solidarity.

2. Recommendations Concerning the Powers of the Advisory Council on Family and Children

15. Having found after analysis of Article 2 of the bill that the powers of the Advisory Council on Family and Children under the said Article do generally reflect the constitutional

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missions of the said entity, the National Council for Human Rights recommends the strengthening of the powers of the Advisory Council on Family and Children, by highlighting certain aspects that were especially recommended by the treaty bodies in their general comments.

As such, the National Council for Human Rights proposes to introduce in Article 2 a clause that will allow the Advisory Council on Family and Children to assess the impact of public spending on the implementation of children's rights. This proposal aims to implement the recommendations of the United Nations High Commissioner for Human Rights in its report: "Towards a Better Investment in Rights of the Child," published December 19, 2014¹⁸. The High Commissioner called for States "Implement ex-ante and ex-post child rights impact assessments and evaluations of economic policies, budgets and fiscal processes to monitor the impact of decisions on children's rights. Such evaluation must be continuous and comprehensive, and contribute meaningfully to fiscal planning and budget formulation across budget cycles."¹⁹

The National Council for Human Rights considers that the status of the Advisory Council on Family and Children as an entity that is both independent and advisory will allow it to accomplish the task of an independent impact assessment of public spending in general, and public investment particularly on the fulfillment of the rights of the children. This vision is in line with the recommendations of the Committee on the Rights of the Child in its draft of General Comment No. 19 on public spending on the implementation of children rights²⁰ (to be adopted in 2016). Indeed, the Committee on the Rights of the Child recommends that the assessment covers both public expenditure of state and local authorities, and that special attention be given to the most vulnerable groups. The Committee also considers that the assessment must be conducted by independent entities, and that it addresses the direct and indirect impacts of public expenditure on the fulfilment of children rights²¹.

16. In the same context, the National Council for Human Rights proposes to introduce in section 2 of the bill another provision that will allow the Advisory Council on Family and Children to address issues inherent to the economic development, social and cultural promotion of the family, income inequality between the heads of families and finally to support the reconciliation between work and family.

3. Recommendations for the Composition of the Advisory Council on Family and Children

17. The National Council for Human Rights has conducted an analysis of the provisions of Articles 4 and 14 of the bill; and it appears that these articles divided the members' appointment authorities as follows:

- The King appoints eight members: The Chairman, the General Secretary, five expert

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recommended by the Head of the Government, and one representative of the Supreme Council of Ulema (Religious scholars) recommended by the Secretary General of the Supreme Council of the Ulema;

- The President of the House of Representatives appoints, after consulting the political parties and parliamentary groups, three members: one member of the House of Representatives and two members representing civil society associations on the recommendation of their deliberative bodies and instances. Eligible civil society organizations must have at least fifteen years of experience in the field related to responsibilities of the new council;
- The President of the House of Councilors appoints after consultation with political parties and parliamentary groups three members: one member of the House of Councilors and two members representing the associations of civil society, on the recommendation of their deliberative bodies and instances. Eligible civil society organizations must have at least fifteen years of activity in the field related to responsibilities of the new council;
- The Head of Government appoints four members: two members representing the professional organizations most representative of employers, including a succession of professional organizations representing employers in the crafts sector on the recommendation of the said organizations, two members representing the relevant government agencies in the field of family and children on the recommendation of their respective administrations;
- The Higher Council of the Judiciary appoints one judge to represent the judicial branch

18. The Council's conclusions on the above introduced composition may be presented as follows:

- If it can be assumed that the representation of «employers in the crafts sector» is justified by the prevalence of child labor phenomenon in this industry, other sectors such as agriculture where child labor is customary should be represented;
- Article 4 of the draft law does not enshrine the principle of parity in the composition of the said council;
- The explanatory memorandum of the bill provides no justification on the criteria of eligibility of civil society associations (fifteen years of experience). This condition may, in the opinion of the national Council of Human rights negatively impacts the inclusive nature that must characterize the composition of the membership of the Advisory Council on Family and Children
- A first reading will give the impression that the wording of Article four ensures a relative balance between the constitutional powers of appointment. A further reading, however, reveals the preponderance of the Head of Government in the appointment schedule. In fact, the King appoints the five experts on the recommendation of the Head of Government. If we add the intervention of the Head of government in the process of nomination and appointment, the real rate of intervention of the Chief Executive in

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the council's membership process reaches 43% while the real rate of intervention of the king in the council's membership appointment process is 14%. This is another form of imbalance of constitutional authority in the council's composition process;

- Article 4 of the draft law does not specify which government departments fall under the «general government» which will be represented in the Council;

- Article 4 of the bill does not provide for children representation. The National Council for Human Rights wishes to recall in this regard the commitment of Morocco, as a state party to the Convention on the Rights of the Child, to facilitate the active participation of children to «the social life of the community» (art. 23) and to assure, under Article 12 of the Convention, to any child capable of forming his or her own views «the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.²²»

Based on these findings, the National Council for Human Rights proposes that Article 4 of the Bill be amended as follows.

- Replace the condition of «good character» in the first paragraph of Article 4 by the term «integrity»;

- Insert in the first paragraph of Article 4 a provision that will allow it to reconcile, in the composition of Advisory Council on Family and Children, between competence, expertise, gender, and youth representation, representation of the Moroccans living abroad and regional representation.

The National council for human rights also proposes a series of amendments to Article 4 designed to ensure three objectives:

- Introduce into the composition of the Advisory Council on Family and Children certain entities whose contributions are vital to the achievement of its missions;

- Ensure a balanced involvement of the different constitutional powers in the process of designation and appointment of council's members;

- Strengthen the inclusive nature of the composition of the council.

As such, the National Council for Human Rights recommends:

- Increasing the number of representatives of non-governmental organizations who are appointed by the Presidents of both Houses of Parliament from four to six and reducing the number of years of experience required for eligibility of these associations from fifteen to five years;

- Amending the method of appointment of the experts appointed by the King to allow the King to appoint directly from persons recognized for their expertise in the Council's competence, without being proposed by the Head of Government;

- Providing for the representation of two faculty members from academic institutions appointed by the King;

- Including one member representing the office of the Head of Government to be appointed by the Head of Government;

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- Including one representative from each of the following constitutional institutions: The Economic, Social and Environmental Council, the Higher Council for Education, Training and Scientific Research and the Advisory Council for Youth and Community Action;
- Providing for one representative of the High Commissioner for Planning;
- Identifying government departments which fall under the two government representatives «specialized in the areas of family and childhood» and who are appointed by the Head of Government;
- Maintaining the formula provided for in Article 4 of the bill regarding the appointment of two members representing the professional organizations most representative of employers, a magistrate appointed by the Higher Council of the Judiciary and a representative the Higher Council of the Ulema appointed by decree on the recommendation I of the Secretary-General of the Higher Council of the Ulema.

19. The National Council for Human Rights also recommends the rewording of the second paragraph of Article 5 concerning the incompatibilities as the paragraph includes the Advisory Council on Family and Children.

4. Recommendations for the Entities within the Advisory Council on Family and Children:

20. With regard to the three standing committees whose creation is provided for by Article 13 of the Bill, the National council for Human Rights believes that the inclusion of its recommendations concerning the expansion of powers of the Advisory Council on family and Children will logically require a change of designation of these commissions. For added flexibility, it would be more appropriate, in the opinion of this council, to simply provide in the first paragraph of Article 13, the principle of the creation of the standing committees within the Advisory Council on Family and Children, while referring to the rules regarding their name and their scope of action, according to the new configuration of powers of the said council.

Notes

1. General Comment No. 14 (2013) on the child's right to have his best interests as a primary consideration (Article 3, paragraph 1); CRC / C / GC / 14; May 29, 2013.
2. General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child (articles 4, 42 and 44, by 6); CRC / GC / 2003/5; 27 November 2003.
3. General Comment No. 12 (2009): The child's right to be heard; CRC / C / GC / 12; July 20, 2009.
4. General Comment No. 19 (2016): On Public Spending and the Rights of the Child (Article 4); CRC / C / GC / 19; version of June 11, 2015.
5. A / RES / 67/142.
6. A / RES / 68/136.
7. A / RES / 66/126.
8. Unofficial translation.
9. Unofficial translation.
10. Unofficial translation.
11. A / HRC / 29 / L.7 / Rev.1 (§ 6 a).
12. A / HRC / RES / 23/7 (§8).
13. A/RES/67/142.
14. A/RES/68/136.
15. A/RES/68/136 (§6).
16. A / RES / 68/136 (§ 7).
17. General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, Article 3, paragraph. 1), subparagraph 2 (25)
18. A / HRC / 28/33.
19. A / HRC / 28/33 (§ 67, paragraph k).
20. General Comment No. 19 (2016): On Public Spending and the Rights of the Child (Article 4); CRC / C / GC / 19; version of June 11, 2015
21. CRC / C / GC / 19 (§ 123-126).
22. See also: Committee on the Rights of the Child: General Comment No. 12 (2009), The child's right to be heard; CRC / C / GC / 12; July 20, 2009.

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