Critically-ill children and international human rights system: assessing the status and role of the UNCRPD in the case of Archie Battersbee

Over the past few years, some parents and clinicians in the UK have argued about decisions on the fate of critically-ill children, with the cases ending in protracted and emotionally-sapping legal disputes. The long -running legal conflicts have played out in the public eye, eliciting conflicting opinions. At the core of the disputes is whether parents or clinicians should determine the appropriate course of action. In the event of the disagreements, the domestic court intervenes guided by the 'best interests' principle. A corpus of scholarship, falling on either side of the debate, has captured the contradictions. Until recently, the discourse had focused on the common recourses to domestic courts and the European Court of Human Rights. However, in the recent case of incapacitated 12-year-old Archie Battersbee, his parents sought redress from the international human rights system through the Committee on the Rights of People with Disabilities to stop termination of his life support. The courts barred the involvement of the Committee on the basis that the UK had not incorporated the treaty which birthed the Committee. The case brought into sharp focus the relationship between international law and domestic law. First, this paper asserts that the weight (not) given to international law by the domestic courts was inconsistent with its treatment of international obligations in other cases. Secondly, assertions that unincorporated treaties do not have legal effect in domestic proceedings do not appear unambiguous. Finally, the treaty body appeared ill-suited to handle a case of a critically-ill child in the face of the impatient demands of local justice.

Key words: Archie Battersbee, parents, UNCRPD, Charlie Gard, Alfie Evans, disabilities, human rights, treaties

1. Introduction

Debates on decisions on ending life support for critically-ill children have elicited conflicting opinions.[1] In essence, extant scholarship has mirrored the disputes between parents of the children and clinicians, with contrasting academic standpoints. According to English law, choices regarding a child's medical care are determined in accordance with the 'best interests' principle.[2] When the child cannot participate, these are typically decided through a "shared decision-making" process comprising the parents and the treating healthcare team.[3] However, the optimal course of therapy for a child who is seriously ill, if any, is occasionally disputed by parents and medical experts. Limits on therapy for life-sustaining conditions can give rise to the most heated disputes. In recent years, a number of emotionally-engrossing conflicts between parents and clinicians over decisions on critically-ill children have received sustained publicity. In some cases, using novel or creative treatments, parents of critically-ill children may ask for the continuation of life-sustaining medical care, going against the clinical view that more treatment is no longer in the child's best interests.[4] Sometimes, this viewpoint results from the unclear effectiveness and/or or uncertain risks of novel therapies.[5] Others might have relatively

1 See e.g., Gillon R. Why Charlie Gard's parents should have been the decision-makers about their son's best interests. J Med Ethics. 2018 Jul;44(7):462-465. D. I Benbow, An analysis of Charlie's Law and Alfie's Law. Medical Law Review, 28 (2). pp. 223-246 (2020) asserting that parents are not always the best decision makers

2 Children Act 1989 S.1(1) The Act refers to ''the child's welfare shall be the paramount consideration''

3 G Birchley et al 'Best Interests' in Paediatric Intensive Care: An Empirical Ethics study' (2018) 102 Arch Dis Child 930.

4 See, *Re C (Baby: Withdrawal of Medical Treatment)* [2015] 150 BMLR 161; *An NHS hospital Trust v HK* [2017] EWHC 1710 (Fam); *King's College Hospital NHS Foundation Trust v Thomas (Withdrawal of Treatment)* [2018] EWHC 127 (Fam).

5 See *Portsmouth City Council v Naghmeh King & Ors* [2014] EWHC 2964 (Fam); *Great Ormond Street Hospital v Constance Yates & Ors* [2017] EWHC 972 (Fam).

established treatments that the treating team does not deem appropriate.[6] Alternatively, despite receiving medical advice that certain medical treatment is in their child's best interests, parents may choose to withhold their consent.[7] When disagreements about a child's medical care between parents and healthcare providers come to a deadlock in any of these situations, a judge must step in to decide what is best for the child.[8] Some of the debates on critically-ill children revolved around replacing the 'best interests' principle test with the 'significant harm' test.[9]

The protracted case of twelve-year-old Archie Battersbee is a typical exemplar of the tensions which have arisen between parents of a critically-ill child and medical experts. Archie was found unconscious at home on 7 April 2022; it is thought he may have been trying to take part in an online blackout challenge.[10]After being transferred to the Royal London Hospital in east London, run by Barts Health NHS Trust, doctors told Archie's family they believed his brain damage was so significant that he may be brain stem dead. This is significant – was Archie dead or disabled? The treatment of a living person would be different to that of the deceased. In subsequent court hearings, lawyers representing the Trust implored judges to make a decision which was in Archie's best interests.[11] As noted, the 'best interests' principle has traditionally been the fulcrum for welfare matters related to children. But its interpretation in such cases is emotionally

6 See *King*, ibid; *Alder Hey Children's NHS Foundation Trust v Thomas Evans & Ors* [2018] EWHC 308 (Fam); *Barts NHS Foundation Trust v Raqeeb* [2019] EWHC 2531.
7 See *Manchester University Hospital NHS Foundation Trust v M & Anor* [2019] EWHC 468 (Fam); *NHS Trust v BK and Others* [2016] EWHC 2860.
8 *Glass v United Kingdom* (2004) 39 ECHR 15.
9 C Auckland and I Goold, 'Parental Rights, Best Interests and Significant Harms' (2019) 78 *Cambridge Law Journal* 287–323. D. I Benbow, 'An analysis of Charlie's Law and Alfie's Law' *Medical Law Review*, 28 (2).(2020) pp. 223-246.
10 https://www.nationalworld.com/lifestyle/tech/blackout-challenge-videos-what-is-the-social-media-tiktok-trend-what-happened-to-archie-battersbee-online-ligature-accident-3660878
11 [2022] EWCA Civ 1055 paras 1-2

contentious. In the event Archie was presumed alive and a person with disabilities, his best interests needed to be protected as a living person. The determination of his status is what set off a long-running legal dispute, with Archie's parents persistently resisting suggestions he was dead and that his life support treatment (LST) needed to be terminated.

Before Archie's case, some of the high-profile cases in England and Wales involving disputes between parents and clinicians include those of Ashya King[12],Charlie Gard,[13] Alfie Evans[14] and Tafida Raqeeb,[15] However, the conditions of the children in all the four cases were different. Of these previous cases, courts decided in favour of the parents of Ashya and Tafida, both aged five at the time. In cases of 11-month-old Charlie and one-year-old Alfie, the courts decided that the life-support be terminated. Charlie was born with infantile-onset mitochondrial DNA depletion syndrome (MDDS). MDDS is a genetic disease where abnormal mitochondrial DNA causes cells to malfunction. He was admitted to Great Ormond Street Hospital (GOSH) at two-months-old. Charlie's doctors agreed to try the therapy. However, before a trial commenced, Charlie suffered several weeks of refractory epileptic fits. This caused severe brain damage and Charlie's doctors believed he had no hope of improvement, counselling fatal withdrawal of ventilation.[16]

Charlie's parents were unwavering in their desire for additional medical care, including nucleoside therapy. They had intended to take the child to the US for experimental treatment,

12 *Re King* [2014] 2 FLR 855.
13 *Great Ormond Street Hospital v. Constance Yates, Chris Gard and Charles Gard (A Child by his Guardian Ad Litem)* [2017] EWHC 972 (Fam) [20].
14 *Alder Hey Children's NHS Foundation Trust v. Mr Thomas Evans, Ms Kate James, Alfie Evans (A Child by his Guardian CAFCASS Legal)* [2018] EWHC 308 (Fam) [6].
15 *Tafida Raqeeb v. Barts NHS Foundation Trust and Others* [2019]:
16 *Great Ormond Street Hospital v Constance Yates, Chris Gard and Charles Gard* (A Child by his Guardian Ad Litem) [2017] EWHC 972 (Fam) [20] and *Alder Hey Children's NHS Foundation Trust v Mr Thomas Evans, Ms Kate James, Alfie Evans* (A Child by his Guardian CAFCASS Legal) [2018] EWHC 308 (Fam) [6].

accusing the hospital of holding Charlie hostage.[17] The hospital, however, sought a court order that it would be lawful to withdraw treatment because treatment was not in Charlie's best interests. The dispute resulted in a string of litigations and appeals in the High Court, Court of Appeal and Supreme Court, without success.[18] Charlie's parents took the case to the European Court of Human Rights (ECtHR) but the judges refused to intervene. [19] On 7 July, GOSH applied to the High Court for an affirmation of the April declarations.[20] On 26 July, the court set a deadline for Charlie's parents and GOSH to agree how and when he will die. The deadline passed at 12pm 27 July. His death was announced on 28 July 2017.

Alfie's was no less eventful. He was suffering from a severe neurodegenerative disorder and was treated in intensive care. Alfie's parents wanted to continue the treatment; his doctors, on the other hand, thought the best course of action was to end the life sustaining therapy.[21] The High Court decided, on 20 February 2018, that LST care provided by the hospital to Alfie was not in his best interests.[22] Like in Charlie's case, Alfie's parents started their way through a number appeals in the Court of Appeal, the Supreme Court, and the ECtHR. However, these attempts were unsuccessful. Alfie died on 28 April 2018, again after a long and difficult court battle between his parents and the healthcare system.

17 Birchley G 'Charlie Gard and the weight of parental rights to seek experimental treatment' *Journal of Medical Ethics* 2018; 44:448-452.
18 *GOSH v Yates* [2017] EWHC 972.; *Yates and Gard v GOSH* [2017] EWCA Civ 410; *Gard and Others v UK* [2017]; ECHR 39793-17; *GOSH v Yates No.2* [2017] EWHC 1909; Court Order: *GOSH v Yates, Gard and Gard* FD17 P 00103 AND FD17 P 00358. 2017
19 ECHR *Application 39793/17*
20 Court Order: *GOSH v Yates, Gard and Gard* FD17 P 00103 AND FD17 P 00358. 2017
21 *Great Ormond Street Hospital v Yates* [2017] EWCA Civ 410
22 [2018] EWHC 308 (Fam) para 66

In all these cases, the 'shared decision-making' process failed, necessitating judicial intervention. As has been noticed in the court cases, while parents' views are important[23], the court has to make its own decision.[24] Ashya and Tafida's cases were different - the former suffered from brain cancer while the latter had brain damage. At the time of writing, the two, while suffering disabilities, were still alive. However, all the cases highlight the intractable conflicts between parents and clinicians in cases of critically-ill children. Auckland and Goold have argued that prima facie decision-making authority about a child's medical care should rest with the child's parents, affording them the ability to choose between the range of medical options available. The authority should yield only where the parents' decision carries a 'serious risk of significant harm' to the child; only then can the court intervene. And when it does so, it should then apply the best interests approach.[25] Suggestions have also been made that better non-adversarial methods need to be found as a matter of urgency to resolve matters involving disagreements about the treatment of terminally-ill children.[26] On the hand, Benbow contends that the proposal to replace the best interest test, which is currently determinative in such contentious cases, with a significant harm test, as it would render UK law divergent from international law.[27] However, the recent amendment to the Health and Care Bill[28] (Charlie's Law) essentially adopts the

23 General Medical Council, Treatment and Care Towards the End of Life: Good Practice in Decision Making (Manchester: General Medical Council, 2010) 46

24 C Auckland and I Goold, 'Parental Rights, Best Interests and Significant Harms' (2019) 78 *Cambridge Law Journal* 287–323.

25 C Auckland and I Goold, 'Parental Rights, Best Interests and Significant Harms' (2019) 78 *Cambridge Law Journal* 287–323.

26*Great Ormond Street Hospital v Yates and others* [2017] EWHC 972 (Fam) para 130; Freckelton I. Responding Better to Desperate Parents: Warnings from the Alfie Evans Saga. J Law Med. 2018 Jul;25(4):899-918. PMID: 29978674. K A Choong, 'Can "Medical Futility" Conflicts be Mediated?. *Journal of Medical Law and Ethics*, 6 (1). pp. 41-53

27 D. I Benbow, 'An analysis of Charlie's Law and Alfie's Law' *Medical Law Review*, 28 (2). pp. 223-246 (2020)

28 Hansard: Health and Care Bill Volume 820: debated on Wednesday 16 March 2022, UK Parliament

significant harm test. It will protect parental rights in these cases by restricting court involvement to cases where there is a risk of significant harm to the child. The amendment aims to assuage conflict between parents and doctors from escalating to court and recognises that parents should be able to pursue an alternative treatment for their child, if it is proposed by a credible doctor, and is in the best interests of the child. As such, its proponents have contended it has no impact on the legal basis of the existing 'best interest principle.' Instead, the amendment leaves doctors' autonomy intact, so they never have to pursue a treatment that was not in the child's best interests.[29] This new approach is yet to be tested. Under the circumstances, it would be premature to determine that the new proposition would be efficacious or not.

However, what set *Battersbee* apart from previous legal cases of critically-ill children was its unprecedented recourse to the international human rights system. The parents courted the intervention of the United Nations Committee on Rights of People with Disabilities (UNCtRPD). Previously, the furthest such cases had gone was wat the ECtHR. Decisions to terminate lives, even when couched in 'best interests' terms, do not sit very easily in secular societies. The case of Battersbee represents the determination of parents to transcend traditional legal boundaries to preserve lives of their children. To begin with, Archie's case, at local level, represented, as in the previous cases, the failure of the vaunted 'shared decision-making' process. Secondly, the 'significant harm' test, which seeks to prioritize parents' involvement, did not enter the calculus; the courts did not engage it.

29 Bambos Charalambous 'Charlie's Law: a landmark victory for palliative care, with cross-party support' Labourlist 25 March, 2022

The engagement of the UNCtRPD is particularly significant in determining (a) critically-ill children can be deemed to have disabilities and (b) whether a new path has now been opened for critically-ill children in the event of clinicians-parents disputes. Archie's legal team considered him as a 'person with disabilities' whose rights and best interests needed to be protected as any other living person, thus invoking the mandate of the UNCtRPD. On the other hand, clinicians contended he was brain-steam dead, and a decision on his fate rested with British courts. The case brought into sharp focus the relationship between international law and domestic law. While this was, indeed, a remarkable development, potentially opening a new recourse in such cases, questions need to be asked about effectiveness of international the human rights system in addressing such emotionally-charged legal disputes. To address these questions, one needs to interrogate the extant relationship between international human rights law and domestic law and the capacity of quasi-judicial treaty bodies to handle such cases.

Human rights treaty bodies can, indeed, perform quasi-judicial functions contingent upon ratification of the permitting treaty by a state. But there are caveats. Archie's case illustrated the longstanding challenges for international law. The UK ratified the UNCRPD and its Optional Protocol, the latter paving way for individual communications pursued by Archie's family. As we shall notice, despite these legal commitments, the case came unstuck in court – the UK has not incorporated the Convention, and this, according to the court, slammed the door shut for the Committee's involvement. This scenario arises from the latitude inherent in international to allow states to cherry-pick treaties for voluntary ratification and incorporation in order for the agreements to have effect before domestic courts.

This paper argues that assertions that unincorporated treaties do not have legal effect in domestic proceedings do not appear to be unambiguous. Secondly, the weight (not) given to international

law by the English courts in Archie's case was inconsistent with the treatment of treaties in other legal cases. In the event that the international human rights route is available, a further question needs to be asked about the suitability of treaty bodies to adjudicate such matters. The bodies hold periodic meetings to deal with individual communications. This paper also assesses the suitability of treaty bodies to handle cases of critically-ill children in the face of the impatient demands of local justice.

The paper is organized as follows. The first part offers a summary of Archie Batterbee's case against the background of similar children. The subsequent section discusses UK approaches to international treaties. The third part focuses on international and domestic disability laws in the context of Archie's condition. This is followed by a discussion on the unprecedented intervention of the United Nations Committee on the Rights of People with Disabilities in the case of Archie. The fourth section discusses the status of unincorporated treaties in UK domestic law. The next part assesses the UK's commitment to children's rights before concluding with an evaluation of the UN Committee on the Rights of People with Disabilities as a quasi-judicial body in cases of critically-ill children.

2. The case of Archie Batterbee

In April 2022, Barts Health NHS Trust approached the court seeking two applications in relation to Archie; first, for the court to make a declaration for a Specific Issue Order under section 8 of the Children Act 1989, that Archie was brain stem dead and that he was dead on a particular date; and second, if the Court was unable to make that finding, for the court consider whether it was lawful and in Archie's best interests to continue to receive mechanical ventilation.[30] The

30 [2022] EWHC 1435 (Fam) para 2. See also para 16

applications to end Archie's life were opposed by his parents. The parents believed it was premature to decide to LST. They relied on video evidence that they said showed Archie gripping the hand of his mother and tears coming from his eyes. The family argued that Archie needed to be given more of a chance for his brain to recover. [31] The deliberate termination of life, they contended, would also conflict with Archie's own religious beliefs against ending life. However, medical experts concluded Archie's condition was unrecoverable.[32]

In her judgment of 13 June, 2022, Arbuthnot J stated that her decision 'must be based on my assessment of Archie's best interests as his welfare, in the widest sense, was the paramount consideration. The judge, thus, granted permission to cease the mechanical ventilation. On 15 July 2022, on appeal, Hayden J, addressing the conundrum between prolonging treatment and best interests of a patient, also concluded that it was not in Archie's best interests for LST to continue and declared it lawful for the treatment to be withdrawn. He cited *Aintree University Hospital NHS Trust v James*[33] as the flagship case, quoting Baroness Hale, who pointed out that:

> "the focus is on whether it is in the patient's best interests to give the treatment, rather than on whether it is in his best interests to withhold or withdraw it. If the treatment is not in his best interests, the court will not be able to give its consent on his behalf and it will follow that it will be lawful to withhold or withdraw it. Indeed, it will follow that it will not be lawful to give it. It also follows that (provided of course that they have acted reasonably and without negligence) the clinical team will not be in breach of any duty towards the patient if they withhold or withdraw it."[34]

Hayden J, after analysing the welter of medical evidence, thus concluded that continuation of ventilation was not Archie's best interests. He described continuation of the treatment as intrusive, burdensome and intensive. [35]

31 [2022] EWHC 1435 (Fam)
32 [2022] EWHC 1435 (Fam) paras 73 - 84
33 [2013] UKSC 67
34 [2013] UKSC 67 para 22
35 [2022] EWFC 80 para 46

The events in Archie's case landed credence, as in previous similar cases, to concerns about relegation of parental authority. The established orthodoxy reposes in courts the power to reach decisions in the 'best interests' of the child. However, the deployment of the 'best interests' principle in these cases is controversial. For instance, Auckland Goold have argued that the "best interest threshold" lacks sufficient justification and that the jurisprudence does not offer a sufficient normative basis for it.[36] They contend that a balance needs to be struck between offering protection, while respecting parental authority and preventing illegitimate incursions into private and family life.[37]

However, in this case, the 'significant harm' test did not have to enter the calculus. Unlike the previous case, Archie's parents were not seeking other forms of novel treatments locally or abroad. Instead, Archie's parents sought to appeal on, among other premises, the 'best interests' principle itself. The proposed appeal would not just rely on domestic law but mobilise international law. The parents would argue that the judge had failed to give any or adequate reasons for not accepting submissions they made in relation to Article 6 United Nations Convention on the Rights of the Child (UNCRC), Articles 10 and 12 of the Convention on the Rights of People with Disabilities (CRPD) and Article 8 European Convention on Human Rights (ECHR),[38] in breach of the state's positive obligation under Article 2 ECHR[39] and Archie's wishes to be kept on life support.[40] Article 3 of the UNCRC states that the best interests of the

36 Cressida Auckland and I Goold, 'Parental Rights, Best Interests and Significant Harms' (2019) 78 *Cambridge Law Journal* 287–323.
37 Cressida Auckland and I Goold, 'Parental Rights, Best Interests and Significant Harms' (2019) 78 *Cambridge Law Journal* 287–323.
38 In breach of Archie's Article 8 right to choose the manner of his death: *Haas v Switzerland* (2011) 53 EHRR 33;
39 As explained in *Lambert v France* (2016) 62 EHRR 2;
40 [2022] EWCA Civ 1055 para 21 (1) & (2)

child must be a primary consideration. According to the UNCtRPD, however, the best interests principle is incompatible with Article 12 of the UNCRPD which asserts the superiority of a 'rights, will and preferences' standard in upholding the right of disabled persons to have equal recognition before the law.[41]

3. UK and international treaties

The foregoing discussion needs to be understood in the context of UK's international legal obligations. UK follows a dualist approach,[42] meaning provisions of an international treaty can only have effect in domestic law if they are written into or incorporated by UK domestic legislation. Provisions of treaties that are not made part of UK law are not usually recognised in law. In *Tin Council*, Lord Oliver observed against the backdrop of earlier cases that, "[q]uite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation."[43] The judgment of the House of Lords in *Tin Council* has been regarded as the leading authority on unincorporated treaties and English law. It is routinely relied on by the courts, most recently by the Supreme Court in *Miller*, concerning the United Kingdom's withdrawal from the EU treaties (Brexit).[44] The Supreme Court in *Miller* concluded that, while unincorporated treaties "are binding on the United Kingdom in international law, [they] are not

41 UN Committee on the Rights of Persons with Disabilities. General comment No. 1 (2014) Article 12: Equal recognition before the law2014 Eleventh session 31 March–11 April 2014.
42 *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696 , *R v Lyons* [2003] 1 AC 976 , para 13 and *R (Hurst) v London Northern District* Coroner [2007] 2 AC 189 , para 56, *Pham v. Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591
43 *J.H. Rayner (Mincing Lane) Ltd. v Department of Trade and Industry* [1990] 2 A.C. 418, 500.
44 *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 W.L.R. 583 at [56]

part of UK law and give rise to no legal rights or obligations in domestic law".[45] Numerous iterations of this position appear in the UK jurisprudence.[46]

The case of Archie highlights the impact of incorporation, or otherwise, of treaties by states. In essence, it demonstrates limitations to accessing rights resulting from selective incorporation of treaties. The UK has not incorporated some key international treaties, including the UNCRC,[47] the foremost international legal instrument on the rights of children. The UNCRPD[48] is also, at the time of writing, unincorporated into UK domestic law, creating the impasse witnessed in *Battersbee.* To be sure, however, the UK has 'domesticated' some treaties. An example of an incorporated treaty is the European Convention on Human Rights (ECHR) given effect by the Human Rights Act (HRA)1998.[49] It is the reason parents of critically-ill children, Charlie, Alfie and recently, Archie, found recourse in the ECHR.

3.1 ECHR in cases of critically-ill children

The UK has often pointed to this incorporation of the ECHR as the reason for its reluctance to domesticate the UNCRC. However, the HRA is not as comprehensive as the UNCRC and offers limited rights for children. The ECHR is an 'international' treaty between the States of the

45 *Miller v Secretary of State for Exiting the European* Union [2017] UKSC 5; [2017] 2 W.L.R. 583 at [55] See also *Maclaine Watson & Co Ltd v Department of Trade and Trade and Industry* [1990] 2 AC 418, 474-5).
46 R v. Lyons [2003] 1 AC 976, Lord Bingham at [13]; and see Lord Hughes in SG at [137] ("international treaty obligations may guide the development of the common law"). *Assange v. Swedish Prosecution Authority* [2012] 2 AC 471, Lord Dyson JSC at [122]: "there is no doubt that there is a 'strong presumption' in favour of interpreting an English statute in a way which does not place the United Kingdom in breach of its international obligations." *Smith v Smith* [2006] UKHL 35, [2006] 1 WLR 2024, *A v. Secretary of State for the Home Department* (No. 2) [2006] 2 AC 221, Lord Bingham at [27]
47 UN Convention on the Rights of the Child., 7 March 1990, E/CN.4/RES/1990/74
48 UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106,
49 Human Rights Act 1998, c. 42 Statutes (UK).

Council of Europe.[50] The incorporation of ECHR made available in UK courts a remedy for the breach of a Convention right, without the need to go to the ECtHR in Strasbourg. In the event that a party felt a right had not been addressed, the matter could be taken to the European Court after exhausting the domestic remedies.[51] In the successful appeal in the Ashya King case, the court took into account his right to life under Article 2 and his right to respect for a private and family life under Article 8.[52] His parents were allowed to take him for treatment in Prague.

The parents of Charlie Gard and Alfie Evans also took their cases to the ECtHR asserting exhaustions of domestic remedies and violations of the Convention; however, the applications were unsuccessful.[53] In both cases, the European court ruled the cases were inadmissible. Like in Archie's case later, the ECtHR judges found no appearance of a violation of the Convention by the UK government. The parents had first appealed before the domestic courts that a decision by a previous court, disregarding or reinterpreting Archie's express wishes and desires, was wrong in law because it was in breach of the rights established by a number of international conventions, including the ECHR. Art 2 of the ECHR relating to the right to life, places a positive obligation upon a state. The lawyers also argued that the judge had erred in fact in determining Archie's LST was 'burdensome and 'futile.'[54] The judge, they argued further, had also failed to apply the well-established 'strong presumption' in favour of prolonging life,[55] had only focused on medical interests, disregarded Archie's religious beliefs and failed to consider

50 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5
51 Article 35 ECHR
52 [2014] EWHC 2964 (Fam) para 30
53 *Charles Gard and Others against the United Kingdom* (Application no. 39793/17) 27 June 2017; Evans v. the United Kingdom (application no. 18770/18)
54 [2022] EWCA Civ 1055 para 21 (4)
55 *Airedale NHS Trust v Bland* [1993]

the best interests in a wider sense.[56] The parents' case under Art 8 of the ECHR was that a patient had the right to elect the manner of their death and it was not, therefore, for the court to substitute its own view of best interests which conflicted with those views.

In rejecting the appeal by Archie's parents, the Appeal Court had pointed out that the earlier decision of the ECtHR in *Gard v UK*[57], declaring the application inadmissible, demonstrated that the court in Strasbourg would evaluate whether a domestic regulatory framework was in place that was compatible with the requirements of Art 2, whether account had been taken of the patient's previously expressed wishes and feelings and those close to him (as well as the opinions of medical personnel), and whether it was possible for parties to approach a domestic court in the event of a dispute.[58] The challenge under Art 2 in *Gard* in the context of the regime in England and Wales in end of life cases was declared to be manifestly ill-founded.[59] The Appeal Court also dismissed the ground under ECHR Art 8, that a patient had the right to choose the manner of their death because the cases in both *Pretty* and *Haas*[60] concerned capacitous adults who had investigated the options facing them and who had come to a considered decision.

The court concluded that, after a detailed examination, there was no prospect of the decision being shown to be wrong or unjust, whether for procedural reasons or otherwise. Archie's best interests "had rightly and repeatedly been given the most anxious attention and the judge had made a conscientious decision that this court would not disturb." [61] However, the court granted a

56 [2022] EWCA Civ 1055 para 23
57 ECHR *Application 39793/17*
58 ECHR Application 39793/17 para 80
59 [2022] EWCA Civ 1055 para 26 (i)
60 *Pretty v UK* [2002] ECHR 2346/02, at paragraph 64 and *Haas v Switzerland* (2011) 53 EHRR 33 at paragraph 51
61 [2022] EWCA Civ 1055 para 72

stay to enable the parents to consult with lawyers and specifically to allow an application, should they wish to do so, to the ECtHR.

The public sequel in Archie was wrenching to all involved. On 3 August 2022, the lawyers for Archie's parents made a request to the ECtHR under Rule 39, asking it to issue an interim measure preventing the hospital from withdrawing life-sustaining treatment.[62] The parents also lodged a substantive application with the Court invoking Articles 2 (right to life), 6 (right to a fair trial), 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion), 13 (right to an effective remedy), 14 (prohibition of discrimination) and 34 (right of individual petition). However, the ECtHR declined to issue the interim measure sought. The European Court considered that the conditions of admissibility provided for in Articles 34 and 35 of the Convention were not fulfilled, [63] and thus would not interfere with the decisions of the UK national courts.[64] Further, the ECtHR indicated that its decision did not constitute an acknowledgement that it, either in fact or in law, had jurisdiction to hear the case under Article 35 § 2 (b) of the Convention.[65] This appeared to be reference to the application to by the parents to the UNCtRDP discussed below.

Cases of critically-ill children, which have ended at the ECtHR, have not yielded positive outcomes for the parents. While the previous cases only went as far as the European human rights court, the recourse to the UNCtRPD in Archie's case was remarkable. Granted that the

62 Press Release: Request for interim measures refused in case concerning the withdrawal of life sustaining treatment ECHR 250 (2022) 03.08.2022
63 Press Release: Request for interim measures refused in case concerning the withdrawal of life sustaining treatment ECHR 250 (2022) 03.08.2022
64 Press Release: Request for interim measures refused in case concerning the withdrawal of life sustaining treatment ECHR 250 (2022) 03.08.2022
65 It provides that the Court shall not deal with any application that is substantially the same as a matter that has already been submitted to another procedure of international investigation or settlement.

ECtHR is a court and the UNCtRPD a quasi-judicial body, these human rights bodies have made binding decisions and contributed to the development of human rights jurisprudence.

3.1 Critically-ill children and concept of 'disability'

The UK ratified UNCRPD on 8 June 2009. Due to the dualist nature of the British Constitution, and since the Convention has not been enacted into domestic law by an Act of Parliament, it is held that disabled claimants cannot rely on it in the domestic courts. People with disabilities rely on the Equality Act 2010.[66] The question of whether Archie was alive and a person with disabilities on one hand or deceased on the other, was the subject of animated legal dispute during the proceedings. It will be recalled that Barts Health NHS Trust made two applications in relation to Archie: the first, for the Court to make a declaration that Archie was 'brain stem dead' and that he was dead on a particular date and second, if the Court was not able to make that finding, then the Court should consider whether it was lawful and in Archie's best interests to continue to receive mechanical ventilation.[67] While the interest of the Trust's lawyers was whether LST could be terminated on the one hand, for purposes of disability laws, on the other, determining if Archie was alive and a person with disabilities, or dead was crucial in order for disability rights claims to be made on his behalf. Ordinarily, it would be irrational to perpetuate LST on a decedent.

The conception of 'death' became a subject of contestation. Like most of expert evidence of the Trust's witnesses, the doctors concluded that Archie was very likely to be brain dead and to remain in a comatose or vegetative state and dependent on mechanical ventilation for the rest of

66 Equality Act 2010 UK Public General Acts 2010 c. 15
67 [2022] EWHC 1435 (Fam) 73.

his life.[68] If Archie was brain stem dead, then he could not recover and there would be no point in providing him with mechanical ventilation. However, Archie's family contended that death only occurred when the heart stopped beating. The evidence also deferred to Archie's view when he was active that he would only be dead when his heart and breathing had stopped. A medical expert from the US, instructed by the parents, gave examples of children or young people who had been found brain dead but who had made some sort of recovery.[69] In medical practice, he asserted, when certifying death, medical practitioners do so beyond reasonable doubt. The lawyers argued that Courts should not apply a lesser standard.[70]

A conclusion that Archie was alive would invoke claims under the UNCRPD and the Equality Act 2010. Article 10 relates to right to life and is in very similar terms to Article 2 of the ECHR and Article 12 requires contracting States to afford persons with disabilities equality under the law and in various specific circumstances. As already noted, the UK Equality Act 2010 applies to people with a physical or mental impairment that has a 'substantial' and 'long-term' negative effect on their ability to do normal daily activities.[71] The assumption is that the people are 'alive' but suffer certain inhibitions. The UNCRPD is premised on the same assumptions. While the clinicians argued Archie was brain stem dead, the court record suggested Archie was alive. It said Archie had been 'incapacitated' from 7 April 2022 when was found to be in 'a very profoundly damaged state' by his mother, with a ligature around his neck in their home.[72] On the

68 [2022] EWCA Civ 1055 Para 21
69 [2022] EWHC 1435 (Fam) para 122
70 [2022] EWHC 1435 (Fam) para 106
71 (Section 6: 1 (a) and (b))
72 [2022] EWCA Civ 1055 para. 1.

face of it, 'incapacitation' or 'very profound damage' does not comport with the conventional meaning of 'death.'

However, the judge was unequivocal: "I find that Archie *died* at noon on 31 May 2022, which was shortly after the MRI scans taken that day. I find that irreversible cessation of brain stem function has been conclusively established. Brain stem death became the legal definition of death in the House of Lords case of *Bland*.'[73] The judge also relied on *Namiq*[74] in which the Trust applied for a declaration that it was lawful in relation to a baby to have mechanical ventilation removed; the test for death by neurological criteria was examined. In that case, brain stem tests were administered, and the Court found that the baby had died by neurological criteria. Relying on these outcomes, the court granted permission to the medical professionals at the Royal London Hospital to cease to ventilate Archie mechanically; extubate him, cease the administration of medication and not to attempt any cardio or pulmonary resuscitation on him when cardiac output ceases or respiratory effort ceases.[75]

On appeal, Archie's lawyers argued that the Judge had failed to apply the well-established 'strong presumption' in favour of prolonging life[76] and made a manifestly incorrect finding that Archie's LST treatment served "only to protract his death whilst being unable to prolong his life."[77] The contention on the subject of prolongation here (life or death) was poignant. Hayden J agreed with Archie's representatives, noting that making a finding of brain stem death by application of the civil standard of proof was erroneous.[78] He pointed out that the Court of

73 *Airedale NHS v Bland* [1993] AC 789 [my emphasis]
74 *Manchester University NHS Foundation Trust v Midrar Namiq* [2020] EWCH 180 (Fam)
75 [2022] EWHC 1435 (Fam)
76 Citing *Airedale NHS Trust v Bland* [1993] AC 789 at p.825
77 [2022] EWCA Civ 1055 Para 21 (5)
78 [2022] EWHC 1435 (Fam); [2022] EWFC 80 para 1

Appeal had concluded that such an approach was wrong in law. “It strikes me that it is also wrong, clinically. The law and good medical practice will rarely, if ever, diverge.”[79] The civil standard of proof relies on probability (that death had occurred). However, ‘ascertaining death required the application of clear clinical guidelines.[80] Where they were not met, brain stem death could not be identified with the certainty that such a conclusion required. Brain stem death could not be equated with a diagnosis. Death was a stage beyond diagnosis.[81] As Golia and Pawa posit, in the absence of either complete clinical findings consistent with brain death, or confirmatory tests demonstrating brain death, brain death cannot be diagnosed and certified.[82]

Given these findings, the Court would thus proceed, unless death was proven, on the premise that Archie was alive and a person with disabilities. The focus would then shift to his best interests. It follows thus that, for purposes of the law, Archie would be entitled to disability rights encapsulated in legislation, including international law, as a child and if deemed disabled.

With Archie’s status established, the paper now turns to the possibilities of him using the human rights system for redress. To facilitate accountability, the UN established a variety of mechanisms for monitoring the compliance of state parties with their human rights obligations. The UN Human Rights system consists of Treaty Bodies composed of committees of experts created to monitor governments’ implementation of specific human rights conventions. These bodies act as quasi-judicial organs.

79 [2022] EWHC 1435 (Fam) [2022] EWFC 80 para 2
80 [2022] EWFC 80 para 2
81 Ibid
82 A. K Goila & M. Pawar ‘The diagnosis of brain death.’ Indian J Crit Care Med. 2009 Jan-Mar;13(1):7-11. The court also referred to the Academy of Medical Royal Colleges’ “The Code of Practice for the Diagnosis and Confirmation of Death”.

4. Archie Battersbee and intervention of UNCtRPD

In seeking a domestic remedy, lawyers for Archie's parents had submitted that 'a decision to remove [life sustaining treatment] from someone who previously had capacity, can only be made on the basis of the person's will and preferences and failing this then according to the "best interpretation of will and preferences."'[83] The Convention requires that "decisions relating to a person's physical or mental integrity [i.e. medical treatment] can only be taken with the free and informed consent of the person concerned.[84] However, Archie was incapable of declining or consenting to treatment. The court concluded that in the context of a person who was so disabled with no free-standing capacity for life without artificial and intensive medical intervention, appeared to stretch the parameters of the Convention beyond its intended boundaries. In any case, according to the court, *Aintree University Hospital NHS Trust v James*[85] and elsewhere, it had been established that the approach in domestic law did afford due respect to wishes and feelings in a manner that would be compatible with the principles of UNCRPD.[86]

While the presumed consent to treatment was premised on his religious beliefs, his lawyers based the petition on Article 10 of the UNCRPD which enjoins states parties to "reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others;" and Art 12 on person with disabilities' equal status with others under the law. This would chime with the Equality Act 2010. Previously, the UNCtRPD, had asserted that the 'best interests' principle is incompatible with Article 12 of the UNCRPD which asserts the superiority of a 'rights, will and

83 [2022] EWCA Civ 1106 para 20
84 Ibid, para 42, referring to the interaction of Article 12 with Article 17 (the right to personal integrity).
85[2014] A.C. 59. paras 39 and 45
86 [2022] EWCA Civ 1055 para 26 (iv)

preferences' standard in upholding the right of disabled persons to have equal recognition before the law.[87]

What is notable, however, is that the domestic court made scant reference to the Convention. The limited reference to the UNCRPD suggests the unincorporated Convention was used only as an interpretative device. In essence, the 'interpretative' approach failed to reflect the full extent of UK's international obligations for people with disabilities. This approach is in stark contrast to the treatment of another unincorporated treaty – the UNCRC. UK courts have routinely referred substantively to the UNCRC, even as an interpretative tool. The question still remains worth unincorporated international should only serve the function as interpretive tools.

The Court of Appeal had been specifically requested for the stay to allow the parents to approach the UNCtRD on the premise that the proceedings in England and the decisions made had failed to afford due respect to the rights of Archie under that Convention. While the Court of Appeal did not expressly afford an additional period of stay to allow for such application, the parents did not require its permission to approach the UNCRPD [88] On 28 July, the Supreme Court rejected an application for an appeal for further stay.

Following the petition, the UNCtRPD secretariat stated:

> "Under art 4 of the optional protocol to the Convention of Rights of People with disabilities, the Committee, acting through its Special Rapporteur on Communications, requests the State party to refrain from withdrawing life-preserving medical treatment, including mechanical ventilation and artificial nutrition and hydration, from the alleged victim whilst the case is under consideration by the Committee. This request does not imply that any decision has been reached on the substance

87 UN Committee on the Rights of Persons with Disabilities, 'General Comment on Article 12: Equal Recognition before the law' (CRPD/C/GC/1, adopted 11 April 2014), paragraph 27.
88 [2022] EWCA Civ 1106 paras 4 and 5

> of the matter under consideration. The Committee may review the necessity of maintaining the request for interim measures once the State's observations have been received."[89]

The communication from the Committee made provision for the UK to respond on admissibility by 29 September, about two months from the date of the letter. It is assumed the UK government would have needed to recognize the competence of the Committee and determine if the complaint received by the Committee would be admissible, for example, that the complainants had exhausted domestic remedies, before the 'merits" stage. The Government Legal Department – who had been required to consider the situation as it developed in particular following communication from UNCRPD – wrote to the urgent out of hours judge of the Family Division, indicating that the Government regarded any question of any further stay as being a matter for the court.

The Court granted stay until 1 August 2022. The parents' application was for a stay to be granted pending the determination by the UNCtRPD of the complaint alleging breach of the Convention's terms. Lawyers for the parents submitted that the "request made by the UN Commission (sic) in Geneva is in mandatory terms and if this court were to ignore them, the court would be acting in 'flagrant' breach of international law.[90] The lawyers relied on provisions of Article 4 of the Optional Protocol to the UNCRPD for an interim request to be made:

> '1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.

89 [2022] EWCA Civ 1106 para 8
90 Para 23

> 2. Where the Committee exercises its discretion under paragraph 1 of this article, this does not imply a determination on admissibility or on the merits of the communication.'

It would seem, nonetheless, that Archie's parents had fulfilled the admissibility precepts. The intervention of the UNCtRPD presented an unparalleled test case on the nexus between domestic law and the international human rights system in cases of critically-ill children. The stage was now set for arguments on the *bona fides* of the UNCtRPD's intervention based on the status of its founding law. The decision could have a profound effect on subsequent cases involving critically-children after disputes between parents and clinicians.

Lawyers for Hospital Trust, submitted that arguments by the parents' lawyers had no foundation in law, citing in particular, *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others* [2021] UKSC 615. The Hospital Trust's lawyers pointed to the judgment of Lord Reed[91], asserting he put the issue beyond doubt. I do not intend to insert the lengthy extracts from the judgment, but in short, it restated the ineffectual status of unincorporated international treaties. Lord Reed stated: "There is, accordingly, no basis in the case law of the European court, as taken into account under the Human Rights Act, for any departure from the rule that our domestic courts cannot determine whether this country has violated its obligations under unincorporated international treaties."[92] Lawyers for the hospital were referring to the UNCRPD, the unincorporated international treaty ratified by the UK.

The court agreed. Relying on the reasons set out by Lord Reed in the case of *SC*, it would, therefore, be inappropriate for the court to apply an unincorporated international treaty into its

91 *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others* [2021] UKSC 615 Judgment of Lord Reed at [74] – [79]
92 Ibid at [84]:

decision-making process, or to investigate whether the UK was in some way in breach of any duty, in particular under UNCRPD.[93]

> If this court were to accede to the parents' application, the court would be acting contrary to what it has determined to be in Archie's best interests, it would be sanctioning a step, namely postponing the implementation of the order, which would be contrary to his best interests, and would be doing so by reference to an unincorporated treaty that is not part of domestic law. That seems to me to be plainly wrong.[94]

The Court also dismissed the submission that the Equality Act mandated it to grant a stay because it incorporated the UNCRPD. The court emphasized that the 2010 Act does not refer to UN Convention at all.[95]

The court's position on unincorporated treaties would comport with, among other cases highlighted earlier, the decision in *Belhaj* that: "judges applying the common law are not at liberty to create, abrogate or modify municipal law rights or obligations in accordance with unincorporated norms derived from international law."[96] However, as will discussed later, the status of unincorporated treaties in domestic law might not be as unambiguous as these courts concluded.

The court also dismissed invocation of the *Gard* case for purposes on whether a stay should be granted, stating the previous case did not constitute *stare decisis*; each case had to be determined on its own merits and facts.

93 [2022] EWCA Civ 1106 para 36
94 [2022] EWCA Civ 1106 para 37
95 [2022] EWCA Civ 1106 para 40
96 *Belhaj v Straw and Others and Rahmatullah (No. 1) v Ministry of Defence and Another* [2017] UKSC 3; [2017] 2 W.L.R. at [252].

> "I have summarised Archie's condition and the narrow choice that was facing the court in terms of choosing how this young man should die, rather than any other more positive outcome. In terms of Archie's best interests, every day that he continues to be given life sustaining treatment is contrary to his best interests. A stay, even for a short time, is against his best interests and not in accordance with his welfare, and that is the decision that has been taken by court in England and Wales."[97]

5. Are unincorporated treaties inapplicable?

The decisions in Archie's case, as stated above, were unequivocal in their pronouncements on the relationship between UK law and unincorporated treaties. The decision appeared to shut a potentially new recourse for parents of hospitalized critically-ill children.

It is generally considered axiomatic that in order to be unquestionably cognizable by an English court, a treaty has to be the object of embedment into domestic law. The position derives from the principles of sovereignty and the supremacy of parliament[98] as discussed above. However, the question of whether treaties have no effect within domestic law without the sanction of Parliament is a matter of debate. Some jurists have questioned this oft-enunciated extant rule on inapplicability of unincorporated treaties. For instance, in ***Nzolameso***, the Supreme Court alluded to it as an 'interesting question,' adding that '[t]hat must be a question for another day.'[99] It is indeed a question of interest given the commitments through ratification. Some scholars and jurists view international law as more than just an interpretative tool. For instance, analysing jurisprudence[100], Bjorge has argued that the broad assertion advanced in *Tin Council*, and

97 [2022] EWCA Civ 1106 para 42
98 [2017] UKSC 5 Miller para 57
99 [2015] UKSC 22 para 29
100 *Porter v Freudenberg* [1915] 1 KB 857. Laker Airways Ltd. v Department of Trade [1977] Q.B. 643, 728 (Lawton L.J.). Imperial Japanese Government v P. & O. Steam Navigation Company [1895] A.C. 644

restated in *Miller,* about the inapplicability of unincorporated treaties is too bald to proffer a convincing representation of the correct position. Some constitutional and judicial authorities recognize that there are, in fact, situations in which the courts may give effect to obligations contained in unincorporated treaties.[101] An argument can be made that in cases as fundamental as the right to life of children with disabilities, courts should given effect to obligations in the associated treaties.

The *Parlement Belge*[102] is generally considered to be the authority from which the rule on English law and unincorporated treaties derives.[103] The case concerned a Belgian mail boat that collided into the vessel of a British subject. The Crown had, based on an unincorporated postal convention, purported to confer immunity on the Belgian vessel, with the potential effect of depriving the British subject of the right to bring proceedings. Sir Robert Phillimore concluded that there was "a class of treaties the provisions of which were inoperative without the confirmation of the legislature; while there were others which operated without such confirmation"[104] As another example, he cites Sir Hersch Lauterpacht observing that the decision in *Porter v Freudenberg*[105] "apparently assumed that Article 23(h) of Hague Convention no. IV respecting the Laws and Customs of War on Land was enforceable by British courts although

101 Bjorge, E . (2017). Can unincorporated treaty obligations be part of English law? Public Law, 2017, 571-591.
102 The Parlement Belge (1879) 4 P.D. 129
103 This seems to be universally accepted: e.g. H.W.R. Wade & C.F. Forsyth, Administrative Law (11th edn., O.U.P. 2014) 289; R. Jennings & A. Watts (eds.), Oppenheim's International Law (Longman 1992) 58–59; G. Marston, "Unincorporated Treaties and Colonial Law" (1990) 20 Hong Kong Law Journal 178; F. Vallat, International Law and the Practitioner (Manchester University Press 1966) 7–8; W. Holdsworth, A History of English Law Vol XIV (Methuen & Co. 1964) 73; W.R. Anson, Law and Custom of the Constitution Vol. II (O.U.P. 1911) 109–10.
104 *The Parlement Belge* (1879) 4 P.D. 129, 150
105 *Porter v Freudenberg* [1915] 1 KB 857.

that Convention had never received express legislative assent."[106] The *Imperial Japanese Government v P. & O. Steam Navigation Company [1895] A.C. 644*, arising from the unincorporated British–Japanese Treaty of Peace, Friendship, and Commerce, seemed to constitute another clear example of an unincorporated treaty being operative before the courts.

Bjorge concludes that whether an unincorporated treaty could operate in domestic law depended on whether it deprived the citizen of existing legal rights or interfered with those rights. Dicey explicitly referred in his *Law of the Constitution*, observing that it was "open to question whether the treaty-making power of the executive might not in some cases override the law of the land."[107] The underlying principle on which the general rule is based is to guard against "abuses by the executive to the detriment of citizens."[108]

6. Conclusion

Over the past few years, some parents and clinicians in the UK have argued about decisions the fate of critically- ill children, with the cases ending in protracted and emotionally-grueling legal disputes. The long-running legal conflicts have played out in the public eye, eliciting conflicting opinions. At the core of the disputes is whether parents or clinicians should determine the appropriate course of action. Suggestions on mediations are not easily dismissible. In the absence of such mechanism, the domestic court intervenes guided by the 'best interests' principle. A corpus of scholarship, falling on either side of the debate, has captured the contradictions. Until recently, the discourse had focused on the common recourses to domestic courts and the European Court of Human Rights. The case of 12-year-old Archie Battersbee was

106 H. Lauterpacht, International Law: Collected Papers Vol. II (C.U.P. 1975) 558.
107 A.V. Dicey, Introduction to the Study of the Law of the Constitution (8th edn., Macmillan & Co., 1915) 460–61.
108 McKerr [2004] UKHL 12; [2004] 1 W.L.R. 807 at [50].

seminally remarkable in that it broke new ground by seeking a remedy from the international human rights system through the Committee on the Rights of People with Disabilities. As the court confirmed, Archie was a person with disabilities rather than dead. It comes as unsurprising that intentional termination would be objectionable to the parents. However, the courts concluded the extent of his disabilities were too serious LST had to be stopped in his best interests. The case brought into sharp focus the relationship between international law and domestic law. The Court barred the involvement of the UNCtRPD on the basis that the UK had not incorporated the treaty which birthed the Committee. However, historical jurisprudence has illustrated that unincorporated treaties have been considered by the courts. Human rights treaties, especially those associated with children might require interpretation by bodies associated with those agreements in the 'absence of domestic remedies.' The latter, contrasted with 'exhaustion of domestic remedies,' does not mean that justice mechanism are non-existent, but rather the futility of pursuing remedies internally in pre-determined cases. Recourse to external quasi-judicial bodies would thus be expeditious. Further, the perfunctory treatment given to the UNCRPD by the domestic courts was inconsistent with the treatment of other unincorporated treaties in other cases, particularly the UNCRC. While also unincorporated, the UNCRC has received recognition before domestic courts. That said, one has to consider if human rights committees can handle such urgent and sensitive cases. Under the present modalities, treaty bodies, however, appear unsuited to handle cases of critically-ill children in the face of the impatient demands of local justice. The Committees can, however, provide useful recourse if capacitated to handle the inevitable volume of such "urgent cases" promptly.