

LAW LIBRARY OF CONGRESS
INTERNATIONAL LAWS
CHILDREN'S RIGHTS

Executive Summary

The growth of children's rights as reflected in international and transnational law has transformed the post-war legal landscape. This overview describes some of the major global and regional legal instruments that have contributed to this transformation, as well as specific relevant provisions in broader human-rights related instruments and in international agreements on child protection and placement.

I. Introduction

It was not until the late nineteenth century that a nascent children's rights' protection movement countered the widely held view that children were mainly quasi-property and economic assets. In the United States, the Progressive movement challenged courts' reluctance to interfere in family matters, promoted broad child welfare reforms, and was successful in having laws passed to regulate child labor and provide for compulsory education. It also raised awareness of children's issues and established a juvenile court system. Another push for children's rights occurred in the 1960s and 1970s, when children were viewed by some advocates as victims of discrimination or as an oppressed group. In the international context, "[t]he growth of children's rights in international and transnational law has been identified as a striking change in the post-war legal landscape."¹ The purpose of this overview is to sketch in broad strokes some of the key provisions of major international legal instruments on children's rights that form part of that landscape.

II. Global International Documentation on Children's Rights

A. Declaration of the Rights of the Child 1959²

The U.N. Declaration of the Rights of the Child (DRC) builds upon rights that had been set forth in a League of Nations Declaration of 1924. The Preamble notes that children need "special safeguards and care, including appropriate legal protection, before as well as after birth," reiterates the 1924 Declaration's pledge that "mankind owes to the child the best it has to give," and specifically calls upon

¹ Stephen R. Arnott, *Family Law: Autonomy, Standing, and Children's Rights*, 33 WILLIAM MITCHELL LAW REVIEW 809 (2007). Arnott notes that "the very term 'children's rights' is both broad and loose," *id.* at 808.

² The U.N. Declaration of the Rights of the Child comprises a Preamble and ten principles. G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354. For an online text of the Declaration, see the Office of the U.N. High Commissioner for Human Rights (UNHCHR) Web site, <http://www.unhchr.ch/html/menu3/b/25.htm> (last visited July 20, 2007) (unofficial source). A list of the Status of Ratification of the Principal International Human Rights Treaties as of July 14, 2006, is available at <http://www2.ohchr.org/english/bodies/docs/status.pdf> (last visited Dec. 3, 2007).

voluntary organizations and local authorities to strive for the observance of children's rights.³ One of the key principles in the DRC is that a child is to enjoy "special protection" as well as "opportunities and facilities, by law and by other means," for healthy and normal physical, mental, moral, spiritual, and social development "in conditions of freedom and dignity." The "paramount consideration" in enacting laws for this purpose is "the best interests of the child,"⁴ a standard echoed throughout legal instruments on children's rights. Among other DRC principles, a child is entitled to a name and nationality; to adequate nutrition, housing, recreation, and medical services; to an education; and, for the handicapped, to "special treatment, education and care."⁵ Other principles are on protection against neglect, cruelty and exploitation, trafficking, underage labor, and discrimination.

B. Minimum Age Convention 1973⁶

The aim of the Minimum Age Convention (MAC) is to establish a general instrument on the subject of the minimum age of employment with a view to achieving the total abolition of child labor (Preamble). Thus, each State Party is to "pursue a national policy designed to ensure the effective abolition of child labor and to raise progressively the minimum age for admission to employment to a level consistent with the fullest physical and mental development of young persons" (article 1). States Parties must specify a minimum age for admission to employment or work, subject to certain exceptions set forth in the MAC. That minimum may not be less than the age of completion of compulsory schooling and, in any case, less than fifteen years, but it may initially be set at fourteen years if a state's economy and educational facilities are insufficiently developed (article 2). Exceptions to the age limits may also be permitted for light work or for such purposes as participation in artistic performances (articles 7 and 8). If the employment may be hazardous to a young person's health, safety, or morals, the minimum age is generally not to be less than eighteen years (article 3(1)).

C. U.N. Convention on the Rights of the Child 1989

The Convention on the Rights of the Child (CRC) is the most comprehensive document on the rights of children.⁷ Based purely on the number of substantive rights it sets forth, as distinct from implementation measures, it is the longest U.N. human rights treaty in force and unusual in that it not only addresses the granting and implementation of rights in peacetime, but also the treatment of children in situations of armed conflict. The CRC is also significant because it enshrines, "for the first time in binding international law, the principles upon which adoption is based, viewed from the child's perspective."⁸ The CRC is primarily concerned with four aspects of children's rights ("the four 'P's"): participation by children in decisions affecting them; protection of children against discrimination and all forms of neglect and exploitation; prevention of harm to them; and provision of assistance to children for their basic needs.⁹ For the purposes of the CRC, a child is defined as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier" (article 1).

³ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 10-11 (Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1995). 35 *International Studies in Human Rights*.

⁴ DRC, principle 2, *supra* note 2.

⁵ The 1924 Declaration stated children "must be the first to receive relief"; the DRC specifies more pragmatically that they are to be "among the first" to receive protection and relief (principle 8). VAN BUEREN, *supra* note 3, at 11.

⁶ The Minimum Age Convention, comprising a Preamble and 18 articles, was adopted by the 58th Session of the General Conference of the International Labour Organisation on June 26, 1973, and entered into force on June 19, 1976; I.L.O. No. 138. For an online text, see the Office of the U.N. High Commissioner of Human Rights (OHCHR) Web site, <http://www.ohchr.org/english/law/ageconvention.htm> (last visited July 25, 2007) (unofficial source).

⁷ The Convention on the Rights of the Child, with a Preamble and 54 articles, was adopted by the U.N. General Assembly on November 20, 1989, and entered into force on September 2, 1990. G.A. Res. 44/25, annex, 44 U.N. GAOR Supp.

Key accomplishments of the CRC have been described as five-fold. It creates new rights for children under international law that previously had not existed, such as the child's right to preserve his or her identity (articles 7 and 8), the rights of vulnerable children like refugees to special protection (articles 20 and 22), and indigenous children's right to practice their culture (articles 8 and 30). In some instances, this innovation takes the form of child-specific versions of existing rights, such as those in regard to freedom of expression (article 13) and the right to a fair trial (article 40). In addition, the CRC enshrines in a global treaty rights that hitherto had only been found in case law under regional human rights treaties (e.g., children's right to be heard in proceedings that affect them) (article 12). The CRC also replaced non-binding recommendations with binding standards (e.g., safeguards in adoption procedures and with regard to the rights of disabled children) (articles 21 and 23). New obligations are imposed on States Parties in regard to the protection of children, in such areas as banning traditional practices prejudicial to children's health and offering rehabilitative measures for victims of neglect, abuse, and exploitation (articles 28(3) and 39). Finally, the CRC sets forth an express ground obligating States Parties not to discriminate against children's enjoyment of CRC rights.¹⁰ The right to participate in proceedings, it is argued, "together with the principles of non-discrimination in Article 2 and provision for the child's best interests in Article 3, form the guiding principles of the Convention, which reflect the vision of respect and autonomy which the drafters wished to create for all children."¹¹

D. Optional Protocols to the CRC on Sex Trafficking, Armed Conflict

The United Nations adopted two protocols to the CRC on May 25, 2000, the Optional Protocol to the CRC on the Sale of Children, Child Prostitution, and Child Pornography 2000 (Sex Trafficking Protocol) and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Child Soldiers Protocol). The Sex Trafficking Protocol¹² (STP) addresses

(No. 49) at 167, U.N. Doc. A/44/49 (1989); 28 I.L.M. 1448 (1989). For an online text, see the OHCHR Web site, <http://www.ohchr.org/english/law/crc.htm> (last visited July 23, 2007); it includes the 1995 amendment to article 43, paragraph 2 (G.A. Res. 50/155 (Dec. 21, 1995)), which entered into force on November 18, 2002. For the status of signatures, ratifications, and accessions, see the OHCHR Web site, <http://www.ohchr.org/english/bodies/ratification/11.htm> (last visited Nov. 28, 2007). The United States (and Somalia) has signed but not ratified the CRC; it insisted that ratification of the two CRC Protocols on sex trafficking and on child soldiers (see below) not be considered a legal assumption by the United States of CRC obligations.⁷ Both Protocols permit CRC signatories to sign and ratify the Protocols without having ratified the CRC, under article 13(1) in each document. Inclusion of such a provision has been characterized as an attempt to obtain U.S. support for the Protocol; the United States ratified the Protocols on December 23, 2002. See Cris R. Revaz, *The Optional Protocols to the UN Convention on the Rights of the Child on Sex Trafficking and Child Soldiers*, 9 HUMAN RIGHTS BRIEF 13 (Fall 2001). For an in-depth analysis of Part I of the Convention (articles 1-41), see SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (The Hague/Boston/London, Martinus Nijhoff Publishers, 1999); see also *Convention on the Rights of the Child*, AMNESTY INTERNATIONAL USA, http://www.amnestyusa.org/Children/Convention_on_the_Rights_of_the_Child/page.do?id=1101777&n1=3&n2=78&n3=1272 (last visited July 24, 2007).

⁸ VAN BUEREN, *supra* note 3, at 16, 101.

⁹ *Id.* at 15. Van Bueren calls these "the four 'P's"; other scholars refer to the Convention as being concerned with the three types of children's rights, called the three 'P's: provision, protection, and participation. See, for example, Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study* [Special Issue on Legal Representation of Children], 6 NEVADA LAW JOURNAL 971 (Spring 2006).

¹⁰ VAN BUEREN, *supra* note 3, at 16; Ursula Kilkelly, *The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child*, HUMAN RIGHTS QUARTERLY 311 (2001), available at http://muse.jhu.edu/journals/human_rights_quarterly/v023/23.2kilkelly.pdf.

¹¹ Kilkelly, *supra* note 10.

¹² The Sex Trafficking Protocol comprises a preamble and 17 articles. G.A. Res. A/RES/54/263 of 25 May 2000. It entered into force on January 18, 2002. For an online text, see the OHCHR Web site, <http://www.ohchr.org/english/law/crc-sale.htm> (last visited Nov. 28, 2007). The status of ratifications and reservations to the STP is available via hyperlinks on the same Web site.

the problem of sex trafficking, one among many purposes for which children are bought and sold, including, in addition, forced labor, adoption, participation in armed conflicts, marriage, and organ trade. The Preamble refers to achieving “the purposes of the CRC” and to the need for States Parties to implement specific provisions, among them CRC articles 34 and 35 on broad protections against child trafficking, sexual exploitation, and abuse. The Preamble also reflects CRC language in regard to protecting children from economic exploitation and performance of hazardous or harmful work.¹³ In addition, it recognizes “that a number of particularly vulnerable groups, including girl children, are at greater risk of sexual exploitation” and are disproportionately represented among the sexually exploited, and expresses concern over “the growing availability of child pornography on the Internet and other evolving technologies.” The STP defines and prohibits the sale of children, child prostitution, and child pornography; obliges States Parties to make certain acts punishable under their criminal law; sets forth the bases for States Parties to assert jurisdiction over actionable practices, and strengthens their ability to pursue extradition of offenders. The STP also provides for protection of and assistance to the victimized children in the criminal justice process, the best interests of the child being the guiding principle in the children’s judicial treatment.¹⁴ For purposes of prevention and redress of offenses, the victims must have access to procedures to seek compensation for damages from those legally responsible (article 9(4)). The STP also has provisions on strengthening international cooperation in regard to sex trafficking involving children and on reporting requirements for States Parties (article 12).

The Child Soldiers Protocol¹⁵ reaffirms in its Preamble that “the rights of children require special protection,” notes “the harmful and widespread impact of armed conflict on children,” and condemns their being targeted in such situations. It also refers to inclusion as a war crime in the Rome Statute of the International Criminal Court “the conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflicts.” The Preamble takes note of the definition of a child in article 1 of the CRC and expresses the conviction that raising the age of possible recruitment will contribute effectively to implementing the principle of the best interests of the child as a primary consideration in all actions concerning children.¹⁶ The Child Soldiers Protocol extends the minimum age requirement for direct participation in armed conflict and conscription to eighteen (articles 1 and 2, respectively) and forbids rebel or other non-governmental armed forces “under any circumstances,” to recruit or to use in hostilities persons under that age (article 4). It does not prescribe the age eighteen minimum for voluntary recruitment, but requires States Parties to raise the minimum age for it from fifteen (as set out in article 38, paragraph 3, of the CRC; i.e., to sixteen years of age) and to deposit a binding declaration setting forth the minimum age permitted for voluntary recruitment and describing safeguards adopted to ensure voluntariness (article 3(1-3), in part).¹⁷ The Child Soldiers Protocol requires States Parties to take “all feasible measures to ensure” the demobilization or release from service of children recruited into armed conflict or used in hostilities and, “when necessary,” to accord “all appropriate assistance” for the children’s rehabilitation and social reintegration (article 6(1) and (3)).

¹³ Revaz, *supra* note 7.

¹⁴ *Id.*

¹⁵ The Child Soldiers Protocol, comprising a Preamble and 13 articles, entered into force on February 12, 2002. G.A. Res. A/RES/54/263 of 25 May 2000. For an online text, *see* the OHCHR Web site, <http://www.ohchr.org/english/law/crc-conflict.htm>

(last visited July 23, 2007). The status of ratifications and reservations to the Child Soldiers Protocol is available via hyperlinks in the left column of that same Web site.

¹⁶ *Id.*

¹⁷ According to article 3(5), “the requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child.” *See also* Revaz, *supra* note 7.

III. Regional Documentation

A. African Charter on the Rights and Welfare of the Child 1990¹⁸

The African Charter on the Rights and Welfare of the Child (ACRWC), the first regional treaty on children's rights, builds on the 1979 Declaration on the Rights and Welfare of the African Child,¹⁹ but most of its provisions are modeled after those of the CRC. "The main difference lies in the existence of provisions concerning children's duties [in article 31], in line with the African Human Rights Charter" (*see below*).²⁰ The Preamble states that "the child occupies a unique and privileged position in the African society" and requires legal protection as well as "particular care with regard to health, physical, mental, moral and social development." A child is defined as "every human being below the age of 18 years" (article 2). The ACRWC sets forth the principles of non-discrimination and the best interests of the child and also provides that children have an inherent right to life, protected by law. The death sentence is not to be applied to crimes committed by children (articles 3-5). Children have a right to a name and nationality as well as to freedom of expression, association and peaceful assembly; thought, religion, and conscience; privacy; education; and rest and leisure (articles 6-12).²¹ Special measures of protection are to be taken for handicapped children and children should enjoy physical, mental, and spiritual health (articles 13-14). Children should also be protected against all forms of economic exploitation and from performing work likely to be hazardous (article 15) and against all forms of torture, maltreatment, and abuse (article 16); harmful social and cultural practices (article 21); all forms of sexual exploitation or abuse (article 27); the use of narcotics and illicit drugs (article 28); and abduction, sale, trafficking, and use in begging (article 29).

B. European Convention on the Exercise of Children's Rights 1996

The European Convention on the Exercise of Children's Rights (ECECR) stresses in the Preamble the aim of promoting the rights and "best interests" of children.²² To that end, it states that

¹⁸ The African Charter on the Rights and Welfare of the Child, with a Preamble and 48 articles, was adopted on July 11, 1990, and entered into force on November 29, 1999. OAU Doc. CAB/LEG/24.9/49 (1990). For an online text, *see* the African Union Web site,

http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf (last visited July 20, 2007) (unofficial source). For a list of signatures, ratifications, and accessions, *see* the African Union Web site,

<http://www.africa-union.org/root/AU/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf> (last visited July 30, 2007).

¹⁹ VAN BUEREN, *supra* note 3, at 24-25 and n.171. For an online text, *see* Organization of African Unity (OAU), Declaration on the Rights and Welfare of the African Child, AHG/St. 4 (XVI) Rev. 1 1979, DECLARATION AND RESOLUTIONS ADOPTED BY THE SIXTEENTH ORDINARY SESSION OF THE ASSEMBLY OF HEADS OF STATE AND GOVERNMENT (July 17-20, 1979), <http://www.africa-union.org/root/au/Documents/Decisions/hog/pHoGAssembly1979.pdf> (last visited July 24, 2007).

²⁰ *International Norms and Standards Relating to Disability*, UNITED NATIONS ENABLE, <http://www.un.org/esa/socdev/enable/comp303.htm> (last visited July 25, 2007). VAN BUEREN, *supra* note 3, at 24-25, notes "the high risk of conditionality" of the concept of children's responsibilities set forth in the two Charters and criticizes the responsibility "to respect parents and elders at all times" as being "too unquestioning and general." She adds, "[w]here family members are abusing or exploiting children, to maintain that children are obliged to respect the abuser is a dangerous precedent."

²¹ Article 11 on education is the longest article in the ACRWC. It also provides, among other measures, that States Parties are to in particular to provide free and compulsory basic education (art. 11(3))

²² The European Convention on the Exercise of Children's Rights, C. E.T.S. No. 160, has a Preamble and 26 articles. It was opened for signature on January 25, 1996, and entered into force on July 1, 2000. For an online text, *see* the COE Web site, <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=160&CL=ENG>, and, for an explanatory report,

children should have the opportunity to exercise their rights, particularly in family proceedings affecting them; they should be provided with relevant information (defined as information appropriate to the child's age and understanding, given to enable the child to exercise his or her rights fully, unless contrary to the welfare of the child) and their views should be given "due weight"; and, "where necessary," States as well as parents, should engage in the protection and promotion of those rights and best interests (Preamble). The ECECR applies to children who have not reached the age of eighteen (article 1(1)). The ECECR procedural rights include the child's right to be informed and to express his or her views in proceedings; the right to apply for the appointment of a special representative; and "other possible procedural rights," e.g., the right to apply to be assisted by an appropriate person of their choice to help them express their views, the right to appoint their own representative, and the right to exercise some or all of the rights of parties to the proceedings (articles 3-5).

IV. Specific Provisions in Other International and Regional Instruments

A. Universal Declaration of Human Rights 1948²³

The Universal Declaration of Human Rights contains two articles that specifically refer to children. Article 25(2) states: "[m]otherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock shall enjoy the same social protection."²⁴ Article 26 calls for the right to education for all, and deals both with access to and the aims of education. Thus, education is to be free, at least in the elementary and fundamental stages; elementary education is to be compulsory; and education should be "directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms." Nevertheless, "[p]arents have a prior right to choose the kind of education that shall be given to their children."

B. International Covenant on Economic, Social and Cultural Rights 1966²⁵

The Preamble to the International Covenant on Economic, Social and Cultural Rights (ICESCR), insofar as it recognizes the indivisibility of human rights, is applicable to children's rights as well. Thus, it notes that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and that "these rights derive from the inherent dignity of the human person."²⁶ Specific references to children are found in articles 10 and 12. Under article 10, "[t]he widest possible protection and assistance should be

<http://conventions.coe.int/Treaty/EN/Reports/HTML/160.htm> (both last visited July 27, 2007). See also Kilkelly, *supra* note 10; Ursula Kilkelly, *Children's Rights: a European Perspective*, 4:2 JUDICIAL STUDIES INSTITUTE JOURNAL 68 (2004), available at http://www.jsijournal.ie/html/Volume%204%20No.%202%204%5B2%5D_Kilkelly_Children's%20Rights%20A%20European%20erspective.pdf; and SANDY RUXTON, WHAT ABOUT US? CHILDREN'S RIGHTS IN THE EUROPEAN UNION: NEXT STEPS (Nov. 2005), available at http://www.crin.org/docs/Ruxton%20Report_WhatAboutUs.pdf. ["CRIN" is the Child Rights Information Network.]

²³ The Universal Declaration of Human Rights, with a Preamble and 30 articles, was adopted by the U.N. General Assembly on December 10, 1948. G.A. Res. 217 A (III), U.N. Doc. A/810 at 71 (Dec. 10, 1948). For an online text, see the United Nations Web site, <http://www.un.org/Overview/rights.html> (unofficial source) (last visited July 24, 2007).

²⁴ This gives no recognition, however, to the role of fatherhood, and the "twinning of the exclusive role of women and children continues to resound throughout international law." VAN BUEREN, *supra* note 3, at 18.

²⁵ The International Covenant on Economic, Social and Cultural Rights, with a Preamble and 31 articles, was adopted by the U.N. General Assembly on December 16, 1996, and entered into force on January 3, 1976. G.A. Res. 2200A (XXI), 21 U.N.GAOR, 21st Sess., Supp. (No. 16) at 49, U.N. Doc. A/6316 (Dec. 16, 1966), 993 U.N.T.S. 3. For an online text, see the OHCHR Web site, <http://www.ohchr.org/english/law/cescr.htm> (last visited July 23, 2007).

²⁶ *Id.* See also VAN BUEREN, *supra* note 3, at 19.

accorded to the family, ... particularly for its establishment and while it is responsible for the care and education of dependent children” (item 1, in part). It further stipulates that “special measures of protection and assistance” should be taken on behalf of the young without any discrimination; that they should be protected from economic and social exploitation; that employing them in morally or medically harmful or dangerous work or in work likely to hamper their normal development should be punishable by law; and that age limits should be set below which the paid employment of child labor is prohibited and punishable by law (item 3). Article 12 addresses the right of all to “enjoyment of the highest attainable standard of physical and mental health,” to be fully realized by, among other measures, States Parties’ providing “for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child” (item 2(a)). The ICESCR also provides for the right of everyone to education (article 13(1)) and stipulates “primary education shall be compulsory and available free to all” (article 13(2a)).

C. International Covenant on Civil and Political Rights 1966²⁷

The International Covenant on Civil and Political Rights (ICCPR) contains general provisions from which children are entitled to benefit as well as certain specific provisions on safeguards for children in the administration of justice and as members of a family unit. Thus, article 2 obliges States Parties “to respect and to ensure to all individuals within its territory and subject to its jurisdiction” the rights recognized in the ICCPR, “without distinction of any kind;” to adopt laws to give effect to those rights; and to provide effective remedies where there are violations. Article 14(1) incorporates a more specific reference to rights of the young: “any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.” Furthermore, criminal proceedings “should take account of [juveniles’] age and the desirability of promoting their rehabilitation” (article 14(4)) and the penal system should segregate juvenile offenders from adults and accord them treatment “appropriate to their age and legal status” (article 10(3)).²⁸ Like the ICESCR, the ICCPR recognizes the family as entitled to societal and state protection (article 23(1)), and so States Parties are to respect the liberty of parents to ensure their children’s religious and moral education in conformity with their own convictions (article 18(4)). If a marriage is dissolved, provision must be made for the protection of any children (article 23(4)). Article 24 of the ICCPR is specifically devoted to children. It stipulates that “every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.” It further prescribes that every child must be registered immediately after birth and have a name and that every child has the right to acquire a nationality.

D. Convention on the Rights of Persons with Disabilities 2006²⁹

²⁷ The International Covenant on Civil and Political Rights, with a Preamble and 53 articles, was adopted by the U.N. General Assembly on December 16, 1966, and entered into force on March 23, 1976. G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess. Supp. (No. 16) at 52, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171. For an online text, *see* the OHCHR Web site, <http://www.ohchr.org/english/law/ccpr.htm> (last visited July 26, 2007).

²⁸ VAN BUEREN, *supra* note 3, at 20. She notes that the Covenant prohibits imposition of the death penalty for crimes committed by persons under the age of 18 as the result of an initiative from Japan, citing to U.N. Doc. A/C.3/L 650.

²⁹ The Convention on the Rights of Persons with Disabilities has a Preamble and 50 articles. It was adopted by the U.N. General Assembly on December 13, 2006, and was opened for signature on March 30, 2007. G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Jan. 24, 2007). For an online text, *see* GENERAL ASSEMBLY, 1 RESOLUTIONS AND DECISIONS ADOPTED BY THE GENERAL ASSEMBLY DURING ITS SIXTY-FIRST SESSION: VOLUME I, RESOLUTIONS, 12 SEPTEMBER – 22 DECEMBER 2006 65-80 (New York, United Nations, 2007) (Supplement No. 49 (A/61/49), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N07/295/65/PDF/N0729565.pdf?OpenElement>), or the OHCHR Web site, <http://www.ohchr.org/Documents/Publications/newCoreTreatiesen.pdf> (last visited Dec. 2, 2007). The Optional Protocol to the

The Convention on the Rights of Persons with Disabilities contains a number of specific provisions on children. Aside from recalling various key human rights conventions, including the CRC, the Preamble specifically recognizes that “women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation” (q). It further states, “children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children,” recalling obligations of States Parties to the CRC (r). Among the general principles of the Convention is “respect for the evolving capacities of children with disabilities” and for the children’s right to preserve their identities (article 3(h)). It is a general obligation of the States Parties to “closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations” in developing and implementing legislation and policies to execute the Convention as well as in other decision-making processes on issues concerning the disabled (article 4, item 3).

Under article 6, item 1, of the Convention, States Parties, recognizing that disabled women and girls are subject to multiple discrimination, are to take measures to ensure that they fully and equally enjoy all human rights and fundamental freedoms. Article 7, which is entirely devoted to children with disabilities, prescribes that States Parties are to take all necessary measures to ensure the children’s full enjoyment “of all human rights and fundamental freedoms on an equal basis with other children,” and the “best interests of the child” are to be “a primary consideration” “in all actions concerning children.” In addition, States Parties must ensure that disabled children “have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.”

The Convention also stipulates that States Parties must “take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of ... age-sensitive assistance and support for persons with disabilities and their families and caregivers” as well as protection services that are age-sensitive (article 16, item 2). Recovery from abuse and reintegration in society are also to take into account age-specific needs (article 16, item 4). In addition, States Parties should adopt effective legislation and policies focused on children to ensure identification, investigation, and, where appropriate, prosecution of acts of exploitation, violence, and abuse against disabled children (article 16, item 5). The Convention provides that children with disabilities are to be registered right after birth and “have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents” (article 18, item 2).

States Parties are obliged to take measures to ensure that disabled children retain their fertility on an equal basis with others (article 23, item 1 (c)); that their best interests are paramount in such matters as guardianship, wardship, trusteeship, and adoption; and that they have equal rights in family life. To realize the latter, “and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families” (article 23, items 2-3). States Parties must further

Convention, adopted on the same date, mainly refers to procedural matters and does not refer to children’s rights per se. According to the UN ENABLE Web site, the Convention had a record number of signatories (82) for a U.N. Convention on its opening day and is also “the first human rights convention to be open for signature by regional integration organizations.” *Convention on the Rights of Persons with Disabilities*, UN ENABLE, <http://www.un.org/disabilities/default.asp?navid=8&pid=150> (last visited Dec. 3, 2007). As of December 3, 2007, ten countries had ratified the Convention; the total number required for its entry into force is 20. *DISABILITY: Three More Countries Ratify Rights Convention*, CRIN Web site, Dec. 3, 2007, available at <http://www.crin.org/resources/infodetail.asp?id=15727>. The ten countries include Bangladesh, Croatia, Cuba, Gabon, Hungary, India, Jamaica, Panama, South Africa, and Spain. *U.N. Convention on the Rights of Persons with Disabilities*, CRIN Web site, <http://www.crin.org/Law/instrument.asp?InstID=1048> (last visited Dec. 3, 2007).

ensure that children are not separated from their parents against their will, except when it is determined to be in their best interest. However, “[i]n no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents” (article 23, item 4). The Convention stipulates that, to realize the right of the disabled to an education, States Parties must ensure that “children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability” and that, in particular, they deliver education to children “who are blind, deaf or deafblind ... in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development” (article 24, items 2 (a) and 3 (c)). States Parties are to provide health services for the disabled that include early identification and intervention and those “designed to minimize and prevent further disabilities, including among children” (article 25 (b)). States Parties must also take appropriate measures to ensure that women and girls with disabilities, in particular, have access to social protection and poverty reduction programs (article 28, item 2 (b)). Disabled children must also be ensured “equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system” (article 30, item 5 (d)).

E. European Convention on Human Rights 1950³⁰

The Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (ECHR), the first international human rights agreement to establish supervisory and enforcement machinery, obliges States Parties to “secure everyone within their jurisdiction” the rights and freedoms it sets forth (article 1). The ECHR uses throughout the term “everyone” (or, where appropriate, “no one”); as a result, children have successfully brought suit either on their own behalf or as co-applicants with their parents.³¹ Specific references to the young are found in two articles of the ECHR and concern legal proceedings. Article 5(1)(d), on the lawful procedures for depriving a minor of his or her liberty, permits the lawful detention of a minor for the purpose of educational supervision or for bringing him before the competent legal authority. Article 6(1) stipulates that everyone is entitled to a fair and public hearing and that judgment will be pronounced publicly, but the hearing may be held in private when required by the interests of juveniles or the protection of the parties’ private life. Protocol No. 7 to the ECHR provides that while spouses enjoy equality of rights and responsibilities in their relations with their children, this does not prevent States “from taking such measures as are necessary in the interests of the children” (article 5).³²

F. African Charter on Human and People's Rights 1981 (Banjul Charter) and Protocol³³

The African Charter on Human and People's Rights (hereinafter ACHPR) (also known as the Banjul Charter) encompasses civil and political as well as economic, social, and cultural rights. In regard to children, it emphasizes the rights of the family and of duties towards the family rather than the rights

³⁰ The Convention for the Protection of Human Rights and Fundamental Freedoms, C.E.T.S. No. 005, with a Preamble and 59 articles, was adopted on November 4, 1950, and entered into force on September 3, 1953. There have been 11 Protocols to the Convention, but as from November 1, 1998, Protocol 9 was repealed and Protocol 10 lost its purpose. For an online text as amended by Protocol 11 (E.T.S. No. 155, in force November 1, 1998), see the Council of Europe Web site, <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> (last visited July 26, 2007). Other documents, such as the status of ratifications and an explanatory report, are also available through links provided on the same Web site, at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG> (last visited July 26, 2007).

³¹ VAN BUEREN, *supra* note 3, at 22. She mentions several cases in fn. 153 and discusses them elsewhere in the text.

³² *Id.* at 22, n.154.

³³ The Banjul Charter, in a Preamble and 68 articles, was adopted June 27, 1981, and entered into force October 21, 1986. OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). For an online text, see the African Commission on Human and People's Rights Web site, http://www.achpr.org/english/info/charter_en.html (unofficial source) (last visited July 26, 2007).

and duties of individual family members, which can be viewed as a reflection of African customary law. Thus, the ACHPR makes it incumbent on the individual “[t]o preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need” (article 29(1)). The ACHPR does not set forth any additional specific rights for children, relying instead on existing international protections regarding children’s rights³⁴ (in article 18(3)). As in other international human rights documents, however, rights in the ACHPR are mentioned in connection with “the individual” or “every individual.”

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa³⁵ makes numerous specific references to children and to girls in particular. The Preamble calls for the condemnation and elimination of “any practice that hinders or endangers the normal growth and affects the physical, emotional and psychological development of women and girls.” States Parties are to enact and implement legislative measures to prohibit all forms of such harmful practices (article 2(1)(b)); protect women and girls against rape and all other forms of violence, including trafficking; and “ensure that in times of conflict and/or war, such acts are considered war crimes and are punished as such” (article 4(c) and (d)). States Parties should also condemn harmful practices such as medicalization of female genital mutilation and scarification that affect the fundamental human rights of women and girls and are contrary to recognized international standards, and take measures against them, such as rehabilitation of the victims and granting of asylum to those at risk (article 6(b-d)). States Parties should afford effective protection to women and children in emergency and conflict situations (article 11(4)) as well. In furtherance of the right to education and training, “all appropriate measures” should be taken to eliminate discrimination against women and girls, with specific positive action to be taken to promote girls’ education and training “at all levels and in all disciplines” as well as their retention in schools and other training institutions (article 12).

G. American Convention on Human Rights (Pact of San José, Costa Rica)³⁶

The American Convention on Human Rights (ACHR) obliges States Parties to respect the rights and freedoms recognized in its provisions and “to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. The term “person” used in the ACHR means “every human being” (article 1). Thus, every person has the right to a legal personality, to life, to humane treatment, to personal liberty, and to a fair trial, among many other rights set forth. However, parents or guardians “have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions” (article 12(4)), and “public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence,” notwithstanding the right to freedom of thought and expression (article 13(4)). The ACHR stipulates that provision must be made for the protection of children “solely on the basis of their own best interests” when a marriage is dissolved and that equal rights must be recognized by law for children born in and out of wedlock (article 17(4) & (5)). Everyone also has the right to a given name and to the surnames of one

³⁴ VAN BUEREN, *supra* note 3, at 24.

³⁵ The Protocol was adopted by the African Union on July 11, 2003, and entered into force on November 25, 2005. For an online text, *see* the Human Rights Education Associates Web site, http://www.hrea.org/erc/Library/display.php?doc_id=806&category_id=31&category_type=3 (last visited July 25, 2007).

³⁶ The American Convention on Human Rights, with a Preamble and 82 articles, was adopted on November 22, 1969, in San José, Costa Rica, and entered into force on July 18, 1978. OAS, Treaty Series, No. 36; U.N. Registration 08/27/79 No. 17955. For an online text of the Convention, *see* Organization of American States (OAS) Web site, <http://www.oas.org/juridico/english/treaties/b-32.html> (unofficial source) (last visited July 26, 2007); for the status of ratifications, *see* OAS Web site <http://www.oas.org/juridico/english/Sigs/b-32.html> (last visited July 26, 2007).

or both parents (article 18). The ACHR has a separate provision on the rights of the child: “[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state (article 19).” This article is listed among those that may not be suspended in time of war, public danger, or other emergency (article 27(2)).

H. Convention on the Elimination of all Forms of Discrimination against Women 1979³⁷

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has been described as an international bill of rights for women. It defines what constitutes discrimination against women and establishes an agenda for States Parties to act to end it.³⁸ The Preamble, in invoking the Universal Declaration of Human Rights, notes its affirmation of the principle of the inadmissibility of discrimination and its proclamation “that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex.” This kind of statement forms the backdrop for certain rights set forth in CEDAW, even though girls specifically are mentioned only once: the obligation of States Parties to ensure the reduction of female student drop-out rates and the organization of programs for girls and women who have left school prematurely (article 10, in part). States Parties are also to take appropriate steps “to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women” (article 5(a)). CEDAW refers to the interests of children being paramount in relation to the common responsibility of men and women for their children’s upbringing and development (article 5(b)) as well as in regard to States Parties’ ensuring the same rights and responsibilities between men and women as parents in matters relating to their children and in matters of guardianship, wardship, trusteeship, and adoption of children (article 16 (1)(d) and (f)). CEDAW also proscribes betrothal and marriage of children and calls for action to specify a minimum age for marriage and to make marriage registration compulsory (article 16(2)).

V. Child Protection and Placement Agreements

A. Hague Convention on Jurisdiction, etc., for the Protection of Children 1996³⁹

The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (1996

³⁷ CEDAW, comprising a Preamble and 30 articles, was adopted by the U.N. General Assembly on December 18, 1979, and entered into force on September 3, 1981. G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46. For an online text, see the U.N. Division of the Advancement of Women Web site,

<http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article1> (last visited July 27, 2007). A list of the status of signatures, ratifications, and accessions is available on the same Web site, at

<http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited July 27, 2007).

³⁸ *Convention on the Elimination of all Forms of Discrimination Against Women: Text of the Convention*, U.N. Division of the Advancement of Women: Department of Social and Economic Affairs Web site, <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (last visited July 27, 2007).

³⁹ The 1996 Convention was adopted on October 19, 1996, and entered into force January 1, 2002. 35 I.L.M. 1391, 1396 (1996). It comprises a brief Preamble and 63 articles. For an online text, see the Hague Conference on Private International Law (HCCH) Web site, http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=70 (last visited July 27, 2007). See also *How Children's Voices Are Heard in Protective Proceedings*, REPRESENTING CHILDREN WORLDWIDE (RCW) (2005), available at <http://www.law.yale.edu/rcw/> (the study covers 250 jurisdictions), and Gloria Folger DeHart, *The Relationship Between the 1980 Child Abduction Convention and the 1996 Protection Convention*, 33:1 JOURNAL OF INTERNATIONAL LAW AND POLITICS 83 (2000), available at <http://www3.law.nyu.edu/journals/jilp/issues/33/pdf/33f.pdf>. The entire issue of the JILP is devoted to the 1980 Convention, marking its twentieth anniversary.

Convention) covers a wide range of civil child protection measures, “from orders concerning parental responsibility and contact to public measures of protection or care, and from matters of representation to the protection of children’s property.”⁴⁰ The Preamble confirms “that the best interests of the child are to be a primary consideration.” Article 2 stipulates that the Convention is applicable “to children from the moment of their birth until they reach the age of 18 years.” The 1996 Convention provides a structure to resolve disputes over contact and custody issues when parents are separated and living in different countries and has uniform rules to determine which country’s authorities are competent to take the necessary protection measures. Provisions on recognition and enforcement ensure that primacy be given to decisions taken by the authorities of the country where the child has his or her habitual residence, reinforcing provisions of the 1980 Hague Convention (*see below*). There are also provisions on cooperation procedures to better protect unaccompanied minors who cross borders and are in vulnerable situations and children placed in alternative care across frontiers. The latter includes arrangements such as foster care and the Islamic law institution of *Kafala*, a functional equivalent of adoption falling outside the scope of the 1993 Intercountry Adoption Convention (*see below*).⁴¹

B. Hague Convention on Jurisdiction, etc., Relating to Adoptions 1965⁴²

The Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions (1965 Convention), the first Hague Convention on the issue, apparently has no contracting parties at present. The Convention is applicable “to all international adoptions, not only where a child originated from another country but also to adoptions where the only international aspect is the foreign nationality of the child.”⁴³ It has been characterized as incorporating four important provisions. The authorities are not to grant an adoption “unless it will be in the interest of the child.” Before granting an adoption, the authorities should conduct “a thorough inquiry” relating to the adopter(s), the child, and the child’s family. The inquiry should be carried out “as far as possible ... in cooperation with public or private organizations qualified in the field of inter-country adoptions” and with the help of specially trained or qualified social workers (article 6). Furthermore, the national law of the child is to be applied in decisions pertaining to consent and consultation issues, rather than that of the adopter, family, or spouse (article 5, paragraph 1).⁴⁴ The 1965 Convention also allows States Parties to make a declaration at the time of signature, ratification, or accession but revocable at any time, specifying provisions of domestic law prohibiting adoptions founded upon certain specified grounds, e.g., the existence of a previous adoption of the child or the age of the adopter and that of the child (article 13).

C. European Convention on the Adoption of Children 1967⁴⁵

⁴⁰ *The Hague Convention of 1996 on the International Protection of Children*, HCCH Web site, <http://hcch.e-vision.nl/upload/outline34e.pdf> (last visited July 27, 2007). The article summarizes the Convention’s contents.

⁴¹ *Id.*

⁴² The Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, Hague No. 13, with a brief Preamble and 24 articles, was concluded on November 15, 1965, and entered into force on October 23, 1978. In accordance with its article 23, it will cease to have effect on October 23, 2008. For an online text, *see* the HCCH Web site, http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=75 (last visited July 27, 2007).

⁴³ VAN BUEREN, *supra* note 3, at 98.

⁴⁴ *Id.*

⁴⁵ The European Convention on the Adoption of Children was opened for signature on April 24, 1967, and entered into force on April 26, 1968. C.E.T.S. No. 058. It comprises a Preamble and 28 articles. For an online text, *see* the COE Web site, <http://conventions.coe.int/Treaty/en/Treaties/Html/058.htm> (last visited July 27, 2007). Links to a chart of signatures and ratifications and other information are available via the same Web site, at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=058&CL=ENG> (last visited July 27, 2007).

The European Convention on the Adoption of Children (ECAC) applies to the legal adoption of children under the age of eighteen, not currently or previously married, and not deemed in law to have come of age earlier (article 3). Its provisions are only minimum standards; States Parties may adopt provisions more favorable to the adopted child (article 16).⁴⁶ The ECAC ensures that national child protection laws apply not only to adoptions of children from the States Parties, but also to those of children from other States. The essential provisions are on adoption practices that each Party should undertake to incorporate in national legislation. Under them, adoption must be granted by a judicial or administrative authority in order to be valid (article 7) and the competent authority should not grant an adoption unless it “will be in the interest of the child” (article 8(1)). The authority is to make appropriate inquiries into such matters as the child’s views with respect to the adoption and the mutual suitability of the child and the adopter (article 9). After the adoption, the child should generally be able to acquire the adopter’s surname and be treated as having rights of succession (article 10 (3) and (5)). States Parties should prohibit any improper financial advantage arising from a child being given up for adoption (article 15). Four supplementary provisions, requiring only the States’ Parties’ consideration, stipulate, inter alia, that provision be made to enable adoption to be completed without the adopter’s identity being disclosed to the child’s family (article 20(1)) and to require or permit adoption proceedings to take place in camera (article 20(2)). Children are not accorded the right to know the identity of their former parents.⁴⁷

D. Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors 1984⁴⁸

The Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors (IAC) applies to the adoption of minors in the form of full adoption, adoptive legitimation, and “other similar institutions” when the domicile of the adopter and the habitual residence of the adoptee are in different States Parties (article 1). Such adoptions are irrevocable (article 12). A State Party may declare that the IAC also applies to “any other form of international adoption of minors” (article 2); revocation of such adoptions will be governed by the law of the adoptee’s habitual residence at the time of adoption (article 12). The IAC states that the law of the minor’s habitual residence also governs capacity, consent, and other requirements for adoption, as well as adoption procedures and formalities (article 3). The IAC protects the identity of the birth parents, with certain exceptions regarding medical data (article 7). The adoptee and the adopter (and the adopter’s family) generally have the same rights of succession as those of legitimate family members (article 11). In cases where conversion of a simple adoption into full adoption, adoptive legitimation, or similar institutions is permitted, the adoptee’s consent is required if he or she is over fourteen years of age (article 13, paragraph 2)). If an adoption is annulled, the minor’s interests are to be protected (article 14). Although the IAC terms and the laws applicable under it are to be interpreted “consistently and in favor of the validity of the adoption and the best interests of the adoptee” (article 19), a State Party’s authorities may refuse to apply those laws when they are “manifestly contrary to its public policy” (article 18).

E. Hague Convention on the Protection of Children in Intercountry Adoption 1993⁴⁹

⁴⁶ VAN BUEREN, *supra* note 3, at 99.

⁴⁷ *Summary of the Treaty*, the COE Web site, <http://conventions.coe.int/Treaty/en/Summaries/Html/058.htm> (last visited July 27, 2007); VAN BUEREN, *supra* note 3, at 99.

⁴⁸ The Inter-American Convention, in 29 articles, was adopted by the OAS Member States on May 24, 1984, and in force as of May 26, 1988. O.A.S.T.S. No. 62. For an online text of the Inter-American Convention, see the OAS Web site, <http://www.oas.org/juridico/english/sigs/b-48.html> (last visited July 30, 2007) (scroll to the end of the page for the hyperlink to the treaty text). The URL also lists the status of signatures and ratifications to the Convention.

⁴⁹ The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption, comprising a Preamble and 48 articles, was concluded on May 29, 1993, and entered into force on May 1, 1995. 32 I.L.M. 1134 (1993). For an online text, see the HCCH Web site,

The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (1993 Convention), has three stated aims: to establish safeguards to ensure that intercountry adoptions are in the best interest of the child and in accordance with the child's fundamental rights; to establish a system of safeguards to avoid abuses such as trafficking in children; and to secure recognition in States Parties of adoptions made in accordance with the Convention (article 1). The underlying principle of the 1993 Convention is that "although it is difficult to define the best interests of the child, the child's interests should always take priority over those of the prospective adopters," but the application of this principle has proved problematic.⁵⁰ The 1993 Convention asserts that authorities must ensure, taking into account the age and degree of maturity of the child, that he or she has been counseled and informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required; that consideration has been given to the child's wishes and opinions; that the child's consent to the adoption has been given freely, in the required legal form, and in writing; and that consent has not been induced by payment or compensation of any kind (article 4(d)). Information on the child's origin, in particular the identity of the parents as well as the medical history, should be preserved, but access by the child to that information is permitted only insofar as it is allowed by the law of the State where it is held (article 30). Personal data gathered or transmitted under the 1993 Convention's provisions is to be used "only for the purposes for which they were gathered or transmitted," without prejudice to article 30 (article 31).⁵¹

F. Hague Convention on the Civil Aspects of International Child Abduction 1980⁵²

The Hague Convention on the Civil Aspects of International Child Abduction (1980 Convention) governs issues related to parental kidnapping or the removal of children under the age of sixteen across international borders and involving the jurisdiction of different countries' courts. Its stated objectives are to secure the prompt return of children wrongfully removed to or retained in any contracting state and to ensure that the rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states (article 1). Removal or retention of a child is deemed wrongful if: a) it is in breach of custody rights attributed to a person, an institution, or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were exercised, or would have been but for the removal or retention (article 3, paragraph 1).

http://www.hcch.net/index_en.php?act=conventions.text&cid=69 (last visited July 27, 2007). See also Hans Van Loon, *Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 3 THE INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 463 (1995), available at http://www.iss-ssi.org/Resource_Centre/Tronc_CI/thevloon.pdf.

⁵⁰ VAN BUEREN, *supra* note 3, at 99-100.

⁵¹ *Id.* at 122 notes that the 1993 Convention's approach reinforces that taken in the IAC guaranteeing the secrecy of the adoption "where called for." She also refers to the non-binding 1986 Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally, which states: "[t]he need of a foster or an adopted child to know about his or her background should be recognised by persons responsible for the child's care unless this is contrary to the child's best interests."

⁵² The Hague Convention on the Civil Aspects of International Child Abduction, Hague No. 28, was adopted by the Hague Conference on Private International Law on October 25, 1980, and entered into force on December 1, 1983. T.I.A.S. No. 11,670, 1343 U.N.T.S. 89; 19 I.L.M. 1501 (1980). It has a brief Preamble and 45 articles. For an online text, see the HCCH Web site, http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=24 (last visited July 26, 2007) (unofficial source). For an online description of the Convention and links to other sites and information, see the U.S. Department of State Bureau of Consular Affairs Web site, http://travel.state.gov/family/abduction/hague_issues/hague_issues_578.html (last visited July 26, 2007). For a list of "Party Countries and Effective Dates with U.S.," see http://travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html (last visited July 26, 2007). See also Gloria Folger DeHart, *The Relationship Between the 1980 Child Abduction Convention and the 1996 Protection Convention*, 33:1 JOURNAL OF INTERNATIONAL LAW AND POLITICS 83 (2000), available at <http://www3.law.nyu.edu/journals/jilp/issues/33/pdf/33f.pdf>. The entire JILP issue is on the 1980 Convention.

G. The European Convention Concerning the Custody of Children 1980⁵³

The European Convention on the Recognition and Enforcement of Decisions Concerning the Custody of Children (the Luxembourg Convention) seeks to protect the rights of custody and access to children in the international context. It calls upon the central authorities designated by States Parties to provide “free, prompt, non-bureaucratic assistance” in determining the whereabouts and restoring custody of an improperly removed child.⁵⁴ They must also avoid prejudice to the interests of the child or of the applicant in restoring child custody, among other requirements. Like the 1980 Convention, the Luxembourg Convention defines a child as being under the age of sixteen (article 1(a)). Also, under both instruments, the right of action lies with the custody holder.⁵⁵ The Luxembourg Convention uses the term “improper removal” to refer to “the removal of a child across an international frontier in breach of a decision relating to his custody” given in a State Party and enforceable in that State (article 1(d)), in contrast to the 1980 Convention’s term “wrongful removal or retention” of a child and the CRC’s term “the illicit transfer and non-return of children abroad” (article 11).⁵⁶

H. Worst Forms of Child Labour Convention 1999⁵⁷

The Worst Forms of Child Labour Convention (WFCLC) refers in the Preamble to the need to adopt new instruments for the prohibition and elimination of the worst forms of child labour, “to complement the Convention and the Recommendation Concerning Minimum Age for Admission to Employment, 1973, which remain fundamental instruments on child labour.” For the purposes of the WFCLC, the term “child” applies to all persons under the age of eighteen (article 2). The “worst forms of child labour” comprise: (a) all forms of slavery or practices similar to it, such as the sale and trafficking of children and forced labor (including forced recruitment for armed conflict); (b) the use, procuring, or offering of a child for prostitution or for pornography or pornographic performances; (c) the use, procuring, or offering of a child for illicit activities such as drug trafficking; and (d) work that is likely to harm children’s health, safety, or morals (article 3). Each State Party is to adopt measures to: prevent the engagement of children in the worst forms of child labor; to provide direct assistance for the removal of children from such labor and for their rehabilitation and social integration; to ensure access to free basic education and, wherever possible and appropriate, to vocational training for all children removed from the worst forms of child labor; to identify and reach out to children at special risk; and to take account of the special situation of girls (article 7(2)).

E. International Convention for the Protection of All Persons from Forced Disappearance 2006⁵⁸

⁵³ The European Convention on the Recognition and Enforcement of Decisions Concerning the Custody of Children, comprising a Preamble and 30 articles, was concluded in Luxembourg on May 20, 1980. E.T.S. No. 105. For an online text, see the COE Web site, <http://conventions.coe.int/Treaty/EN/Treaties/Html/105.htm> (last visited July 30, 2007).

⁵⁴ DETRICK, *supra* note 7, at 208.

⁵⁵ This is because children are rarely in a position to initiate legal proceedings in situations of child abduction. VAN BUEREN, *supra* note 3, at 90-92.

⁵⁶ DETRICK, *supra* note 7, at 208-209.

⁵⁷ The Worst Forms of Child Labour Convention, in a Preamble and 16 articles, was adopted by the General Conference of the International Labour Organisation on June 17, 1999, and entered into force on November 19, 2000. For an online text, see the OHCHR Web site, <http://www.ohchr.org/english/law/childlabour.htm> (last visited July 30, 2007).

⁵⁸ The International Convention for the Protection of All Persons from Forced Disappearance has a Preamble and 45 articles. It was adopted on December 20, 2006. G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Jan. 24, 2007). For an online text, see 1 RESOLUTIONS AND DECISIONS ADOPTED BY THE GENERAL ASSEMBLY DURING ITS SIXTY-FIRST SESSION: VOLUME I, RESOLUTIONS, 12 SEPTEMBER – 22 DECEMBER 2006 *supra* note 29, at 408-418, or International Convention for the Protection of All Persons from Forced Disappearance, United Nations Treaty Collection database, *available at*

The International Convention for the Protection of All Persons from Forced Disappearance stipulates in general that “no one shall be subjected to enforced disappearance” and that “no exceptional circumstances whatsoever” may be invoked as a justification for it (article 1). “Enforced disappearance” is defined in article 2, for the purposes of the Convention, as

the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

The Convention prescribes that States Parties may establish aggravating circumstances, without prejudice to other criminal procedures, particularly when the commission of an enforced disappearance involves minors, among other categories of especially vulnerable persons (article 7, item 2 (b)).

Article 25 of the Convention focuses on the enforced disappearance of children. It provides for each State Party to take measures to prevent and punish under its criminal law the following acts:

1. (a) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;
- (b) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph (a) above.

States Parties are obliged to search for and identify the children referred to in item 1(a) above and to return them to their families “in accordance with legal procedures and applicable international agreements,” and to assist one another in taking such measures (items 2 and 3). To protect the best interests of such children as well as

their right to preserve, or to have re-established, their identity, including their nationality, name and family relations as recognized by law, States Parties which recognize a system of adoption or other form of placement of children shall have legal procedures in place to review the adoption or placement procedure, and, where appropriate, to annul any adoption or placement of children that originated in an enforced disappearance (item 4).

Article 25 further affirms that “in all cases, and in particular in all matters relating to this article, the best interests of the child shall be a primary consideration,” and that children capable of forming their own views have a right to express them freely, with the views being given due weight in accordance with the child's age and maturity (item 5).

VI. Other Initiatives

Among other developments regarding children's rights are an international call for action to end violence against children and a resolution adopted by the U.N. General Assembly on the establishment of a Human Rights Council.⁵⁹

http://untreaty.un.org/English/notpubl/IV_16_english.pdf (last visited Dec. 6, 2007).

⁵⁹ News Release, NGO Advisory Council for the UN Study on Violence Against Children, International Call for Action to End Violence Against Children: Establish a Special Representative to the UN Secretary General on Violence Against Children (May 18, 2007), Child Rights Information Network, *available at* <http://www.crin.org/resources/infodetail.asp?id=13401>; Resolution Adopted by the General Assembly [*without Reference to a*

Prepared by Wendy Zeldin
Senior Legal Research Analyst
July 2007