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# **PROTECTION OF CHILDREN** **UNDER DIFFERENT HUMAN** **RIGHTS INSTRUMENTS**

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## **INTRODUCTION**

One of the most vulnerable groups among persons with disabilities are children. They are more vulnerable to wars, exploitation, malnutrition, physical and psychological ill-treatment, trafficking etc., and rely on adults for the enforcement of their human rights mechanisms have taken a significant interest in the protection of disabled children.

It was not until the late nineteenth century that 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 labour 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, "the growth of children's rights in international and transnational law has been identified as a striking change in the post-war legal landscape."<sup>1</sup>

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<sup>1</sup> 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

## INTERNATIONAL DOCUMENTS

### DECLARATION OF THE RIGHTS OF THE CHILD, 1959

The U.N. Declaration of the Rights of the Child (DRC)<sup>2</sup> 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 voluntary organizations and local authorities to strive for the observance of children’s rights.<sup>3</sup>

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,” 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.”<sup>4</sup> Other principles are on protection against neglect, cruelty and exploitation, trafficking, underage labour, and discrimination.

### 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.<sup>5</sup> 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

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<sup>2</sup> 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

<sup>3</sup> Geraldine Van Bueren, *The International Law on the Rights of the Child* 10-11 (Dordrecht/Boston, Martinus Nijhoff Publishers, 1995)

<sup>4</sup> 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).

<sup>5</sup> 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. (No. 49) at 167, U.N. Doc. A/44/49 (1989); 28 I.L.M. 1448 (1989)

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.”

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.<sup>6</sup> 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.”<sup>7</sup>

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,<sup>8</sup> the rights of vulnerable children like refugees to special protection,<sup>9</sup> and indigenous children’s right to practice their culture.<sup>10</sup>

In some instances, this innovation takes the form of child-specific versions of existing rights, such as those in regard to freedom of expression<sup>11</sup> and the right to a fair trial.<sup>12</sup> 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).<sup>13</sup> 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).<sup>14</sup> 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

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<sup>6</sup> 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)

<sup>7</sup> Article 1

<sup>8</sup> Articles 7 and 8

<sup>9</sup> Articles 20 and 22

<sup>10</sup> Articles 8 and 30

<sup>11</sup> Article 13

<sup>12</sup> Article 40

<sup>13</sup> Article 12

<sup>14</sup> Articles 21 and 23

measures for victims of neglect, abuse, and exploitation.<sup>15</sup> Finally, the CRC sets forth an express ground obligating States Parties not to discriminate against children's enjoyment of CRC rights.<sup>16</sup> 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."

## **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 Protocol<sup>17</sup> (STP) addresses the problem of sex trafficking, one among many purposes for which children are bought and sold, including, in addition, forced labour, 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.

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

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<sup>15</sup> Articles 28(3) and 39

<sup>16</sup> 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)

<sup>17</sup> 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

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. For purposes of prevention and redress of offenses, the victims must have access to procedures to seek compensation for damages from those legally responsible.<sup>18</sup> The STP also has provisions on strengthening international cooperation in regard to sex trafficking involving children and on reporting requirements for States Parties.<sup>19</sup>

The Child Soldiers Protocol<sup>20</sup> 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.<sup>21</sup>

The Child Soldiers Protocol extends the minimum age requirement for direct participation in armed conflict and conscription to eighteen,<sup>22</sup> and forbids rebel or other non-governmental armed forces "under any circumstances," to recruit or to use in hostilities persons under that age.<sup>23</sup> 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

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<sup>18</sup> Article 9(4)

<sup>19</sup> Article 12

<sup>20</sup> 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.

<sup>21</sup> *Ibid.*

<sup>22</sup> Articles 1 and 2

<sup>23</sup> Article 4

minimum age permitted for voluntary recruitment and describing safeguards adopted to ensure voluntariness.<sup>24</sup> 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.<sup>25</sup>

## REGIONAL INSTRUMENT

### AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD, 1990

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,<sup>26</sup> but most of its provisions are modelled 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.” 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.”<sup>27</sup>

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.<sup>28</sup> 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.<sup>29</sup> Special measures of protection are to be taken for handicapped children and children should enjoy physical, mental,

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<sup>24</sup> Article 3(1-3)

<sup>25</sup> Article 6(1) and (3)

<sup>26</sup> 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)

<sup>27</sup> Article 2

<sup>28</sup> Articles 3-5

<sup>29</sup> Articles 6-12

and spiritual health.<sup>30</sup> Children should also be protected against all forms of economic exploitation and from performing work likely to be hazardous<sup>31</sup> and against all forms of torture, maltreatment, and abuse;<sup>32</sup> harmful social and cultural practices;<sup>33</sup> all forms of sexual exploitation or abuse;<sup>34</sup> the use of narcotics and illicit drugs;<sup>35</sup> and abduction, sale, trafficking, and use in begging.<sup>36</sup>

## **SPECIFIC PROVISIONS IN OTHER INTERNATIONAL AND REGIONAL INSTRUMENTS**

### **UNIVERSAL DECLARATION OF HUMAN RIGHTS, (UDHR), 1948**

The Universal Declaration of Human Rights contains two articles that specifically refer to children. Article 25(2) states: “motherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock shall enjoy the same social protection.” 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, “parents have a prior right to choose the kind of education that shall be given to their children.”

### **INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 1966**

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<sup>30</sup> Articles 13-14

<sup>31</sup> Article 15

<sup>32</sup> Article 16

<sup>33</sup> Article 21

<sup>34</sup> Article 27

<sup>35</sup> Article 28

<sup>36</sup> Article 29

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."

Specific references to children are found in articles 10 and 12. Under article 10, "the widest possible protection and assistance should be 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 labour 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<sup>37</sup> and stipulates "primary education shall be compulsory and available free to all."<sup>38</sup>

## **INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966**

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

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<sup>37</sup> Article 13(1)

<sup>38</sup> Article 13(2a)

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”<sup>39</sup> and the penal system should segregate juvenile offenders from adults and accord them treatment “appropriate to their age and legal status.”<sup>40</sup>

Like the ICESCR, the ICCPR recognizes the family as entitled to societal and state protection,<sup>41</sup> 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.<sup>42</sup> If a marriage is dissolved, provision must be made for the protection of any children.<sup>43</sup> 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.

## EUROPEAN CONVENTION ON HUMAN RIGHTS, 1950

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.<sup>44</sup> The ECHR uses throughout the term “everyone” (or, where appropriate, “no one”); as a result, children

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<sup>39</sup> Article 14(4)

<sup>40</sup> Article 10(3)

<sup>41</sup> Article 23(1)

<sup>42</sup> Article 18(4)

<sup>43</sup> Article 23(4)

<sup>44</sup> Article 1

have successfully brought suit either on their own behalf or as co-applicants with their parents.

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."<sup>45</sup>

## **CHILD PROTECTION AND PLACEMENT AGREEMENTS**

### **HAGUE CONVENTION ON JURISDICTION, ETC., FOR THE PROTECTION OF CHILDREN, 1996**

The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996 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."

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

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<sup>45</sup> Article 5

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. 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 Kabala, a functional equivalent of adoption falling outside the scope of the 1993 Inter-country Adoption Convention.

## **HAGUE CONVENTION ON JURISDICTION, ETC., RELATING TO ADOPTIONS, 1965**

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.”

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.<sup>46</sup>

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.<sup>47</sup> 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

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<sup>46</sup> Article 6

<sup>47</sup> Article 5, paragraph 1

the child or the age of the adopter and that of the child.<sup>48</sup>

## EUROPEAN CONVENTION ON THE ADOPTION OF CHILDREN, 1967

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.<sup>49</sup> Its provisions are only minimum standards; States Parties may adopt provisions more favourable to the adopted child.<sup>50</sup> 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<sup>51</sup> and the competent authority should not grant an adoption unless it “will be in the interest of the child.”<sup>52</sup> 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.<sup>53</sup>

After the adoption, the child should generally be able to acquire the adopter’s surname and be treated as having rights of succession.<sup>54</sup> States Parties should prohibit any improper financial advantage arising from a child being given up for adoption.<sup>55</sup> 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<sup>56</sup> and to require or permit adoption proceedings to take place *in camera*.<sup>57</sup> Children are not accorded the right to know the identity of their former parents.

## INTER-AMERICAN CONVENTION ON CONFLICT

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<sup>48</sup> Article 13

<sup>49</sup> Article 3

<sup>50</sup> Article 16

<sup>51</sup> Article 7

<sup>52</sup> Article 8(1)

<sup>53</sup> Article 9

<sup>54</sup> Article 10 (3) and (5)

<sup>55</sup> Article 15

<sup>56</sup> Article 20(1)

<sup>57</sup> Article 20(2)

## **OF LAWS CONCERNING THE ADOPTION OF MINORS, 1984**

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.<sup>58</sup> Such adoptions are irrevocable.<sup>59</sup> A State Party may declare that the IAC also applies to “any other form of international adoption of minors;”<sup>60</sup> revocation of such adoptions will be governed by the law of the adoptee’s habitual residence at the time of adoption.<sup>61</sup>

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.<sup>62</sup> The IAC protects the identity of the birth parents, with certain exceptions regarding medical data.<sup>63</sup> The adoptee and the adopter (and the adopter’s family) generally have the same rights of succession as those of legitimate family members.<sup>64</sup> 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.<sup>65</sup> If an adoption is annulled, the minor’s interests are to be protected.<sup>66</sup> Although the IAC terms and the laws applicable under it are to be interpreted “consistently and in favour of the validity of the adoption and the best interests of the adoptee,”<sup>67</sup> a State Party’s authorities may refuse to apply those laws when they are “manifestly contrary to its public policy.”<sup>68</sup>

## **HAGUE CONVENTION ON THE PROTECTION OF CHILDREN IN INTER-COUNTRY ADOPTION, 1993**

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<sup>58</sup> Article 1

<sup>59</sup> Article 12

<sup>60</sup> Article 2

<sup>61</sup> Article 12

<sup>62</sup> Article 3

<sup>63</sup> Article 7

<sup>64</sup> Article 11

<sup>65</sup> Article 13, paragraph 2

<sup>66</sup> Article 14

<sup>67</sup> Article 19

<sup>68</sup> Article 18

The Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption, has three stated aims: to establish safeguards to ensure that inter-country 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.<sup>69</sup> 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.

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 counselled 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.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup>

## **HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, 1980**

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

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<sup>69</sup> Article 1

<sup>70</sup> Article 4(d)

<sup>71</sup> Article 30

<sup>72</sup> Article 31

the law of one contracting state are effectively respected in the other contracting States.<sup>73</sup>

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.<sup>74</sup>

## **THE EUROPEAN CONVENTION CONCERNING THE CUSTODY OF CHILDREN, 1980**

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. 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.<sup>75</sup> Also, under both instruments, the right of action lies with the custody holder. 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,<sup>76</sup> 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.”<sup>77</sup>

## **CONCLUSION**

In recent years the children's rights movement has gathered considerable strength and the adoption of international legal standards has been viewed by many as a particularly useful means to entrench in national law the notion that children have rights. In general those rights

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<sup>73</sup> Article 1

<sup>74</sup> Article 3, paragraph 1

<sup>75</sup> Article 1(a)

<sup>76</sup> Article 1(d)

<sup>77</sup> Article 11

overlap significantly with all human rights, but they also extend to a variety of special measures to which children are entitled by virtue of their special vulnerability.

The first efforts at the international level were undertaken by the League of Nations, which established a special committee to deal with questions relating to the protection of children and adopted conventions prohibiting the traffic in women and children (1921) and slavery (1926). The Geneva Declaration of the Rights of the Child, adopted in 1924 by the Assembly of the League, was not cast in terms of state obligation but of duties declared and accepted by "men and women of all nations" and according to which "the child must be given the means requisite for its normal development, both materially and spiritually."

Subsequently, the Universal Declaration of Human Rights of 1948 proclaimed a basic catalogue of internationally recognized human rights, most of which were equally applicable to children and adults. But only two of its provisions are specifically concerned with children - article 25 (2), which recognizes that "motherhood and childhood are entitled to special care and assistance," and article 26, dealing with the right to education."

However, the most important policy statement in this field adopted by the General Assembly is the 1959 Declaration of the Rights of the Child. Stressing that "mankind owes to the child the best it has to give," the Declaration's 10 principles affirm the right of the child to receive special protection, to be given opportunities and facilities to enable him to develop in a healthy and normal manner, to enjoy the benefits of social security, including adequate nutrition, housing, recreation and medical services, to receive education and to be protected against all forms of neglect, cruelty and exploitation. Most of these rights were subsequently reaffirmed in treaty form in the International Covenant on Economic, Social and Cultural Rights adopted in 1966.