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## Emerging Limitations on the Rights of the Child: the U.N. Convention on the Rights of the Child and Its Early Case Law

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# EMERGING LIMITATIONS ON THE RIGHTS OF THE CHILD: THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD AND ITS EARLY CASE LAW

by Jonathan Todres\*

Adopted by the United Nations General Assembly in 1989, the Convention on the Rights of the Child (CRC or Convention) was celebrated as one of the most significant steps taken toward improving the lives of children throughout the world.<sup>1</sup> Since then, the primary focus of activists and advocates has been on achieving universal ratification and on pressing governments to adopt new laws and policies to implement the provisions of the CRC. In contrast, little attention has been paid to judicial interpretations of the CRC. The early use of the CRC by courts in a number of countries, however, indicates some signs of trouble for its implementation. Limitations on the rights “ensured” by the Convention are emerging, as domestic courts interpret the Convention in ways that often fall short of full realization of the rights of the child. Though a jurisprudence on the CRC is only beginning to develop, the implications of the early case law on the development of children’s rights—internationally and in the United States—are significant. This Article analyzes the potential limitations of the Convention in light of its early case law, and discusses the ramifications of these limitations for children’s rights.

Children are particularly vulnerable to human rights abuses. In general, they are less able to draw attention to violations of their rights because they do not have the right to vote and may also lack the verbal skills or contacts necessary to make themselves heard.<sup>2</sup> Children are often

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1. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/Res/44/25 (1989) [hereinafter CRC or Convention].

2. Geraldine Van Bueren, *The International Law on the Rights of the Child* xx (1995). See also Adam Lopatka, *An Introduction to the United Nations Convention on the Rights of the Child*, 6 *Transnat’l L. & Contemp. Probs.* 251, 254 (1996).

seen as easy targets because of their vulnerability. Therefore, there is a need not only to develop instruments such as the CRC, but also to ensure that these instruments are fully implemented.

The judiciary plays a fundamental role in the implementation process, interpreting and applying international treaties such as the CRC. With respect to the CRC, the role of the judiciary is essential, not only for juvenile justice cases, but also in shaping the law on all issues that affect children. In this Article, I argue that although the CRC is probably the greatest achievement to date in the international child rights movement, insufficient attention to the role of domestic courts could prove to be a costly mistake in the effort to ensure full realization of the rights of the child. The early case law of the CRC reveals that this oversight has allowed the courts in some states to curtail the impact of the CRC and thus place limitations on the rights of the child. In exploring the weaknesses of the Convention, this Article analyzes the early case law of the CRC and argues that dangers may lie ahead. The Article considers in detail several key provisions of the CRC and the case law that is shaping the meaning of these sections of the Convention.

In part I of this Article, I examine the developments leading to the adoption of the CRC. The history of the CRC reveals that (1) the idea of child rights has a history which extends back well beyond the CRC, contradicting the view that the rights embodied in the CRC are a new idea of the West, encroaching on the sovereignty of states, and (2) the drafting process of the CRC produced weaknesses in the formal document. In part II, I identify the major bodies involved in overseeing the implementation of the CRC and explore their consideration, or lack thereof, of the courts' role. In part III, I examine key provisions of the CRC, focusing on Article 3, which identifies the "best interests of the child" standard as the underlying principle of the Convention, and Article 4, which outlines States Parties' obligations. In part IV, I consider the status of the CRC as an international treaty and the implications for its application by domestic courts. In part V, I focus on the judicial use of the CRC, identifying key areas in which limits are emerging. Finally, in part VI, I discuss the implications of these emerging limitations on the CRC in the context of ensuring the rights of the child.

## I. THE HISTORY OF THE CRC: ITS ADOPTION CULMINATES A SIXTY-FIVE YEAR PROCESS

### A. Developments Leading to the Idea of a Convention

In reviewing the historical developments leading up to the creation of the CRC, two important points emerge. First, the idea of children's rights is not a new one. Rather, the child rights movement was part of early international efforts to recognize human rights. Second, at many stages in the development of the rights of the child, a wide range of countries participated in the process, undermining arguments that children's rights are simply a Western concept.

Though the U.N. General Assembly unanimously adopted the CRC in 1989,<sup>3</sup> the process of establishing international standards on the rights of the child began approximately sixty-five years earlier with the Declaration of the Rights of the Child, adopted by the League of Nations in 1924 (known as the Declaration of Geneva).<sup>4</sup> While there are even earlier

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3. CRC, *supra* note 1.

4. Cynthia Price Cohen, *Introductory Note, United Nations: Convention on the Rights of the Child*, 28 I.L.M. 1448 (1989). The Declaration's five principles are:

By the present Declaration of the Rights of the Child, commonly known as the Declaration of Geneva, men and women of all nations, recognising that mankind owes to the child the best it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed:

- I. The child must be given the means requisite for its normal development, both materially and spiritually;
- II. The child that is hungry must be fed; the child that is sick must be helped; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured;
- III. The child must be the first to receive relief in times of distress;
- IV. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation;
- V. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow man.

*Cited in* Geraldine Van Bueren, *International Documents on Children* 3 (1993). For a compilation of international instruments related to the rights of the child, see Van Bueren, *International Documents on Children* (1993); Maria Rita Saulle, *The Rights of the Child*:

international treaties concerning the rights of the child—such as those aimed at eliminating child labor and trafficking<sup>5</sup>—the Declaration of Geneva was the first treaty to establish the more general idea of children's rights.<sup>6</sup> The Declaration of Geneva is limited in scope and makes no mention of the obligations of states, rather it places the burden on "men and women of all nations."<sup>7</sup> Yet the Declaration remains an important first step in the history of child rights treaties.

The next significant step came in 1959, when the United Nations officially recognized the human rights of children by adopting the U.N. Declaration of the Rights of the Child.<sup>8</sup> The Declaration was the culmination of a process that began thirteen years earlier. From the beginning, a broad range of countries, representing a diversity of cultures and different levels of economic development contributed to the drafting

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International Instruments (1995).

5. See, e.g., ILO Convention Fixing the Minimum Age for Admission of Children to Industrial Employment Nov. 28, 1919, 38 L.N.T.S. 81, 134 B.F.S.P. 383; ILO Convention Concerning the Night Work of Young Persons Employed in Industry, Nov. 28, 1919, 38 U.N.T.S. 93, 134 B.F.S.P. 381; International Agreement for the Suppression of White Slave Traffic, Mar. 18, 1904, 1 L.N.T.S. 83, 97 B.F.S.P. 95; International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45, 103 B.F.S.P. 244; International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 416, 116 B.F.S.P. 547. For a history of the development of the child rights idea, see Philip E. Veerman, *The Rights of the Child and the Changing Image of Childhood* (1992). Veerman provides a detailed account of some of the pioneers of child rights and the early work done in the field, dating back to the turn of the twentieth century. He includes chapters on Ellen Key, one of the first individuals to write about child rights, including her work in 1900, *The Century of the Child*, and Eglantyne Jebb, founder of the Save the Children Fund, which is credited with the drafting of the Declaration of Geneva. Through these accounts, Veerman offers extensive evidence that the idea of the rights of the child is by no means a new one.

6. Cohen, *supra* note 4, at 1448.

7. See Declaration of Geneva, *supra* note 4. See also Van Bueren, *supra* note 2, at 7–8. See generally Veerman, *supra* note 5.

8. Prior to the U.N. Declaration in 1959, there was a Declaration of the Rights of the Child in 1948. The 1948 Declaration included seven principles, a very moderate expansion of the five in the Declaration of Geneva. For this reason, it is generally not attributed much significance in the development of the rights of the child. See *1948 Declaration of the Rights of the Child*, in Sharon Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* 641–642 (1992). For the text of the 1959 Declaration, see U.N. Declaration of the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354 (1959). See generally Cohen, *supra* note 4, at 1448.

of the Declaration. In 1949, for example, the Secretary-General of the United Nations received comments from the governments of twenty-one countries, including Burma, Columbia, Czechoslovakia, Dominican Republic, India, Iraq, the Netherlands, the Philippines, the United States, and Venezuela.<sup>9</sup> This broad participation demonstrates that the notion of child rights is not entirely a Western creation.<sup>10</sup>

The 1959 Declaration made some substantive changes as well. It introduced the idea that children are entitled to special protection, and that "the best interests of the child shall be the paramount consideration."<sup>11</sup> The 1959 Declaration also contains a non-discrimination clause. Though considered new at the time, such non-discrimination clauses are now a fundamental aspect of any international human rights treaty. The non-discrimination clause states that the rights embodied in the instrument apply to all people—all children—irrespective of race, color, gender, language, religion, national or social origin, or other status.<sup>12</sup> In addition, the Declaration began to use the language of entitlement for the first time,

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9. Van Bueren, *supra* note 2, at 9–10. Other governments that offered commentary were Belgium, Canada, Denmark, Ecuador, Egypt, Mexico, New Zealand, Panama, South Africa, Sweden, and the United Kingdom.

10. The presence of input early in the process from a diverse group of countries representing a wide range of cultures should, at least in part, refute the argument of cultural relativists who claim that "human rights" or "child rights" are Western ideals or concepts with little or no application to other parts of the world. For a discussion of cultural relativism and human rights, see Michael J. Perry, *Are Human Rights Universal? The Relativist Challenge and Related Matters*, 19 Hum. Rts. Q. 461 (1997).

11. See Principle 2, U.N. Declaration of the Rights of the Child, *quoted in* Detrick, *supra* note 8, at 643. See also Van Bueren, *supra* note 2, at 11.

12. The non-discrimination clause in the 1959 U.N. Declaration states that

[t]he child shall enjoy all the rights set forth in this Declaration. Every child without any exception whatsoever shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether himself or his family.

See Principle 1, U.N. Declaration of the Rights of the Child, *in* Detrick, *supra* note 8, at 642. Similar provisions appear in the other major conventions. See, e.g., Article 2(1) of the International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, (entered into force Mar. 23, 1976) [hereinafter ICCPR]; Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No.16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, (entered into force Jan. 3, 1976).

recognizing children as subjects of international law capable of “enjoy[ing] the benefits of specific rights and freedoms.”<sup>13</sup>

The 1959 Declaration, however, weakened one important principle. Whereas the 1924 Declaration stated that the child “must be the first to receive relief,” the 1959 Declaration stated that the child shall be “among the first.”<sup>14</sup> Some regarded this change as adopting a more realistic approach, taking account of situations in which more people, including children, would be saved if relief were administered first to an appropriate adult, such as a doctor.<sup>15</sup> However, this change also foreshadowed later compromises that were initially intended to provide flexibility but instead opened loopholes in the protection of the rights of the child.

## B. The Drafting of the CRC

To commemorate the twentieth anniversary of the U.N. Declaration, the United Nations recognized 1979 as the International Year of the Child.<sup>16</sup> As part of this event, Poland proposed that the principles set forth in the 1959 Declaration be translated into a legally binding convention.<sup>17</sup> A ten-year drafting period followed, culminating in the Convention on the Rights of the Child.<sup>18</sup>

When the Polish Government proposed the idea of a legally binding convention, it intended to have a convention, based largely on the 1959 Declaration, adopted by the end of 1979.<sup>19</sup> However, when the Secretary-General of the United Nations circulated a draft, several government representatives objected. Some considered the language of the draft to be inappropriate. At the time, the Danish Government commented that “it lacks the preciseness and clarity which is required in the formulation of legally binding texts.”<sup>20</sup> Other objections included concern

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13. Van Bueren, *supra* note 2, at 12.

14. *Id.* at 11.

15. *Id.*

16. Cohen, *supra* note 4, at 1448.

17. Nigel Cantwell, *The Origins, Development and Significance of the United Nations Convention on the Rights of the Child*, in Detrick, *supra* note 8, at 21.

18. Cohen, *supra* note 4, at 1448–49.

19. Cantwell, *supra* note 17, at 21.

20. *Id.*

that the text did not address all human rights applicable to children<sup>21</sup> and that it was silent on the issue of implementation.<sup>22</sup> All of these criticisms were important, and they prompted the U.N. Commission on Human Rights to establish an open-ended Working Group on the Question of a Convention on the Rights of the Child (Working Group). The open-ended approach of the Working Group enabled a broad range of parties, including states, international organizations, and non-governmental organizations, to contribute to and shape the drafting process.<sup>23</sup>

One significant aspect of the drafting process is that the Working Group operated on the basis of consensus.<sup>24</sup> Though this approach later ensured easy passage of a completed draft Convention through the higher U.N. bodies, it unfortunately led to the abandonment of some proposals that clearly had the support of the majority. One proposal was to place strict limitations on medical experimentation on children. However, despite widespread agreement in principle, this issue was dropped because no agreement could be reached on the specific language of the provision.<sup>25</sup> Another proposal established a minimum age of children who participate in armed conflicts. This limitation was eventually included, though in a weakened form.<sup>26</sup>

Throughout the drafting process, a central tension existed between a desire for consensus and efforts to create an effective legal document. As a result, the initial progress on the draft convention was slow.<sup>27</sup> In the late

21. The Polish proposal was viewed by some in the West, particularly the United States, as an Eastern Block project, in that it initially focused on economic and social rights and gave less attention to civil and political rights. The latter were generally seen in the West as the core of human rights. The early "bias" toward economic and social rights seems to be more a reflection of how child rights were conceptualized at that time. The focus, then, on child rights tended toward ensuring proper protections and care for the child, which translated into more economic and social rights. See generally Cohen, *supra* note 4, at 1449.

22. Cantwell, *supra* note 17, at 21.

23. For the role of NGOs in the drafting process, see Cynthia Price Cohen, *Role of Non-Governmental Organizations in the Drafting of the Convention on the Rights of the Child*, 12 Hum. Rts. Q. 137 (1990).

24. Cantwell, *supra* note 17, at 22.

25. *Id.*

26. *Id.*

27. Some governments viewed the CRC as admirable but not a pressing issue. Also, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was being drafted at the same time, and it garnered significantly more serious attention than the CRC. See Cantwell, *supra* note 17, at 23; see generally Cynthia Price



1980s, a final push by the drafters finished the Convention in time for the tenth anniversary of the International Year of the Child.<sup>28</sup>

The CRC emerged from this drafting process as a comprehensive treaty on the rights of the child, including provisions related to civil and political rights, as well as economic, social, and cultural rights. States Parties to the CRC are required to “respect and ensure the rights set forth” in the Convention on behalf of every child within their jurisdiction.<sup>29</sup> The provisions of the treaty can be broken down into eight general categories: general measures of implementation; the definition of the child; general principles (including non-discrimination, the best interests of the child, the right to life, survival and development, and respect for the views of the child); civil rights and freedoms; family environment and alternative care; basic health and welfare; education, leisure, and cultural activities; and special protection measures (including such areas as sexual exploitation of children, child labor, children in armed conflicts, and refugee children).<sup>30</sup>

## II. THE CRC’S EARLY YEARS: INSUFFICIENT ATTENTION TO THE COURTS

Once the Convention was adopted, activists and advocates shifted their focus to securing the minimum number of state ratifications necessary for the CRC to enter into force.<sup>31</sup> Signatures and ratifications came at a rate much faster than expected. The Convention entered into force within ten months of its adoption,<sup>32</sup> no other convention has entered into force so quickly.<sup>33</sup> Today, 191 states are parties to the Convention, leaving only two

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Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 St. Thomas L. Rev. 1, 11 (1993) [hereinafter Cohen, *The Developing Jurisprudence*].

28. See Cantwell, *supra* note 17, at 23.

29. CRC, *supra* note 1, art. 2(1). See also Lopatka, *supra* note 2, at 252.

30. UNICEF, *The Reporting Process to the Committee on the Rights of the Child: A UNICEF Resource Guide 17–21* (1997) (providing General Guidelines regarding the form and contents of initial reports to be submitted by States parties under Article 44, paragraph 1(a), of the Convention) [hereinafter UNICEF, *The Reporting Process*].

31. CRC, *supra* note 1, art. 49 (establishing that the Convention would come into force thirty days after the twentieth state had ratified the CRC).

32. Lopatka, *supra* note 2, at 259.

33. See, e.g., Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1980) (adopted on December 18, 1979, and entered into force on September 3, 1981). Compare the International Covenant on Economic, Social and Cultural Rights, *supra* note 12, and the International Covenant on Civil and Political Rights, *supra* note 12. Both

more states for universal ratification.<sup>34</sup> The CRC is by far the most widely ratified human rights treaty.<sup>35</sup>

In part, the rapid acceptance of the CRC is a result of its subject—children. Most states do not want to be perceived as neglecting children. Moreover, some suggest that the Convention's popularity is due to the belief that children are vulnerable to the most serious forms of human rights abuse, and therefore, a treaty which aims to protect children is not as controversial as some of the other specialized conventions.<sup>36</sup> However, part of the success of the CRC must also be attributed to the various U.N. agencies, most notably UNICEF, and to non-governmental organizations (NGOs) that pushed states to ratify the CRC. For example, in 1996, UNICEF issued a new Mission Statement that focused on the rights of the child and on achieving universal ratification of the CRC.<sup>37</sup>

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took over nine years from the date of their adoption before entering into force.

34. Only the United States and Somalia have not ratified the CRC, though the United States has signed the Convention. U.N. High Commissioner for Human Rights (visited Sept. 15, 1998) <<http://www.unhchr.ch/html/intlinst.htm>>.

35. Compare Convention on the Elimination of All Forms of Discrimination against Women, *supra* note 33 (162 parties); the International Covenant on Civil and Political Rights, *supra* note 12 (140 parties); the International Covenant on Economic, Social and Cultural Rights, *supra* note 12 (137 parties); the International Convention on the Elimination of All Forms of Racial Discrimination, *open for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) (151 parties); and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, annex, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987) (106 parties). Details on the status of ratifications can be found at the web site of the U.N. High Commissioner for Human Rights, *supra* note 34.

36. Lawrence J. LeBlanc, *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights* xii (1995).

37. The Mission Statement reads, in part, that:

UNICEF is mandated by the United Nations General Assembly to advocate for the protection of children's rights, to help meet their basic needs and to expand their opportunities to reach their full potential.

UNICEF is guided by the Convention on the Rights of the Child and strives to establish children's rights as enduring ethical principles and international standards of behaviour towards children.

United Nations, United Nations Children's Fund, Executive Board, Proposal for a New Mission Statement 4, U.N. Doc. E/ICEF/1996/AB/1.2 (1996).

Though these early efforts to gain universal ratification have contributed to the success of the Convention, implementation has not received the attention it fully deserves. Admittedly, limited resources are responsible in part, as organizations put their initial efforts into promoting ratification of the CRC. Further, the Convention is still relatively new, and it is probably too early to expect fully developed implementation measures. However, early CRC case law reveals that the doctrine on the rights of the child is already being shaped at the domestic level, and that immediate attention must be given to implementation in order to avoid future misinterpretation and harmful precedent.

The CRC not only requires States Parties to take steps to implement the provisions of the Convention, it also establishes the Committee on the Rights of the Child (the Committee), whose task is to "examin[e] the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention."<sup>38</sup> The Committee has focused on reviewing States Parties' reports with a view toward examining legislation and policies affecting children. The Committee relies primarily on the reporting process for monitoring implementation. States Parties to the CRC are required to submit a report within two years of ratification and thereafter every five years.<sup>39</sup> These reports must detail the "measures they have adopted which give effect to the rights recognized [in the CRC] and on the progress made on the enjoyment of those rights."<sup>40</sup> States Parties must also "indicate factors and difficulties, if any, affecting the degree of fulfillment of the obligations under the present Convention."<sup>41</sup>

Despite these instructions to the States Parties, the Committee has been largely responsible for determining the content of reports. The Committee shapes reports both by providing reporting guidelines to the States Parties and by posing questions to States Parties during the pre-sessional working group. None of the questions, however, explicitly mentions the domestic courts, except those regarding the juvenile justice system.<sup>42</sup> Similarly, the Committee's reporting guidelines contain little mention of the judiciary.<sup>43</sup> These guidelines have been widely accepted as

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38. CRC, *supra* note 1, art. 43(1).

39. *Id.* art. 44(1).

40. *Id.*

41. *Id.* art. 44(2).

42. See UNICEF, *The Reporting Process*, *supra* note 30, at 16–21.

43. See *id.*

establishing the necessary criteria to be included in a report, and governments have tailored their reports to reflect the interests of the Committee on the Rights of the Child.<sup>44</sup> The Committee is limited then to issuing “suggestions and general recommendations,”<sup>45</sup> which, since based largely on States Parties’ reports, may also give inadequate attention to domestic courts.<sup>46</sup> The end result is that in many states there is little or no monitoring of the judiciary’s role in ensuring the rights of the child embodied in the Convention.

### III. A CLOSER LOOK AT THE CRC AND THE EARLY CASE LAW INTERPRETING ITS PROVISIONS

The CRC set out to cover four general areas: the participation of children in decisions that affect their future (which incorporates the idea of a child’s “evolving capacities”); the protection of children against discrimination and all forms of neglect and exploitation; the prevention of harm to children; and the provision of assistance for children’s basic needs.<sup>47</sup> A closer examination of the provisions of the CRC reveals important deficiencies in the Convention. These weaknesses have been exploited in some of the early case law on the CRC.

It is important to recognize that the CRC represents much more than just a legal instrument. It has contributed to, and will continue to produce, increased support for the idea of children’s rights. It also has increased pressure on governments to take steps to ensure the rights of the child. In this respect, the CRC is much like the Universal Declaration of Human Rights.<sup>48</sup> Though not legally binding, the Universal Declaration has

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44. See, e.g., Initial Reports of States Parties Due in 1995, Addendum: Armenia, U.N. Doc. CRC/C/28/Add.9 (1997). It is impossible to list all of the States Parties’ reports that have given little or no attention to the role of the judiciary, but the author’s research reveals that it is clearly the majority of the reports.

45. See CRC, *supra* note 1, art. 45(d).

46. In some instances, in addressing the issue of raising awareness about the CRC, the Committee has suggested training judicial personnel, magistrates, and lawyers. See, e.g., Concluding Observations of the Committee on the Rights of the Child: Uganda, U.N. Doc. CRC/C/15/Add.80 (1997). However, this suggestion tends to be only a part of the larger recommendation for States Parties to do more to raise awareness about the CRC and is not a direct effort to address the role of the judiciary.

47. Van Bueren, *supra* note 2, at 15.

48. Universal Declaration of Human Rights, art. 29, G.A. Res. 217A, U.N. GAOR, 3rd Sess., U.N. Doc. A/810, at 71 (1948).

demonstrated that international human rights instruments can have effects far beyond their legal mandates.

Nonetheless, in its essence, the CRC is a legal document. While the CRC may contribute greatly in shaping values of both policy makers and society in general, the Convention's central objective was to establish a legal framework for the protection of children's rights.<sup>49</sup> In addition, much of the initial impetus behind the push for a convention on child rights—and behind the initial proposal by the Polish Government—was a desire to transform the aspirations of the 1959 Declaration on the Rights of the Child into a set of legal principles.<sup>50</sup> Thus, while there are certainly reasons to applaud the “successes” of the CRC, it is also important to recognize its weaknesses as a legal document.

The following is an examination of several of the key provisions of the CRC and the early case law interpreting these provisions.

#### A. The Best Interests of the Child Principle

The primary aspiration of the CRC is to advance “the best interests of the child.”<sup>51</sup> The Convention aims to bring together the protections in the many scattered human rights treaties relating to children and to unite them under a single comprehensive document that focuses on the best interests of the child.<sup>52</sup>

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49. See Philip Alston, *The Legal Framework of the Convention on the Rights of the Child*, 91/2 Bull. Hum. Rts. 1 (1992) [hereinafter Alston, *Legal Framework*].

50. At the meeting in which the representative of Poland introduced the draft resolution for a Convention on the Rights of the Child, the representative recalled that:

[I]n 1959 the General Assembly had adopted the Declaration on the Rights of the Child, which had been instrumental in promoting the rights of children throughout the world as well as shaping various forms of international co-operation in that field. [The representative of Poland] felt that, almost 20 years after the proclamation of the principles of that Declaration by the General Assembly, *it was time to take further and more consistent steps by adopting an internationally binding instrument in the form of a convention . . .*”

Detrick, *supra* note 8, at 31 (emphasis added). See also Thomas Hammarberg, *The UN Convention on the Rights of the Child—and How to Make It Work*, 12 Hum Rts. Q. 97, 98 (1990).

51. See Hammarberg, *supra* note 50, at 99.

52. *Id.* at 98.

Article 3 sets forth the “best interests of the child” standard as one of the underlying principles of the CRC. This “umbrella provision” is invoked often as a guiding principle when interpreting other articles and rights in the CRC.<sup>53</sup> The drafters intended this provision to establish the principle that official decisions affecting a child must be taken with primary consideration for the child’s best interests, and that neither the interests of the parents nor the interests of the state should be the most important consideration.<sup>54</sup>

Paragraph (1) of Article 3 merits close examination. It reads as follows: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>55</sup>

As stated, the best interests of the child principle must be used in “all actions concerning children.” This phrase is intended to be interpreted broadly, so as to encompass any action that directly or indirectly affects children. During the drafting of the CRC, an early draft of Article 3 read “[i]n all official actions concerning children,” but the word “official” was dropped to broaden the scope of the provision.<sup>56</sup> Geraldine Van Bueren suggests that the phrase “all actions” was intended to include not only state action but also actions by private actors.<sup>57</sup> In addition, the article refers to “all actions concerning children,” which implies that the CRC may be invoked not only when the action in question applies to the particular child in question, but also when the action in question affects children in general. Such an interpretation should have a positive impact on those claims brought under this article. Furthermore, the Committee has stated that the phrase should be interpreted as broadly as possible.<sup>58</sup>

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53. Alston, *Legal Framework*, *supra* note 49, at 7.

54. See Thomas Hammarberg, *Making Reality of the Rights of the Child—The UN Convention: What it says and how it can change the status of children worldwide* 9 (Rädda Barnen, 1990).

55. CRC, *supra* note 1, art. 3(1).

56. See *Considerations 1981 Working Group*, reprinted in Detrick, *supra* note 8, at 133–35.

57. Van Bueren, *supra* note 2, at 46.

58. See also Alston, *Legal Framework*, *supra* note 49, at 7–10.

The domestic courts of several States Parties have adopted a broad reading of the "in all actions concerning children" phrase. Cases relating to the deportation of non-citizen parents of citizen children have been deemed to be "actions concerning children" by some courts.<sup>59</sup> A criminal sentencing proceeding in which both parents of a child faced prison time has also been recognized as "action concerning children."<sup>60</sup> On the other hand, an Australian court held that the CRC was not applicable to the repossession of a father's car, where the father claimed that it was in the best interests of his child to allow the father to keep the vehicle so that he could drive his child to after-school education lessons.<sup>61</sup>

In all three of these situations, children were or would have been affected by the courts' decisions, yet all three determinations of whether the CRC applies seem reasonable. Courts seem to be arriving at such different decisions in large part because the CRC provides no guidance on what constitutes an "action concerning children." It has been left to states to decide, and thus left to individual judges. Though this case-by-case approach may be the best available, it has significant implications for the rights of the child.

Second, the "best interests of the child" standard itself, upon which the CRC relies so heavily, warrants examination. The standard is not new.<sup>62</sup> In fact, many countries rely on the standard, and it was in use long before the advent of the CRC. The United States, for example, uses it in child custody cases. One court has stated, "[w]ithout question, the paramount concern of courts in child custody proceedings is the welfare of the child."<sup>63</sup> However, the "best interests of the child" principle is not without

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59. For cases in Australia, see *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1995) 128 A.L.R. 353 (Austl.); *Re Anais Moala Kailomani* (1996) IRT Reference No. N94.01675 (Austl.); *Yad Ram v. Department of Immigration and Ethnic Affairs* (1996) No. Q95/646, Admin. Appeals Tribunal (Austl.). For those in New Zealand, see *Schier v. Removal Review Authority* [1998] N.Z.A.R. 230 (N.Z.); *Patel v. Minister of Immigration* [1997] 1 N.Z.L.R. 257 (N.Z.); *Puli'uvea v. Removal Review Authority* [1996] 3 N.Z.L.R. 538 (N.Z.); *Elika v Minister of Immigration* [1996] 1 N.Z.L.R. 741 (N.Z.).

60. *Walsh v. Department of Social Security* (1996) No. 5795 (Austl.).

61. *Isaac John MacKay Shields v. Official Receiver in Bankruptcy and Official in Trustee in Bankruptcy* (1995) No. 441/96, Fed. Ct. N.S.W. (Austl.) (LEXIS, Austl. Fed. Ct.).

62. The principle of the "best interests of the child" was developed in the 19th century. See, e.g., *Chapsky v. Wood*, 26 Kan. 650 (1881) (an application for custody by the father was denied and custody was awarded to an aunt, who had raised her niece. The court's paramount consideration was the child's welfare, which it felt would be best ensured if the girl continued to live with her aunt.).

63. *Perrenoud v. Perrenoud*, 206 Kan. 559, 576, 480 P.2d 749, 762 (1971).

critics.<sup>64</sup> Primary concerns about this principle include questions of who decides what is in the best interests of the child, and what criteria are used to determine what is in the best interests of the child. Some argue that it is not a viable standard because it relies too heavily on culture and social context.<sup>65</sup> One expert comments that

[t]he choice is inherently value-laden; all too often there is no consensus about what values should inform this choice. These problems are not unique to children's policies, but they are especially acute in this context because children themselves often cannot speak for their own interests . . . . Even if predictions as to the consequences of policy alternatives were possible, what set of values should a judge use to determine a child's best interests . . . . He must have some way of deciding what counts as good and what counts as bad.<sup>66</sup>

Zimbabwe provides an excellent example of a setting where the "best interests of the child" principle can produce different results depending on the construction used.<sup>67</sup> In Zimbabwe, statutory law holds that in custody cases the best interests of the child "shall be the paramount consideration."<sup>68</sup> However, the construction one uses to determine what constitutes the best interests of the child—whether cultural, material, legal, or political—will shape the resulting determination.<sup>69</sup> Thus, if a cultural construction is used in Zimbabwe, custody of a child rests with the

64. For critiques of the "best interests of the child" standard, see Martha Albertson Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (1991); Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 Ariz. L. Rev. 11 (1994). For a defense of the standard, see Carl Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 Mich. L. Rev. 2215 (1991) (arguing that the best interests standard provides a framework, though imperfect, for obtaining individualized justice).

65. For an in-depth examination of culture and the "best interests of the child" principle, see generally Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, in *The Best Interests of the Child I* (Philip Alston ed., 1994) [hereinafter Alston, *Reconciling Culture and Human Rights*].

66. Mnookin, *In the Interest of Children* (1985), quoted in Alston, *Legal Framework*, supra note 49, at 8.

67. See Alice Armstrong, *A Child Belongs to Everyone: Law, Family and the Construction of the 'Best Interests of the Child' in Zimbabwe* (Innocenti Occasional Papers, UNICEF International Child Development Centre 1995).

68. *Id.* at 27.

69. *Id.*



family—usually the paternal family—and not with the individual.<sup>70</sup> In many instances, culture dictates that custody decisions must be handled by the families outside of the formal courts. Furthermore, culture may also prescribe that a child be taught obedience, deference to elders and authority, and to act in “male” or “female” ways.<sup>71</sup> In contrast, if one were to use a legal construction, custody would rest with an individual rather than a family.<sup>72</sup> Alice Armstrong writes that

the very act of bringing a custody case into a formal state court means, first, that “best interests” will be decided by an institution that is not recognized by [the rules, customs, and traditions of the indigenous people of Zimbabwe] and, second, that “best interests” will largely be interpreted according to the general law, based on foreign, “Western” values.<sup>73</sup>

Even when culture is not an issue, a child’s best interest is still a contentious topic.<sup>74</sup> For example, in some instances there may be no difference between legal construction and cultural construction in a particular state, and the parties involved may share the same cultural values and beliefs with each other and with the relevant legal system. Yet, concerns would remain about the “indeterminacy, vagueness or open-endedness” of the best interests standard.<sup>75</sup> Some commentaries, however, maintain that the CRC itself does provide some guidance to those seeking to identify what is in the best interests of the child.<sup>76</sup>

The indeterminacy of the “best interests” standard will not necessarily produce a negative result. The Zimbabwe study shows that

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70. *Id.* at v.

71. *Id.*

72. *Id.*

73. *Id.* at 19.

74. Though no single conception has gained consensus, it must be kept in mind that in many countries where children are subject to repeated human rights violations, having the best interest standard of the CRC in place will have the effect of significantly advancing the rights of the child. In some countries, it may be the first recognition of the idea that children have “human rights” as separate individuals, and not just rights through their families.

75. Stephen Parker, *The Best Interests of the Child—Principles and Problems*, in Alston, *Reconciling Culture and Human Rights*, *supra* note 65, at 26 (arguing that despite these concerns, the decision to use the best interests standard in the CRC was not necessarily misguided, and that we can work to minimize the indeterminacy and reach a better understanding of the real issues at stake).

76. See, e.g., Alston, *Legal Framework*, *supra* note 49, at 8.

policies adopted in the best interests of the child can differ depending on culture, and yet still benefit the child. Alston states that “identical norms can lead to very different results, but results that may well be, in light of the prevailing cultural or other circumstances, largely compatible with international norms.”<sup>77</sup> In these cases, child rights activists raised in the Western rights tradition must be careful not to criticize decisions as not in the child’s best interests simply because the approach taken is not Western. It is possible, however, that the “best interests of the child” principle will allow governments to hide behind the veil of culture and avoid addressing human rights abuses of children in their countries.

The third, and perhaps most significant, aspect of the foundational principle of the CRC is that the “best interests of the child” is to be “a primary consideration.” There was considerable debate over this aspect of the CRC. The basic working text adopted by the 1980 Working Group stated that the best interests of the child shall be “the paramount consideration.”<sup>78</sup>

The United States objected to this language of the working draft and introduced a revised Article 3, which mandated that the best interests of the child should be a primary consideration.<sup>79</sup> Some considered the word “paramount” to be too broad. One speaker at the 1981 meeting of the Working Group stated that

the interests of a child should be a primary consideration in actions concerning children but were not the overriding, paramount consideration in every case, since other parties might have equal or even superior legal interests in some cases (e.g., medical emergencies during childbirth).<sup>80</sup>

Thus, although a number of the delegates agreed that the Polish proposal offered greater protection for the child, the U.S. proposal was accepted as a compromise.<sup>81</sup> The final language was intended to allow for flexibility when necessary, while still asserting that any action should be taken in the

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77. Alston, *Reconciling Culture and Human Rights*, *supra* note 65, at 22.

78. Basic working text as adopted by the 1980 Working Group, in Detrick, *supra* note 8, at 131.

79. Considerations 1981 Working Group, *reprinted in* Detrick, *supra* note 8, at 131.

80. *Id.* at 133.

81. *Id.*

best interests of the child, and with due consideration for the child's rights.<sup>82</sup>

Early decisions by domestic courts demonstrate that the desire for flexibility in Article 3(1) has created a significant loophole in the CRC. Australian courts have held that by requiring that the best interests of the child be only "a primary consideration," the CRC demands that Australia only abide by the procedural fairness requirement.<sup>83</sup> This interpretation of "the best interests of the child" principle as a procedural requirement not only weakens the provision, but also provides little direction for judges handling cases affecting children.<sup>84</sup> The message, if any, to judges is that the requirements of the CRC are met simply by "considering" what is in the child's best interests. This interpretation allows judges to "consider" the child's best interests, but then to issue a decision that may not reflect those interests.

In New Zealand, for example, the CRC has been cited in a number of immigration cases, but the loophole has allowed the courts to adopt an approach that balances New Zealand's international obligations and its domestic laws and policies—an approach that in fact has favored its

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82. Alston, *Legal Framework*, *supra* note 49, at 9.

83. *See, e.g.*, *Department of Immigration and Ethnic Affairs v. Ram* (1996) 41 A.L.R. 517 (Austl.) (holding that "a decision-maker is not bound to treat the interests of a child as a primary matter."); *Vaitaiki v. Minister for Immigration and Ethnic Affairs* (1997) Austl. Fed. Ct. LEXIS 546 at 33 (Fed Ct. Gen Div.). ("It is clear . . . that the principle laid down in *Teoh* [from the CRC] is a *rule of procedural fairness*. . . . [and] procedural fairness was provided in the present case.") (emphasis added). On appeal, the decision in *Vaitaiki* was set aside by consent and the court remanded the case to the tribunal for reconsideration. *See Vaitaiki v. Minister for Immigration and Ethnic Affairs* (1998) 150 A.L.R. 608 (Austl.). However, the court did not reject the view that the CRC's requirements are procedural; instead it found that the Tribunal had not properly considered the best interests of the child. The court "ma[de] it perfectly clear that none of this is to say that the tribunal could not have validly reached a decision that the deportation should proceed."

84. Because many of these cases are very fact specific, I am not necessarily criticizing the court decisions, but rather the process by which judges are reaching their decisions. If courts hold that the CRC only requires procedural fairness, it diminishes the weight accorded to the CRC in future cases.

internal policies.<sup>85</sup> This conflict between national and international law is a recurring one, and will be discussed in further detail below.

## B. The Obligations of States Parties to the Convention

### 1. Article 4 of the Convention

Article 4 is the general provision outlining the obligations and duties of States Parties to the Convention. It reads as follows:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in this Convention. In regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.<sup>86</sup>

This article, combined with the non-discrimination provision in Article 2,<sup>87</sup> forms the basis of a State Party's obligations under the CRC.

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85. Appeals of deportation decisions were denied in five of seven cases, implying that this "balancing" in fact strongly favors the internal administrative policies and statutes over international human rights law. See *Schier v. Removal Review Authority* [1998] N.Z.A.R. 230 (N.Z.); *Mil Mohamed Mohamud v. Minister of Immigration* [1997] N.Z.A.R. 223 (N.Z.); *Rajan v. Minister of Immigration* [1996] 3 N.Z.L.R. 543 (N.Z.); *Puli'uvea v. Removal Review Authority* [1996] 3 N.Z.L.R. 538 (N.Z.); *Elika v. Minister of Immigration* [1996] 1 N.Z.L.R. 741 (N.Z.); *Tavita v. Minister of Immigration* [1994] 2 N.Z.L.R. 257 (N.Z.). (Only in *Tavita* and *Mohamud* were the appeals not rejected. Further, in *Tavita* the court said that, due to the passage of time, circumstances had changed enough so that the case warranted reconsideration. *Tavita*, 2 N.Z.L.R. at 266. Therefore, stay was continued, allowing Mr. Tavita the opportunity to appeal again to the Minister. Doctrinally, this can hardly be viewed as a "victory" for the CRC.)

86. CRC, *supra* note 1, art. 4.

87. *Id.* art 2. Article 2 of the CRC reads as follows:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Since the second part of Article 4 addresses the economic, social, and cultural rights embodied in the Convention, the first sentence must therefore address all other provisions—most notably those on civil and political rights and some of the provisions on special protection measures. A state's obligations with respect to the rights and special protections covered by the first sentence of Article 4 are not subject to availability of resources. Yet, when outlining these obligations no direct reference is made to the judiciary or to judicial remedies. Furthermore, the *travaux préparatoires* do not reveal any discussion about judicial remedies.<sup>88</sup> Perhaps the issue of judicial remedies is covered by the language "other measures," but it seems to be a significant oversight considering that "courts of law" are specifically identified in Article 3.

The second part of Article 4—specifically the phrase "to the maximum extent of their available resources"—is one of the more obvious loopholes in the CRC. This phrase parallels that of Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>89</sup> In many respects the ICESCR is a relatively weak international human rights treaty, since it generally only requires States Parties to "take steps" toward ensuring rights rather than requiring that they ensure those rights.<sup>90</sup> The language of the second sentence of Article 4 of the CRC was inserted out of concern that developing countries might not

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2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

88. The *travaux préparatoires* are the legislative history of an international treaty.

89. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights reads as follows:

Each State Party to the present Covenant undertakes to take steps, individually, and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

ICESCR, *supra* note 12.

90. Since the International Covenant on Economic, Social and Cultural Rights only requires that States Parties "take steps" toward the realization of certain rights, it is difficult to assess whether a State Party has fulfilled its obligations. Further, some States Parties may "fulfill" their obligations by taking relatively small or insignificant steps towards ensuring the rights in the Covenant. *See id.*

ratify the Convention if no allowance were given for their limited resources.<sup>91</sup> Although this reasoning is understandable and one could argue that the goal of fostering support of the CRC among developing nations has been realized, this phrase still leaves a loophole which should be of concern to human rights advocates for two reasons.

First, the Convention does not clearly delineate which provisions fall under the heading of economic, social, and cultural rights.<sup>92</sup> Do special protection provisions related to child labor (Article 32) fall under the rubric of economic, social, and cultural rights? Or, are some human rights abuses suffered under child labor a violation of civil rights? One must be concerned about which provisions might fall under this category. Philip Alston identifies two indicators which he believes help to determine which rights are economic, social, and cultural rights: (1) the presence of phrases which constitute "resource qualifiers" in the body of such articles (e.g. "subject to available resources" in Article 23(2)); and (2) the parallel with the ICESCR.<sup>93</sup> Therefore, those provisions of the CRC that refer to rights which are also in the ICESCR would be considered economic, social, or cultural rights. Despite Alston's suggestions, gray areas remain. Some provisions of the CRC do not fit clearly in just one category, and the Committee has not published any guidelines on this issue.

Second, even if the Committee or other appropriate body defines which articles fall under the economic, social and cultural rights category, a loophole remains—States Parties can still claim that they do not have adequate resources to respect and ensure these rights. This loophole is narrowed somewhat by the additional phrase: ". . . and, where needed, within the framework of international cooperation."<sup>94</sup> This phrase would require that States Parties without the necessary resources to ensure the rights of the child within their jurisdiction seek assistance "within the

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91. The delegations of Brazil, India, Venezuela, Libya, and Algeria led the opposition to a proposal by the United States which would have removed the language regarding "available resources." It was this opposition that led to a compromise position, in which economic, social and cultural rights were addressed separately and allowances were made for available resources with respect to these rights. See Considerations 1989 Working Group (1989), in Detrick, *supra* note 8, at 155.

92. Alston, Legal Framework, *supra* note 49, at 11.

93. *Id.*

94. CRC, *supra* note 1, art. 4. See also Hammarberg, *supra* note 50, at 102.

framework of international cooperation.”<sup>95</sup> Even with this qualification, a sizable loophole remains.

Another weakness of the “all available resources” language in Article 4 concerns the interpretation of the phrase “obligations of States.” The “obligations of States” is a vague phrase in international law and is often interpreted as applying only to state action, particularly at the national level. Such an interpretation, however, ignores other important actors at the regional and community level.<sup>96</sup> It is essential that resource mobilization, particularly in developing countries, include all aspects of society—the public and private sectors—at all levels of society.<sup>97</sup> Thus, a broad interpretation of “available resources” would help to ensure that states do not hide behind claims of a lack of available resources.

Currently, no domestic court has analyzed or interpreted Article 4 of the CRC, but its limitations are still significant. Though Article 4 is more directly relevant to shaping legislation and public policies than to judicial decisions, domestic courts will be required to interpret and apply the new law that emerges from Article 4.

## 2. Duty to Raise Awareness About the Convention

The CRC places significant emphasis on raising public awareness. Article 42 of the CRC states that “States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.”<sup>98</sup> This idea includes States Parties’ reports, as Article 44(6) requires that “States Parties shall make their reports widely available to the public in their own countries.”<sup>99</sup> While, again, language such as “by appropriate and active means” is vague enough to permit loopholes, it is clear that States Parties have a duty to actively raise awareness regarding the rights of children. This duty should extend to raising awareness among judges, lawyers, and others working in the

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95. Alston, *Legal Framework*, *supra* note 49, at 12.

96. James R. Himes & Diana Saltarelli, *Implementing the Convention on the Rights of the Child: Resource Mobilization in Low-Income Countries 4* (Innocenti Studies, UNICEF International Child Development Centre 1996) [hereinafter Himes].

97. *Id.* at 8 (“it is also a mistake to assume . . . that the ‘State’ has little or no influence on resource-allocation decisions at the household or community level.”).

98. CRC, *supra* note 1, art. 42.

99. *Id.* art. 44(b). *See generally* Cohen, *The Developing Jurisprudence*, *supra* note 27, at 23.

judicial systems of their countries, an issue which to date has received inadequate attention.<sup>100</sup>

### 3. Provisions for Implementation of the Rights Enshrined in the CRC

The CRC is comparatively weak with respect to provisions on implementation by States Parties. The CRC relies almost exclusively on States Parties' reports, which are to be submitted on a regular basis.<sup>101</sup> It does not allow for state-to-state complaints, nor does it provide any avenue for individuals to bring complaints against a state. These limitations are a stark contrast to some of the other international human rights instruments which provide frameworks for both state and individual complaints.<sup>102</sup> Without providing for its own system for handling complaints, the CRC will be forced to rely on the courts of the various States Parties to interpret and implement the provisions of the Convention. In turn, this reliance on domestic courts will open the door to a wide range of interpretations, including narrow readings that may further limit the rights of the child.

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100. What little attention has been given thus far to raising awareness among judges and lawyers is only in the context of juvenile justice, thereby overlooking the many other areas in which children's rights, and lives, are greatly affected by the courts.

101. See Roger J.R. Levesque, *The Internationalization of Children's Human Rights: Too Radical for American Adolescents?*, 9 Conn. J. Int'l Law 237, 274-5 (1994). Other than the reporting requirements in Article 44, there is little in the CRC that grants authority to the Committee on the Rights of the Child. The Committee can invite specialized agencies, UNICEF, and other United Nations organs to submit reports or provide expert advice, or may request technical advice or assistance of these bodies. It may also recommend to the General Assembly to undertake specific studies related to child rights. Finally, the Committee can make suggestions and general recommendations based on the information it receives from States Parties reports and from the additional bodies mentioned above. See CRC, *supra* note 1, art. 45.

102. See, e.g., ICCPR, *supra* note 12, art. 41 (saying that a State Party may declare that it recognizes the Human Rights Committee's authority to receive communications from other States Parties claiming that it is not fulfilling its obligations under the Covenant). See also Optional Protocol to the ICCPR, art. 1, G.A. Res. 2200A, 21st Sess., U.N. GAOR, Supp. No. 16, at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302 (entered into force March 23, 1976) (stating that a State Party recognizes the competence of the Human Rights Committee to consider communications from individuals). Compare International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 35 (States Parties automatically agree to recognize the authority of the Committee on the Elimination of Racial Discrimination to receive States Parties' communications (article 11) and have the option to recognize communications from individuals (article 14)).



#### IV. THE LIMITATIONS OF THE CRC AS AN INTERNATIONAL HUMAN RIGHTS TREATY

Some of the CRC's limitations relate to the role of international treaties in general. Inherent in the nation-state system are limitations on the effectiveness of international law. While the unprecedented support for the CRC may actually shape international law and its application in the future, present use of the CRC is limited to the state of international law today. For example, domestic courts provide the first forum for those seeking remedies of human rights violations.<sup>103</sup> Therefore, the success of a lawsuit on behalf of a child depends, in part, on the status of an international human rights treaty in national law.<sup>104</sup> Since many states have constitutional provisions which determine the status of international treaties in their national law, the precise legal implications will vary from state to state.<sup>105</sup> However, several overriding principles are relevant to the application of the CRC in the domestic law of all states.

##### A. International Law and the Vienna Convention on the Law of Treaties

There are two primary sources for international law today: treaties and customary law.<sup>106</sup> The law of treaties, and thus the interpretation of the CRC, is governed primarily by the Vienna Convention on the Law of

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103. Even those international human rights treaties that have established bodies which can receive individual complaints require that domestic remedies first be exhausted. See, e.g., Optional Protocol to the ICCPR, *supra* note 102, art. 2; International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 35, art. 14(7)(a); and Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *supra* note 35, art. 22(5)(b).

104. Van Bueren, *supra* note 2, at 380.

105. *Id.*

106. See Restatement (Third) of Foreign Relations Law of the United States §102 (1987) ("A rule of international law is one that has been accepted as such by the international community of states. . . (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world."). The third source, general principles, "may be invoked as supplementary rules of international law" but are considered to be a secondary source, without the authority of the first customary law or international agreements and treaties [hereinafter Restatement (Third)].

Treaties.<sup>107</sup> The Vienna Convention requires States Parties to perform their obligations under the CRC in good faith.<sup>108</sup> The Vienna Convention also states that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>109</sup> These principles have implications for courts in various legal contexts, particularly related to the issue of immigration.<sup>110</sup>

Another consideration with respect to sources of international law is whether universal ratification would imply that the rights embodied in the CRC have become customary law. David Freestone writes that

[f]rom the point of view of the development of the international law of human rights in general terms, the formal repetition of rights and standards in this way plays an important role in their adoption and recognition as a part of customary law. The acceptance of rights under customary law makes them binding not simply on parties to human rights conventions, but on all

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107. Vienna Convention on the Law of Treaties, *opened for signature*, May 23, 1969, 11 U.N.T.S. 331, 8 I.L.M. 679 (entered into force on January 27, 1980) [hereinafter Vienna Convention].

108. *Id.* art. 26, “Pacta sunt servanda. Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

109. *Id.* art. 27. Article 27, however, does not prejudice Article 46, which states:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

110. Though the United States is not a party to either the Vienna Convention or the CRC, its courts have been willing to use principles of international treaties as a guide in making determinations. *See Levesque, supra* note 101, at 281–282 n.223 (1994) (discussing U.S. courts’ interpretation of international conventions). Levesque cites the following examples in which the Supreme Court has made reference to international law in death penalty cases: *Coker v. Georgia*, 433 U.S. 584, 596 n. 10 (1977) (citing *Trop v. Dulles*, 356 U.S. 86, 102, where the Court states that the “climate of international opinion concerning the acceptability of particular punishment” was relevant); *Edmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (international opinion was “an additional consideration”); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (stating that executions of anyone below sixteen years of age was inconsistent with “the leading members of the Western European Community”).

states except those that specifically object—and significantly the Convention text was adopted without dissent.<sup>111</sup>

Though most would agree that the CRC's provisions have not yet become customary law, principles of customary law could emerge in the future from practice related to the CRC.

## B. A Self-Executing or Non-Self-Executing Treaty?

Perhaps the biggest limitation to full implementation of the CRC in this context is whether the CRC is self-executing or non-self-executing. When an international agreement or treaty is self-executing, no domestic implementing legislation is needed, and the treaty is immediately applicable on a domestic level upon entry into force. If non-self-executing, then the ratification of a treaty will create international obligations for the state, but the treaty will not have domestic legal force.<sup>112</sup>

Whether a treaty is self-executing often depends on the law of the country in question. In most Western parliamentary systems, treaties carry international obligations but do not have effect as domestic law.<sup>113</sup> In the United States, treaties are the law of the land,<sup>114</sup> and “[c]ourts in the United States are bound to give effect to international law and to international agreements of the United States, except that a ‘non-self-executing’ agreement will not be given effect as law in the absence of necessary implementation.”<sup>115</sup> The Restatement (Third) states that a treaty of the U.S. is non-self-executing “if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, . . . if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or . . . if

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111. David Freestone, *The United Nations Convention on the Rights of the Child*, in *Children and the Law* 291 (David Freestone ed., 1990). See also Vienna Convention, *supra* note 107, art. 38 (“Rules in a treaty becoming binding on third States through international custom”).

112. For a general discussion of whether a treaty is self-executing or non-self-executing, see *International Law: Cases and Materials* 212–221 (Louis Henkin et al. eds., 1993).

113. Louis Henkin, *Foreign Affairs and the Constitution* 156 (1972).

114. U.S. Const. art VI, cl. 2 (“and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”).

115. Restatement (Third), *supra* note 106, §111(3).

implementing legislation is constitutionally required.<sup>116</sup> Similarly, in the United Kingdom, treaties are non-self-executing and require an act of parliament to give effect to their provisions.”<sup>117</sup>

Article 4 of the CRC specifically states that States Parties are obligated to take steps toward implementation. This could imply that the CRC is intended to be non-self-executing. The *travaux préparatoires* do not provide any clear answer on this matter, thus it becomes dependent on the law of the particular country.

The early case law demonstrates that whether a state considers the CRC self-executing is particularly significant for judicial branches of governments. In Canada, a Federal Court of Appeal held that the CRC is non-self-executing, thus the courts are not required to give effect to its provisions until implementing legislation has been passed.<sup>118</sup> The court stated that

[T]he *Convention on the Rights of the Child*, not having been adopted into Canadian law, cannot constitutionally give rise to rights and obligations as to how the discretion given by . . . the *Immigration Act* is to be exercised. That is the Convention cannot prescribe, in a manner enforceable by the courts, the obligation to give the best interests of children, of an alien who is under order of deportation, superior weight to some other factors. Such a prescription would give rise to a substantive, not merely a procedural, right and cannot be the subject of legitimate expectations.<sup>119</sup>

The court expressed further concern that the CRC would require it to take into consideration the best interests of a convict’s child.<sup>120</sup> In doing so, the court did not stop at saying that the CRC does not have effect in Canadian law until implementing legislation is adopted, but went on to say that at best the CRC is a procedural requirement in cases directed at the child and not relevant for cases that merely have consequences for the child.

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116. *Id.* §111(4).

117. See André Alen & Wouter Pas, *The UN Convention on the Rights of the Child’s Self-executing Character*, in *Monitoring Children’s Rights* 165, 166 (Eugeen Verhellen ed., 1996).

118. *Re Baker and Minister of Citizenship and Immigration* [1996] 142 D.L.R. 554 (Can.).

119. *Id.* at 571–572.

120. *Id.* at 570.

For states like Canada that maintain that the CRC is non-self-executing, the impact and the legal authority of the CRC are significantly minimized. However, the fact that a state considers the CRC to be non-self-executing does not absolve it of all obligations with respect to the Convention.

If the CRC is considered non-self-executing, the state still has an obligation to adhere to the provisions of the CRC.<sup>121</sup> Professor Louis Henkin writes, "Rendering a treaty non-self-executing in no way reduces or significantly postpones our legal obligations."<sup>122</sup> A state has an obligation to "enact necessary legislation promptly so as to enable it to carry out its obligations under the treaty."<sup>123</sup> A state also has a duty, if not a legal obligation, to abide by the provisions of a treaty once it has signed the instrument.<sup>124</sup> If a State Party does not take steps to fulfill its treaty obligations, it could eventually be found in default.<sup>125</sup> However, this process could be lengthy, and other states may be reluctant to accuse a state of being in default.

This issue has had a particularly unsettling effect in Australia, where treaties are considered non-self-executing. The debate in Australia is centered around what has been perhaps the most significant case thus far on the jurisprudence of the CRC. In *Minister of State for Immigration and Ethnic Affairs v. Teoh*, a Malaysian citizen entered the country legally, married an Australian, and had three Australian-born children.<sup>126</sup> He was

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121. See Vienna Convention, *supra* note 107, art. 26.

122. Louis Henkin, *Treaties in a Constitutional Democracy*, 10 Mich. J. Int'l L. 406, 425 n.42 (1989).

123. *Id.* at 425. See also Restatement (Third), *supra* note 106, § 111 cmt. h ("If an international agreement or one of its provisions is non-self-executing, the United States is under an international obligation to adjust its laws and institutions as may be necessary to give effect to the agreement.").

124. See Vienna Convention, *supra* note 107, art. 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) ("A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.").

125. See Restatement (Third), *supra* note 106, § 111, reporter's note 5 ("If a treaty is not self-executing for a state party, that state is obliged to implement it promptly, and failure to do so would render it in default on its treaty obligations.").

126. *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1995) 128 A.L.R. 353 (Austl.).

convicted of drug related charges during the time he was applying for a permanent visa. His visa was denied because of the drug conviction, and deportation proceedings were initiated. In his defense, Mr. Teoh cited the CRC, saying that it was in the best interests of his children that they not be separated from their primary caretaker. The children's mother was a heroin addict, and Mr. Teoh was responsible for the care of the children. The High Court of Australia held that there was a legitimate expectation that the government would abide by the principles of the CRC, even though the parliament had not yet passed implementing legislation to give effect to the provisions of the CRC.

The aftermath of *Teoh* is still unsettled. Shortly following the decision of the High Court, the executive branch of the Australian government issued an executive statement, stating that Australian law was to be interpreted according to precedent prior to the *Teoh* decision.<sup>127</sup> In 1997, legislation was introduced in parliament to clarify that international treaties such as the CRC are to be non-self-executing and will not create expectations that their provisions will be enforced automatically.<sup>128</sup> The

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127. *Developments and Events: The High Court's Decision in Minister of State for Immigration and Ethnic Affairs v. Teoh and the Government's Response*, 9 Aust. J. Fam. L. 89, 93 (1995).

128. The draft legislation is currently under consideration by the Parliament of Australia. It reads in relevant part:

The fact that (a) Australia is bound by, or a party to, a particular international instrument; or (b) an enactment reproduces or refers to a particular international instrument; does not give rise to a legitimate expectation of a kind that might provide a basis at law for invalidating or in any way changing the effect of an administrative decision.

See draft Administrative Decisions (Effect of International Instruments) Bill 1997, No. \_\_\_, 1997, A Bill for an Act relating to the effect of international instruments on the making of administrative decisions (on file with author). The Human Rights and Equal Opportunity Commission of Australia has opposed this legislation. The Manager of the Human Rights Policy for the Commission has stated that

to declare before the international community a commitment to [human rights] standards and then to enact legislation which enables decision-makers to ignore them completely is, in our view, inconsistent and unacceptable . . . . But of more importance is the message that the proposed legislation sends to Australians. It states that Australians themselves should have no expectation that their human rights will be considered by the Government or by decision-makers in making purely

legislation, if passed, would have significant implications for not only child rights in Australia, but also for Australia's obligations under any international treaty. This position is particularly disconcerting, since Australia has long been viewed as one of the strong supporters of the international human rights movement in general, and specifically of the CRC.

Adopting the view that the CRC is non-self-executing introduces the possibility of court decisions like the Canadian case discussed above, *Re Baker*. Despite a duty to fulfill treaty obligations in good faith, it seems states are willing to hide behind the non-self-executing shield, which could allow human rights abuses of children to continue without adequate remedy.<sup>129</sup>

### C. Reservations to the CRC

Reservations are another significant means by which the effects of an international human rights treaty can be minimized.<sup>130</sup> Article 51 of the CRC explicitly allows for reservations, so long as they are "not incompatible with the object and purpose of the Convention."<sup>131</sup> Inevitably, some tension existed in the early years following the CRC's creation. While its advocates wanted states to support all of its provisions, it was important to gain as many ratifications as quickly as possible.<sup>132</sup> Thus, the

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administrative decisions in the absence of statute law to the contrary.

*See* Commentary by Kieren Fitzpatrick, Human Rights and Equal Opportunity Commission, November 20, 1995 (on file with author). At present, it is unclear whether this bill has the necessary support to become law.

129. For a perspective on this issue in the immigration context, see Bobbie Marie Guerra, *Comment, A Tortured Construction: The Illegal Immigration Reform and Immigrant Responsibility Act's Express Bar Denying Criminal Aliens Withholding of Deportation Defies The Principles of International Law*, 28 St. Mary's L.J. 941 (1997).

130. Upon ratification of a treaty, a state can issue reservations, understandings, or declarations. Reservations are the most significant, as they propose to alter a state's obligations under the treaty.

131. CRC, *supra* note 1, art. 51(2). *See also* Vienna Convention, *supra* note 107, art. 19.

132. Alastair Bissett-Johnson, *What did States really agree to?—Qualifications of Signatories to the United Nations Convention on the Rights of the Child*, 2 Int'l J. Children's Rts. 399, 400 (1994).

CRC has achieved nearly universal ratification, but the ratifications have not been without some reservations.<sup>133</sup>

For the most part, the reservations have not been detrimental to the overall quality of the document. In fact, in the rare situation where a state has made a reservation that has severe implications, other States Parties have applied strong pressure on the reserving state to withdraw it. This occurred with Myanmar's initial reservation to Article 37, which states that "States Parties shall ensure that . . . [n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."<sup>134</sup> Reservations to this provision can be seen as in conflict with the treaty's object and purpose. As a result, the objection to Myanmar's Article 37 reservation was strong, and Myanmar withdrew the reservation.<sup>135</sup>

Although the reservations have not had an overall negative impact, they have had broad implications in a few specific areas. For example, rights under Articles 13 and 14 regarding freedom of thought and expression, and the right to education under Article 28, have raised concern about the balance between parental and children's rights.<sup>136</sup> Some groups in the United States have expressed concern by objecting to U.S.

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133. For the reservations of the first 187 states that ratified the CRC, see Reservations, Declarations, and Objections Relating to the Convention on the Rights of the Child, Committee on the Rights of the Child, U.N. Doc. CRC/C/2/Rev.5 (1996) [hereinafter Reservations, Declarations, and Objections].

134. CRC, *supra* note 1, art. 37(a). Myanmar's reservation to Article 37 reads in part as follows:

Nothing contained in Article 37 shall prevent, or be construed as preventing, the Government of the Union of Myanmar from assuming or exercising, in conformity with the laws for the time being in force in the country and the procedures established thereunder, such powers as are required by the exigencies of the situation for the preservation and strengthening of the rule of law, the maintenance of public order (ordre public) and, in particular, the protection of the supreme national interest, namely, the non-disintegration of the Union, the non-disintegration of national solidarity and the perpetuation of national sovereignty, which constitute the paramount national causes of the Union of Myanmar . . . Such powers shall include the powers of arrest, detention, imprisonment, exclusion, interrogation, enquiry and investigation.

Reservations, Declarations, and Objections, *supra* note 133, at 26.

135. See Reservations, Declarations, and Objections, *supra* note 133, at 26.

136. See Bissett-Johnson, *supra* note 132, at 400.



ratification of the CRC because, among other things, they consider it to be anti-parent.<sup>137</sup> Much of this criticism is overstated. The CRC assumes that the family environment is best for the child, and that parents play a significant role in the care of the child, a role which States Parties must respect.<sup>138</sup>

Also of concern is that several States Parties to the CRC have submitted more general reservations, the actual scope of which is not clear. The most common general reservation has come from Islamic countries, many of which have reserved the right not to follow provisions that are incompatible with Islamic law or the *Shariah*.<sup>139</sup> Several states have voiced concern that these provisions may be overbroad, that in fact these reservations could be tailored to cover only a limited number of provisions.<sup>140</sup> In addition, any general reservations warrant further examination, with a view to narrowing their scope or having them withdrawn. As discussed below, an important aspect of the implementation

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137. A few conservative organizations opposed to U.S. ratification of the CRC have painted the Convention as a radical, anti-parent document which would hand the United Nations power over all matters related to children in the United States. Their argument that ratifying the CRC would hand over to the United Nations all authority in matters related to children is simply unfounded. The U.S. has ratified a number of multilateral treaties without losing its sovereignty. Furthermore, the deference to States Parties evident in the text of the CRC further dispels any claim that the U.S. would lose its sovereignty. There is also much to suggest that the CRC is not anti-parent. *See, e.g.*, Cynthia Price Cohen & Susan H. Bitensky, *United Nations Convention on the Rights of the Child: Answers to 30 Questions 2-4* (1996); Children's Defense Fund, *America's Children Falling Behind: The United States and the Convention on the Rights of the Child 9-11* (1992).

138. CRC, *supra* note 1, art. 5 (stating that "States Parties shall respect the responsibilities, rights, and duties of parents . . . to provide . . . appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."). In addition to Article 5, other provisions in the CRC recognize the importance of the parent-child relationship, including: Articles 2, 3, 7, 8, 9, 10, 14, 16, 18, 20, 21, 23, 24, 27, 37, and 40. *See also* Lopatka, *supra* note 2, at 255. Lopatka, who from 1979-1989 was the Chairman-Reporter of the Working Group that drafted the CRC, writes that the Convention "assumes that the family is the best environment for the proper development of the child."

139. It can be argued that the reservations based on the Islamic *Shariah* are no different from those that do not allow conflict with a country's constitution. However, the objection is based on the idea that the general reservation applies to all provisions of the CRC, and is not tailored to address specific concerns. An analysis of Islamic law compared with the provisions of the CRC is beyond the scope of this article, but it warrants further exploration.

140. States that have objected to such reservations as overbroad include: Austria, Denmark, Federal Republic of Germany, Ireland, Italy, the Netherlands, Norway, Portugal, the Slovak Republic, and Sweden. *See Reservations, Declarations, and Objections, supra* note 133, at 37-50.

of the CRC is to work toward the elimination of those reservations that could impair the rights of the child.

The Committee consistently recommends that States Parties review their reservations with a view toward withdrawing them. The Committee's stance could be strengthened if it receives stronger support from States Parties in the form of objections to reservations and pressure on other states to reconsider their reservations. Under international law, a State Party to a convention can object to a reservation by another State Party.<sup>141</sup> Generally, however, States Parties are reluctant to criticize other states. Even when one state criticizes another, their objections usually do not challenge the legal effect of the reservation.

Finland, for example, issued the following objection:

The Government of Finland has examined the contents of the reservation made by Qatar upon signature of the said Convention, by which Qatar expresses that "[t]he State of Qatar wishes to make a general reservation with regard to those provisions of the Convention which are incompatible with Islamic law." In the view of the Government of Finland this reservation is subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of internal law as justification for failure to perform its treaty obligations. For the above reason the Government of Finland objects to the said reservation. However, *the Government of Finland does not consider that this objection constitutes an obstacle to the entry into force of the said Convention between Finland and Qatar.*<sup>142</sup>

Again, the tension between encouraging ratifications and establishing a strong legal instrument is evident. As a result, some States Parties may tolerate reservations by other States Parties to the detriment of children in those countries.

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141. See Vienna Convention, *supra* note 107, arts. 20, 21.

142. Reservations, Declarations, and Objections, *supra* note 133, at 39–40 (emphasis added).

## V. JUDICIAL INTERPRETATION OF THE CRC—LIMITATIONS EMERGE

Cynthia Price Cohen has written that “[u]ltimately, no law, whether it is local, national or international, can be understood until it has been interpreted and applied to a given set of circumstances by some ‘authoritative source.’”<sup>143</sup> According to Cohen, the authoritative source for the CRC is the Committee on the Rights of the Child.<sup>144</sup> Cohen describes a process in which States Parties will be the first to interpret the Convention, and subsequently the Committee will evaluate these interpretations. After this process is repeated several times, “the Convention’s true meaning will ultimately be determined by the Committee’s application of the Convention’s text to the acts of States Parties.”<sup>145</sup> However, it would be a mistake to ignore or minimize the impact of the judiciaries of States Parties and their power to shape the application of the Convention in their own states. As the previous section identified, victims of human rights violations primarily seek remedies in the domestic courts. This is especially true of CRC violations, since the Convention does not have any mechanism for handling individual complaints or even state-to-state complaints. Thus, the domestic courts of each State Party have significant authority, and they may well establish “accepted” interpretations of the CRC before the Committee has the opportunity to respond.<sup>146</sup>

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143. Cynthia Price Cohen, *A Guide to Linguistic Interpretation of the Convention on the Rights of the Child*, in *Children’s Rights in America: U.N. Convention on the Rights of the Child Compared with United States Law 33* (Cynthia Price Cohen & Howard A. Davidson eds., 1990).

144. *Id.*

145. Cohen, *The Developing Jurisprudence*, *supra* note 27, at 5–6.

146. Vienna Convention, *supra* note 107, art. 31(1) (requiring that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”). *See id.* art. 31(3)(b) (interpretation of a treaty should be done in context of the text and any preamble and annexes.) The Vienna Convention also states that “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” is also to be considered in interpretation. A developing jurisprudence can be considered part of “subsequent practice,” particularly if no objections are made to the interpretations in practice).

### A. Some Positive Signs From the Early Case Law

Though the CRC entered into force less than ten years ago, the courts of numerous nations have already begun to cite its provisions.<sup>147</sup> The courts of Australia, Canada, England and Wales, and New Zealand have been the most frequent users of the CRC.<sup>148</sup> Moreover, courts have cited the majority of the CRC's provisions. The most commonly cited articles are Article 3 (regarding the best interests of the child), Article 9 (regarding separation of the child from his or her parents), and Article 12 (regarding the child's right to be heard).<sup>149</sup> This frequent citing is very encouraging because it reflects the breadth of issues for which the CRC has been viewed

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147. In at least thirteen legal systems, the courts have cited the CRC in legal opinions. These include: Australia, Canada, England and Wales, Federal Republic of Germany, France, India, Ireland, Italy, New Zealand, Northern Ireland, Scotland, South Africa, and the United States of America (the legal systems of the United Kingdom are listed separately, as they are independent of each other, with the exception of the final appeal to the House of Lords). This list is not necessarily exclusive, and represents the author's review of materials from the Columbia University Law Library, LEXIS, and sources collected while conducting research as an intern at UNICEF's Child Rights Advisory Unit in New York.

Interestingly, judges in two cases in the United States have cited the CRC, even though the United State has not ratified the Convention. *See Sadeghi v. I.N.S.*, 40 F.3d 1139 (10th Cir. 1994) (Kane, J., dissenting); *Batista v. Batista*, 1992 Conn. Super. LEXIS 1808 (Conn.Sup.Ct 1992). *Batista* is noteworthy for its use of the CRC as a persuasive authority, even though the United States is not a State Party.

148. Australia reported the highest number of cases citing the CRC, with almost one hundred, followed by England (over 25 cases), Canada (20 cases), and New Zealand (15 cases). (Figures as of September 1, 1998).

149. The author's survey of these cases shows that the following articles have been cited: Article 1 (re: definition of a child); Article 2 (re: non-discrimination); Article 3 (best interests of the child); Article 5 (respect for the rights and duties of parents); Article 6 (the child's inherent right to life); Article 7 (the right to know and to be cared for by both parents); Article 8 (right to preserve one's identity); Article 9 (non-separation of child from his or her parents); Article 10 (family reunification); Article 11 (illicit transfer and non-return of children abroad); Article 12 (child's rights to be heard); Article 16 (unlawful interference with a child's privacy, family, home or correspondence); Article 19 (protection from abuse); Article 20 (alternative care); Article 21 (intercountry adoption); Article 23 (regarding children with disabilities); Article 24 (right to health care); Article 26 (right to benefit from social security); Article 27 (the child's standard of living); Article 28 (the right of the child to education); Article 34 (sexual exploitation and sexual abuse); Article 37 (deprivation of liberty); Article 38 (children in armed conflict); and Article 40 (juvenile justice).

as applicable. It also implies that the courts have interpreted the phrase "all actions concerning children" as far-reaching. Courts have used the CRC in a range of cases covering the following issues: immigration; child custody; parental access to their children; the access of biological parents to their children; abduction and non-return of children; inter-country adoption; juvenile justice; criminal sentencing of both juveniles and their parents; welfare payments; education; healthcare; access of a child to siblings; private nuisance; and bankruptcy. Most of the case law is concentrated in a few areas, including immigration, custody/parental access, and abduction/non-return of children.

## B. Limitations Have Curtailed the Scope of the Rights Enshrined in the CRC

While much of the case law is encouraging, there is also cause for concern. In several areas, the limitations inherent in the language of the CRC have undermined the rights of the child. These areas need greater attention.

### 1. Immigration Cases

Immigration cases provide the clearest example of the limitations on the rights of children. Interestingly, immigration is also one of the areas in which the CRC has been most frequently cited. Courts have weakened the effect of the Convention by using both the role of international law in general and the specific limitations related to non-self-execution and reservations to the CRC. In addition, courts have further weakened the Convention by using the language of the CRC itself, in particular, the loopholes in the language of Article 3.

With respect to the general limitations of international law, case law in Canada and Australia has highlighted shortcomings in the non-self-executing nature of the treaty. In Canada, a Federal Court of Appeal determined that since the legislature had not adopted implementing legislation, it was not bound to give effect to the substantive rights provided by the CRC.<sup>150</sup> As such, it was not required to make the child's best

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150. *Re Baker and Minister of Citizenship and Immigration* [1996] 142 D.L.R. 554 (Can.). See also *Francis (Litigation Guardian of) v. Canada (Minister of Citizenship and Immigration)* [1998] 160 D.L.R. 557, 563-564 (Can.) (court acknowledges that the CRC can

interests a primary consideration. The court went further, stating that the CRC should apply only to those cases that directly affected children and not those that “merely have consequences for children.”<sup>151</sup> Since the case involved the deportation of the mother and not the children, the court said that the CRC did not apply. The court then dismissed the mother’s appeal from a deportation order even though she had lived in Canada for eleven years and had given birth to four Canadian-born children.<sup>152</sup>

In Australia, while the *Teoh* case favorably held that ratification does carry with it a legitimate expectation that its provisions will be followed, the aftermath, including ensuing attempts to pass legislation, revealed a real reluctance by the Australian Government to allow any international human rights treaty to affect its deportation decisions.<sup>153</sup> In addition, other Australian courts have interpreted the language of Article 3(1) to mean that the child’s best interests are relevant but not dispositive.<sup>154</sup>

New Zealand has also followed suit. Its courts have taken the stance that these decisions require a balancing between international obligations and national law,<sup>155</sup> but they have leaned heavily in the direction of favoring national law.<sup>156</sup> In *Patel v. Minister of Immigration*, the High Court rejected a deportation order appeal by a couple and their child, noting in part that “[the CRC’s] obligations are stated in broad and relative terms and that in respect of the child it is “a” not “the” primary consideration and is not “the” or “a” paramount consideration.”<sup>157</sup> This case

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be viewed as a source of “fundamental justice” but states that the CRC “does not purport to create rights but to declare them.”)

151. *Re Baker* 142 D.L.R. at 570 (quoting J. McHugh in his dissent in *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1995) 128 A.L.R. 353, 387.

152. *Id.* at 554.

153. *See supra* notes 127–128 and accompanying text.

154. *See supra* note 83 and accompanying text.

155. *See Patel v. Minister of Immigration* [1996] 1 N.Z.L.R. 252 (N.Z.).

156. *See also Puli’uvea v. Removal Review Authority* [1996] 3 N.Z.L.R. 538 (N.Z.) (court does not find the CRC Article 3(1) persuasive, instead referring to the state’s power with respect to immigration); *Elika v. Minister of Immigration* [1995] 1 N.Z.L.R. 741 (N.Z.) (the High Court’s balancing of international obligations under the CRC and its right to determine who can remain in its country leans in favor of deportation of the woman appellant, who had three New Zealand-born children under six years old, including one still breast-feeding).

157. 1 N.Z.L.R. 252, at 256. *See also R. v. Secretary of State for the Home Department ex parte Ahmed* (Transcript: Smith Bernal) (Q.B. Div. 1998) (U.K.).

is yet another example of a domestic court exploiting loopholes in the language of the CRC.

The United Kingdom has also demonstrated that it will retain the right to selectively apply provisions of the CRC. The government's reservation regarding immigration matters<sup>158</sup> had a decisive impact on two immigration cases in particular, in which the Court of Appeal concluded that the United Kingdom's reservations meant that the CRC did not apply.<sup>159</sup> This deference to the political branches limits the effectiveness of the CRC in the United Kingdom.

It is not just the limitations of international law that have hindered the implementation of the CRC in the area of immigration. As described above, the language of Article 3—"the best interests of the child shall be a primary consideration"—has been exploited by the courts of several countries. Both Australia and New Zealand have in effect established that the phrase "a primary consideration" indicates that the child's best interests are relevant, but not determinative. This interpretation has led to the denial of numerous appeals by non-citizen parents of citizen children. These children face the prospect of either being separated from their parents or having to leave a country in which they have a legal right to stay and going to another country where their future may be even more uncertain. This result cannot be the effect intended by the drafters of the

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158. Upon ratification, the reservations and declarations of the United Kingdom read, in part:

The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time.

Reservations, Declarations, and Objections, *supra* note 133, at 33–34.

159. See *R v. Secretary of State for Home Department ex parte Khan*, 1 F.L.R. 762 (C.A. 1998) (U.K.); *R. v. Secretary of State for the Home Department, ex parte Mercy-Ezegbe* (Transcript: Smith Bernal) (C.A. 1997) (U.K.) (denying appeals of a deportation order, noting specifically the reservations made by the United Kingdom upon ratification with respect to immigration and nationality legislation).

CRC, who designed a convention incorporating both rights and special protections.<sup>160</sup>

States will insist on their sovereignty and will claim that they must have the right to control their own borders. They will maintain that they must ensure national security by deporting certain individuals. However, states must reconsider whether in some cases their actions are in fact in violation of the CRC, and whether a different approach can be found to ensure national security while not exposing children to unnecessary hardships. With respect to controlling a state's own borders, the generally accepted rule is that these decisions must be made in the interest of the public order.<sup>161</sup> It is arguable, at least in some of these cases, whether deportation of a mother with several young children is saving the public from imminent danger.

Advocates of child rights must be concerned about these early decisions because they may soon form the precedent on which future cases, and perhaps a body of law, are built.

## 2. The Child as a Member of the Family: Custody, Parental Access, and Abduction Cases

Some courts have cited the CRC on a number of occasions in cases involving issues related to the child's position in the family, including such issues as child custody, parental access and visitation rights, and abduction or non-return of children (usually by one of the child's parents). These cases highlight a potential loophole discussed earlier: the interpretation of the best interests of the child principle.

Custody and parental access cases have most often been decided with reference to Articles 7 and 9 of the CRC. Article 7 states, in part, that a child shall have "as far as possible, the right to know and be cared for by

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160. It is debatable whether such decisions are in violation of the Vienna Convention on the Law of Treaties, which states that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." See Vienna Convention, *supra* note 107, art. 31, General Rule of Interpretation.

161. See, e.g., the Universal Declaration of Human Rights, *supra* note 48, art. 29 ("[E]veryone shall be subject only to such limitations [on their rights] as are determined by law solely for the purpose . . . of meeting the just requirements of morality, public order and the general welfare in a democratic society."). Similar provisions are found in other human rights treaties.



his or her parents.”<sup>162</sup> Article 9 states that “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine . . . that such separation is necessary for the best interests of the child.”<sup>163</sup> While Article 9 explicitly introduces the “best interests of the child” standard as the guiding principle in custody and parental access cases, Article 7 has been cited more frequently in cases in which a man seeks to prove that he is the father of a child.

The early case law has not clearly established how the CRC will be interpreted in this area, in large part because issues of custody and parental access are necessarily decided on a case-by-case basis. However, it is clear that the best interests of the child principle is central to the courts’ decision-making process.<sup>164</sup> While the reliance on the best interests of the child principle is encouraging, the practical implication is that judges are turning to, and relying on, a principle of the CRC that is inherently weak.<sup>165</sup> As a result, it is important that the case law in this area be closely monitored.

The CRC has been cited in a number of cases concerning abduction. Article 8, Article 9, and Article 11 favor the return of the child in abduction cases, but Article 3 and Article 12 both have the power to

162. CRC, *supra* note 1, art. 7(1).

163. *Id.* art. 9(1) (“Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.”).

164. For the use of the CRC in custody and parental access cases, see, for example, in Canada: *P. (D.) v. S. (C.)* [1993] 108 D.L.R. 287 (Can.) (stating that the best interests of the child principle is the applicable test in an appeal regarding a father’s access rights); *Young v. Young* [1993] 108 D.L.R. 193 (Can.) (stating that the best interests of the child is accorded significant weight in a case involving issues of custody and access). In New Zealand, see *Re T (An Adoption)* [1996] 1 N.Z.L.R. 368 (N.Z.) (stating that the focus is the best interests of the child, and not that of the parent, and ruling that the term “parents” in Article 9 of the CRC under New Zealand law ceases to mean biological parents once an adoption order has been issued, and thus article 9(3) would no longer apply to the father in this case). In England, see *In Re H (A Minor) (Blood Tests: Parental Rights)*, 4 All E.R. 28 (C.A. 1996) (upholding order for blood tests to determine the father of the child against the wishes of the mother, citing Article 7 of the CRC in support of a child’s right to know both parents.); *Re F (A Minor: Paternity Test)*, 3 All E.R. 596 (C.A. 1993) (supporting a child’s right to know both parents). *But see Re F (A Minor: Paternity Test)*, 3 All E.R. 596 (C.A. 1993) (rejecting father’s appeal, based on Article 7 of the CRC, of a decision denying the order of a paternity test, citing that allowing the test would be detrimental to the child’s relationship with the mother which is more important at this stage).

165. See discussion *infra* Part III.A.

override Articles 8, 9, and 11.<sup>166</sup> Because Articles 3 and 12 can be used to support either return or non-return of children, the best interests of the child principle becomes an important factor in the decision. The early case law of New Zealand, England, and Canada reveals that courts favor the return of children, unless it is not in the best interests of the child—a determination that the CRC has left to individual states.<sup>167</sup>

## VI. CONCLUSION

In its relatively brief history, the CRC has witnessed many encouraging signs, including the near universal ratification of the Convention and the implementation of new laws and regulations by a number of states.<sup>168</sup> Also encouraging is the broad range of issues to which courts have found the Convention applies. In many cases, the CRC has provided the necessary legal basis to ensure respect for the rights of the child. However, there is also cause for concern, most importantly with respect to the emerging limitations on Article 3 and the best interests of the

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166. See CRC, *supra* note 1, art. 8 (“States Parties undertake to respect the right of the child to preserve his or her . . . family relations”); art. 9 (“States Parties shall ensure that a child shall not be separated from his or her parents against their will”); art. 11 (“States Parties shall take measures to combat the illicit transfer and non-return of children abroad”); art. 3 (“best interests of the child”); art. 12 (“States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child”).

167. For New Zealand cases, see *Re Jayamohan* [1996] 1 N.Z.L.R. 172 (N.Z.) (a father was successful in getting the court to issue an order for the return of the children); *Clarke v. Carson* [1996] 1 N.Z.L.R. 349 (N.Z.) (a mother’s request for an order for the return of her children is denied). In England, in four cases, the court follows the views of the children in denying an order for their return. See *Re: B (Abduction: Children’s Objections)*, 1 F.L.R. 667 (Fam. Div. 1998); *Re M (A Minor) (Child Abduction)*, 1 F.L.R. 390 (C.A. 1994); *Re: D (A Minor) (C.A. 1993)*; *S. v. S (Child Abduction)(Child Views)*, 2 All ER 683 (C.A. 1993). Yet, in a fifth case, the court was less certain about the reasons behind the child’s objections, and thus ordered the return of the child. See *Re: K (Abduction: Child’s Objections)*, 1 F.L.R. 977 (Fam. Div. 1995). In Canada, the Supreme Court held that the best interests of the child lay in the prompt return of the child to his or her habitual place of residence. See *W. (V.) v. S. (D.)* [1996] S.C.R. 108 (Can.).

168. See generally UNICEF, *The Convention: Child rights and UNICEF experience at the country level* (Innocenti Studies, UNICEF International Child Development Centre 1991); UNICEF, *The Progress of Nations Report* (1996) (reporting that of the 43 countries whose reports had been reviewed at that time, fourteen had incorporated the CRC into their constitutions, and 35 of the 43 had passed new laws or amended existing laws to conform with the CRC.).

child principle. In support of the Convention, one expert wrote that “[t]he possibility of making small allowances for local conditions does not shatter the universal character of the Convention.”<sup>169</sup> Although this is certainly true, the concern is that the courts may be developing a jurisprudence on the rights of the child that does not ensure the rights and special protections that children today so desperately need in many parts of the world.

Adam Lopatka, who served as the Chairman-Reporter of the Working Group that drafted the CRC, wrote that “[t]he Convention is an historic achievement of the United Nations in the sphere of promotion and protection of human rights. However, it would be too much to treat the Convention as a sanctity without the need for improvement.”<sup>170</sup> Although the early years of the Convention have been marked by some great successes, we must not be content with that alone. Without monitoring of, and effective action within, the judicial branches of States Parties to the CRC, we risk permitting interpretations of the Convention that limit its effectiveness. Though the needs of the world’s children cannot be addressed by law alone, the law and the courts should, and do, remain an integral part of the solution—not merely mechanisms for managing juvenile justice.

In 1994, then Executive Director of UNICEF, James Grant,<sup>171</sup> stated that “[t]he largest unified movement in pursuit of rights that the world has ever seen may be emerging around the Convention on the Rights of the Child.”<sup>172</sup> The importance of this stage in the international child rights movement should not be underestimated. Greater attention must be given to the role of domestic judicial systems in order to ensure the implementation and application of the CRC’s provisions in ways that enable the CRC to live up to its great promise as a comprehensive human rights treaty for children.

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169. Lopatka, *supra* note 2, at 256.

170. *Id.* at 259.

171. The late James P. Grant was the long-time Executive Director of UNICEF and a vocal advocate of children’s rights and of the CRC.

172. James P. Grant, *Child Rights: A Central Moral Imperative of Our Time*, Statement to the Third Committee of the 49th General Assembly of the United Nations, New York (Nov. 11, 1994) (on file with author).