



# **CRC in Court:**

**The Case Law of the Convention on the Rights of the Child**

## **Acknowledgment**

CRC in Court: The Case Law of the Convention on the Rights of the Child was written by Patrick Geary for the Child Rights International Network (CRIN). CRIN welcomes comments, suggestions and feedback; contact us at: The Child Rights International Network, 2 Pontypool Place, East Studio, London SE1 8QF, United Kingdom. Tel: +44 20 7401 2257.

Email: [info@crin.org](mailto:info@crin.org); Web: [www.crin.org](http://www.crin.org).

Published by  
**Child Rights International Network (CRIN)**  
**East Studio**  
**2 Pontypool Place**  
**London, SE1 8QF**  
**United Kingdom**  
**+44 20 7401 2257**  
**[www.crin.org](http://www.crin.org)**

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## **Introduction**

Both outside and inside the courtroom, the Convention on the Rights of the Child has proved a uniquely powerful tool in advancing children's rights. This is no wonder, as the CRC addresses a wide range of contexts and subject matter, enjoys nearly universal acceptance and provides a basis for international accountability. Its monitoring body, the Committee on the Rights of the Child, has for nearly two decades reviewed States Parties' efforts to implement the Convention, looking at whether national laws, policies and practices fall in line with children's rights. Following a successful advocacy campaign, this group of experts will also soon preside over a complaints mechanism through which children can bring violations of their rights to international attention.

While the new complaints mechanism promises to meaningfully expand children's access to justice, legal claims involving children's rights are already being heard in courts around the world. In fact, the Convention on the Rights of the Child has been making its way through national, regional and international justice systems since it first came into force. CRIN believes these developments must not be overlooked, and that for children to enjoy the full benefits of their rights under the CRC, they must be able to enforce them directly in court.

With this in mind, CRIN launched the "CRC in Court" case law database in 2009 to highlight important decisions from all corners of the globe that cite, quote and discuss the Convention. This report compares and contrasts the decisions collected in the CRC in Court database, drawing out trends in the ways the Convention has been used by judicial decision-makers and painting a clearer picture of how claims involving the CRC have fared in the courtroom. In particular, we aim to review CRC case law to date in light of children's right to a remedy. In so doing, we look not only to the ultimate resolution of the dispute in question, but further consider the role played by children in bringing or pursuing cases that involve potential violations of their rights.

We also seek to give lawyers and advocates a better sense of the various approaches adopted in judicial review of the Convention. Since this depends to some degree on the nature of the legal system in question and the status granted to international children's rights in the national legal order, explanations of predominant legal systems and common methods of granting authority to the CRC are provided immediately below. Following this, we present and interpret the results of our analysis, reach conclusions on the CRC's actual and potential use in legal proceedings, and offer recommendations to bolster the Convention as an enforceable set of rights.

In the end, this report primarily explores the potential for advancing children's rights through legal advocacy. Above all else, however, we hope that reviewing the case law of the Convention on the Rights of the Child provides a source of inspiration to expand its application in all manner of judicial proceedings. The CRC is very much a living legal instrument, and national, regional and international courts offer a strong, effective means to ensure that children's rights progress from laudable aspirations to binding obligations.

## Status of the CRC in National Legal Systems

Although all States Parties make the same commitment when ratifying the CRC, this does not mean that the Convention enjoys the same status and authority within each legal system. Rather, States can and do adopt differing attitudes to the enforceability of international law. In some jurisdictions, the CRC may be viewed alongside the national constitution as the reigning law of the land; in others, it functions more as guiding force in crafting and interpreting legislation.

The clearest distinction in this regard is that between “monist” and “dualist” systems. In monist systems, ratified international conventions can be enforced directly by national authorities and in national courts. In dualist systems, however, treaties cannot be enforced until they have been “incorporated” into national law. Conventions are typically incorporated via national legislation; this may be done either directly, where the whole of an instrument is adopted in a single national law, or, more commonly, in a piecemeal manner through a number of separate subject-specific acts and amendments.

The force the CRC holds in national law often dictates how judicial decision-makers view and use the Convention in legal disputes. If a CRC provision has not been incorporated in a dualist State, for instance, it will likely not be possible for judges in that jurisdiction to explicitly and directly apply that provision. While it is regrettable that the CRC is not fully enforceable in the courts of every State Party, this does not mean that it has no place in legal proceedings. The Convention has been and can be used as a source of valuable interpretive guidance, helping judges to scrutinise national laws and examine facts in light of international children's rights obligations.

CRIN's analysis below looks in part at how courts have used the CRC within the confines of their legal systems; cases are divided into those where the Convention has been enforced, or “directly applied”, and those where it has served as guiding force in interpreting the law. The differences between these two approaches can perhaps best be illustrated by excerpts taken from decisions in the database, as provided below.

### **Directly Applied**

"In reviewing the documents, facts and circumstances of the case...the judge or authority charged with issuing the legal decision...must apply the fundamental principles enshrined in the Convention on the Rights of the Child and the provisions set out in Law No. 136-03, which must prioritise the best interests of the child in granting or revoking custody."

- *Bencosme v. Devers (Supreme Court of the Dominican Republic)*

“On the strength of Art. 5 (4) of the Constitution of the Republic of Bulgaria, the [Convention on the Rights of the Child and Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption] shall constitute part of the country’s internal law and shall prevail over those norms of the national legislation that contradict them...”

- *Kerezov v. Minister of Justice (Supreme Administrative Court of Bulgaria)*

“The provision of Article 9, point (3), of the CRC is directly applicable since the right of the child to

maintain regular contacts with both parents clearly follows from it.”

- *Maja Dreco et al. v. Slovenia (Constitutional Court of Slovenia)*

“Article 3(1) [of the Convention on the Rights of the Child] is enforceable by the Courts and no specific legislation is required to implement it as opposed to other Articles of the said Convention. In any proceedings before the courts for the legal custody or upbringing of a child...the Court must regard the welfare of the child as the first and paramount consideration and not the punishment of the guilty spouse/parent.”

- *Molu v. Molu (Supreme Court of Vanuatu)*

“Public authorities, who are exceptionally responsible for child protection, failed to prevent violations of the child's right to life in a home environment or to guarantee the best interests of the child in this case. Article 3(1) of the Convention on the Rights of the Child requires that 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.”

- *S.R., V.R. v. Lithuania (Supreme Court of Lithuania)*

### **Interpretive Guidance**

“The extent of the state obligation must also be interpreted in the light of the international obligations binding upon South Africa. The United Nations Convention on the Rights of the Child, ratified by South Africa in 1995, seeks to impose obligations upon state parties to ensure that the rights of children in their countries are properly protected.”

- *Government v. Grootboom (Constitutional Court of South Africa)*

“I am told that Nauru is a signatory to the Convention [on the Rights of the Child]. Whether it has become part of the domestic law of Nauru is a moot point. Whether it is or is not part of our domestic law, I feel able to take the Convention into account in considering the cases stated...”

- *In re Lorna Gleeson (Supreme Court of Nauru)*

“It is indisputable that the provisions of an international treaty such as the UN Convention on the Rights of the Child, of which Botswana is a party, do not form part of Botswana law, unless parliament elects to incorporate its provisions into our domestic law by legislation. But the fact that the Convention has not been incorporated into national law, as is the case with the UN Convention on the Rights of the Child, does not mean that its ratification holds no significance for Botswana law, for its provisions have strong persuasive value on the decisions of this Court.”

- *Ndlovu v. Macheme (High Court of Botswana)*

“This is a clear mandate to the courts of this country to have regard to the provisions of the Convention in appropriate cases. More than lip service must be paid to the provisions of the Convention... This overwhelming abundance of international authority shows how parties to the Convention on the Rights of a Child notwithstanding the lack of specific domestic legislation have imported the Convention, its underlying principles and philosophies into domestic law. In doing so these countries have breathed life into the CRC...”

- *Police v. Vailopa (Supreme Court of Samoa)*

“Even if an international treaty has not been incorporated into domestic law, our domestic legislation has to be construed so far as possible so as to comply with the international obligations which we have undertaken. When two interpretations of these regulations are possible, the interpretation chosen should be that which better complies with the commitment to the welfare of children which this country has made by ratifying the United Nations Convention on the Rights of the Child.”

- *Smith v. Smith and Another (House of Lords (United Kingdom))*

Admittedly, these examples do not give a full sense of the many ways in which judicial decision-makers have relied on the Convention. To provide more context and demonstrate the wider range of approaches taken, we have also put together quotations from a larger selection of judgments that exemplify the versatility of the CRC in an annex to this report.

## **Analysis**

The CRC in Court database is searchable by CRC article referenced, key word, country and region, and each individual summary contains further information on the presiding court, date, background, issues addressed and the way the court reached its decision. Excerpts citing, quoting or discussing the CRC have been included and, where possible, translated into English; if available, follow up information on the implementation and enforcement of decisions is also provided. To offer a child rights perspective on the outcome of and reasoning behind decisions, CRIN has also added commentary to explain whether we see each individual judgment as consistent or inconsistent with the Convention.

The database contains at present 132 court decisions from national, regional and international judicial and quasi-judicial bodies around the world. The cases have been selected for their discussion and interpretation of the CRC, their relevance and overall importance to children's rights, and/or their ability to give a sense of how the Convention has been used in a particular jurisdiction. We recognise that our criteria for selection do not give a fully accurate cross-section of how the CRC has fared in every courtroom, but rather provide a sense of how the Convention has been and could be used to advance children's rights through legal advocacy.

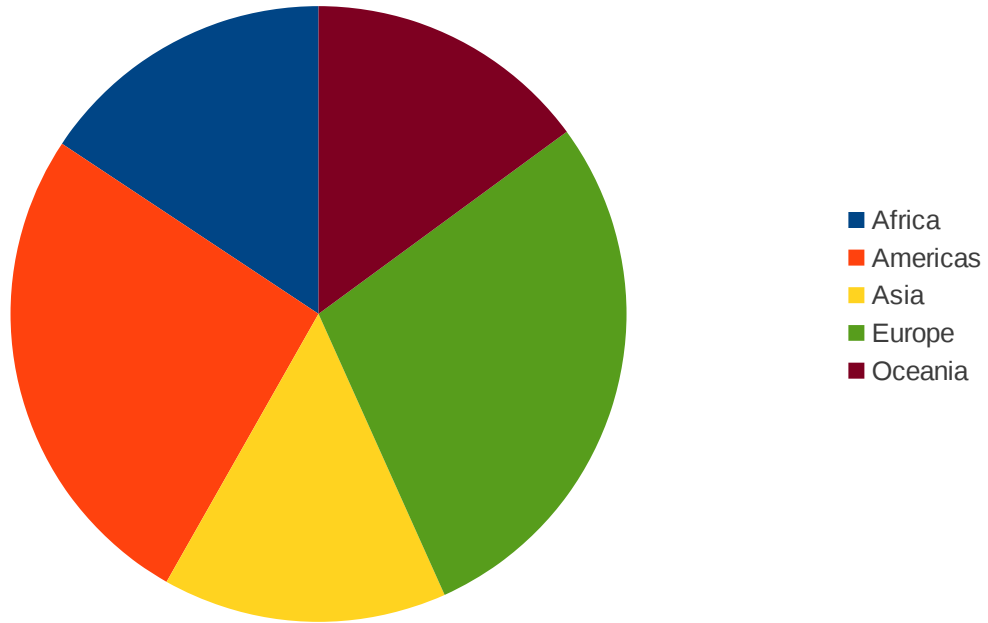
Despite the lack of science behind our selection process, we believe that undertaking an analysis of the way the CRC has informed judicial decision-making in the cases in our database will provide meaningful insight into the Convention and its jurisprudence. As set out in the Introduction, we aim to give not only a snapshot of where the cases have come from and the issues they address, but also an impression of when the Convention has been used most successfully to advance children's rights. This involves not only looking at the decisions themselves, but at how these disputes arrived in the courtroom and whether the resolutions reached ultimately serve to advance children's rights in line with the CRC. Accordingly, we present below the findings of our review.

### **Region**

Jurisdictions have been grouped into five regions by geographic location: Africa, the Americas, Asia, Europe and Oceania. Of these, the most cases come from Europe (38), followed by the Americas (35), Africa (21), Asia (20) and Oceania (20), as represented in the chart below:

*Figure 1. Cases by Region*



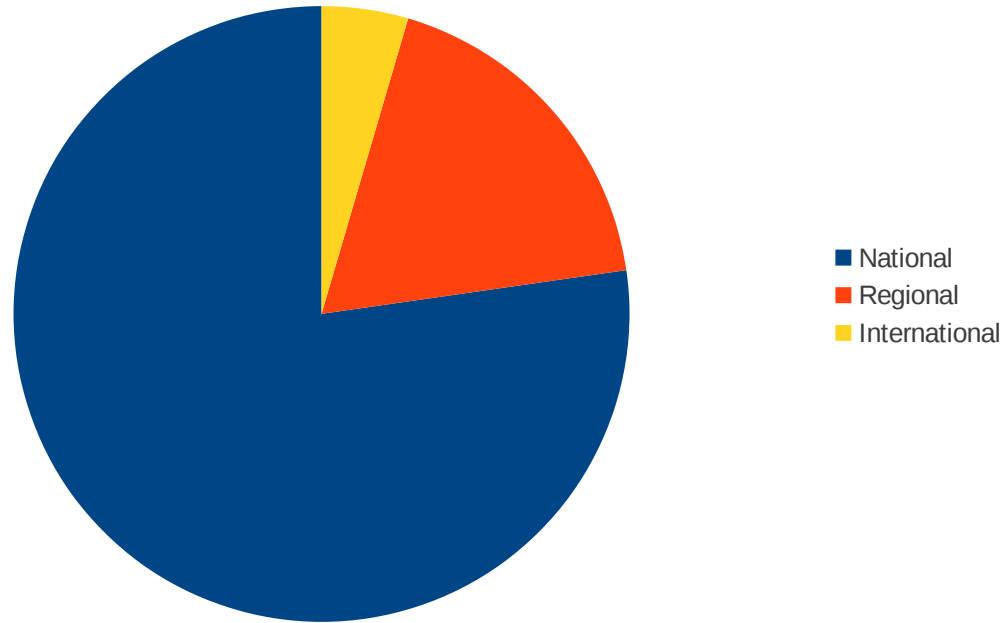


The larger number of cases from Europe and the Americas is partly explained by the availability and use of regional human rights mechanisms. Along these lines, the database includes 12 cases from the European Court of Human Rights, 8 cases from the Inter-American Court of Human Rights, 2 cases from the European Social Committee, and 1 case each from the European Court of Justice and Eastern Caribbean Supreme Court. Taking these decisions into account, there do not appear to be large disparities across the broader regions as regards the use of the CRC in judicial decision-making.

### Scope

As cases in the database come from international, regional and national judicial mechanisms, decisions vary in terms of their reach and scope. As shown below, the majority of cases come from national courts (102), followed by regional (24) and international (6) judicial and quasi-judicial mechanisms:

*Figure 2. Cases by Scope*

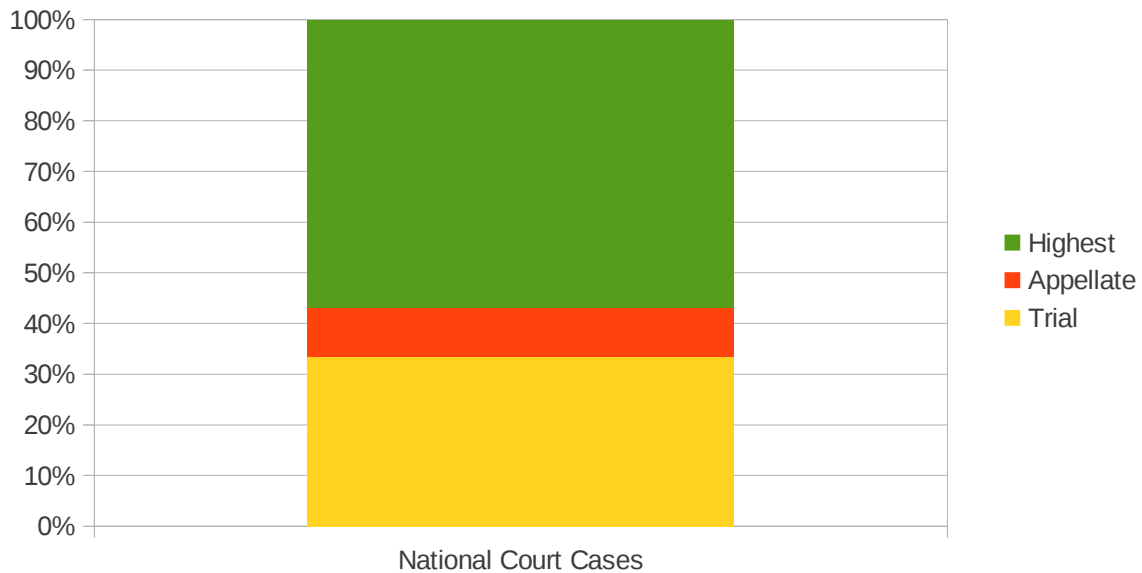


As discussed above, regional cases primarily come from the European Court of Human Rights (12) and Inter-American Court of Human Rights (8), but also include small numbers of cases from the European Social Committee (2), European Court of Justice (1) and Eastern Caribbean Supreme Court (1). The 6 international decisions come from the International Court of Justice (2), Permanent Court of Arbitration (1), United Nations Human Rights Committee (1), International Labour Organization (1), and International Criminal Court (1). This indicates not only the willingness of many national courts to consider the CRC in cases involving children's rights, but also the openness of a wide variety of regional and international judicial and quasi-judicial mechanisms to claims involving the Convention.

### Scope: National Courts

Within national judicial systems, the CRC may be raised and addressed at many different levels. Most of these systems are structured such that there are trial courts, courts of appeal and supreme or constitutional courts. For the purposes of analysis, national court cases have been categorised as Trial Court (e.g., District Court, High Court; also includes branches thereof, e.g., Family Court, and any subordinate judicial bodies, e.g., Magistrates' Courts, Administrative Law Courts), Appellate Court (courts with exclusively appellate jurisdiction, not including trial courts that review cases from lower subordinate courts) or Highest Court (e.g., Supreme Court, Constitutional Court, Court of Cassation). Dividing national court decisions into these three categories reveals the following breakdown:

*Figure 3. National Court Cases by Scope*



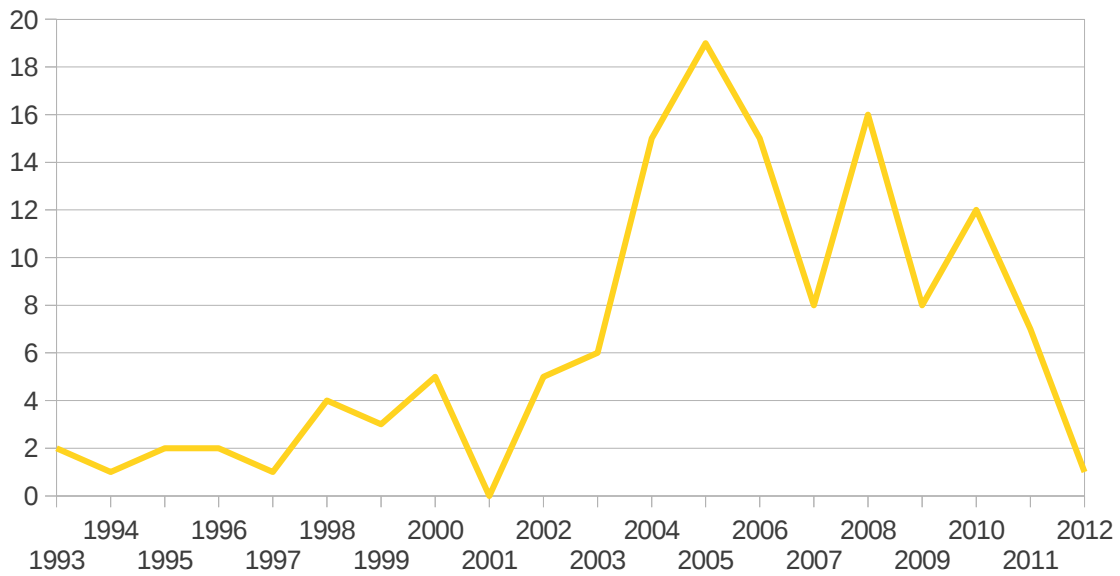
As is apparent, the CRC has been raised across all levels of national court systems, and has in particular been embraced in many jurisdictions' highest courts. It would be wise, however, to avoid the conclusion that higher courts are more likely to look at the Convention than lower courts. CRIN's case selection criteria explicitly look for cases that have a stronger impact on children's rights, which creates a bias toward higher-level national court decisions. Higher courts are also more likely to formally publish their decisions and make them available online, while many lower court decisions go unreported. This is especially true in cases that involve children, which are often kept confidential in light of privacy concerns. Lastly, given the nature of legal proceedings, the fact that the CRC is cited in an appellate decision likely means that it was also cited during trial.

Notably, litigating cases requires time and resources, and many cases may be settled out-of-court at an early stage of proceedings. Where this happens, it would be possible for the CRC to be raised but never cited in a formal judicial proceeding. Financial and time commitments are similarly required to bring appeals, which indicate that the majority of cases where the CRC is cited are likely on a trial court level. Once these commitments have been made, however, it is not uncommon for cases to proceed to the highest court where possible. This may explain the smaller number of lower appellate court decisions, especially given that the highest courts in a country's judicial system are typically empowered to hear cases involving constitutional concerns, rights violations and issues of importance to the general public interest.

## Date

The CRC entered into force in 1990, marking the beginning of its now 22 years of jurisprudence. The oldest case in the database comes from 1993, and the most recent from 2012. The number of decisions for each of the last 20 years is illustrated below:

*Figure 4. Number of Decisions by Year*



This graph shows a general trend toward greater use of the CRC in judicial decisions. The increase in cases referencing the Convention could, however, also be explained by a number of other factors. For instance, because it can take many years for cases to work their way through the court system, the CRC may have been used from the outset in legal proceedings that did not reach final resolution until much later. Equally, decisions in recent years are more easily published and accessed online, making earlier cases citing the CRC relatively difficult to find. In the very recent past, the lack of decisions may also be accounted for both by the time frame during when the majority of case research was conducted (2009 to 2011) and the delays that often occur between a decision being reached and it being made publicly available.

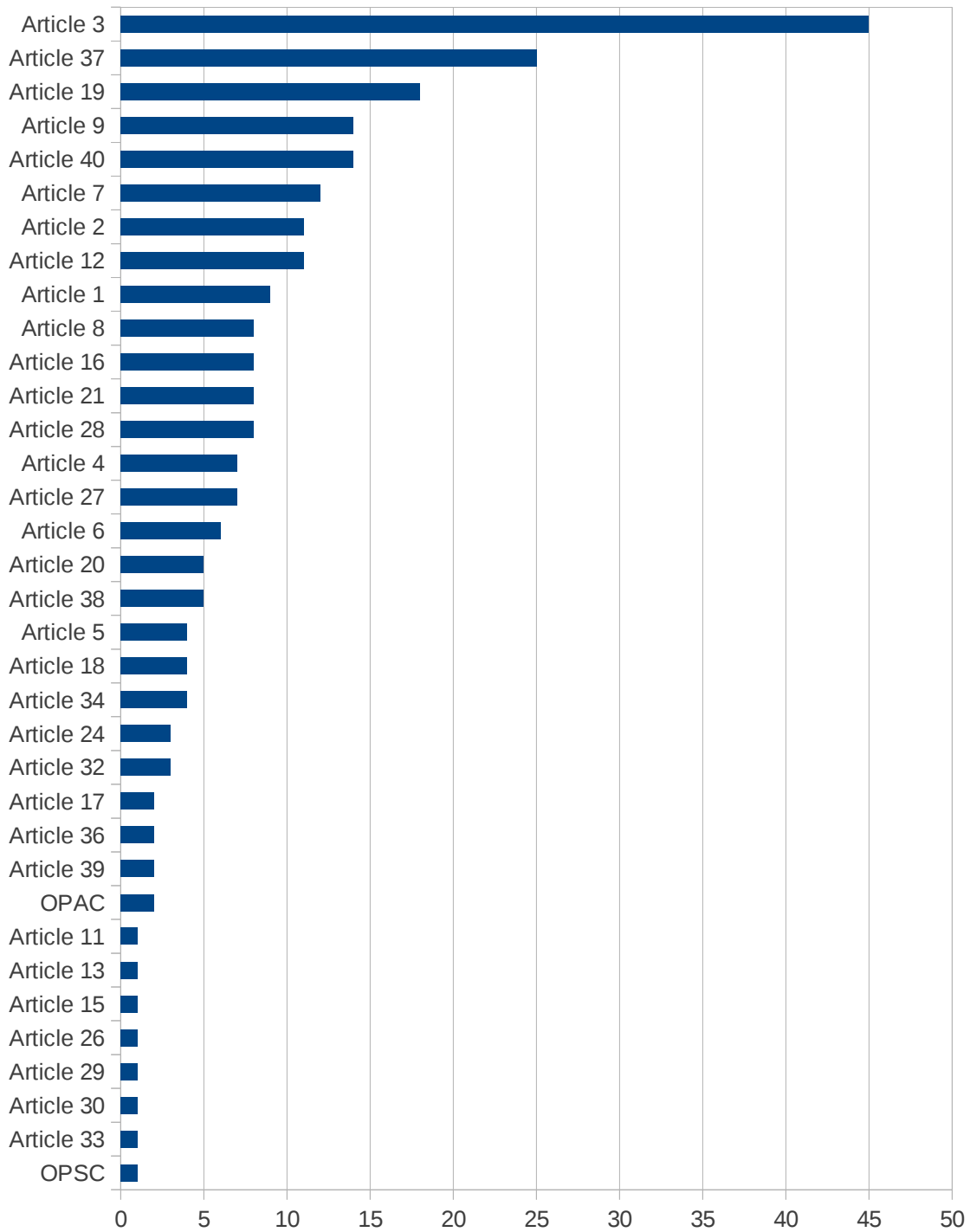
### Article/Instrument

The 41 substantive articles of the CRC, its procedural provisions and its two substantive Optional Protocols have received vastly differing levels of attention in the courts. For the purposes of this analysis, all of these provisions are referred to as “articles.” With this in mind, the table and chart below show references to CRC articles as they appear in the convention and rank these articles in order from most frequently to least frequently cited:

*Figure 5. Number of Decisions citing CRC Article in Convention order*

<b>Article</b>	<b>Cases Referencing</b>	<b>Article</b>	<b>Cases Referencing</b>
Article 1 (Definition of a child)	9	Article 23 (Children with disabilities)	0
Article 2 (Non-discrimination)	11	Article 24 (Health and health services)	3
Article 3 (Best interests of the child)	45	Article 25 (Periodic review of placement)	0
Article 4 (Implementation of rights)	7	Article 26 (Social security)	1
Article 5 (Parental guidance and the child's evolving capacities)	4	Article 27 (Standard of living)	7
Article 6 (Survival and development)	6	Article 28 (Education)	8
Article 7 (Name and nationality)	12	Article 29 (Aims of education)	1
Article 8 (Preservation of identity)	8	Article 30 (Children of minorities or of indigenous peoples)	1
Article 9 (Separation from parents)	14	Article 31 (Leisure, recreation and culture)	0
Article 10 (Family reunification)	0	Article 32 (Child labour)	3
Article 11 (Illicit transfer and non-return)	1	Article 33 (Drug abuse)	1
Article 12 (The child's opinion)	11	Article 34 (Sexual exploitation)	4
Article 13 (Freedom of information)	1	Article 35 (Sale, trafficking and abduction)	0
Article 14 (Freedom of thought, conscience and religion)	0	Article 36 (Other forms of exploitation)	2
Article 15 (Freedom of association)	1	Article 37 (Torture and deprivation of liberty)	25
Article 16 (Protection of privacy)	8	Article 38 (Armed conflicts)	5
Article 17 (Access to appropriate information)	2	Article 39 (Rehabilitative care)	2
Article 18 (Parental responsibilities)	4	Article 40 (Administration of juvenile justice)	14
Article 19 (Protection from abuse and neglect)	18	Article 41 (Respect for existing standards)	0
Article 20 (Protection of children without parental care)	5	Articles 42 – 54 (Implementation and monitoring)	0
Article 21 (Adoption)	8	Optional Protocol on Armed Conflict	2
Article 22 (Refugee children)	0	Optional Protocol on Sexual Exploitation	1

Figure 6. Number of Decisions citing CRC Article in rank order



Note: Articles not cited include Articles 10, 14, 22, 23, 25, 31, 35, 41, 42-54

As the chart illustrates, article 3 on the best interests of the child emerges clearly as the most cited provision (45 cases), followed by article 37 on torture and deprivation of liberty (25 cases) and article 19 on protection from abuse and neglect (18 cases). Five articles are cited between 10 and 15 times, 10 articles are cited between 5 and 9 times, and a further 17 articles are cited between 1 and 4 times. Nine articles are not referenced in any decision contained in the database.

The best interests of the child (Article 3) is also the most regularly cited of the so-called “guiding principles” of the Convention. The other guiding principles include the definition of the child (Article 1: 9 cases), non-discrimination (Article 2: 11 cases), the right to life, survival and development (Article 6: 6 cases), and respect for the views of the child (Article 12: 11 cases). It is perhaps noteworthy that all of these articles are referenced more regularly than the median number of times.

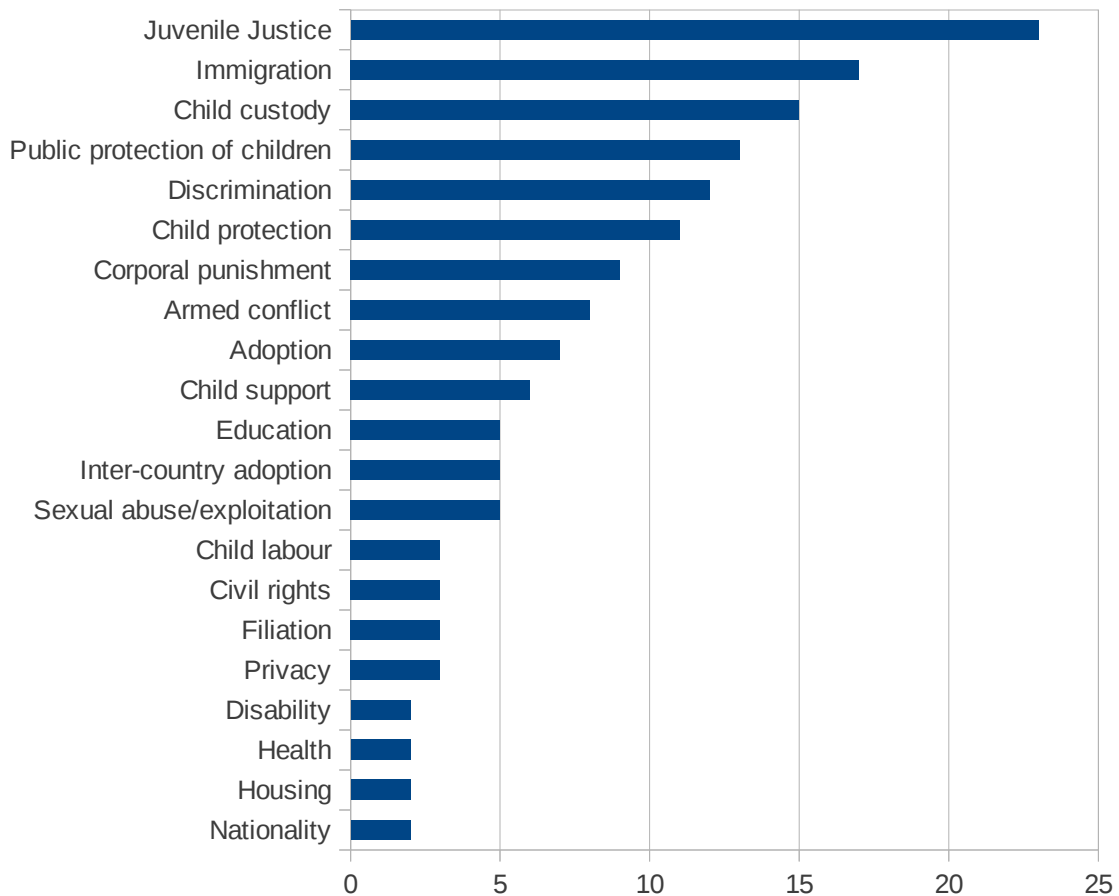
Looking in more detail at the subject matter of the articles cited, it appears that articles related to children's civil and political rights (e.g., freedom of expression; freedom of thought, conscience and religion; freedom of association) are referenced significantly less frequently than those related to children's economic, social and cultural rights (e.g., health, education, social security). Articles related to child protection, care and custody feature regularly (e.g., separation from parents, protection from abuse and neglect), as do articles relevant to children in conflict with the law (e.g., torture and deprivation of liberty, administration of juvenile justice).

These variations may be reflective of differing levels of openness courts have to addressing individual rights or types of rights within the Convention. Given the often conservative nature of judicial systems, it is possible that lawyers are more inclined to raise and judges more inclined to discuss traditionally less controversial rights. Articles referenced are also, however, influenced by the nature of the cases that come before the legal system. While the rights of children in conflict with the law are often viewed less favorably by national Governments, for instance, they naturally lend themselves to be cited by children involved in juvenile justice proceedings. Moreover, the best interests of the child is a common theme in divorce and child custody proceedings, just as the right to be protected from violence is often relevant to child protection proceedings and the right not to be separated from parents is regularly raised in immigration proceedings.

## **Topic**

As looking solely at the CRC article cited does not paint a full picture of the issues in dispute in a given case, we have further classified decisions in the database by the topic or topics broadly addressed. The figure below lists these topics in order from most common to least common; each case falls under at least one topic heading, although a number address two or even three of these. While the nature of most topics is relatively apparent, it is important to distinguish cases that involve individual children in child protective proceedings (“child protection”) from those that involve the Government's duty to ensure that all children are protected from violence (“public protection of children”):

*Figure 7. Cases by topic*



As discussed above, the CRC articles raised in a case will often depend heavily on the topics addressed. Looking at these topics, it becomes more clear why certain articles would be more frequently cited than others. Another trend also emerges; four of the most regularly addressed six topics indicate claims of a kind more likely to be filed by parents (child custody) or the Government (juvenile justice, immigration, child protection) than children themselves. More insight into the ways and nature of cases involving children's rights that come before the courts is offered in the section below.

### **Court jurisdiction/Nature of Case**

National courts often have the power to hear only certain kinds of cases, especially on the lower levels. Claims are often filtered into different tracks based on whether they are civil or criminal. Civil cases typically involve a dispute between two or more parties, while criminal cases involve the prosecution of an individual or organisation. Courts may be further divided into those that hear family, administrative, or special constitutional matters. Family courts address cases relating to family relationships like divorce, child custody, child support and child protection; administrative courts review public decisions, often in the context of welfare or immigration; and special constitutional courts or procedures have been established in some systems to hear certain kinds of claims that relate to fundamental rights or freedoms.



The figures below group cases in the database both by the jurisdiction of the court issuing the decision, i.e., the kinds of cases a court can hear, and the nature of the matter addressed. Notably, international and regional courts and mechanisms are marked as “international”, and the nature of the matter addressed has been categorised in line with the criteria above. For consistency's sake, special constitutional matters have been reclassified in line with the subject of the underlying claim as these kinds of procedures are not available in the majority of judicial systems. Given the importance of children's rights to this analysis, criminal matters have also been separated into those that involve the prosecution of adults (“criminal”) and those that involve the prosecution of children (“juvenile justice”), regardless of whether a country operates a separate juvenile justice system.

Figure 8. Jurisdiction of Issuing Court

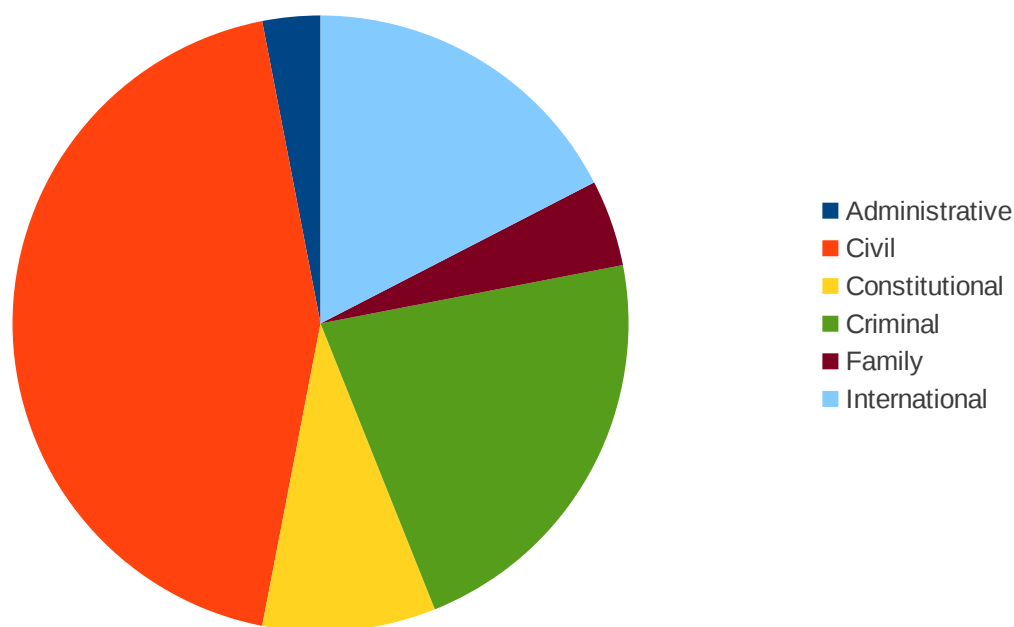
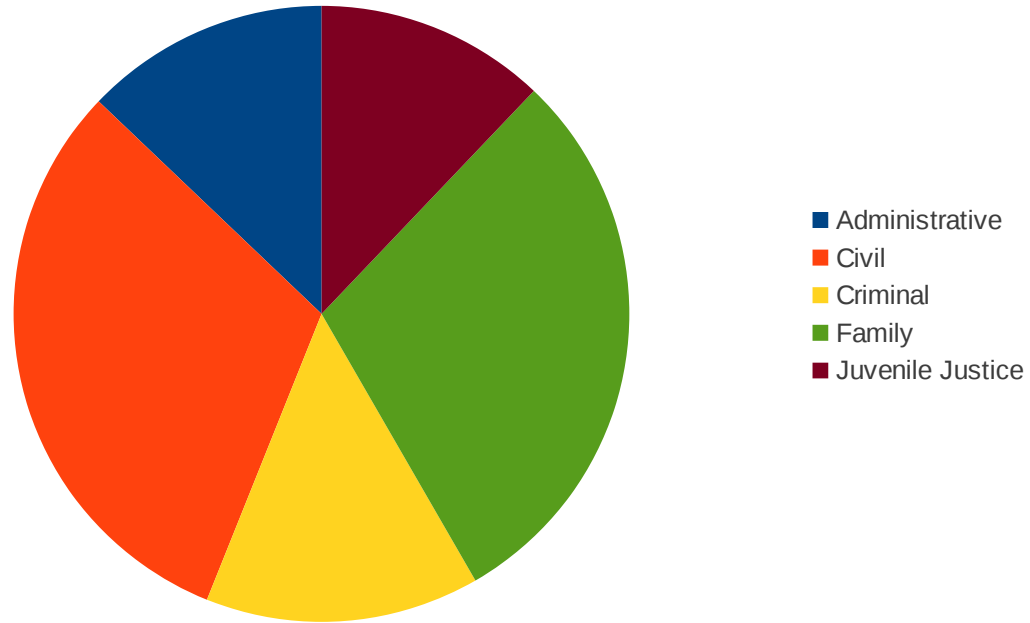


Figure 9. Nature of case



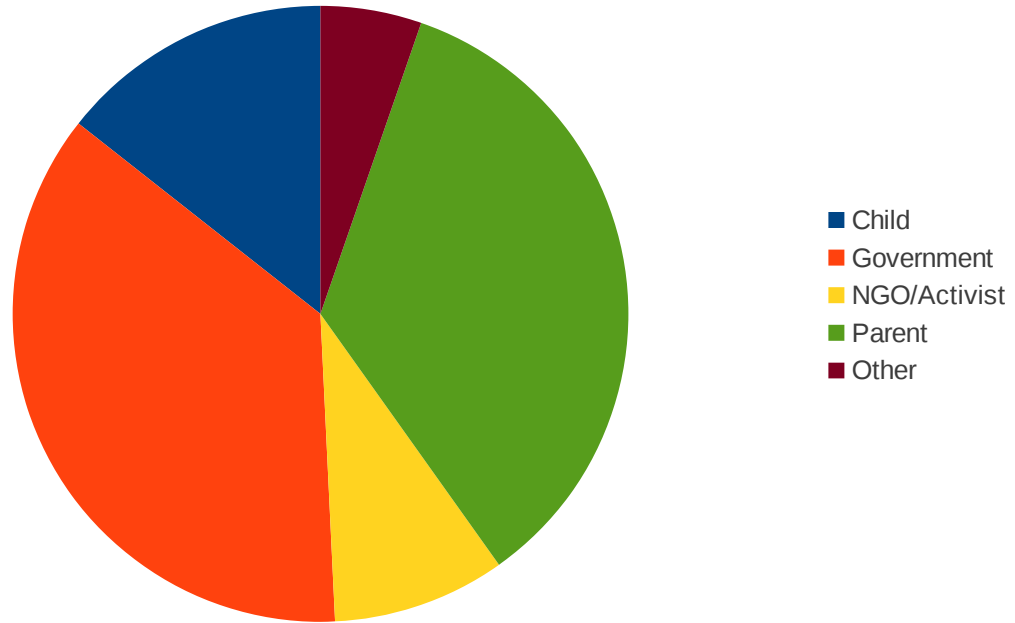
The differences between the two charts may in part be explained by the hierarchy of courts within a judicial system. Family and juvenile justice courts are often only available at lower levels; where this is the case, appeals would be filed with a court that the ability to hear a wider range of cases. Looking at the second chart, it can be seen that civil (41 cases) and family (39 cases) matters together account for the majority of decisions in the database. Administrative (17 cases), criminal (19 cases), and juvenile justice (16) matters, meanwhile, make up just over a third.

It is perhaps not surprising that the CRC is cited often in family matters, seeing as these cases often have particular relevance to children. The same is true for civil matters, given that claims involving violations of rights are most commonly initiated in civil proceedings. The charts also show, however, that all kinds of courts reference the CRC in all kinds of proceedings. It may also be worthwhile to look at how these cases arrived before the courts, as investigated in further detail below.

## Parties

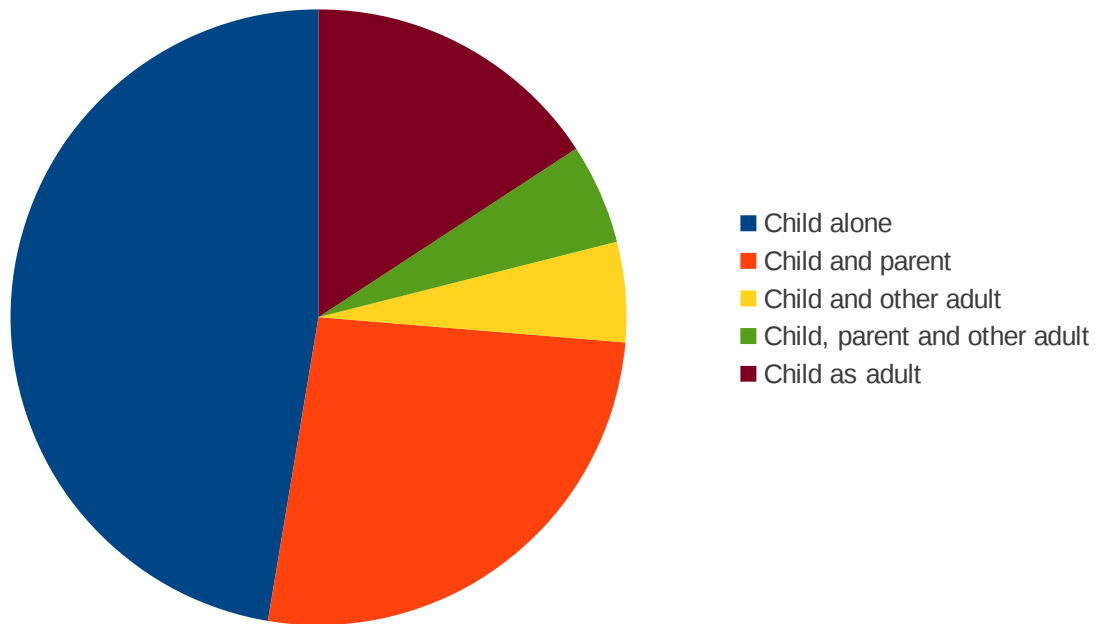
Cases make their way into the courtroom through a number of ways. In criminal and administrative proceedings, it is often the Government that initiates proceedings against a particular person. Civil cases are generally filed by individuals or organisations, and family matters are frequently brought to the court by parents. Looking at who first initiated court proceedings and who the parties involved a particular legal dispute are can give a strong sense of children's involvement in cases that concern their rights, as shown in the figures below:

*Figure 10. Party initiating legal proceedings*



In the chart above, any case at least in part initiated by a child has been categorised as being brought by a child. The figure below provides a more complete understanding of how these 19 cases came before a judge; most of these groupings are self-explanatory, and “child as adult” refers to cases where a person now above the age of majority brought a case related to an action that occurred in his or her childhood:

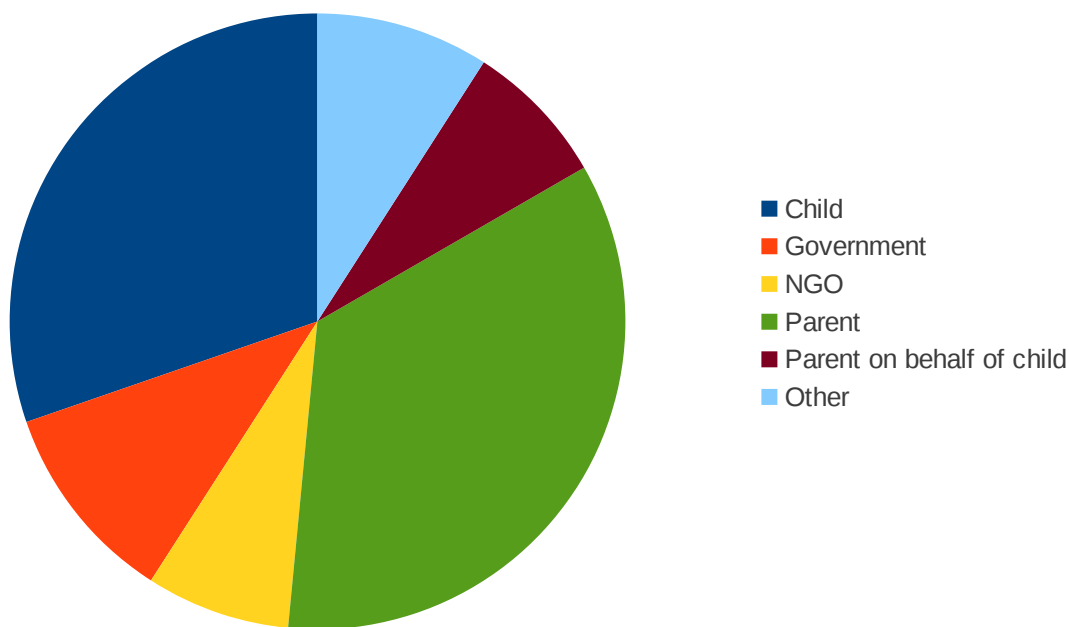
*Figure 11. Party initiating cases brought in part by children*



These charts show that children initiated only a small portion of the cases in the database, and that even where children were involved in bringing court proceedings, the majority of time this was done alongside a parent or other interested adult. This is not surprising, seeing as children often face immense barriers to accessing justice. Among other obstacles, many children are not provided with information about their right to a legal remedy, most do not have the resources to pursue claims, and some are even barred from initiating legal proceedings at all.

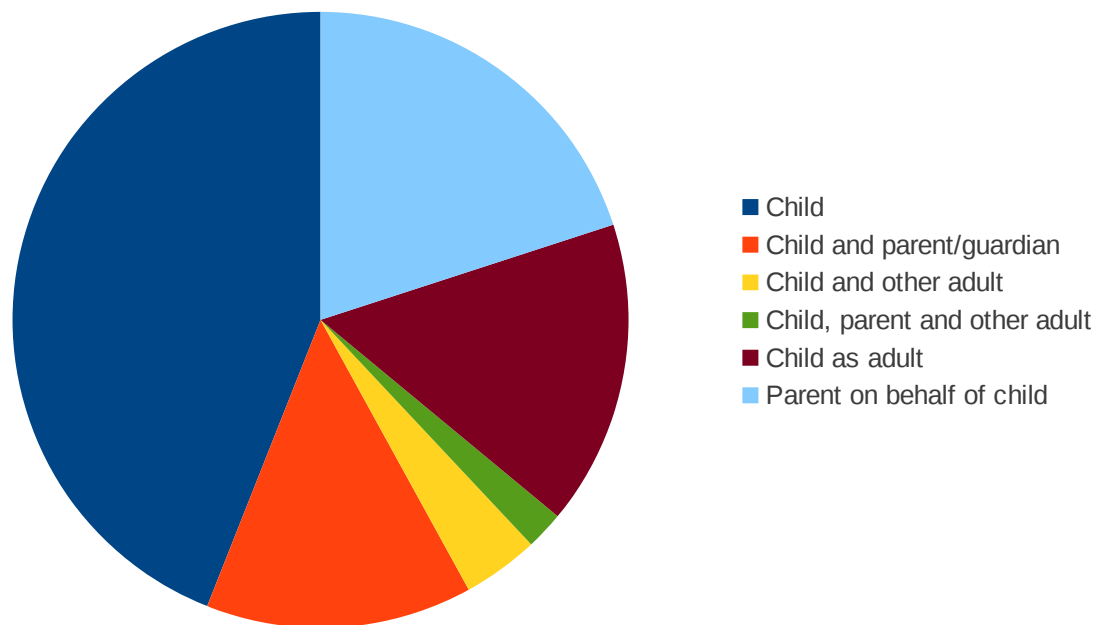
This does not, however, mean that children are not involved in court cases. Children may have difficulty initiating legal proceedings, but can more easily be made parties in actions filed by others. Once children become a formal party to a case, they may then be able to pursue claims that relate to violations of their rights. To give a better picture of how this works, the figure below shows the parties who requested the decision that appears in the database; i.e., in appellate courts, this would be the party who filed the appeal as opposed to the party who first initiated the proceedings:

Figure 12. Party requesting court decision



As above, any decision at least in part requested by a child has been categorised as being brought by a child. The figure below provides more specific information on the party or parties requesting these 40 decisions; to provide a better comparison, cases that were technically brought by parents but solely on behalf of children are also included:

Figure 13. Parties requesting court decisions in part sought by children

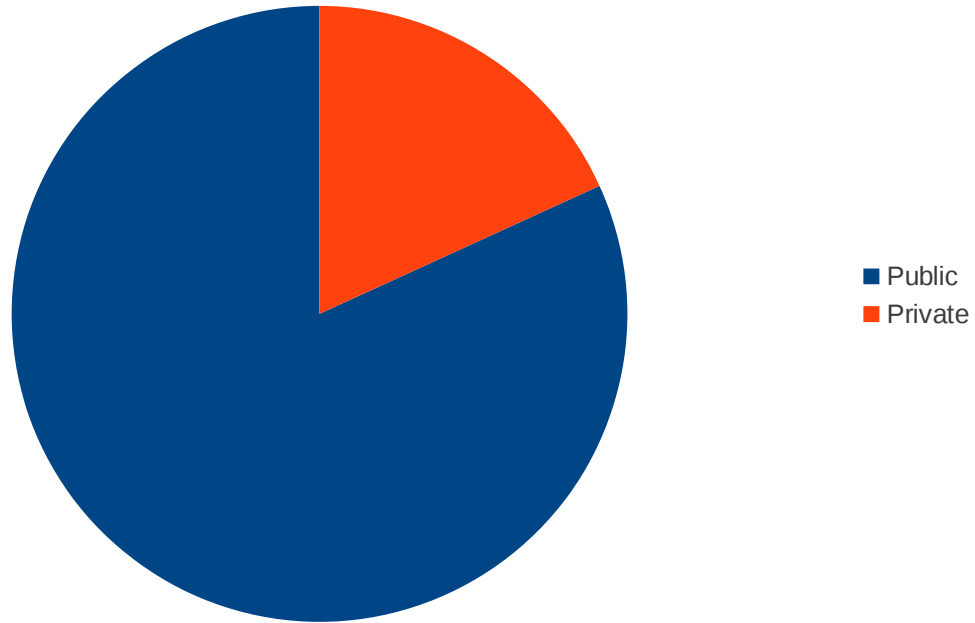


These charts reveal that children are significantly more likely to be directly involved in legal proceedings initiated by other parties than they are to bring cases related to the CRC themselves. Once children have been named a party to a legal action, however, they more often pursue claims involving violations of their rights. As above, this effect may well be explained by the difficulties children face in initiating as opposed to participating in legal proceedings; i.e., it appears more possible for children to respond to issues relating to their rights than it does to raise them in the first instance.

### **Public law versus Private law disputes**

Another common way to look at the nature of legal proceedings separates them into public and private law disputes. Private law disputes are those between two individuals or legal entities, while public law disputes involve relationships between individuals or organisations and the Government. The chart below shows the breakdown between public law and private law cases in the database:

*Figure 14. Public law vs. Private law disputes*



As is clear, the 108 public law disputes undoubtedly dominate the database. This is in many ways to be expected, given that claims relating to children's rights will likely involve the Government in some shape or form. Of the 24 private law disputes, the vast majority come from family court matters, where parents typically litigate issues related to child custody and child support. Although these cases do not explicitly challenge violations of children's rights, the fact that the CRC has been raised in purely private disputes affirms the Convention's relevance to court proceedings of any kind affecting children.

### **Convention use and authority**

The database includes cases that reference the CRC in any capacity. Some merely cite the CRC to support a particular argument, others directly quote relevant provisions in the same capacity, and still others discuss the relevance of the Convention to the case at hand. Accordingly, cases have been categorised into those that cite, quote or discuss the CRC:

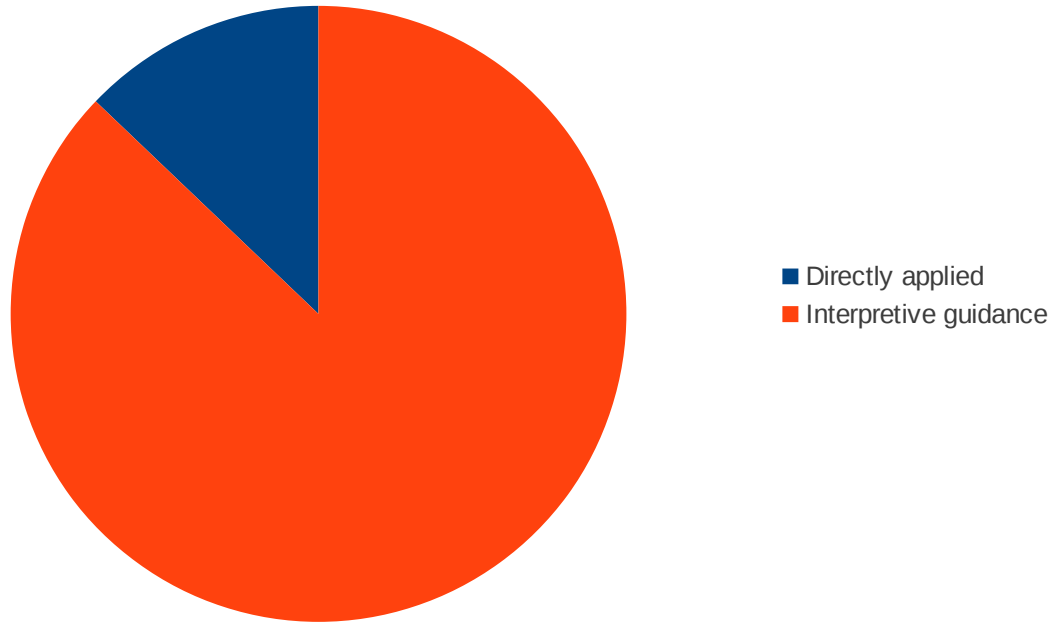
*Figure 15. How the CRC appears in judicial decisions.*



Within the database, there is a relatively even breakdown among cases in the level of attention devoted to the Convention, with 44 decisions citing, 52 cases quoting, and 36 decisions offering fuller discussions of the CRC. This said, given the case selection criteria, there is a bias towards including decisions that offer fuller discussions of the CRC. It is perhaps likely, then, that judges are even more prone to simply cite or quote the Convention to bolster or dismiss an argument than to deliver a well-considered decision on international children's rights.

It may also be informative to consider the way in which judges used the CRC in making their decisions. There is undoubtedly a spectrum ranging from the CRC playing a very small role in decision-making to being the deciding factor in a case, as further explored in the annex to this report. For the purposes of analysis, however, this has been broken down into two categories: those where the Convention has been directly applied and those where it has served as a source of interpretive guidance. The former refers to cases where the CRC is treated as enforceable law and applied to the case at hand; the latter consists of cases where the CRC is used to help interpret facts or laws in reaching a decision. Broadly, this gives a sense of the authority accorded to the Convention in cases that reference it:

*Figure 16. Authority accorded to the CRC*



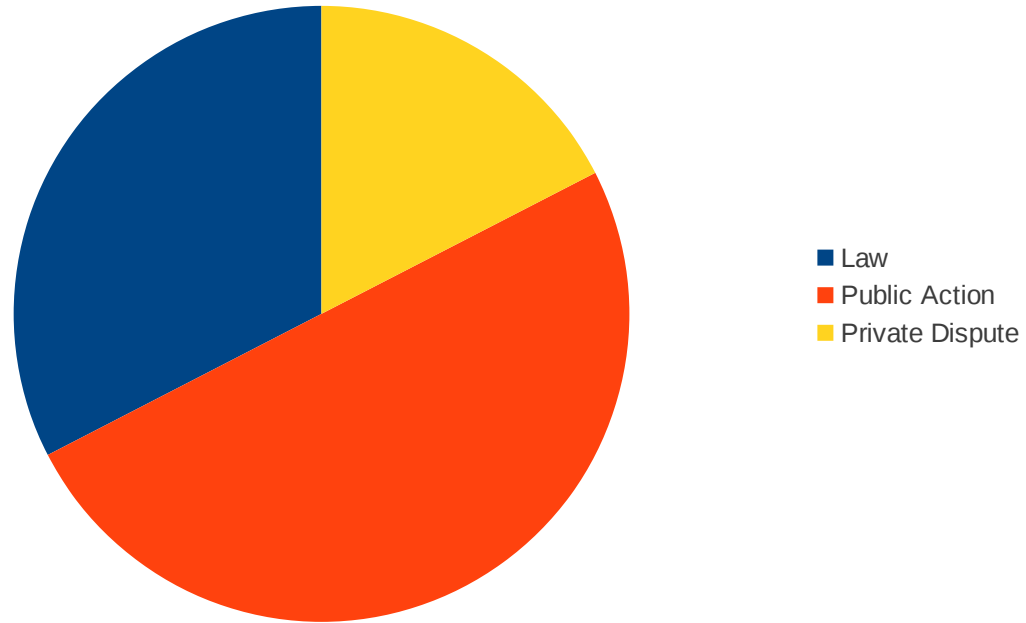
The chart shows that in the vast majority of cases (115), judges used the CRC as interpretive guidance, while in a small but not insubstantial minority (17 cases), the CRC was directly applied. Indisputably, the way in which judges view the CRC is largely dependent on the authority given to the Convention under national law as described in the “Legal Systems and the Status of the CRC” section above. It is, for instance, not possible for judges to enforce the Convention where it has not been incorporated into national law. Nonetheless, judges in legal systems that recognise the CRC at the same level as or at a higher level than national legislation may have the power to choose whether or not the Convention should be directly applied. This merits further research and analysis, but for the purposes of this report, it can simply be stated that some judges choose to look to the CRC only for interpretive guidance rather than giving it the full force of law.

### Case outcomes

In addition to looking at the ways in which the CRC is used, the final case outcomes embodied in judicial decisions should also be analysed both in terms of their effect and their consistency with the provisions, principles and spirit of the Convention. In looking at a decision's effect, it might revise, interpret, uphold or strike down a law; affirm or challenge the action of a Government authority; or apply the law to settle a private dispute. The subject of a court's review – determining the validity of a law, the legality of a public action, or the outcome of a private dispute – can give a good sense of how broad its ultimate effect may prove to be, and is explored in the figure below:

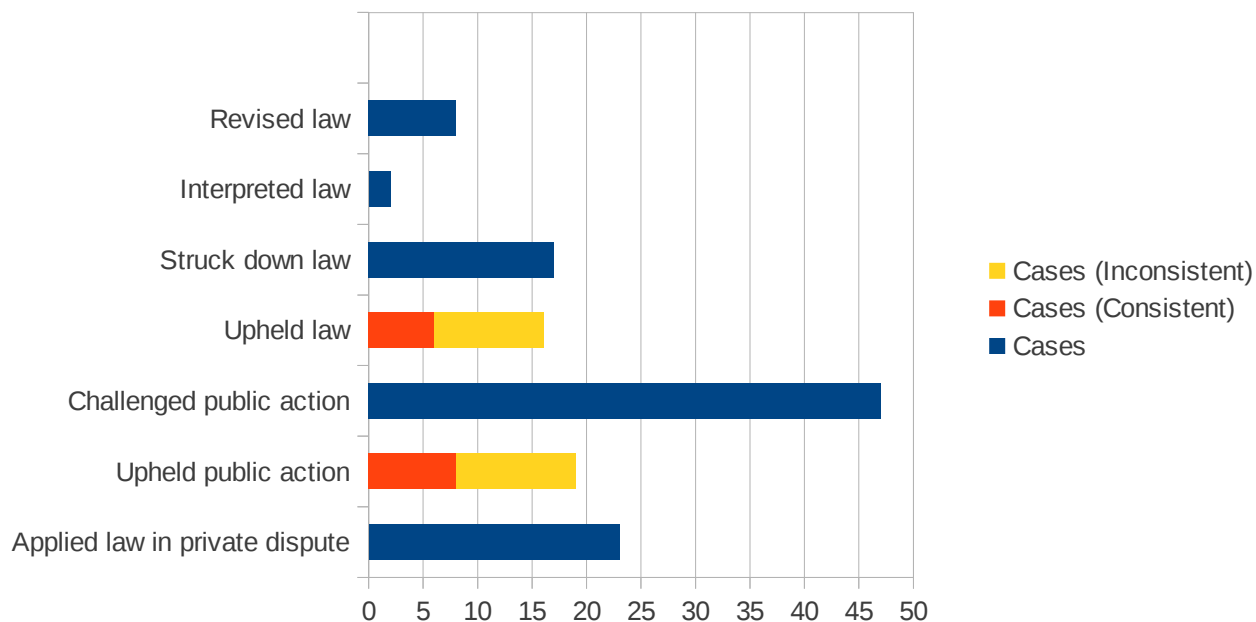
*Figure 17. Subject of court review*





Looking at the data, it appears that exactly half of the cases in the database review the legality of a public authority's action. Approximately two thirds of the remaining cases address the validity of a law, while one third are limited to addressing the CRC in the context of a private legal dispute. Further categorising these decisions, an additional figure below offers information not only on whether a law, public action or private dispute is addressed, but also on the ultimate finding of the court in relation to the matter. It must be noted, however, that affirming a public action or upholding a law does not always result in a decision that could be considered inconsistent with the CRC. Rather, laws or public actions that advance children's rights may be called into question just as those that violate or threaten to violate these rights. As such, note has also been taken of cases where laws are upheld and public actions affirmed in a manner consistent with the CRC:

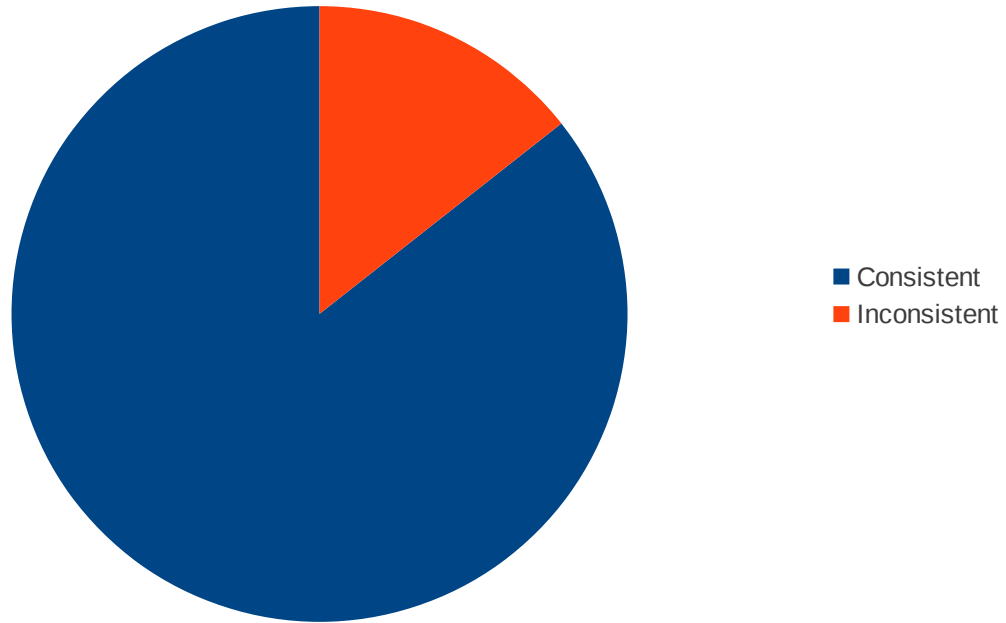
*Figure 18. Effect of Decision*



This graph reveals that decisions in the database most commonly find public actions in violation of the law, and that courts challenged these actions almost three times as often as they upheld them. Decisions involving the review of a particular law were more varied, with slightly more judges striking down laws than upholding them. In some instances, courts also took steps to revise and interpret laws rather than approving them as drafted or fully invalidating them.

As shown above, it is possible to separate out cases that are generally consistent with CRIN's interpretation and understanding of children's rights under the CRC from those that are not. The chart below reviews the consistency of decisions with the CRC across all cases in the database:

*Figure 19. Consistency of Decisions with the CRC*



It appears, then, that the sweeping majority of decisions in the database (118 cases) are generally consistent with the CRC. There is reason for caution, however, and the results should not be read to indicate that judges make decisions in line with international children's rights in a similarly high proportion of cases not included in the database. The fact that a decision includes a reference to the CRC at all indicates a judge's openness to examining the Convention, which may well lead decisions to be more consistent with CRC provisions. Because our database only includes cases that ultimately cite the CRC and not cases where the CRC was raised and dismissed, then, it is difficult to draw conclusions about judges' overall attitudes toward the Convention.

## Conclusion

Looking through our analysis of the 132 decisions in the CRC in Court Case Law Database, it is possible to draw several conclusions. For one thing, it appears that the Convention has a truly global jurisprudence. Courts from all inhabited continents have cited the CRC, and cases involving the Convention have been brought on national, regional and international levels alike. Although this is far from a guarantee that all judges in all countries are willing to consider international children's rights in reaching their decisions, it does indicate a certain openness to the Convention as a legal instrument.

All provisions of the Convention are not necessarily treated equally, however; some are raised with great regularity while others do not appear in even a single case in the database. This does not necessarily mean that articles not cited are not ever relevant to judicial decision-making. More likely, less favoured articles are of specific rather than more general applicability, e.g., fewer cases will address child trafficking than will address the overall prohibition of violence against children. Perhaps unsurprisingly, then, the five broad “guiding principles” of the Convention – the definition of the child (Article 1), non-discrimination (Article 2), the best interests of the child (Article 3), the right to life, survival and development (Article 6) and respect for the views of the child (Article 12) – all ranked in the top half of CRC provisions addressed.

The parts of the CRC that are referenced also depend heavily on the kinds of cases that tend to make their way into the courtroom. Disputes related to juvenile justice, immigration, child custody, and child protection were among the most common in the database, while few issues were raised over violations of children's civil and political rights. Also notably, a large proportion of the reviewed decisions related to matters typically addressed in family court proceedings, which often resolve issues of great importance to children's daily lives but do not explore the obligations of States Parties to respect children's rights in the public arena. A more positive way of viewing this, however, is that the CRC has demonstrated its relevance not only to matters of public law, but also to disputes between two private individuals that involve children.

At first blush, it might seem illogical that so few of the cases in the database were brought by children. After all, who better placed to raise the Convention on the Rights of the Child in the courtroom than a child? Yet children were only involved in initiating 19 of 132 cases, and were directly responsible for bringing only 9 of these. More cases were brought by NGOs and children's rights activists than children alone, and far more cases were brought by Governments and parents than either of these.

Upon reflection, however, this is not an anomaly; rather, it shows the great and often insurmountable difficulties children face in accessing justice where their rights have been violated. Given the legal status and financial resources required to file legal proceedings, children are not often well-placed to challenge violations of their rights. Once involved in court proceedings, however, children were twice as likely to pursue claims than to bring them in the first instance. This shows that children are not afraid or unwilling to raise violations of their rights before the courts; they may simply not have the opportunity to do so on their own initiative.

While the decisions included in the database do not represent an accurate cross-section of the ways that judges have used the CRC in reaching their decisions, they do show a wide range of approaches to the Convention. Judicial decision-makers cite, quote and discuss CRC provisions to very different effect,

but appear much more likely to view the Convention as a tool to help them reach a resolution as opposed to a firm law to be followed and enforced. This is in part dictated by the authority granted to the Convention under the national legal order, but might also indicate an opening for advocates to encourage judges to adopt a stronger stance on the obligations States Parties to the CRC have accepted as regards children's rights.

By the same token, although the decisions presented in the database are more likely to be consistent with the CRC than decisions not included, it is inspiring that the Convention has been used positively to advance children's rights in so many different courts and across such an expansive range of subject matter. Moreover, the CRC's case law has continued to develop over the past two decades. It is harder to say whether the Convention enjoys increasing attention and acceptance in the courtroom with each passing year; the cases seem to point in this direction, but if nothing else, the number of decisions that reference the CRC will only continue to increase as more and more courts begin to report and publish their judgments online.

This brings us to the ultimate aim of the CRC in Court: Case Law Database project: to draw attention to the developing case law of the CRC. We sincerely hope that this review has proved informative and helpful, and that you will consider finding a way to use the Convention on the Rights of the Child in your own legal advocacy work. While there are no guarantees that it will bring immediate and profound advances in children's rights, raising the profile of the CRC in legal proceedings is in many ways an achievement in and of itself.

## **Recommendations**

### Researchers

More research into the way judges have used the CRC should be conducted, particularly examining the weight given to the Convention in light of the authority granted to international children's rights under national law (i.e., was the CRC used only as interpretive guidance when it could have been directly applied?).

### Decision-makers

Judges and other decision-makers should give the greatest authority possible to the Convention, recognising that all of its substantive provisions can be directly applied where so permitted.

### Law-makers

Judicial systems should be made more accessible for children. Children should be entitled and empowered to bring legal claims in their own name where their rights have been violated, and should be granted legal assistance to do so without charge wherever necessary.

### Courts

Decisions should be published online and made freely available, especially at the trial court level as this is most often where claims of children's rights violations are first reviewed.

### Regional and international judicial mechanisms

Regional and international judicial mechanisms should continue to cite, quote and discuss the CRC in cases that involve children's rights, viewing the Convention as an authority on the subject matter. This can and should be done whether or not the parties themselves have raised the Convention in the proceedings, as all human rights instruments should be viewed together to fully appreciate international obligations.

### Advocates

Children's advocates and lawyers should raise the CRC in legal proceedings wherever it is relevant, possible and likely to positively contribute to a legal claim.

### NGOs

Legally-focused national children's rights NGOs should consider developing country-level equivalents of the CRC in Court case law database, offering other national advocates a broad picture of how the CRC has been and could be used in legal proceedings.

## **Annex: Case Excerpts**

### **International**

#### **Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v. Uganda (International Court of Justice)**

*Declaration of Judge Koroma:*

6. Not only are the international Conventions violated by Uganda binding on it, but they are intended to uphold the rule of law between neighbouring States and constitute the foundation on which the existing international legal order is constructed. They oblige States to conduct their relations in accordance with civilized behaviour and modern values — to refrain from the use of military force, to respect territorial integrity, to solve international disputes by peaceful means, and to respect human rights, human dignity, and international humanitarian law. Under the international humanitarian law and international human rights instruments mentioned above, Uganda was obliged to refrain from carrying out attacks against civilians, to ensure humane treatment of them and even of combatants caught up in military conflict, and to respect the most basic of their rights, the right to life...

In other words, in the course of a military conflict, civilians should be spared unnecessary violence, including massacres and other atrocities such as those allegedly perpetrated by the UPDF. Furthermore, according to Article 3 of the 1989 Convention on the Rights of the Child, to which Uganda is also a party, in all actions concerning children, the primary consideration must be the best interests of the child. Article 19 provides that States parties agree to take all appropriate measures to protect the child from all forms of physical and mental violence, while Article 38 of the Convention provides that States parties undertake to respect and to ensure respect for the rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. States parties to the Convention must take all feasible measures to ensure that persons who have not attained the age of 15 years do not take part in direct hostilities. Yet, according to the evidence before the Court, these obligations were wantonly flouted during the UPDF's military campaign in the Congo, as children were recruited as child soldiers to take part in the fighting.

#### **Eritrea v. Ethiopia (Permanent Court of Arbitration)**

154. International humanitarian law imposes clear burdens on belligerents with respect to the protection of children and the integrity of families. Article 27 of Geneva Convention IV, for example, provides that all protected persons are entitled in all circumstances to respect for their family rights. However, both international humanitarian law and human rights law, which Eritrea emphasized, also recognize that, regrettably, absolute protection of the family cannot be assured in wartime. While Article 9 of the Convention on the Rights of the Child states that children should not be separated from their parents against their will, it also recognizes separation may result in the course of armed conflict due to detention or deportation of one or both parents. In the face of the realities of war, Article 24 of Geneva Convention IV sets out special protections for children under the age of fifteen who are separated from their families or orphaned:

The parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances.

Further guidance appears in Article 38 of the Convention on the Rights of the Child, which calls for parties to take “all feasible measures to ensure protection and care of children who are affected by an armed conflict.”

## **Regional**

### **Americas**

#### **Bulacio v. Argentina (Inter-American Court of Human Rights)**

133....[T]he Court points out that the instant case is especially grave because the victim is a child, whose rights are protected not only by the American Convention, but also by numerous international instruments, widely accepted by the international community, prominently including the Convention on the Rights of the Child. These instruments establish the duty of the State to adopt special protection and assistance measures in favor of children under their jurisdiction.

#### **Gelman v. Uruguay (Inter-American Court of Human Rights)**

121. In the first place, as a child, Maria Macarena Gelman had the right to special measures of protection, which under Article 19 of the [American] Convention correspond to the family, society, and the State. Therefore, the rights recognized in Articles 3, 17, 18, and 20 of the Convention should be interpreted in consideration of the corpus juris of the rights of the child and, in particular, in the specific circumstances of the present case, in harmony with the other provisions that affect children, particularly Articles 7, 8, 9, 11, 16, and 18 of the Convention on the Rights of the Child.

122. In this manner, the referred situation affected what has been named the right to identity. Although this right is not expressly established in the Convention, it is possible to determine it on the basis of that provided in Article 8 of the Convention on the Rights of the Child, which establishes that said right encompasses the right to nationality, to a name, and to family relationships. Likewise, it can be conceptualized as the collection of attributes and characteristics that allow for the individualization of the person in a society, and, in that sense, encompasses a number of other rights according to the subject it treats and the circumstances of the case.

#### **Gomez-Paquiyaui Brothers v. Peru (Inter-American Court of Human Rights)**

167. The Convention on the Rights of the Child, ratified almost universally, contains various provisions that refer to the obligations of the State regarding minors who are in similar factual situations as those examined in this case, and which may throw light, in connection with Article 19 of the American Convention, on the behavior that the State should have had in that situation.

#### **Mapiripán Massacre v. Colombia (Inter-American Court of Human Rights)**

153. The content and scope of Article 19 of the American Convention must be specified, in cases such as the instant one, taking into account the pertinent provisions of the Convention on the Rights of the Child, especially its Articles 6, 37, 38 and 39, and of Protocol II to the Geneva Conventions, as these instruments and the American Convention are part of a very comprehensive international corpus juris [(i.e. body of law)] for protection of children, which the States must respect.

#### **Serrano-Cruz Sisters v. El Salvador (Inter-American Court of Human Rights)**



*Dissenting Opinion of Judge A.A. Cançado Trindade:*

147. Furthermore, this Court considers it necessary to emphasize that Article 39 of the Convention on the Rights of the Child establishes the State's obligation "to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, [...] or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."

**State v. Valmond (Eastern Caribbean Supreme Court)**

[14] The above stated approach is in keeping with the state's obligation under the Convention on the Rights of the Child, 1989, which Dominica ratified on 13 March 1991. Article 34 of the Convention provides that:

*"State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse."*

[15] The Sexual Offences Act [10 Act no.1 of 1998 Laws of Dominica], Section 7(1) provides the necessary legislative protection for the vulnerable and the punishment for adults who abuse young children. It is for the courts to properly enforce the seriousness of the offence by imposing appropriate punishment.

**Villagran-Morales et al. v. Guatemala (Inter-American Court of Human Rights)**

188. Article 19 of the American Convention does not define what is meant by "child". However, the Convention on the Rights of the Child (Article 1) considers every human being who has not attained 18 years of age to be a child, "unless, by virtue of an applicable law, he shall have attained his majority previously". According to the Guatemalan legislation in force at the time of the facts of this case, those who had not attained 18 years of age were also minors...

194. Both the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international corpus juris for the protection of the child that should help this Court establish the content and scope of the general provision established in Article 19 of the American Convention.

195. The Convention on the Rights of the Child contains various provisions that relate to the situation of the "street children" examined in this case and, in relation with Article 19 of the American Convention, it throws light on the behavior that the State should have observed towards them...

196. These provisions allow us to define the scope of the "measures of protection" referred to in Article 19 of the American Convention, from different angles. Among them, we should emphasize those that refer to non-discrimination, special assistance for children deprived of their family environment, the guarantee of survival and development of the child, the right to an adequate standard of living, and the social rehabilitation of all children who are abandoned or exploited. It is clear to the Court that the acts perpetrated against the victims in this case, in which State agents were involved, violate these provisions.

**Yean and Bosico v. Dominican Republic (Inter-American Court of Human Rights)**

185. In addition to the above, the Court considers that the vulnerability to which the children were exposed as a result of the lack of nationality and juridical personality was also reflected, in the case of the child Violeta Bosico, by the fact that she was prevented from attending day school... It was precisely because she had no birth certificate that she was forced to study at evening school, for

individuals over 18 years of age, during this period. This fact also exacerbated her situation of vulnerability, because she did not receive the special protection, due to her as a child, of attending school during appropriate hours together with children of her own age, instead of with adults... It is worth noting that, according to the child's right to special protection embodied in Article 19 of the American Convention, interpreted in light of the Convention on the Rights of the Child and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, in relation to the obligation to ensure progressive development contained in Article 26 of the American Convention, the State must provide free primary education to all children in an appropriate environment and in the conditions necessary to ensure their full intellectual development.

## Europe

### **Dynamic Medien Vertriebs GmbH v. Avides Media AG (European Court of Justice)**

85. [T]here is manifestly no substance to [the] ... argument that the signature and ratification of the Convention on the Rights of the Child by both Germany and the United Kingdom mean that the criteria for the examination and classification of image storage media by the competent authorities of the two States are equivalent.... [T]he Convention lays down no common standard for the protection of young persons with regard to the content of image storage media and other media products. Article 17(e) of the Convention provides only that the States Parties shall "encourage the development of appropriate guidelines for the protection of the child from information and material [from the mass media] injurious to his or her well-being."...

88. Nor can the need to interpret and apply the provisions of the EC Treaty on the freedom of movement of goods in the light of Art. 13 of the Convention on the Rights of the Child, which enshrines the right of the child to freedom of expression, be relied upon to infer that the German rules in question are incompatible with those provisions, as Avides argued at the hearing. Under Art.13(1) , that right "shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice."

90. ... the Convention on the Rights of the Child is binding on each of the Member States and is one of the international instruments for the protection of fundamental rights of which it takes account in applying the general principles of Community law.

92. Art. 13(2) of the Convention on the Rights of the Child concedes that exercise of the right to freedom of expression may be made subject by law to such limitations as are necessary, in particular, "for the protection of national security or of public order (ordre public), or of public health or morals," while Art. 17(e) of the Convention ... obliges the States Parties to encourage "the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being."

### **FIDH v. France (European Committee of Social Rights)**

36. Article 17 of the Revised Charter is further directly inspired by the United Nations Convention on the Rights of the Child. It protects in a general manner the right of children and young persons, including unaccompanied minors, to care and assistance. Yet, the Committee notes that  
a) medical assistance to the above target group in France is limited to situations that involve an

immediate threat to life;

b) children of illegal immigrants are only admitted to the medical assistance scheme after a certain time.

37. For these reasons, the Committee considers that the situation is not in conformity with Article 17.

### **Keegan v. Ireland (European Court of Human Rights)**

50. According to the principles set out by the Court in its case-law, where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be created that render possible as from the moment of birth the child's integration in his family... In this context reference may be made to the principle laid down in Article 7 of the United Nations Convention on the Rights of the Child of 20 November 1989 that a child has, as far as possible, the right to be cared for by his or her parents. It is, moreover, appropriate to recall that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down...

### **KT v. Norway (European Court of Human Rights)**

43. The human rights of children and the standards to which all governments must aspire in realising these rights for all children are set out in the Convention on the Rights of the Child . This instrument entered into force on September 2, 1990 and has been ratified by 193 countries, including Norway, which has also incorporated it together with the Convention into its domestic legal order (1999).

44. The Convention spells out the basic human rights that children everywhere— without discrimination— have: the right to survival; to develop to the fullest; to protection from harmful influences, abuse and exploitation; and to participate fully in family, cultural and social life. It further protects children's rights by setting standards in health care, education and legal, civil and social services.

45. States parties to the Convention are obliged to develop and undertake all actions and policies in the light of the best interests of the child. Moreover, states parties have to ensure that a child is not separated from his or her parents against their will unless such separation is necessary for the best interests of the child; and that a child who is separated from one or both parents is entitled to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests...

63. As to the further question whether the impugned interference was “ necessary”, the Court notes by way of preliminary observation that it fell within the range of measures envisaged in art.19 of the UN Convention on the Rights of the Child for States to take in order to prevent abuse and neglect of children. This is an important consideration to be borne in mind in the assessment of the necessity of the interference...

67. In any event, a general duty such as that suggested by the applicant, for the child welfare authorities to thoroughly investigate the validity of a report of concern before opening an investigation could hardly be derived from art.8 of the [European] Convention. If it were to be a prerequisite that all such reports, even those that appear credible on their face, should be verified in advance, it would risk delaying such investigations, deflecting attention and resources away from the real problems and reducing their effectiveness and hampering efforts in instances where it was paramount to establish

urgently and without delay whether a child was living under conditions that may harm his or her health or development. In this connection, the Court cannot but note the emphasis placed on effectiveness in art.19 of the UN Convention on the Rights of the Child.

### **Maslov v. Austria (European Court of Human Rights)**

82 . The Court considers that where offences committed by a minor underlie an exclusion order regard must be had to the best interests of the child. The Court's case-law under Article 8 has given consideration to the obligation to have regard to the best interests of the child in various contexts... The Court considers that the obligation to have regard to the best interests of the child also applies if the person to be expelled is himself or herself a minor, or if — as in the present case — the reason for the expulsion lies in offences committed when a minor. In this connection the Court observes that European Union law also provides for particular protection of minors against expulsion... Moreover, the obligation to have regard to the best interests of the child is enshrined in Article 3 of the United Nations Convention on the Rights of the Child...

83 . The Court considers that, where expulsion measures against a juvenile offender are concerned, the obligation to take the best interests of the child into account includes an obligation to facilitate his or her reintegration. In this connection the Court notes that Article 40 of the Convention on the Rights of the Child makes reintegration an aim to be pursued by the juvenile justice system... In the Court's view this aim will not be achieved by severing family or social ties through expulsion, which must remain a means of last resort in the case of a juvenile offender. It finds that these considerations were not sufficiently taken into account by the Austrian authorities.

### **S and Marper v. UK (European Court of Human Rights)**

124. The Court further considers that the retention of the unconvicted persons' data may be especially harmful in the case of minors such as the first applicant, given their special situation and the importance of their development and integration in society. The Court has already emphasised, drawing on the provisions of Article 40 of the UN Convention on the Rights of the Child of 1989, the special position of minors in the criminal-justice sphere and has noted in particular the need for the protection of their privacy at criminal trials (see *T. v. the United Kingdom* [GC], no. 24724/94, §§ 75 and 85, 16 December 1999).

### **Sahin v. Germany (European Court of Human Rights)**

39. The human rights of children and the standards to which all States must aspire in realising these rights for all children are set out in the United Nations Convention on the Rights of the Child. The convention entered into force on 2 September 1990 and has been ratified by 191 countries, including Germany.

40. The convention spells out the basic human rights that children everywhere – without discrimination – have: the right to survival; to develop to the fullest; to protection from harmful influences, abuse and exploitation; and to participate fully in family, cultural and social life. It further protects children's rights by setting standards in health care, education and legal, civil and social services.

41. States parties to the convention are obliged to develop and undertake all actions and policies in the light of the best interests of the child (Article 3). Moreover, States parties have to ensure that a child is not separated from his or her parents against their will unless such separation is necessary for the best interests of the child, and respect the right of a child who is separated from one or both parents to

maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests (Article 9).

### **T and V v. UK (European Court of Human Rights)**

74. The Court notes in this connection that one of the minimum guarantees provided by Article 40 § 2 (b) of the [CRC] to children accused of crimes is that they should have their privacy fully respected at all stages of the proceedings. Similarly, Rule 8 of the Beijing Rules states that “the juvenile's privacy shall be respected at all stages” and that “in principle, no information that may lead to the identification of a juvenile offender shall be published”. Finally, the Committee of Ministers of the Council of Europe recommended in 1987 that member States should review their law and practice with a view to avoiding committing minors to adult courts where juvenile courts exist and to recognising the right of juveniles to respect for their private lives...

75. The Court considers that the foregoing demonstrates an international tendency in favour of the protection of the privacy of juvenile defendants, and it notes in particular that the [CRC] is binding in international law on the United Kingdom in common with all the other member States of the Council of Europe...

96. In assessing whether the above facts constitute ill-treatment of sufficient severity to violate Article 3 (see paragraph 68 above), the Court has regard to the fact that Article 37 of the [CRC] prohibits life imprisonment without the possibility of release in respect of offences committed by persons below the age of eighteen and provides that the detention of a child “shall be used only as a measure of last resort and for the shortest appropriate period of time”, and that Rule 17.1(b) of the Beijing Rules recommends that “[r]estrictions on the personal liberty of the juvenile shall ... be limited to the possible minimum”...

#### *Concurring Opinion of Lord Reed:*

In considering whether the length of the original tariff, and the length of time already served by the applicant, are compatible with Article 3, it is appropriate to have regard to the UN Convention on the Rights of the Child, which is accepted by all of the member States, including the United Kingdom. Article 3(i) of the UN Convention requires that in all actions concerning children the best interests of the child shall be a primary consideration. Article 40(1) requires the child offender to be treated in a manner which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. These general requirements are reflected in Article 37(b) of the [CRC], which requires that the imprisonment of a child be used only as a measure of last resort and for the shortest appropriate period of time.

#### *Joint partly dissenting opinion of Judges Pastor Ridruejo, Ress, Makarczyk, Tulkens and Butkevych:*

2. As far as the trial is concerned, the Court recognises that there is an international tendency in favour of the protection of the privacy of juvenile defendants. It nevertheless finds that a lack of privacy cannot be decisive for the question whether the trial in public amounted to treatment attaining the minimum level of severity necessary to bring it within the scope of Article 3 of the Convention... According to Article 40 of the UN Convention on the Rights of the Child, privacy has to be “fully respected at all stages of the proceedings”, and it is a crucial element in minimising the suffering and humiliation of children. Although the [CRC] is binding on the United Kingdom, English law nevertheless allows lengthy criminal proceedings to be held in public in an adult court with all the attendant formality...

**World Organisation against Torture (OMCT) v. Ireland (European Committee of Social Rights)**

61. The Committee sets out its reasoning on the substance of the issue below, but by way of preliminary remarks the Committee recalls that when it stated the interpretation to be given to Art.17 in 2001 (see below), it was influenced by an emerging international consensus on the issue and notes that since this consensus is stronger. As regards its reference to the UN Convention on the Rights of the Child, the Committee recalls that this treaty is one of the most ratified treaties, and has been ratified by all member states of the Council of Europe including Ireland, and therefore it was entirely appropriate for it to have regard to it as well as the case law of the UN Committee on the Rights of the Child...

63 The Committee furthermore recalls that the Charter is a living instrument which must be interpreted in light of developments in the national law of member states of the Council of Europe as well as relevant international instruments. In its interpretation of Art.17 the Committee refers, in particular to:  
a. Article 19 of the United Nations Convention on the Rights of the Child as interpreted by the Committee on the Rights of the Child...

**National**

**Argentina**

**V.24 XLVII, Return of Children – Enforcement of Judgment (Supreme Court of Argentina)**

6)...The Convention for the Rights of the Child obliges States Parties to respect the right of the child to preserve his or her identity, name and family relations as recognized by law “without unlawful interference” (Article 8) and to protect the child against “arbitrary or unlawful interference with his or her privacy [or] family”, establishing that the child has the right to protection “against such interference or attacks” (Article 16).

**Australia**

**Minister for Immigration and Multi-cultural and Indigenous Affairs v. B and ors (High Court of Australia)**

*Justice Kirby:*

144. An arguable breach of international obligations: The respondents invoked identified requirements of international law, binding on Australia. They did so not only to support their contention that the welfare jurisdiction conferred on the Family Court under the FLA [Family Law Act] was designed to give effect to international obligations; but also to support the submission that the MA [Migration Act], construed in the light of those obligations, did not sustain the detention of the respondent children proved in the evidence...

152. The provisions of the UNCROC were considered by the first Full Court in the context of its examination of the validity, under the external affairs power, of the provisions of the FLA affording the Family Court its general welfare jurisdiction and powers. However, the same analysis is available in deciding the construction argument, considered at the close of the majority's reasons in the first Full Court. Upon the basis of the majority's view that the respondent children were being held indefinitely in immigration detention the first Full Court concluded that this was contrary to Art 37 of the UNCROC, thereby suggesting that the continued detention of the children was not the obligation

imposed by the MA, properly construed, when read with the FLA. It was on that footing that the majority in the first Full Court concluded that s 196(3) of the MA, purporting to prevent “the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa” did not apply to the ordering of the release of children from detention. Only if the Family Court had the power to order release, in the specific case of children, would the disconformity between Australian federal law and Australia's obligations under the UNCROC (specifically Art 37) be avoided.

153. Effectively, this conclusion of the first Full Court meant a reading down of the general language of ss 189 and 196 of the MA, so as to avoid infraction otherwise of the obligations Australia had freely assumed under international law. For its part, the UNHRC acknowledged that it had no authority to reach conclusions about the alleged breaches of the UNCROC, its mandate being confined to the ICCPR. The UNHRC thus confined its attention to the alleged breaches of the latter instrument. Nevertheless, given the stronger and more specific language of the UNCROC, relevant to the detention of children such as the respondent children, it was strongly arguable that the mandatory obligation to detain such children for very long periods whilst the cases of their parents were winding their way through the primary decision-making processes, the Federal Court and this Court, constituted a breach of Australia's duties under international law.

154. In reaching that conclusion as a first step in its reasoning, the first Full Court did not, therefore, err. Indeed, it was not a novel conclusion, as I shall show. It was the starting point for the consideration of the element of the suggested unlawfulness of the respondent children's detention. It was upon this basis that the majority judges in the first Full Court concluded that they were permitted to override the provisions of the MA. These provisions otherwise appeared to apply to the children to oblige their continued immigration detention and to forbid any court ordering their release without a relevant visa.

*Justice Callinan:*

220. The respondents sought to rely on the United Nations Convention on the Rights of the Child. For present purposes I will proceed upon the basis that the welfare of children in this country can truly be an external affair. In enacting Pt VII of the Family Act the Parliament chose to rely on particular heads of power... The Convention cannot expand the intended and clearly identified scope of Pt VII of the Family Act. Australia's treaty obligations do not form part of Australian domestic law unless incorporated by statute. Whatever relevance the Convention may have as a declared instrument under the Human Rights and Equal Opportunity Commission Act 1986 (Cth), it has not actually been incorporated into the domestic law relating to the detention of unlawful non-citizens which is the subject of express provision under the Migration Act. Nor does Pt VII purport to incorporate the Convention into domestic law as an exercise of any legislative power with respect to external affairs, assuming that the relevant matters could be external affairs. To do so the demonstration of a clear connexion between the law and the treaty would be necessary: the law must truly have the “purpose or object” of implementing the treaty. Part VII manifests no such purpose, even though it may not be inconsistent with the Convention...

222. In explaining the amendments directed at parental responsibility, the Explanatory Memorandum to the Bill for the 1995 amendments noted that the object of Pt VII was “based [not on the reception of the Convention into the Family Act, but] on principles which are consistent with” the Convention. The second reading speech noted Australia's ratification of the Convention and said that the objects clause in Pt VII gave “recognition” to the rights contained in that instrument “by specifying a number of such

rights that should be observed” (emphasis added). It is possible therefore that some Articles of the Convention may have influenced the drafting of sections of Pt VII. The Parliament did not however intend to implement the Convention by, in some way enlarging or creating an all-embracing welfare jurisdiction. The strong possibility in any event is that the Convention may be aspirational only. None of its provisions on any view require that the rights of children be protected or advanced by a conferral of jurisdiction upon the Family Court. Furthermore, the substantive Articles of the Convention set out rights which States are to ensure that children and parents should enjoy, but leave the selection of “appropriate legislative, administrative, and other measures” to State parties.

### **Minister of State for Immigration and Ethnic Affairs v. Teoh (High Court of Australia)**

Lee J considered that the Executive's ratification of the United Nations Convention on the Rights of the Child (the Convention) was a statement to the national and international community that the Commonwealth recognised and accepted the principles of the Convention. Article 3.1 of the Convention provides that “[i]n all actions concerning children ... the best interests of the child shall be a primary consideration”. Although noting that the Convention had not been incorporated into Australian law, his Honour stated that its ratification provided parents and children, whose interests could be affected by actions of the Commonwealth which concerned children, with a legitimate expectation that such actions would be conducted in a manner which adhered to the relevant principles of the Convention. This meant that, in such a context, the parents and children who might be affected by a relevant decision had a legitimate expectation that the Commonwealth decision-maker would act on the basis that the “best interests” of the children would be treated as “a primary consideration”. His Honour held that the delegate had not exercised her power consistently with that expectation because she failed to initiate appropriate inquiries and obtain appropriate reports as to the future welfare of the children in the event that the respondent were deported. That failure involved an error of law...

Carr J's approach was similar to that adopted by Lee J. Carr J also considered that, although the Convention was not part of Australian municipal law, the children in this case had a legitimate expectation that their father's application would be treated by the Minister in a manner consistent with its terms...

Lee and Carr JJ evidently considered that Art 3 of the Convention had an application to the exercise of the discretion, though their Honours did not express any cogent reasons for that conclusion. The respondent did not rely on Art 9, no doubt because it does not seem to address decisions to deport or, for that matter, decisions to refuse permanent entry. The crucial question is whether the decision was an “action concerning children”. It is clear enough that the decision was an “action” in the relevant sense of that term, but was the decision an action “concerning children”? The ordinary meaning of “concerning” is “regarding, touching, in reference or relation to; about”.. The appellant argues that the decision, though it affects the children, does not touch or relate to them. That, in our view, is an unduly narrow reading of the provision, particularly when regard is had to the grounds advanced in support of the application and the reasons given for its rejection, namely that the respondent's bad character outweighed the compassionate considerations arising from the effect that separation would have on the family unit, notably the young children. A broad reading and application of the provisions in Art 3, one which gives to the word “concerning” a wide-ranging application, is more likely to achieve the objects of the Convention. One other aspect of Art 3 merits attention. The concluding words of Art 3.1 are “the best interests of the child shall be *a primary* consideration” (our emphasis). The article is careful to avoid putting the best interests of the child as the primary consideration; it does no more than give



those interests first importance along with such other considerations as may, in the circumstances of a given case, require equal, but not paramount, weight. The impact of Art 3.1 in the present case is a matter to be dealt with later in these reasons...

Junior counsel for the appellant contended that a convention ratified by Australia but not incorporated into our law could never give rise to a legitimate expectation. No persuasive reason was offered to support this far-reaching proposition. The fact that the provisions of the Convention do not form part of our law is a less than compelling reason - legitimate expectations are not equated to rules or principles of law. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as "a primary consideration"...

The question which then arises is whether the delegate made her decision without treating the best interests of the child as a primary consideration. There is nothing to indicate that the Panel or the Minister's delegate had regard to the terms of the Convention. That would not matter if it appears from the delegate's acceptance of the Panel's recommendation that the principle enshrined in Art 3.1 was applied. If that were the case, the legitimate expectation was fulfilled and no case of procedural unfairness could arise... However, it does not seem to us that the Panel or the delegate regarded the best interests of the children as a primary consideration. The last sentence in the recommendation of the Panel reveals that, in conformity with the departmental instructions, it was treating the good character requirement as the primary consideration. The Panel said: "The Compassionate claims are not considered to be compelling enough for the waiver of policy in view of Mr Teoh's criminal record..."

The language of that sentence treats the policy requirement as paramount unless it can be displaced by other considerations. There is no indication that the best interests of the children are to be treated as a primary consideration. A decisionmaker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it.

### **Tien and Others v. Minister of Immigration (Federal Court of Australia)**

Article 3 states:

*"1. 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."*

It has not been incorporated into Australia's domestic law by statute...

[I]t was said that the best interests of the child should have been a primary consideration but that they were not... It followed, said the applicants, that there had accordingly been an error of law within s 476(1)(e) of the Act as the law applicable to the third applicant, the child, had been incorrectly applied.

The respondent submitted that as a matter of fact the rights of the child had been taken into account but that in any event there was no action involved "concerning" the child as the decision to cancel Mr Tien's visa did not affect the child's visa; rather it was the Act (s 140) which cancelled the child's visa...

Even if it could be said, contrary to my finding, that Ms Leonardi did turn her mind to, or focus on, the best interests of the child, the evidence does not support the conclusion that Ms Leonardi considered the best interests of the child as a primary consideration. I am satisfied on the evidence before the Court that Ms Leonardi, in reaching her decision to cancel Mr Tien's visa did not consider the best interests of the child as a primary consideration nor did she tell Mr Tien that she was intending not to consider the best interests of the third applicant as a primary consideration. Adopting the words of Wilcox J in *Davey Browne* (supra) 24, Ms Leonardi: "... did not grapple with the obligation under the Convention to make the best interests of [the child] a primary consideration."

The decision which Ms Leonardi made did not necessarily have to be a decision in the best interests of the child but Ms Leonardi was obliged to address that issue as a primary consideration at the same time as she was considering the matters which tended to support a decision adverse to the best interests of the child. As I noted earlier, if she decided not to make the best interests of the child a primary consideration she was bound to draw this decision to the attention of Mr Tien and give him an opportunity to respond to it.

### **XYZ v. Commonwealth of Australia (High Court of Australia)**

62. Of critical importance was the adoption by the General Assembly of the United Nations, on 20 November 1989, of the Convention on the Rights of the Child (the CRC). Australia ratified that Convention in January 1991. So have most other nation states. Stimulated by the CRC, and by the commitments contained within it, a number of initiatives were taken within the United Nations Organisation, designed to protect children from various harms and dangers. Eventually, an Optional Protocol to the CRC was adopted by the General Assembly on 25 May 2000. By Art 4.2(a) of that Protocol it is provided that:

*"Each State Party may take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3, paragraph 1 [including '[s]exual exploitation of the child'] ... (a) [w]hen the alleged offender is a national of that State or a person who has his habitual residence in its territory."*

63. Australia, through the federal Executive Government, took a leading part in drafting, proposing and securing the adoption of this Protocol. However, the Commonwealth did not rely upon the Protocol as a treaty which the provisions of the Crimes Act in question were designed to implement. Nevertheless, the Commonwealth submitted that the Protocol indicated that the subject matter of the Crimes Act was one of "international concern" and was relevant to Australia's relationships with other nation states and with relevant international organisations.

## **Bangladesh**

### **BLAST v. Secretary of the Ministry of Education and others (High Court of Bangladesh)**

21... Any act of violence which traumatises, terrorises a child, or adversely affects his faculties falls foul of Article 21 of the Constitution. In saying so we are also keeping in view the Convention on the Rights of the Child which in clear terms cast an obligation on the state party to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, maltreatment, torture, inhuman or degrading treatment, exploitation including sexual abuse while in the care of the parent, legal guardian or any other person who are in the care of the child. The signatory state is also obliged to protect the dignity of the child.

We have relied upon the Convention in consonance with the decision of the Supreme Court in *Bandhua Mukti Morcha v. Union of India and others...*, wherein the Supreme Court relying upon the Convention on the Rights of the Child made use of the same and read it along with Articles 21, 23, 24, 39(e) and (f) and 46 to hold that it was incumbent on the State to provide facilities to the child under Article 39(e) and (f) of the Constitution...

The Constitution in Article 35(5) provides that no person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. This clause relates to punishment upon conviction for a criminal offence. In our view it is all the more applicable to persons who have not committed any offence and who cannot be subjected to such treatment for acts and behaviour which does not amount to a criminal offence. Moreover, Bangladesh is a signatory to the Convention on the Rights of the Child (CRC) 1989; therefore, it is incumbent upon all authorities to implement the provisions of the Convention. In this regard we take support from the decision in the case of *Hussain Muhammad Ershad vs Bangladesh and others....* In that case B.B. Roy Chowdhury, J. observed as follows: *“The national courts should not, I feel, straightway ignore the international obligations, which a country undertakes. If the domestic laws are not clear enough or there is nothing therein the national courts should draw upon the principles incorporated in the international instruments.”*

#### **State v. Mondal (Supreme Court of Bangladesh)**

67.... Bangladesh ratified the UN Convention on the Rights of the Child in August of 1990. As a signatory to the convention, Bangladesh is duty bound to reflect the above Article [40] as well as other articles of the CRC in our national laws. We are of the view that the time is ripe for our legislature to enact laws in conformity with the UNCRC. This would also give the opportunity to iron out some of the difficulties faced so far in relation to the date relevant for determining the age of the accused for the purpose of jurisdiction of the Juvenile Court and at the same time it may be spelt out that this legislation will take precedence over all other laws when matters relating to children are in issue. We feel that if the goal of the legislation is to protect children, who are our treasures and future generations, and to give them benefits which they would not otherwise get in a Court dealing with adult offenders, then they must get that benefit for whatever offence they may be alleged to have committed. The seriousness of their action may be reflected in the severity of the order passed by the Juvenile Court. But the child, in our view, must be dealt with by a Court geared to hear matters relating to children.

68. We note that many countries have enacted new laws since UNCRC and many are in the process of doing so with the specific intention of enacting legislation to incorporate the mandate of the UNCRC.

#### **State v. Secretary, Ministry of Law, Justice & Parliamentary Affairs (High Court of Bangladesh)**

We find that the neglect of the Bangladesh Government to implement the provisions of the CRC has led to numerous anomalies in our judicial system when dealing with cases where an offender and/or the victim are children...

We would, therefore, strongly recommend that immediate steps must be taken by the Government to enact laws or amend the existing law in order to ensure implementation of all the provisions of the CRC, which are beneficial to children and also to minimise the anomalous situations which arise when dealing with children. In particular, in order to avoid further complications in the proper application of the existing laws, prompt action must be taken to ensure that the definition of ‘child’ is uniformly fixed in all statutes as anyone below the age of 18 years [Art.1 CRC]...; in all matters where a child is an accused, victim or witness, the best interests of the child shall be a primary consideration [Art.3 CRC];

that a child's views shall be considered by the Court [Art.12 CRC]...; the use of children for the purpose of carrying drugs or arms or in any other activity which exposes them to physical and moral danger or any harm must be made a criminal offence to be tried under the Children Act [Art.33 CRC]...

[O]ne Court in each district must be designated as being a Court dedicated to hear cases involving child offenders so that children's cases can be heard and disposed of on priority basis [Art.37(d) CRC]. Legal Aid must be made available in all matters involving children so that no child remains unrepresented [Art.40(2)(b)(ii)CRC]...

We are dismayed that till today Bangladesh is still lagging far behind in caring for its children. Because of our failure to implement the beneficial provisions of the CRC, the plight of our children has not improved to any measurable extent. The fact that we are lagging behind is only too apparent from the persistent recommendation of the Committee of CRC for Bangladesh to incorporate and implement the provisions of the international instrument...

When it is apparent that the girl was crying to be with her mother, that clearly is an expression of the view of the child to be with her mother and in compliance with Article 12 of the CRC the learned Magistrate should have given effect to it... There is nothing on record to suggest that the learned Magistrate at all considered the views of the child which shows abject ignorance of the international provisions, which are meant to be for the welfare and wellbeing of children. Moreover, the tearing away of a seven year old female child from the bosom of her mother can be nothing other than cruel and inhuman treatment which is contrary to Article 27 of the CRC as well as Article 35(5) of our Constitution. The learned Magistrate has clearly acted in contravention of the provisions of law, the Constitution and the CRC, to which Bangladesh is a signatory.

## **Barbados**

### **Scantlebury v. The Queen (Court of Appeal of Barbados)**

33. It seems clear to us that s 14 was incorporated in the JOA as a response by the Government of Barbados to the requirements of the UN Convention on the Rights of the Child. Barbados signed this Convention on 20 November 1989. The Convention entered into force on 2 September 1990 and was ratified by Barbados on 9 October 1990. Although the Convention as a whole has not been transformed into domestic law, the enactment of s 14 seems to suggest that Parliament, in 1989, desired to act in a manner consistent with Barbados' international treaty obligations. Article 37 of the Convention contains an express prohibition against capital punishment for crimes committed by juveniles under the age of eighteen.

## **Belgium**

### **Public Prosecutor v. LC (Brussels Court of Appeals (Belgium))**

[4] If the provisions of the Vienna Convention of 18 April 1961 are to be assumed to be incompatible with the initiation of legal proceedings to protect diplomats' children, then these provisions will be in conflict with the New York Convention of 20 November 1989 on the Rights of the Child. According to Article 19 of this Convention, State parties will take all suitable steps to protect the child against all forms of physical or mental violence, injury or abuse, neglect or neglectful treatment, mishandling or

exploitation, including sexual abuse, and these measures must include suitable procedures for tracing, reporting, referring, examining, treating and the following up of cases of child abuse and, where applicable, procedures for involving legal authorities.

[5] Article 2 of this Convention emphasises that State parties guarantee the rights described in the Convention for each child under their legal authority without discrimination of any kind whatsoever.

## **Belize**

### **Bowen v. Belize (Supreme Court of Belize)**

106... [A] court must always be astute to recognize and if possible give effect to international human rights obligations contained in treaties or conventions the state has subscribed to... By signing and ratifying an international treaty, agreement or convention, a state assumes obligations and later domestic legislation inconsistent with a treaty obligation does not justify the nonobservance of that obligation...

112. I am satisfied that the CRC does apply in Belize and that the First Schedule of the Families and Children Act can operate depending on the issue, even in the sphere of the criminal justice system as well.

113. I am accordingly, satisfied that since Belize's accession to the CRC in 1990, one of the Convention rights available to a child caught up in the web of the criminal justice system is the obligation incumbent on Belize, as a state party to the Convention as provided in Article 37(a) which states: *"States Parties shall ensure that: (as) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years."*

114. It should be observed that the obligation incumbent on Belize under this Article is to ensure that neither capital punishment nor life imprisonment without possibility of release is imposed for offences committed by juveniles. That is to say persons below eighteen years.

115. This obligation I find has subsisted since 1990 when Belize ratified the CRC and later incorporated it into its laws. It subsisted in April 1996 when the life imprisonment without possibility of release was imposed upon the claimant Anthony Bowen. The obligation still subsisted as well in the case of David Jones when he was also sentenced to life imprisonment in October 2001 without possibility of release. The obligation I find subsisted even in 1998 when the Legislature effected a change to the Indictable Procedure Act allowing, in section 146(2) thereof for the imposition of life imprisonment upon juveniles convicted of murder. This provision, with respect, ignored Belize's subsisting obligation under Article 37(a) of the CRC. And this, as I have concluded in para. 105 of this judgment is no warrant for the contention that section 146(2) trumps Article 37(a). ...

116. I am therefore satisfied that an interpretation that finds in favour of Article 37(a) is, undoubtedly, preferable as it would be clearly in keeping with Belize's obligations under the CRC in relation to the imposition of sentences of life imprisonment on juveniles. As it stands, I am convinced that section 146(2) of the Indictable Procedure Act seriously derogates from Belize's obligation regarding

sentencing juveniles...

#### 126. Conclusion

I am ineluctably, led to conclude from my analysis in the foregoing paragraphs of this judgment, that the claimants have made good their claim. That is to say, the sentences of mandatory life imprisonment without prospect of release imposed upon them for the offence of murder committed when they were juveniles, are not sustainable in the circumstances, in the light of the provisions of section 7 of the Belize Constitution and are not in keeping with the obligations of Belize under the CRC, in particular Article 37(a) of the Convention.

### **Botswana**

#### **Ndlovu v. Macheme (High Court of Botswana)**

20. The standard of the best interests of the child is in accord with several international and regional instruments, which Botswana as a member of civilized community of nations subscribes to. (See 1998 UN Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of The Child (ACRWC)).

21. The United Nations Convention on the Rights of the Child was ratified by the Botswana Government in March 1995. Article 3(1) of the said convention provides that:

*“In all actions concerning the welfare of the 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.”*

22. It is indisputable that the provisions of an international treaty such as the UN Convention on the Rights of the Child, of which Botswana is a party, do not form part of Botswana law, unless parliament elects to incorporate its provisions into our domestic law by legislation. But the fact that the Convention has not been incorporated into national law, as is the case with the UN Convention on the Rights of the Child, does not mean that its ratification holds no significance for Botswana law, for its provisions have strong persuasive value on the decisions of this Court.

### **Bulgaria**

#### **Kerezov v. Minister of Justice (Supreme Administrative Court of Bulgaria)**

[8] Art. 1(2) of the Regulation specifies that during the procedure of adoption, the requirements laid down in Art. 21 of the UN Convention on the Rights of the Child shall be adhered to. The principles established by the Convention on the Rights of the Child and the UN Declaration on the social and legal principles relating to the wellbeing of children, and especially in relation to the provision on raising children and adoption on a national and inter-country scale (Resolution 41/85 of 13 December 1986) have been further developed in the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption...

[9] On the strength of Art. 5 (4) of the Constitution of the Republic of Bulgaria, the international treaties referred to shall constitute part of the country’s internal law and shall prevail over those norms of the national legislation that contradict them....

## Cambodia

### **Decision of the Cambodian Constitutional Council dated 10 July 2007 (Cambodian Constitutional Council)**

Understands that at case trial, in principle, a judge shall not only rely on article 8 of the Law on Aggravating Circumstances for Felonies, but also relies on the law. The term “the law” here refers to the national law including the Constitution which is the supreme law and other applicable laws as well as the international conventions that Cambodia has recognized, especially the Convention on the Rights of the Child.

## Canada

### **Canadian Foundation for Children, Youth and the Law v. Canada (Supreme Court of Canada)**

10...The “best interests of the child” is widely supported in legislation and social policy, and is an important factor for consideration in many contexts. It is not, however, a foundational requirement for the dispensation of justice. Article 3(1) of the Convention on the Rights of the Child describes it as “a primary consideration” rather than “the primary consideration”... It follows that the legal principle of the “best interests of the child” may be subordinated to other concerns in appropriate contexts...

32. Canada is a party to the United Nations Convention on the Rights of the Child. Article 5 of the Convention requires state parties to 'respect the responsibilities, rights and duties of parents or...other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.'

Article 19(1) requires the state party to 'protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Finally, Article 37(a) requires state parties to ensure that “[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment” (emphasis added). This language is also found in the International Covenant on Civil and Political Rights...to which Canada is a party... From these international obligations, it follows that what is “reasonable under the circumstances” will seek to avoid harm to the child and will never include cruel, inhuman or degrading treatment.

33. Neither the Convention on the Rights of the Child nor the International Covenant on Civil and Political Rights explicitly require state parties to ban all corporal punishment of children...

### **D.S. v. V.W. (Supreme Court of Canada)**

76 The primacy of the child's interests is recognized by the [Hague Convention on International Child Abduction]'s fundamental objective, which is confirmed in the Act and set out in the preamble to the Convention: "the interests of children are of paramount importance in matters relating to their custody". This objective is in keeping with the universal recognition that the interests of the child must prevail, as stated in a number of international documents in addition to the Convention, such as the Convention on

the Rights of the Child, Can. T.S. 1992 No. 3, Article 3 of which provides that "[i]n all actions concerning children . . . . the best interests of the child shall be a primary consideration".

**In the matter of the Child and Family Services Act et al. (Saskatchewan Court of Queen's Bench (Canada))**

73. Article 30 of The United Nations Convention on the Rights of the Child provides that: in those states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language. . . . It is clear that culture is an important consideration in determining the best interests of these children as is a continuing connection with their aboriginal roots and community. Adoption of these children by non-aboriginal families does not mean they have to be cut off from their culture or community. "Adoption" and "culture" are not mutually exclusive concepts.

**Re: X (Immigration and Refugee Board (Canada))**

Article 28 of the Convention on the Rights of the Child states that "States Parties recognize the right of the child to education, with a view to achieving this progressively and on the basis of equal opportunity...". It further provides States Parties shall "Make primary education compulsory and available free to all;" . . . and shall "Take measures to encourage regular attendance at schools and the reduction of drop-out rates."

I find the extended suspension of these two children from their school and the uncertainty about whether they will be able to return to school are inconsistent with the principles set out in the Convention on the Rights of the Child, and have resulted in serious and sustained harm to these children. These children were denied primary education in China, through no fault of their own. I find this fundamentally affected their education, which is essential to the development and well-being of a child.

**Colombia**

**Decision C-376/10 (Constitutional Court of Colombia)**

VI.2.1. . . .They indicate that the Colombian State incorporated into its internal legislation the regulation related to the free compulsory primary education contemplated in those systems of protection of rights. That international norm regarding free compulsory primary education should be considered incorporated into the Colombian constitutional order. In fact, the provisions regarding the subject are consecrated...in the Convention on the Rights of the Child (Art. 28).

VI.3.1.3 The compulsory nature of, universality and free access to primary education is reiterated by the Convention on the Rights of the Child of 1989...

**Czech Republic**

**Right of a minor child to be heard in proceedings in which decisions are made about his/her affairs (Constitutional Court of the Czech Republic)**



It must be stressed that the claimed right to a fair process by the minor complainant belongs only to the minor and not to another complainant, and therefore a breach of the rights as established in Article 12, paragraph 2 of the Convention on the Rights of the Child and Article 3(b) of the European Convention on the Exercise of Children's Rights can only be invoked by a minor; generally these rights shall only be applicable to children and not per se to parents (see resolution No. II. U.S. 393/05, II. U.S. 1818/07, available at <http://nalus.usoud.cz>)...

The right to be heard in all proceedings in which decisions will be made on matters explicitly regulated in Article 12 of the Convention on the Rights of the Child and Article 3 of the European Convention for the Exercise of the Rights of Children, as well as in Section 31 (3) of the Family Code and Section 100 (4) of the Civil Procedure Code, provides the child with the possibility to appear in any judicial or administrative proceedings affecting him, either directly or through a representative or an authority, in a manner where the hearing shall be done in accordance with the procedural rules of national law. In other words, the child is guaranteed the right to allow authorities to express his opinion on issues that directly affect him, allowing him (only to a certain extent) to offset his unequal position in relation to his parents or legal guardian.

## **Dominican Republic**

### **Bencosme v. Devers (Supreme Court of the Dominican Republic)**

In reviewing the documents, facts and circumstances of the case of the interested parties, the judge or authority charged with issuing the legal decision in such a case must apply the fundamental principles enshrined in the Convention on the Rights of the Child and the provisions set out in Law No. 136-03 which must prioritise the best interests of the child in granting or revoking custody. This is the primary determinant in granting custody given that the person to whom custody is granted must guarantee the well-being of the child in accordance with their best interests.

### **Hermida v. Berta (Supreme Court of the Dominican Republic)**

The law is the same for everyone; it cannot order more than is fair and useful for the community, nor can it prohibit more than would be harmful. The type of relationship chosen by the parents cannot interfere with the child's right to preserve their identity and to carry the surname of their parents, in accordance with Article 7 of the Convention on the Rights of the Child, which states that a child will be registered immediately after his or her birth and will have the right to a name from birth, to acquire a nationality, and as far as possible, to know their parents and be looked after by them. It would be totally unfair and discriminatory not to acknowledge that Oscar Javier is the son of Oscar Felix Perguero Hermida given that Article 2 of the Convention on the Rights of the Child protects the rights of all children 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. The appellant, basing his argument on alleged violations of Articles 1352 and 312 of the Civil Code and 335 of the Law on Civil Status, denied his paternity of the child Oscar Javier because he had been born within the marriage of the child's mother with Ramón María Marcelo Capéllan. The court rejected the appeal, confirming the decision handed down by the Children's Court with the view that the DNA analysis carried out on October 2, 2002 on the order of the aforementioned court revealed that the appellant could not be excluded as the possible father of the child, with 99.99 per cent probability that he is the parent of the child in question. According to the court, the jure and de jure presumption enshrined in Article 312 of the Civil Code

constitutes discrimination in this case, for which reason, in addition to the proof and other facts and circumstances of the case, the application will not proceed because it is contrary to Article 5 of the Constitution and Articles 7 and 20 Convention on the Rights of the Child. (pages 513-515).

**Lora v. Cabrera (Supreme Court of the Dominican Republic)**

The principle of the "best interests of the child or adolescent" found in the indicated Convention on the Rights of the Child and assimilated by the aforementioned regulations states that the best interests of the child must always be taken into account in the interpretation and application of Law 136-03, Code for System of Protection of Fundamental Rights of Children And Adolescents...

**Pereyra Sorrentino v. Pereyra (Supreme Court of the Dominican Republic)**

Considering that, after the enactment of that law, our country has ratified several international instruments under which the Dominican government undertakes, among other provisions, to ensure the protection of basic rights and equality of all persons before the law without discrimination, whose rules to be ratified constitute a legal character binding up our constitutional system and part of what has been called the constitutional law, both the Convention on the Rights of the Child, Articles 7 and 8, as Articles 3 and 18 of the American Convention on Human Rights, ratified by the Dominican State, highlight that the importance of identity of every human being is clearly established, since it plays a role in the recognition of his law as a fundamental right.

Whereas, the Dominican State, fulfilling its duty ensure the implementation of the rights and freedoms recognized in these international instruments, enacted Law no. 14-94 or Code for the Protection of Children and Adolescents, devoting it to basically the principles and norms contained in the United Nations Convention on the Rights of the Child...

**Fiji**

**Ali v. State of Fiji (High Court of Fiji)**

Children have rights no wit inferior to the rights of adults. Fiji has ratified the Convention on the Rights of the Child. Our Constitution also guarantees fundamental rights to every person. Government is required to adhere to principles respecting the rights of all individuals, communities and groups. By their status as children, children need special protection. Our educational institutions should be sanctuaries of peace and creative enrichment, not places for fear, ill-treatment and tampering with the human dignity of students....

This convention was ratified by Fiji in 1993. Articles 16 and 19 of the convention are relevant. The Convention requires governments to take legislative and other measures to protect children from physical or mental violence including sexual abuse. As with all victims of crimes the rights of children have particular poignancy. Children are the most vulnerable members of any community. It is the duty of the courts to protect their interests, especially where parents are wanting.

**France**

**X v. Y. and Another (Court of Cassation (France))**

Whereas, however, it is apparent from Article 13(b) of the Hague Convention of 25 October 1980 that

an objection cannot be made to the immediate return of the child unless there exists a grave risk of danger or a risk of creating an intolerable situation; and that by virtue of Article 3(1) of the New York Convention on the Rights of the Child, a provision which is directly applicable before French courts, these circumstances must be assessed taking account of the primacy of the best interest of the child...

## **India**

### **M.C. Mehta v. State of Tamil Nadu (Supreme Court of India)**

15. It would be apposite to apprise ourselves also about our commitment to world community. For the case at hand it would be enough to note that India has accepted the Convention on the Rights of the Child, which was concluded by the UN General Assembly on 20th November, 1989. This Convention affirms that children's rights require special protection and it aims, not only to provide such protection, but also to ensure the continuous improvement in the situation of children all over the world, as well as their development and education in conditions of peace and security. Thus, the Convention not only protects the child's civil and political rights, but also extends protection to child's economic, social, cultural and humanitarian rights.

## **Ireland**

### **CA and SOA v. Minister of Justice, Equality and Law Reform et al. (High Court of Ireland)**

1. In particular, it is sought to obtain leave to seek...declarations...that the proposed deportation violates the rights of the applicants under the United Nations Convention on the Rights of the Child, 1989 (being a relief which, even at this stage, cannot succeed in as much as that convention is not part of the domestic law and interlocutory relief to restrain deportation pending the disposition of the proceedings).

### **D. v. Refugee Appeals Tribunal (High Court of Ireland)**

23. The right to education (and especially the right to basic education) is widely regarded as fundamental. This is reflected in Article 42 of the Constitution, Article 2 of the First Protocol of the ECHR and Article 14 of the EU Charter of Fundamental Rights. It is also reflected in international agreements, such as Article 28 of the UN Convention on the Rights of the Child.

## **Hong Kong**

### **Lai Hung Wai v. Superintendent of Stanley Prison (Hong Kong Court of First Instance)**

23. In terms of art. 37, it is accepted therefore that life imprisonment may be imposed on a person under the age of 18 years provided the sentence shall not literally mean 'for life' and shall therefore contain the 'possibility' not certainty of release at some future date. In short, in respect of young offenders, the Covenant recognises that long-term indeterminate sentences are lawful. No mention is made in art. 37 (or elsewhere in the Covenant) of the requirement to ensure that young offenders are provided with a yardstick to enable them to measure with any degree of certainty how long their indeterminate sentences will be. Instead, what is emphasised in the Covenant is the need to look to the reintegration of young offenders into society. Put simply, what is recognized is not the need for certainty but the need to look to rehabilitation.

### **Wah et al. v. Director of Immigration (Hong Kong Court of Appeal)**

69. With regard to the reservation in the UN Convention on the Rights of the Child, counsel points out that the reservation refers only to a reservation of the right of the UK Government to apply its own immigration laws to those who do not have the right under the law to enter and remain in the UK. This means that the UK undertook to respect the rights of all children with the appropriate right of abode status but reserved the right to legislate through its nationality laws with regard to the acquisition of that status by those who do not have such right. It is submitted that such reservation cannot apply to the Hong Kong situation. This is because Hong Kong does not confer nationality through any of its laws. It is further submitted that the paragraph 1(2)(b) does not only create differential treatments. It is a discrimination which cannot be justified in that it contravenes Articles 2 and 26 of the ICCPR which guarantee the enjoyment of rights and equality before the law on a non-discriminatory basis. Counsel says it is discriminatory in two ways : between legitimate and illegitimate children on the basis of the status of a parent at birth and discrimination between illegitimate children of the father and mother. This is an arbitrary deprivation of right...

74. For the arguments put forward by Mr Chang, I also take the view that the reservation by the UK in the UN Convention on the Rights of the Child applies to immigration legislation intended to affect persons without any right under the law in the first place and does not apply to any legislation which tries to affect persons who have the right of abode. Hence, the Convention applies. It is clear that paragraph 1(2)(b) is discriminatory and is in contravention of the Convention as well as the ICCPR (which is also reflected in the Bill of Rights) regarding equality before the law irrespective of status.

## **Israel**

### **A. v. Israel (Supreme Court of Israel)**

The Convention explicitly forbids the use of physical or mental violence against children, and obligates the state to take measures to prevent violence against children. Thus paragraph 19(1) of the Convention states:

*States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, legal guardians or any other person who has the care of the child.*

Accordingly, we decide that corporal punishment of children, or humiliation and derogation from their dignity as a method of education by their parents, is entirely impermissible, and is a remnant of a societal-educational outlook that has lost its validity.

### **Adalah et al. v. Minister of Interior et al. (Supreme Court of Israel)**

12. In so far as the best interests of the child are concerned, art. 3(1) of the Convention on the Rights of the Child provides that:

*'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.'*

Article 9(1) of the Convention on the Rights of the Child further provides 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, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child...’*

No one disputes that enforcing a separation of a child from his parents constitutes a very serious violation of the rights of the child to grow up with his family and with his parents. This is of course the case as long as the family concerned is a functioning one, where the child is not harmed by being with it...

We are not speaking merely of harm to the ‘best interests of the child,’ but of a violation of a real ‘right,’ which is possessed by the child, to grow up with his family, and the state has a duty to refrain in its actions from violating this right (CA 2266/93 A. v. B [61], at pp. 234–235). By tearing asunder the family unit, by separating the child from one of his parents, there is a serious violation of the rights of the child, a violation that the state is obliged to avoid in so far as possible.

## Japan

### **Decision on the share in the inheritance of an illegitimate child (Supreme Court of Japan)**

*Dissenting opinion by Justices Toshijiro Nakajima, Masao Ono, Hisako Takahashi, Yukinobu Ozaki, Mitsuo Endo:*

Concerning international treaties, Article 26 of the International Covenant on the Civil and Political Rights which Japan ratified in 1979, provides that all people are equal under law, and enjoy the right to equal protection without any discrimination. For this goal, the law prohibits all kinds of discrimination, and guarantees equal and effective protection to all, against discrimination on any grounds including birth or other status. Article 2, paragraph 1 of the Convention on the Rights of the Child, which Japan ratified in 1994, provides that the signatory countries shall respect and ensure that all children within their jurisdiction the rights provided by the Treaty regardless of the birth or other status of the children, their parents or statutory guardians.

Considering the above-mentioned facts and the effect on the society which the Provision seemingly has, as well as other factors, at least at present, discriminating against illegitimate children in relation to inheritance for the purpose of respecting and protecting marriage is against the principles of the respect of individuals and their equality, lacks a substantial relationship between the purpose of legislation and means of achieving it. It is strongly questionable whether the Provision can be considered to be constitutional.

### **Demand for rescission of a decision of the local authorities to admit a child into a child welfare facility (Tokyo District Court (Japan))**

3-2 (1) [F]urthermore, with respect to the Convention on the Rights of the Child, Article 9-1 provides as an exception to the obligations of state parties to ensure that a child shall not be separated from his or her parents against their will, circumstances “when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”. Article 9-3 of the CRC further provides as an exception to the obligations of the states parties to respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, if it is contrary to the child's

best interests to do so. Article 19-1 of the CRC provides that States parties must take “all appropriate legislative, administrative, social and educational measures” to protect the child from abuse and other forms of maltreatment while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

The determination to admit the child in a child welfare facility for children with mental disabilities was made in line with the principle of Article 19-1, pursuant to the rules and procedures of Article 28 of the Child Welfare Act, by the director of the Tokyo child welfare department as the competent authority, in accordance with the determination of the family court, taking into account the best interest of the child....”

#### **Demand for rescission of a deportation order (Tokyo District Court (Japan))**

However, Article 9-4 of the CRC provides that where a separation results from any action initiated by a State party, such as deportation of one or both parents or of the child, upon request, the state party must provide the parents or the child with the essential information concerning the whereabouts of the absent member(s) of the family. This provision cannot be construed as a prohibition against separation of parents from their children in connection with a deportation proceeding and should be regarded to be in line with international customary law mentioned above in 1.

As a general matter, the right of families to stay together, the right of children to be protected by their parents and ensuring the best interests of the child must be respected as universal values, and may be considered as a factor in determining whether or not the Minister of Justice issues special permissions to remain in Japan, however, it cannot be said that the provisions in international conventions to which Japan is a party directly regulate the decisions of the Ministry of Justice. Accordingly, if certain rights and interests mentioned above are violated as a result of non-issuance of a special permit to stay in Japan, the reasonable interpretation would be that such non-issuance alone would not constitute a breach or abuse of authority.”

### **Kenya**

#### **RM and CRADLE v. Attorney-General (High Court of Kenya)**

After analyzing the case law cited to us by the applicant[']s counsel including the Interested Parties['] counsel we prefer reinforcing the three relevant [Bangalore] principles set out elsewhere in this judgment to the effect that the States['] clear constitutional provisions should prevail over those of the Conventions. It follows that the clear provisions of s 82 and the limitations must prevail and we so hold. It is only where an Act intended to bring a Treaty into effect is itself ambiguous or one interpretation is compatible with the term of the treaty while others are not that the former will be adopted. This is in recognition with a presumption in our law that legislation is to be construed to avoid a conflict with international law.

### **Lithuania**

#### **A.D. (R.Z.) v. V.D. (M.F.) (Supreme Court of Lithuania)**

This is directly provided in the Civil Code, Article 3.161, paragraph 5, which states that children born to unmarried parents and children born to married parents have equal rights. In order to protect the

child's right to housing (as found in Article 13 of the Law on Fundamentals of Protection of the Rights of the Child) and with respect to paragraph 2 of Article 27 of the United Nations Convention on the Rights of the Child,...parents or other legal representatives of children have the primary responsibility for providing the proper living conditions necessary for the child to develop.

**S.R., V.R. v. Lithuania (Supreme Court of Lithuania)**

Moreover, according to the Article 3(2) of the Convention on the Rights of the Child, States Parties have to ensure to the child such protection and care as is necessary for his or her well-being. As a result, the interests of the child in such cases should be interpreted as conditions that ensure overall, comprehensive and cohesive development; prepare them for independent life in the community; correspond with their health requirements; promise cohesive physical and psychological development; and meet public education demands...

According to the evidence in this case, it is obvious that both sisters were sent to the USA without the Government meeting the legal requirement that a guardian be named. Under Article 20 of the Convention on the Rights of the Child, if a child is temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in the current environment, he or she is entitled to a special protection and assistance provided by the State. The facts of the case reveal that even though the mother's parental rights were not officially terminated and children were not officially separated from their mother, the sisters were factually deprived of their family environment primarily because of their mother's life situation (imprisonment) and therefore acquired a legal right to special protection from the State.

[I]t could be concluded that the Lithuanian institutions which allowed the transfer of underage children to a foreign country without any legal guardian violated the statutory requirements because they did not maintain and did not guarantee that another country would give these children the same or better protection and support that they could get in their home country... Therefore, it is obvious that there is a flagrant breach of Articles 4(1) and 4(5) of the Law on Fundamentals of Protection of the Rights of the Child and Articles 20 and 21 of the Convention on the Rights of the Child as underage children were left without any legal protection as a result of the actions (or inactions) of State institutions and officials...

Public authorities, who are exceptionally responsible for child protection, failed to prevent violations of the child's right to life in a home environment or to guarantee the best interests of the child in this case. Article 3(1) of the Convention on the Rights of the Child requires that 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. Also, Article 41(1)(1) of the Law on Fundamentals of Protection of the Rights of the Child stresses that the legitimate interests of the child should always prevail. Further, the Lithuanian legal system in particular enshrines the priority of children's rights and interests, meaning that during the process of making legislation as well as implementing and applying acts, or considering matters which are not covered by the law, it is always necessary to evaluate the decision or action in the best interests of the child and ensure that their rights and interests are not and will not be endangered or violated.

**Malawi**

**In the matter of the Adoption of Children Act Chapter 26:01 of the Laws of Malawi in the matter of Chifundo James (Malawi Supreme Court of Appeal)**

35. Coming to the actual provisions of the CRC we note that Article 3 provides that "the best interest of the child shall be a primary consideration. Article 21 of the CRC charges the parties who recognize adoptions in their system to ensure that the best interest of the child shall be the paramount consideration and that the adoption is authorized by competent authorities in accordance with the applicable law in those countries. The best interest of the child is also emphasized in Article 24 of the African Charter on the Rights and Welfare of the Child 1990.

36. In our Judgment, we think that whether you talk about the best interest of the child as is the case in the above cited Conventions or you talk about the welfare of the child as is contained in the Act, this really is a question of semantics or nomenclature. They mean the same thing, and it is this; a court of law dealing with the adoption of an infant must pay attention at all times that the welfare of the child is not compromised by secondary issues. We therefore find that there is absolutely no conflict between what the Act provides and what Articles 3, 20 and 21 of the CRC provide. The provisions deal at some length with matters that can only be said to be for the welfare of the child which our courts are mandated to protect under the Act. Article 20 of the CRC in fact encourages state parties to deal with adoption cases in accordance with what the national laws provide.

**Moyo v. Attorney General (Constitutional Court of Malawi)**

The primary consideration in dealing with a juvenile whether in criminal matters, or adoption or custody proceedings is what is in the best interest of that child or juvenile. This is the trend followed internationally as provided in various international instruments to which Malawi is a party. The Convention on the Rights of the Child to which Malawi is a party in its Article 3 provides as follows: *'In all actions covering 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.'*

Malawi having acceded to the CRC on 2nd January, 1991 the said Convention is binding on Malawi and all public or private institutions in this country. As already alluded to herein, the Court as provided for in section 11 (2) (c) of the Constitution in interpreting the provisions of the Constitution, should have regard where applicable, to current norms of public international law and comparable foreign case law. Otherwise the provisions of our Constitution and statutes should be the first port of call...

In dealing with the incarceration of the applicant consideration should have been had to the welfare or best interests of the juvenile. The CRC refers to the best interests of the child principle whereas the Children and Young Persons Act refers to the welfare of the child. Whether one talks about the best interests of the child or the welfare of the child they mean the same thing. (see MSCA Adoption Appeal No. 28 of 2009: In the Matter of Chifundo James). And further on the applicability of the international agreements or convention the case of S. Kalanda -v- Limbe Leaf Tobacco Ltd, Civil Cause No. 542 of 1995 is enlightening...:

'The second view is that binding international agreement before 1994 became part of our law by operation of the Constitution. The uncertainty in section 211 before the amendment is cured by the amendment. Section 211 (1) as amended expressly states that international agreements entered after commencement of the Constitution shall form part of our law by domestic legislation. If it meant prior



international agreements required domestic legislation, the Constitution would in section 211 (1) have added qualifications to the effect that all international agreements before 1994 would, like the ones after, need domestic legislation. The Constitution restricts the requirement to legislation after commencement of the Constitution...’

The CRC is therefore applicable and binding on Malawi. However, the provisions of section 42 (2) (g) of our Constitution and the Children and Young Persons Act are not in conflict but rather they complement each other. Our Constitution in section 42 (2) (g) (iii) as earlier alluded to prohibits incarceration of juveniles / children with adults and section 4 of the Children and Young Persons Act complements the Constitution by requiring that the welfare of the child be upheld at all times. We therefore find that the incarceration of the applicant with adults before and after his trial is a blatant violation of his fundamental human rights and freedom under our Constitution and is contrary to the Convention on the Rights of the Child and other international Convention on child rights as well as the provisions of the Children and Young Persons Act.”

## **Micronesia**

### **Kosrae v. Ned (Kosrae State Court (Micronesia))**

Following detailed review of Articles 37 and 40, and the remaining articles of the Convention, this Court concludes that the imposition of community service would not violate the provisions or spirit of the Convention on the Rights of the Child. Indeed, community service, which could be considered as guidance, supervision, counseling, education and vocational training, are all preferred alternatives to institutional care (detention), which is also explicitly permitted under the Convention. This Court is persuaded that community service will benefit the Defendant and would be in her best interests, appropriate to her well-being and proportionate to the circumstances and the offenses of assault and battery, and offensive conduct in public.

## **Namibia**

### **N.S. v. R.A.H. (High Court of Namibia)**

[157] Adoption and the consequences thereof is not a private affair but remains a government responsibility and as such, regardless of the fact that it is not explicitly provided for by statute, authorities must respect the subsidiarity principle as it was enshrined in art 21(b) of the United Nations Convention on the Rights of the Child, which according to article 144 of the Namibian Constitution has to be considered when interpreting Chapter 3 of the Constitution, pertaining to Fundamental Human Rights and Freedoms, and more in particular Article 15 pertaining to Children’s rights. The effect of the subsidiarity principle is that adoptions by foreigners should be strictly considered as an alternative to adoption by adoptive parents who reside in the child’s country of birth.

## **Nauru**

### **In re Lorna Gleeson (Supreme Court of Nauru)**

I am told that Nauru is a signatory to the Convention [on the Rights of the Child]. Whether it has

become part of the domestic law of Nauru is a moot point. Whether it is or is not part of our domestic law, I feel able to take the Convention [on the Rights of the Child] into account in considering the cases stated....

The interpretation by the Family Court of Section 9 of the Adoption of Children Ordinance 1965 was wrong because that section is inconsistent with Article 3 of the Constitution of Nauru and is contrary to the spirit of the United Nations Convention on the Rights of the Child.

## Netherlands

### **Minister for Immigration Affairs and Integration v. A and B (Netherlands Administrative Law Division)**

[2.7.1] ... Article 3, first section of the Convention on the Rights of the Child (CRC) provides that the best interest of the child concerned is included in all measures concerning children. It is evident from the fact that the minister rejected the foreign nationals' applications because he was of the opinion that adequate support facilities already existed in the country of origin that these best interests have been taken into consideration. As to the weight that should be accorded to a child's best interest in a particular case, the wording of the provision contained in the first section does not contain a standard that can be applied directly by the courts without further elaboration in national law and regulations.

## New Zealand

### **Hosking v. Runting (New Zealand Court of Appeal)**

[139] The United Nations Convention on the Rights of the Child (UNCROC), ratified by New Zealand and all but two United Nations member states, declares for children the same right of privacy as appears in the International Covenant [on Civil and Political Rights].

## Papua New Guinea

### **State v. Noimbik (District Court of Justice (Papua New Guinea))**

18. Finally, [Mr. Noimbik]'s conduct towards the child not only breached our domestic law as I have mentioned above but has transcended international boundary and gone into violating an international law – the Convention on the Rights of the Child which Papua New Guinea [("PNG")] is a signatory to. This Convention recognizes and highlights the human dignity of every child and also demands from member states like PNG that children, no matter how wrong or right they may be must never be harmed in any form or manner and must be protected from all forms of abuse. Each day we see in the news media of reports of children in PNG and elsewhere being continuously and systematically exposed to all forms of abuses, one of which is cruelty at the hands of relatives and people they know and trust, like we see today.

19. As a member state to this Convention, PNG through its various state agencies including the court system is called upon to enforce and give effect to this Convention. Under this law a call is made for a zero tolerance to all forms and manners of abuse and all levels of courts in the country and other state agencies are required to safeguard and protect innocent and defend-less children from abuses by

enforcing both applicable national and international laws. Accordingly, PNG as a signatory to this Convention is under an international obligation to give effect to the intention of this Convention and in so doing must ensure that children's rights are safeguarded, protected and enforced...

23. If PNG is serious about its international commitment to give a high priority to the rights of children, to their survival, their protection and development, and still remembers its obligation under Article 19 of the Convention (supra) then it must act now to make appropriate legislative changes.

## **Russian Federation**

### **K.A.G. (Constitutional Court of the Russian Federation)**

Thus, in order to realize established Constitutional standards, national law on labour and pensions establishes and describes certain social guarantees and benefits for employees who have children, including children with disabilities. These provisions are or should be consistent with the best interests of the child principle and give priority to child protection and care as is necessary for the child's well-being in all spheres of public life, which in particular arises from the Convention on the Rights of Child (adopted by the UN General Assembly on 20 November, 1989).

## **Samoa**

### **Attorney-General v. Maumasi (Court of Appeal of Samoa)**

[T]he Convention on The Rights of the Child, adopted by the General Assembly of the United Nations in 1989 and ratified (with an immaterial exception by Samoa in 1994, includes the right not to be subjected to cruel treatment or punishment (Article 37). All Samoan Courts should have regard to this Convention in cases within its scope.

### **Police v. Kum (Court of Appeal of Samoa)**

All Samoan Courts should have regard to this Convention in cases within its scope.

The Convention requires protection of the child from sexual abuse while in the care of parents and any other person who has the care of the child. The preamble recognises that a child 'should grow up in a family environment, in an atmosphere of happiness, love and understanding.' The judge in this case has not 'had regard to this Convention' on sentencing in a case 'within its scope.'

### **Police v. Vailopa (Supreme Court of Samoa)**

That young offenders and children generally require special treatment cannot be doubted. As recited in the preamble to the CRC, "the child by reason of his physical and mental immaturity needs special safeguards and care including appropriate legal protection before as well as after birth." The result was the CRC, a convention unanimously adopted by the United Nations General Assembly on 20 November 1989 and which remains the most ratified international human rights convention. Samoa has been with an immaterial exception party to this Convention since 29 November 1994 but as with most Pacific states, we have not as yet taken the further step of giving full effect to our Convention obligations as required by article 4 which provides that States "shall undertake appropriate legislative administrative and other measures for the implementation of the rights recognized in the present Convention". I would for present purposes underline the words "other measures"...

The perception that a child needs special protection arises from the immaturity and vulnerability of children. That is the foundation upon which the Convention was constructed. In the hostile and stressful situation of an accusation of a criminal offence, it is accepted a child needs the mature guidance and reassurance of someone who clearly has its interests at heart. To suggest that it should know that it has such a right and would have the courage or maturity to demand it runs counter to the fundamental philosophy of the Convention. I consider it a logical and proper conclusion that the police are obliged to advise any child of the right to have a parent, guardian or legal adviser present and to take any reasonable steps to secure such attendance before taking any step that could result in the child making a statement against its interests.

There is high authority that the courts of this country must follow the Convention. As noted in *Police v Faiga* [2008] WSSC 1996:

"The Court of Appeal as the highest court of the land decreed in *Attorney General v Maumasi* [1999] WSCA 1 that all Samoan Courts should have regard to the articles of the Convention on the Rights of the Child in cases within its scope i.e. in relevant cases. No less a person than Lord Cooke of Thorndon who was for many years the president of the Samoa Court of Appeal has stated that the following of the principles of the CRC should not be mere window dressing..."

This is a clear mandate to the courts of this country to have regard to the provisions of the Convention in appropriate cases. More than lip service must be paid to the provisions of the Convention...

This overwhelming abundance of international authority shows how parties to the Convention on the Rights of a Child notwithstanding the lack of specific domestic legislation have imported the Convention, its underlying principles and philosophies into domestic law. In doing so these countries have breathed life into the CRC and so it should in a modern world where children continue to be exploited in the areas of armed conflict, child pornography, child prostitution and such-like. Samoa should not be hesitant to take its place amongst the nations of the world active in this struggle...

Article 37(d) requires that a youth in custody has the right to promptly receive "access to legal and other appropriate assistance." In this case I would interpret that to mean that of his mother who according to the evidence was in the police building at the time or perhaps even the Registrar of court whom he was brought down on 30 September 2008 to see. In respect of article 40(2) (b) (ii) I would respectfully agree with Chief Justice Ward in *Simona* that the words and/or the underlying philosophy of article 40(2)(b)(ii) means that a parent, guardian, caregiver or one of the persons referred to previously must be present before a youth can be interviewed by the police in respect of potential criminal misconduct. This was not done here, the cautioned statement of 30 September 2008 should be excluded on that ground as well. If not specifically on that basis then at least on the ground that a breach of the spirit and philosophy of articles 37(d) and 40(2) (b) (ii) is tantamount to obtaining a confession by the use of improper and unfair methods.

## Slovenia

### [Maja Drevo et al. v. Slovenia](#) (Constitutional Court of Slovenia)

14. The provision of Article 9, point (3), of the CRC is directly applicable since the right of the child to

maintain regular contacts with both parents clearly follows from it. At the time of this provision coming into force, the provision of the first paragraph of Article 106 of the MFRA was already in force in our legal system. This means that the provision of Article 9, point (3), of the CRC is a later and hierarchically higher provision (Article 8 of the Constitution), which derogates provisions in force that conflict with it (*lex posterior derogat legi priori*). For this reason, the Constitutional Court did not need to deal with the question of whether the provision of the first paragraph of Article 106 of the MFRA should be interpreted in view of the first paragraph of Article 56 of the Constitution, since the provision of Article 9, point (3) of the CRC, which grants this right, is completely unambiguous.

## **Solomon Islands**

### **Regina v. K (High Court of the Solomon Islands)**

The various international Human Rights Conventions referred to (the Universal Declaration of Human Rights, The International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of all forms of Racial Discrimination and Convention on the Rights of the Child) must be read subject to the domestic legislation and the Constitution. Much of what is contained in those Conventions and international instruments are already well reflected in our domestic legislation...

This leaves for consideration the propriety of prosecuting the appellant for a murder committed at so young age, having regard to his understanding and appreciation of the nature of the proceedings in which he was tried. Solomon Islands has acceded to the Convention on the Rights of the Child, which came into force on 2 September 1990. The Convention has not, however, been ratified by Parliament so as to incorporate it into the domestic law of Solomon Islands. As most, therefore, it serves as a guide to the procedure to be followed in case of this kind at common law or under statute. In fact, the only relevant provision of real consequence is article 37 (a) providing that life imprisonment "without possibility of release" shall not be imposed on a person under 18 years who commits an offence", but this is relevant to the sentencing of young offenders rather than to their prosecution or conviction...

I bear in mind the guidelines set out in the Convention on the Rights of the Child regarding how young persons ought to be treated. That the best interests of the child should be the central concern in any sentencing process and that care and rehabilitation should be the main focus of any order of the courts on conviction.

## **South Africa**

### **C and Others v. Department of Health and Social Development (Constitutional Court of South Africa)**

[34] The right to parental care or family care requires that the removal of children from the family environment must be mitigated in the manner described in the UNCRC, in order to satisfy the standard set for the limitation of rights in section 36(1) of the Constitution. The requirements that the removal be subject to automatic review and that all interested parties, including the child concerned, be given an opportunity to be heard, in my view, stand as essential safeguards of the best interests of the child.

### **Christian Education South Africa v. Minister of Education (Constitutional Court of South Africa)**

[40] The state is further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse or degradation. More specifically, by ratifying the United Nations Convention on the Rights of the Child, it undertook to take all appropriate measures to protect the child from violence, injury or abuse...

**Director of Public Prosecutions KwaZulu-Natal v. P (South Africa Supreme Court of Appeal)**

[15] Section 28 has its origins in the international instruments of the United Nations. Of relevance to this case is the United Nations Convention on the Rights of the Child (1989) which South Africa ratified on 16 June 1995 and thereby assumed an obligation under International Law to incorporate it into its domestic law. Various articles under the convention provide that juvenile offenders under the age of 18 years 'should as far as possible be dealt with by the criminal justice system in a manner that takes into account their age and special needs.' Also of relevance is article 40 (1) of the Convention which recognizes the right of the child offender 'to be treated in a manner consistent with the promotion of a child's sense of dignity and worth, which reinforces the child's respect for human rights and fundamental freedom of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.' Section 28 (1) (g) of our Constitution appears to be a replica of s 37 (b) of the Convention which provides that children in conflict with the law must be arrested, detained or imprisoned 'only as a matter of last resort and for the shortest appropriate period of time.'

[16] The Convention has to be considered in conjunction with other international instruments...

**Government v. Grootboom (Constitutional Court of South Africa)**

[75] The extent of the state obligation must also be interpreted in the light of the international obligations binding upon South Africa. The United Nations Convention on the Rights of the Child, ratified by South Africa in 1995, seeks to impose obligations upon state parties to ensure that the rights of children in their countries are properly protected. Section 28 is one of the mechanisms to meet these obligations. It requires the state to take steps to ensure that children's rights are observed. In the first instance, the state does so by ensuring that there are legal obligations to compel parents to fulfil their responsibilities in relation to their children. Hence, legislation and the common law impose obligations upon parents to care for their children. The state reinforces the observance of these obligations by the use of civil and criminal law as well as social welfare programmes.

**S v. M (Constitutional Court of South Africa)**

[16] Secondly, section 28 must be seen as responding in an expansive way to our international obligations as a State party to the United Nations Convention on the Rights of the Child (the CRC). Section 28 has its origins in the international instruments of the United Nations. Thus, since its introduction the CRC has become the international standard against which to measure legislation and policies, and has established a new structure, modelled on children's rights, within which to position traditional theories on juvenile justice. I do not suggest that a children's rights model for juvenile justice, where children themselves are directly in trouble with the law, should automatically be transposed to sentencing in cases where children are only indirectly affected because their primary caregivers are about to be sentenced. What should be carried over, however, is a parallel change in mindset, one that takes appropriately equivalent account of the new constitutional vision.

[17] Regard accordingly has to be paid to the import of the principles of the CRC as they inform the

provisions of section 28 in relation to the sentencing of a primary caregiver. The four great principles of the CRC which have become international currency, and as such guide all policy in South Africa in relation to children, are said to be survival, development, protection and participation. What unites these principles, and lies at the heart of section 28, I believe, is the right of a child to be a child and enjoy special care.

### **Saint Lucia**

#### **Grant v. Grant (High Court of St. Lucia)**

26. While there are no statutes directing the court to give effect to the wishes and feelings of a child, the courts, over the last few years, have become increasingly aware of the importance of listening to the view of older children and taking into account what children say, not necessarily agreeing with what they want nor, indeed, doing what they want but paying proper respect to older children who are at an age and have the maturity to make their minds up as to what they think is best for them, bearing in mind that older children very often have an appreciation of their own situation which is worthy of consideration by, and the respect of, the adults, and particularly the courts. This enjoiner to consider the wishes and feelings is reflective of the international obligation under the UN Convention on the Rights of the Child 1989 which Saint Lucia has ratified.

### **Swaziland**

#### **Stapley v. Dobson (High Court of Swaziland)**

[8] What are the “protections and rights” referred to in section 29 (4). It seems to me that these “protections and rights” are found in various scattered pieces of legislation such as statutes and International conventions on the rights of the child that Swaziland is a signatory too. These are also found in the common law. It is these “pieces” of law that have to be brought together and enacted under section 29 (7) of the Constitution which specifically provides for the enactment of laws by Parliament to ensure children’s’ rights as well as the domestication of the Convention on the Rights of the Child.

### **Tonga**

#### **Fa'aoso v. Paongo (Supreme Court of Tonga)**

[24] In December 1995 Tonga acceded to the Convention on the Rights of the Child. The convention still has to be properly ratified but, as this Court has noted in other cases recently, the accession indicates a willingness by the nation to be bound by its terms. Article 37 of the Convention, in four paragraphs, sets out the obligations of a State in regards to the apprehension and detention of a child (defined as a person under the age of 18).

### **Trinidad and Tobago**

#### **Naidike v. Attorney General (Privy Council (Trinidad and Tobago))**

[I]t is important that the rights and interests of children are taken seriously by all countries which are party to the UN Convention on the Rights of the Child. It is all too easy to lose sight of those rights and

interests in proceedings which are mainly concerned with the rights and interests of adults...

The Convention itself has not been incorporated into the domestic law of Trinidad and Tobago, although its spirit is reflected in numerous specific laws relating to children. That is also the position in Australia and Nelson JA in the Court of Appeal drew attention to the well-known decision of the High Court of Australia, *Minister for Immigration and Ethnic Affairs v Teoh* (1994)...

[T]he rights enshrined in the UN Convention are not absolute rights. The children's interests may have to give way to other more weighty considerations. Among these must be the right of the State of Trinidad and Tobago to expel non-citizens who no longer have a right to remain. Article 9 of the Convention draws a distinction between the compulsory separation of a child from her parents, which must be subject to judicial review and necessary in her best interests, and the separation of a parent from his child, for example by detention, imprisonment, exile, deportation or death. But the High Court of Australia was concerned with the procedural fairness of the decision. The children's legitimate expectations did not give rise to a right to have their interests treated as the paramount consideration at all times. They did give rise to an expectation that, if their interests were not to be treated as a primary consideration in a matter directly affecting their welfare, the family had to be warned and given an opportunity to make representations. If this is the position reached in Australia, where there is no constitutional guarantee of the right to respect for private and family life, one would expect it also to be the position in Trinidad and Tobago, where there is.

## Tuvalu

### **Regina v. Setaga (High Court of Tuvalu)**

The Convention was ratified by Tuvalu in 1995 and, whilst it is clear that Tuvalu has not yet taken the legislative steps required by article 4 to implement the rights recognised by the Convention, the terms of article 40 must be considered to give some guidance of the way the rights of a child are considered by the courts here.

## Uganda

### **In re Namugerwa Joyce et al. (High Court of Uganda)**

[I]n all such applications the court only has the word of the applicant and in many cases the children who may be of too young [an age] to give details to the court of what is happening in their lives are not consulted. Neither are children who are 14 years and above who have the legal capacity to give evidence on oath consulted. This is contrary to Article 12 of the Convention on the Rights of the Child (CRC) which preserves the child's right to be heard. Article 12(2) provides that the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

### **In re Michael (High Court of Uganda)**

20. Section 46 of the Children Act does not possibly run counter to our Constitution only but may also be in conflict with Uganda's obligations under Article 3(1) of the International Convention on the Rights of Child which entered in force on 2nd September 1990 which obliges national legislative



bodies, among others, to make the best interests of the child a primary consideration in all its actions concerning children which includes law making.

**Shamira v. Kampala City Council (High Court of Uganda)**

In my view the [minors'] contractual obligations and their rights under the Human Rights Legislation can only be resolved if the test applied is that of choice or right to express his or her view as stated in Article 12 of the Convention on the Rights of the child (1989) which states that:

*Parties shall assure to the child who is capable of forming his or her own view the right to express that view freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

If the child lacked the capacity to choose or give a view, he or she cannot be a party to an agreement and suit agreement would be void. To impose an agreement on the minor would be an infringement of their human rights. In circumstances where an action is detrimental to the minors' interest the liability should be enforced against the legal Guardian as trustees of the child and not the minors; on whose name the contractual obligation arose.

**United Kingdom**

**Procurator Fiscal v. Watson & Another (Privy Council (United Kingdom))**

*Lord Bingham:*

[61] During this period JK was not in custody. But at the time of the alleged offences he was a child in domestic law, and he is still a young person. I would unreservedly accept the need for cases such as his to be carefully, expertly and sensitively handled, both in interviewing witnesses and in deciding on the best course of action to follow. But the reasonable time requirement in the convention must, when dealing with children, be read in the light of the UN Convention on the Rights of the Child and the Beijing Rules, both of which apply to JK and both of which highlight the need for criminal proceedings, if brought at all, to be prosecuted with all due expedition.

*Lord Rodger:*

[179] As is pointed out in para 16.01 of the Book of Regulations, the United Nations Convention on the Rights of the Child was ratified by the United Kingdom in December 1991 and came into force on 15 January 1992. It was therefore binding on the United Kingdom at all material times. The Book of Regulations notes that, in terms of article 3 of that convention, in all actions concerning children, including actions in courts of law, the best interests of the child are to be the primary consideration. The passage continues: "This has to be borne in mind when dealing with witnesses or accused under 18 years of age". Moreover, as Lord Reed pointed out in *HM Advocate v DP and SM 2001 SCCR 210, 215B–D*, para 11, article 40(2)(b) of the United Nations Convention provides:

*"Every child alleged as or accused of having infringed the penal law has at least the following guarantees: (iii) To have the matter determined without delay ..."*

Similarly, rule 20 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 ("the Beijing Rules") provides that:

*"Each case shall from the outset be handled expeditiously, without any unnecessary delay."*

The European Court has taken account of both the United Nations Convention and the Beijing Rules

when considering proceedings involving children (*V v United Kingdom* (1999) 30 EHRR 121, 175–176, paras 72–73). Lord Reed did so too, when dealing with the reasonable time requirement, in *DP and SM* 2001 SCCR 210, 215B, para 11.

[180] Moreover, the directions given by the Lord Advocate to procurators fiscal as to the way they should proceed if they decide, in consultation with the children’s reporter, to retain a case with a view to precognition and reporting to Crown counsel reflect the spirit of the United Nations Convention and the Beijing Rules:

*“this precognition and reporting should be completed as soon as possible in order that if the matter is ultimately referred to the reporter, the delay in his dealing with it is kept to a minimum. Such cases often involve allegations of sexual abuse or violence by children upon other children” (Book of Regulations, para 16.18).*

[181] The passages in the Book of Regulations show not just that the Lord Advocate is duly conscious of the obligations imposed by these international agreements, but that he has been particularly concerned to ensure that the precognition and reporting of just this very kind of case should be completed as soon as possible. These international obligations and this direction by the Lord Advocate are relevant to any assessment as to whether the time between charge and trial in this case was reasonable. They amply justify the view that, in making that assessment, the court should treat it as a case which called for more than the usual degree of expedition.

**R (Williamson and ors.) v. Secretary of State for Education and Employment (House of Lords (United Kingdom))**

80. Above all, the state is entitled to give children the protection they are given by an international instrument to which the United Kingdom is a party, the United Nations Convention on the Rights of the Child (“UNCRC”).

81. Article 3(1) of UNCRC requires that: “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.” Article 37 requires that: “States parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment...” More significantly, in the present context, article 19(1) provides: “States parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of a child.” This is reinforced by article 28(2): “States parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention.”...

86. With such an array of international and professional support, it is quite impossible to say that Parliament was not entitled to limit the practice of corporal punishment in all schools in order to protect the rights and freedoms of all children. Furthermore, the state has a positive obligation to protect children from inhuman or degrading punishment which violates their rights under article 3. But prohibiting only such punishment as would violate their rights under article 3 (or possibly article 8) would bring difficult problems of definition, demarcation and enforcement. It would not meet the authoritative international view of what the UNCRC requires. The appellants’ solution is that they and other schools which share their views should be exempted from the ban. But this would raise exactly

the same problems... If a child has a right to be brought up without institutional violence, as he does, that right should be respected whether or not his parents and teachers believe otherwise.

**R. v. Christian and Ors. (Supreme Court of the Pitcairn Islands (United Kingdom))**

[171] It should also be observed that each of these three covenants contain articles protecting against arbitrary interference with a person's privacy, family, home or correspondence, and against attacks upon a person's honour and reputation. In addition, the Convention on the Rights of a Child includes art 34, which places an obligation on contracting states to protect the child from all forms of sexual exploitation and sexual abuse. This article, in our view, must be fundamentally designed to protect the inherent dignity and person of the child.

**Smith v. Smith and Another (House of Lords (United Kingdom))**

77....The European Court of Human Rights, however, also looks to other international human rights instruments when interpreting its own Convention. The United Nations Convention on the Rights of the Child is quite specific on this topic. Article 27(2) provides for the basic parental responsibility: "The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development." Article 27(4) requires states parties to back this up: "States parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child...".

78. Even if an international treaty has not been incorporated into domestic law, our domestic legislation has to be construed so far as possible so as to comply with the international obligations which we have undertaken. When two interpretations of these regulations are possible, the interpretation chosen should be that which better complies with the commitment to the welfare of children which this country has made by ratifying the United Nations Convention on the Rights of the Child.

**ZH v. Secretary of State (Supreme Court of the United Kingdom)**

23. For our purposes the most relevant national and international obligation of the United Kingdom is contained in article 3(1) of the UNCRC:

*"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."*

This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and, as a result, section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions "are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom".

24. Miss Carss-Frisk acknowledges that this duty applies, not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves. This means that any decision which is taken without having regard to

the need to safeguard and promote the welfare of any children involved will not be “in accordance with the law” for the purpose of article 8(2). Both the Secretary of State and the tribunal will therefore have to address this in their decisions.

25. Further, it is clear from the recent jurisprudence that the [European Court of Human Rights] will expect national authorities to apply article 3(1) of UNCRC and treat the best interests of a child as “a primary consideration”. Of course, despite the looseness with which these terms are sometimes used, “a primary consideration” is not the same as “the primary consideration”, still less as “the paramount consideration”...

30. Although nationality is not a “trump card” it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a nationality (Article 7) and to preserve her identity, including her nationality (Article 8).

## United States

### **Cabrera-Alvarez v. Gonzales (United States Court of Appeals)**

[3] Article 3 of the Convention requires consideration of the “best interests of the child” in all “actions concerning children.” The latter phrase, which is not defined in the Convention, is most readily understood to apply to actions that concern children directly, such as proceedings involving child custody or the termination of parental rights. In those proceedings, of course, many States explicitly apply the “best interests of the child” standard. See, e.g., Wash. Rev. Code § 26.10.100 (stating that custody shall be determined according to the “best interests of the child”). By contrast, a removal proceeding like the instant one directly “concerns” only the alien parent; it affects his or her children indirectly. Nonetheless, we recognize that the high courts of at least two other nations have held the Convention’s “best interests of the child” standard to be relevant to proceedings involving the deportation of a parent. See *Minister of State for Immigration & Ethnic Affairs v. Teoh* (1995), 183 C.L.R. 273, 289 (Austl.) (holding that the phrase “actions concerning children” encompasses a parent’s immigration proceeding, particularly where the parent’s primary argument involves the hardship to his or her children); *Baker v. Canada* [1999], 2 S.C.R. 817 (holding that the Convention’s “best interests of the child” principle was relevant to interpreting the deportation statute, despite the lower court’s holding that “deportation of a parent was not a decision ‘concerning’ children within the meaning of [A]rticle 3” of the Convention)...

[5] At most, then, the Convention demands that the “best interests of the child” be “a primary consideration” in considering a parent’s application for cancellation of removal, not that the child’s interests will always prevail. Indeed, at oral argument Petitioner’s counsel clarified that he does not ask us to interpret the hardship standard to prevent removal of a parent whenever removal is not in the child’s best interests. He argues only that, in balancing the relevant factors, “extra weight” must be given to the best interests of the child. Article 3 requires only that the child’s best interests be “a primary consideration,” without specifying the precise weight to be given to that consideration relative to others. And, because the child’s interests are already a primary consideration in the agency’s decision whether to grant cancellation of removal, we do not see how the terms of the Convention dictate the amorphous “extra weight” that Petitioner contends is required...

[8] Indeed, if the Convention required that the child's best interests be “the primary consideration” (as Petitioner sometimes argues) the agency would have to reduce reliance on the comparative assessment. Yet, the agency's rigorous comparative standard—“exceptional and extremely unusual”—is demanded by the statute's text. Any interpretation that required a child's best interests to be weighted more heavily than the comparative assessment would be at odds with the text of the statute...See *Munoz*, 339 F.3d at 958 (holding that, to interpret the statute consistently with international law in the manner that the petitioner proposed, would be “squarely at odds with the plain language of the statute”). In short, no rule of statutory construction required the agency to elevate the qualifying child's best interests to a level that would effectively eliminate or alter the express comparative standard set forth in the statutory text...

[13] In sum, we hold that the agency's interpretation of the hardship standard, and its application of the standard in this case, are consistent with the “best interests of the child” principle articulated in the Convention on the Rights of the Child, even assuming that the Convention is “customary international law” and that its dictates are relevant to a proceeding involving deportation of a parent.

### **Graham v. Florida (United States Supreme Court)**

Thus, as petitioner contends and respondent does not contest, the United States is the only Nation that imposes life without parole sentences on juvenile nonhomicide offenders. We also note, as petitioner and his amici emphasize, that Article 37(a) of the United Nations Convention on the Rights of the Child...ratified by every nation except the United States and Somalia, prohibits the imposition of “life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age”... As we concluded in *Roper* with respect to the juvenile death penalty, 'the United States now stands alone in a world that has turned its face against' life without parole for juvenile nonhomicide offenders. 543 U. S., at 577.

The State's amici stress that no international legal agreement that is binding on the United States prohibits life without parole for juvenile offenders and thus urge us to ignore the international consensus... These arguments miss the mark. The question before us is not whether international law prohibits the United States from imposing the sentence at issue in this case. The question is whether that punishment is cruel and unusual. In that inquiry, “the overwhelming weight of international opinion against” life without parole for nonhomicide offenses committed by juveniles 'provide[s] respected and significant confirmation for our own conclusions.' *Roper*, supra, at 578.

## **Vanuatu**

### **Molu v. Molu (Supreme Court of Vanuatu)**

"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."

This Article 3(1) is enforceable by the Courts and no specific legislation is required to implement it as opposed to other Articles of the said Convention.

In any proceedings before the courts for the legal custody or upbringing of a child, or the administration of any property belonging to or held on trust for a minor, or the application of the

income thereof, the Court must regard the welfare of the child as the first and paramount consideration and not the punishment of the guilty spouse/parent.

**Public Prosecutor v. Nawia (Supreme Court of Vanuatu)**

The time will come when the Courts will say something on the customary societal rational of such a practice of swapping female child and in particular in the light of the fundamental rights contained in Article 5 of the Constitution and the Convention on Rights of the Child (CRC) to which Vanuatu has ratified.

**Zimbabwe**

**Bion v. Bion (High Court of Zimbabwe)**

The general principles are that a child of divorced parents is entitled to [be] maintained by them, and they are correspondingly obliged to provide it with everything that it reasonably requires for its proper living and upbringing according to their means, standard of living and station in life... This principle has a foundation in international law. The provisions of the relevant international and regional instruments that Zimbabwe has ratified are the following:

'The Convention on the Rights of the Child' (adopted by the General Assembly of the United Nations on 20 November 1989- Resolution 44 – 25) in Article 27 (2) provides:

*'The parents or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.'*

Further, in Article 3 (1) it is provided that in all actions concerning the child undertaken by any person or authority ' the best interests of the child shall be the primary consideration.'

**Chiramba and Others v. Minister of Home Affairs N.O. and Others (High Court of Zimbabwe)**

The Children's Act does not expressly address the plight of a baby taken by police who have arrested its mother but in my view the prohibition against detention of minors is implied in this section, Article 16 of the Convention on the Rights of the Child provides thus:

*'Article 16- protection and privacy*

- 1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.*
- 2. The child has the right to the protection of the law against such interference or attacks.'*

In any event I hold that the protection afforded to children is over and above that set out in the Constitution and other statutes. There is need however for the appropriate Act to expressly state this prohibition in clearer terms as it appears a lacuna exists in our law as presently constituted.

**State v. Chikungurese (High Court of Zimbabwe)**

It seems to me that the legislature in promulgating the Sexual Offences Act, and providing a penalty section which provides for a sentence of up to 10 years imprisonment had recognised the growing problem of the abuse of young children. This was also an acceptance that the common law offence of indecent assault was not effectively dealing with the problem.

In my view it was also in recognition that Zimbabwe is also a party to the United Nations Convention

on the Rights of the Child (CRC) and a party to the African Charter on the Rights of the Child that the legislation was enacted...

Both [the CRC and the African Charter on the Rights and Welfare of the Child] require State Parties to protect the rights of children by putting in place administrative, legislative and other structures to ensure the full protection of children from all forms of abuse, including sexual abuse.

The conventions as can be seen in Article 19(2) of the CRC require State Parties to provide support for the child who has been abused. Sadly in most developing countries, and Zimbabwe is no exception, very little is done in terms of counselling and other forms of support due to financial constraints.

It seems to me that in these circumstances, the judiciary would be failing in its duty if it did not [hold accountable those who] abuse children sexually...