

Ius Comparatum – Global Studies in Comparative Law

Olga Cvejić Jančić *Editor*

The Rights of the Child in a Changing World

25 Years after The UN Convention on
the Rights of the Child



 Springer

Ius Comparatum - Global Studies in Comparative Law

Volume 13

Series Editors

Katharina Boele-Woelki, University of Utrecht, The Netherlands

Diego P. Fernández Arroyo, Institut d'Études Politiques de Paris, Sciences Po,
France

Founding Series Editors

Jürgen Basedow, Max Planck Institute for Comparative and International Private
Law, Germany

George Bermann, Columbia University School of Law, USA

Board of Editors

Bénédicte Fauvarque-Cosson, Université Panthéon-Assas, Paris 2, France

Giuseppe Franco Ferrari, Università Bocconi, Milan, Italy

Toshiyuki Kono, Kyushu University, Fukuoka, Japan

Marek Safjan, Court of Justice of the European Union, Luxembourg

Jorge Sanchez Cordero, Mexican Center of Uniform Law, Mexico

Ulrich Sieber, Max Planck Institute for Foreign and International Criminal Law,
Germany

More information about this series at <http://www.springer.com/series/11943>

Académie Internationale de Droit Comparé
International Academy of Comparative Law



Olga Cvejić Jančić

Editor

The Rights of the Child in a Changing World

25 Years after The UN Convention
on the Rights of the Child

 Springer

Editor

Olga Cvejić Jančić
University Educons – Sremska Kamenica
Faculty of European Legal and Political
Studies – Novi Sad
University professor
Novi Sad, Serbia

ISSN 2214-6881

ISSN 2214-689X (electronic)

Ius Comparatum - Global Studies in Comparative Law

ISBN 978-3-319-23188-4

ISBN 978-3-319-23189-1 (eBook)

DOI 10.1007/978-3-319-23189-1

Library of Congress Control Number: 2015956385

Springer Cham Heidelberg New York Dordrecht London

© Springer International Publishing Switzerland 2016

This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

The publisher, the authors and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, express or implied, with respect to the material contained herein or for any errors or omissions that may have been made.

Printed on acid-free paper

Springer International Publishing AG Switzerland is part of Springer Science+Business Media (www.springer.com)

Preface

For a long time in human history, the legal status of the child was not the focus of attention by the state, government, international organisations and even family itself. The child was not treated as an independent holder of rights but rather as a more or less subordinate object of rights of the parents or guardians. More attention began to be paid to children and their position just after the First World War, when, thanks to the efforts and commitments of two sisters, Eglantyne Jebb and Dorothy Buxton, the first Declaration of the Rights of the Child (1924) was adopted. This document highlights a very important maxim *that mankind owes to the child the best that it has to give*, which plausibly had far-reaching consequences for a further improvement of the status of children in the world. After this first Declaration of the Rights of the Child, the second one was adopted in 1959, and only in 1989 was the first legally binding international document regarding children rights adopted as the UN Convention on the Rights of the Child.

Since then, a quarter of a century has been passed, and the 19th Congress of the International Academy of Comparative Law, which took place in Vienna from 20–27 July 2014, was a good opportunity to compare the experiences and results in the implementation of the Convention in different parts of the world. Based on the questionnaire, which is appended at the end of this book, authors from 21 countries from all continents, except Africa, submitted national reports about the status of the rights of the child in their countries. This book compiles these national reports, which come from Australia, Canada, Croatia, Denmark, France, Germany, Greece, India, Iran, Japan, Portugal, Romania, Scotland, Serbia, Solomon Islands, Spain, the Netherlands, the UK, the USA, Uzbekistan and Venezuela. They were also the bases for the general report that represents a synthetic overview of the topic.

On this occasion I would like to thank all national rapporteurs for their research and commitment to the preparation of their reports, without which this comprehensive and profound analysis and overview of the implementation of the Convention

on the Rights of the Child in such diverse parts of the world would not be possible. My gratitude also goes to Penny Booth, professor of Law (England), to whom I am deeply indebted for her invaluable assistance in the linguistic revision of my general report.

Novi Sad, Serbia
January 2015

Olga Cvejić Jančić

Contents

Rights of the Child in a Changing World.....	1
Olga Cvejić Jančić	
The UN Convention on the Rights of the Child: Tracing Australia’s Implementation of the Provisions Relating to Family Relations.....	37
Rita Shackel	
Les droits de l’enfant : Rapport du Canada.....	61
Michelle Giroux and Carmen Lavallé	
The Rights of the Child: Croatian National Report	83
Nenad Hlača and Sandra Winkler	
The Rights of the Child: Danish National Report.....	97
Christina G. Jeppesen de Boer and Annette Kronborg	
Les droits de l’enfant en droit français	109
Adeline Gouttenoire	
The Rights of the Child in Germany: The UN Convention on the Rights of the Child and Its Implementation in National Law	123
Stefanie Schmahl	
The Implementation of the UN Convention on the Rights of the Child by the State Parties: The Case of Greece.....	151
Eleni Micha	
Implementation of the United Nations Convention on the Rights of the Child in Indian Legal System	167
Vishnupriya Yadlapalli	

A Study on the Rights of the Child in Iranian Legal System	183
Habiballah Ahmadi Baloutaki	
Legal Status of the Child in Japan, Especially in Family Law Matters	191
Yoshiaki Ohmura	
Legal Framework for the Rights of the Child in Portugal	201
Manuela Baptista Lopes	
The Rights of the Child: Romanian National Report	221
Daniela-Anca Deteșeanu	
The Rights of the Child in Scotland	235
Frankie McCarthy	
The Rights of the Child in Serbia	251
Nevena Vučković Šahović and Ivana Savić	
The Rights of the Child in Solomon Islands' Plural Legal System	263
Jennifer Corrin	
Les droits de l'enfant mineur d'âge en droit espagnol après la Constitution de 1978	293
Gabriel García Cantero	
The Rights of the Child in the Netherlands: A Family Law Perspective	313
Ton Liefwaard and Machteld Vonk	
The Rights of the Child: United Kingdom National Report	331
Jenny Driscoll	
The State, Parents, Schools, "Culture Wars," and Modern Technologies: Challenges Under the UN Convention on the Rights of the Child	349
Nora V. Demleitner	
The Rights of Children: An Uzbek Perspective	371
Iroda Djuraeva	
La transposition de la Convention de l'ONU sur les droits de l'enfant en droit Venezuelien	389
Alberto Blanco-Uribe	
Questionnaire for the Section IV A: Public International Law	401
Index	405

About the Authors

Olga Cvejić Jančić taught Family Law, European Family Law, and Inheritance Law at the Faculty of Law, University of Novi Sad (1980–2010), and since then at the Faculty of European Legal and Political Studies, Novi Sad, Educons University, Sremska Kamenica. She is currently a member of the Commission for the Drafting of the Serbian Civil Code, of the Ethical Board of the Clinical Centre of the Province of Vojvodina, and of the Editorial Board of the Kopaonik School of Natural Law.

From 2004 to 2006, she served as a dean of the Faculty of Law, University of Novi Sad, where she also served as a vice dean, director of the Institute of Legal Sciences, president of the Faculty's Senate, secretary of the law journal titled *Zbornik radova Pravnog fakulteta u Novom Sadu* [Bulletin of the Novi Sad Law Faculty] and the head of the Civil Law Department.

Prof. Cvejić Jančić is an associate member of the International Academy of Comparative Law, a councillor of the European Law Institute, a member of the International Society of Family Law, a member of the Executive Board of Directors of the International Academy for the Study of the Jurisprudence of the Family and the president of the Executive Board of the Serbian Association for Comparative Law.

She also sits on the editorial boards of the following journals: *Zeitschrift für das gesamte Familienrecht (FamRZ)*, *Law and Justice Review* and *Human Rights Review* (both published by the Justice Academy of Turkey), *Strani Pravni Život* [Foreign Legal Life] (published by the Institute of Comparative Law, Belgrade) and *Pravo i Politika* [Law and Politics] (published by the Faculty of European Legal and Political Studies, Novi Sad).

In 2010 she was a visiting scholar-in-residence at Washington and Lee University, Lexington, VA, USA. She has published a number of books and textbooks and more than 140 journal articles, book chapters and other papers.

Novi Sad, Serbia

Rita Shackel is an associate professor of Law at Sydney Law School and holds the Chair of The University of Sydney Human Research Ethics Committee. Her research interests revolve around evaluation and reform of legal and social justice processes, with a specific focus on sexual and gender-based violence, the needs of victims and survivors and children's interaction with the law.

Sydney Law School, Law School Building, The University of Sydney, Camperdown, NSW, Australia

Michelle Giroux Université d'Ottawa, Ottawa, ON, Canada

Carmen Lavallée Université de Sherbrooke, Sherbrooke, QC, Canada

Nenad Hlača graduated from the Faculty of Law, University of Rijeka, in 1980. Before he joined the University in 1982, he was a clerk at the Municipal Court in Rijeka. In 1984 he received the master's degree in civil law studies from the Faculty of Law, University of Belgrade. In 1990 he received the title of Doctor of Laws from the Faculty of Law, University of Zagreb, by defending doctorate dissertation on 'Family Law Aspects of the Transgender'. In 1991, Nenad Hlača was nominated an assistant professor, and in 1998 he became the professor of Family Law at the Faculty of Law, University of Rijeka. He was twice elected as a vice dean: from 1990 to 1994 and from 1999 to 2001. From 1991 to 1994, as well as from 2009 to 2011, he acted as the editor in chief of the Collected Papers of the Law Faculty of the University of Rijeka. He is also a member of the international advisory board of the review *FamRZ (Zeitschrift für das gesamte Familienrecht mit Betreuungsrecht, Erbrecht, Verfahrensrecht, Öffentlichem Recht)*.

Since 1999 to 2015, Professor Nenad Hlača was a vice president of the Croatian Section of the *Commission Internationale de l'Etat Civil* in Strasbourg.

While a member of the working group, formed by the Ministry of Work and Social Welfare of the Republic of Croatia, he worked on the draft proposal on the Family Act (1994–1998). Professor Hlača actively participated in many international and national seminars and conferences and published a number of scientific papers and articles.

Sandra Winkler is a senior research assistant at the Chair of Family Law of the Faculty of Law, University of Rijeka (Croatia). Before she joined the University in 2006, she worked in a law office. In 2009 she received her PhD degree in Law from the Faculty of Law, University of Verona (Italy). She was awarded a research grant at the *Max-Planck-Institut für ausländisches und internationales Privatrecht* in Hamburg (Germany) on two occasions. Her research interests include Family Law and European Family Law. She is a member of the European Law Institute (ELI) and of the Croatian Comparative Law Association (HUPP).

She actively participated in international and national seminars and conferences and published scientific papers and articles in the field of Family Law and European Family Law.

Faculty of Law, University of Rijeka, Rijeka, Croatia

Christina Jeppesen de Boer is a researcher and lecturer at Utrecht University (research group Family and Law) and is further affiliated with UCERF (Utrecht Centre for European Research into Family Law) and the research school IUS Commune. Her main interest is Comparative Family Law and Human Rights Law.

Molengraaff Instituut, Utrecht, The Netherlands

Annette Kronborg is an associate professor at Copenhagen University, Denmark, and is affiliated to the Centre of Legal Culture. She teaches family law courses and has published broadly within family law. Currently, her main interest is Nordic Family Law in a comparative perspective.

Copenhagen University, Copenhagen K, Denmark

Adeline Gouttenoire Professor at the Faculty of Law and Political Science of Bordeaux, Director of the Institute of Minors and CERFAP, President of the Departmental Observatory of the Gironde.

Bordeaux, France

Stefanie Schmahl is a professor of Law and holds the Chair of German and Foreign Public Law, Public International Law and European Union Law at the Julius-Maximilians-University of Würzburg (Germany). She was nominated as a member of the group of specialists on child-friendly justice of the Council of Europe in 2008. The objective of the group was to produce comprehensive European Guidelines on child-friendly justice which were approved by the Committee of Ministers in November 2010. In 2011, Stefanie Schmahl acted as a counsel on behalf of the Federal Government of Germany at a proceeding before the European Court of Human Rights. From 2011 until 2013, she was a member of the Independent Committee concerning the law of member of Parliament at the German Bundestag. Since 2012, she is an alternate member of the Management Board of the European Union Agency for Fundamental Rights, and in 2015, she was elected as a member of the Advisory Board to the International Nuremberg Principles Academy.

Stefanie Schmahl is the author and editor of books and scholarly articles on public international law, European Union and German public law. Inter alia, she has written a Commentary to the Convention on the Rights of the Child (*Kinderrechtskonvention mit Zusatzprotokollen, Handkommentar, Baden-Baden 2013*).

Juristische Fakultät, Julius-Maximilians-Universität Würzburg, Würzburg, Germany

Eleni Micha holds a doctorate degree in law from the University of Athens and a diploma from the International Committee of the Red Cross. Parts of her studies were carried out at Leiden University in the Netherlands. Dr. Micha specialises in Public International Law, and her particular fields of interest are International and

Regional Protection of Human Rights, International Humanitarian Law and Law of War, International Criminal Law and Domestic Application of International Law.

She currently holds a teaching post at the Department of International Studies at the School of Law of the University of Athens. She is attorney at law at the Athens Bar Association dealing mostly with cases regarding protection of human rights. She is a member of the Board of Directors of the NGO 'Human Rights Defense Centre' and an external evaluator of the law journal *International Community Law Review*, published by Brill/Nijhoff.

Dr. Micha participated in various conferences and has published a number of articles in Greece and abroad. Her recent work deals with execution issues of the judgments of the European Court of Human Rights, domestic application of treaties treating human trafficking and justiciability of social rights. She also contributed to the Commentary of the European Convention on Human Rights compiled and edited under the supervision of the Greek judge in the European Court of Human Rights, Professor Linos-Alexander Sicilianos.

School of Law, University of Athens, Athens, Greece

Vishnupriya Yadlapalli did her Master of Arts (MA) with specialisation in Industrial Economics and Master of Laws (LLM) with specialisation in Labour Laws. She did her doctoral degree (PhD) entitled *Child Labour: A Socio-legal Study with Reference to Slate Mines of Markapur in Andhra Pradesh, India*, where concentration of child labour is severe. She also did a Postgraduate Diploma in Industrial Relations and Personnel Management. She has been teaching Labour Law, Family Law, Law of Contracts, Women and Law, Human Rights and Law and Social Change to LLB, LLM and PhD students since June 1989. National and international PhD scholars are doing research under her guidance.

She was a chairperson of Board of Studies in Law from June 2012 to July 2014. Presently, she is head of the Department of Law, Osmania University. She is a member of the Governing Body and Selection Committee of different law colleges. She is a member of the Board of Examiners of various universities and public service commissions. She delivered invited lectures in various universities and institutions. She was the regional coordinator of Law Common Entrance Test – 2013, 2014 and 2015 – in the states of Telangana and Andhra Pradesh.

She has published 35 articles in standard legal journals. She participated in 50 national and international seminars/conferences and workshops. She has participated and presented papers in the *16th IVR World Congress on 'Law, Justice and State' which was held at Reykjavik, Iceland, and Women's Worlds Congress at Hyderabad Central University in August 2014*. She has submitted Indian report in the *IACL World Congress organised by the International Academy of Comparative Law (IACL) at Vienna in July 2014*.

She is a member of the Academic Council of Maharashtra National Law University, Mumbai. She is an editorial board member of legal journals such as *Indian Socio-legal Journal, Jaipur*, and *Justicia, Hyderabad*. She is a life member of the Indian Law Institute, New Delhi; Indian Institute of Comparative Law, Jaipur;

and Central Social Welfare Board, New Delhi. She is associated with many NGOs working for human rights.

Her areas of interest are Human Rights, Gender Justice, Child and Law and Law and Social Change.

Department of Law, Osmania University, Hyderabad, Telangana State, 500 007, India

Habiballah Ahmadi Baloutaki is an advocate in Iran Legal System and has received LLB, LLM and PhD degrees in the field of International Human Rights Law, from University College of Law, Osmania University, Hyderabad – 500007 – India.

Education:

LLB/Bachelor of Laws, College of Law, Azad University, Ahwaz, Iran, 1996–2000

LLM/Master of Laws in International Human Rights Law, College of Law, University of Shahid Beheshti, Tehran, Iran, 2003–2006

Thesis topic: ‘Freedom of Press in Iran Legal System by View of International Human Rights Law’, PhD/Research Scholar at Osmania University, Hyderabad, India. ‘Protection of Human Rights in the Developing Countries, a study of Brazil, Kenya and India’

Occupation: attorney at law and legal advisor, in Iran Legal System and PhD in the field of Human Rights, at University College of Law, Osmania University, Hyderabad – 500007 – India

Activities: Participated in many national seminars, international conferences, world congress and workshop and published several articles in prestigious international journals

University College of Law, Osmania University, Hyderabad, Telangana State, 500 007, India

Advocate Law Office, Tehran, Iran

Yoshiaki Ohmura was born in Tokyo in 1963 and graduated from the Faculty of Law, Tokyo University. Ohmura has a legal master’s degree (University of Tokyo). Ohmura’s field is Private International Law (especially in Family Law matters) and field of interest is Interpersonal Family Law.

Prof. Yoshiaki Ohmura is dean of the Faculty of Law, Chuo-gakuin University, Abiko City, Chiba Prefecture, Japan

Manuela Baptista Lopes The author is secretary general of the Constitutional Court of Portugal and a legal advisor on its permanent staff. She previously served with Ministry of Justice bodies responsible for the jurisdictional protection of minors (civil matters and underage offenders). She spent several years linked to both the international convention protection of children within the framework of the Council of Europe and the Hague Conference on Private International Law and similar questions in the bilateral domain (France and Luxembourg).

Tribunal Constitucional, Lisboa, Portugal

Daniela-Anca Deteseanu is a lecturer at the Faculty of Law, University of Bucharest, with her major teaching and research interests being in Human Rights Law and International Law. She obtained both her undergraduate degree and the PhD at the University of Bucharest Law School. Currently, Mrs. Deteseanu teaches Human Rights Law, Public International Law, International Humanitarian Law and International Criminal Law at the University of Bucharest Law School. Since February 2015, Mrs. Deteseanu has been appointed as vice dean of the University of Bucharest Law School. She is also a member of the Bucharest Bar Association.

Faculty of Law, University of Bucharest, Bd, Bucharest, Romania

Frankie McCarthy is a senior lecturer in Private Law at the University of Glasgow. She is the author of *Succession* (2012) and *Family Law* (with Griffiths and Fotheringham, 2013), and her work has been published in *European Human Rights Law Review* and *Child and Family Law Quarterly*, amongst others.

School of Law, University of Glasgow, Glasgow, Scotland

Nevena Vučković Šahović is a professor at the Faculty of Law, Union University, in Belgrade, Serbia, teaching International Public Law with International Organisations and Family Law with Rights of the Child. She is the coordinator of the Master on the Rights of the Child. Nevena Vučković Šahović is the founder and director of Child Rights Centre – Belgrade – which was the first and the only organisation in Serbia exclusively devoted to the promotion and implementation of the Convention on the Rights of the Child. She served on the Committee on the Rights of the Child (2003–2009). She is active in many countries in Europe, Asia and the USA, teaching human rights and rights of the child.

Nevena Vučković Šahović is the author of numerous articles, books and researches. Some include *Implementation of the General Measures of the CRC and the Role of Civil Society* (WP, UNICEF Innocenti Research Centre, Florence, 2010, p. 61), ‘Measures to Implement the Convention on the Rights of the Child and Good Governance: The Case of Serbia’ (in: Ganguly Thukral, Enakshi, *Every Right for Every Child*, Routledge Taylor and Francis Group, p. 65–89, 2011), *ENOC Study Report on National Human Rights Institutions and Child/Juvenile Delinquency* (ENOC, Council of Europe, Strasbourg, 2012, p. 61) and *The Rights of the Child in International Law* (with Jaap Doek and Jean Zermatten) (Stampfli Publishers, November 2012, p. 420).

Beograd, Serbia

Ivana Savić is an executive director of the Centre for Human Rights and Development Studies (CHRDS), an organisation focused on advancing global, regional and national policies in the areas of human rights, especially of the rights of the child and youth rights, and sustainable development. From 2009 until 2014, she had been one of the Organising Partners for the United Nations Major Group for

Children and Youth (MGCY) with a mandate to coordinate and facilitate young people's participation in the international sustainability negotiations, namely, Rio+20 and the post-2015 process. Ivana is a member of the UNDP Civil Society Advisory Committee and CIVICUS Youth Advisory Group. Additionally, she has been involved in different child and youth initiatives worldwide and has been internationally recognised as expert in the field of the Rights of the Child, Youth Rights, Human Rights and Environment, Sustainable Development and Young People's Participation. She is a published author in the area of her expertise. Ivana holds an LL.M degree in the Rights of the Child and is a doctoral candidate in the Rights of the Child at the Union University, Faculty of Law, in Belgrade, Serbia.

Beograd, Serbia

Jennifer Corrin is a director of the Centre for Public, International and Comparative Law and professor in the TC Beirne School of Law at The University of Queensland. She is the recipient of an Australian Research Council Future Fellowships (project number FT120100642), researching law reform and development in plural legal regimes. Jennifer is a partner investigator in two international research collaborations on legal pluralism funded by the Social Sciences and Humanities Research Council and L'Agence Universitaire de la Francophonie. She is also part of an interdisciplinary team working on environmental issues in Solomon Islands, funded by the MacArthur Foundation. Jennifer has published in the areas of South Pacific Law, Customary Law, Human Rights, Court Systems, Evidence, Civil Procedure, Family Law, Land Law, Constitutional Law and Contract. Jennifer's most recent publications include a third edition of *Introduction to South Pacific Law* and articles on legal pluralism and questions of proof, family law in the South Pacific, and complexities of legal pluralism. Before joining The University of Queensland, Jennifer spent 6 years at the University of the South Pacific, having joined the Faculty after 9 years in her own legal firm in Solomon Islands. Jennifer is a member of the Editorial Board of *The Journal of Legal Pluralism*, the International Editorial Board of the *Journal of South Pacific Law*, and the Editorial Board of the *Comparative Law Journal of the Pacific*.

TC Beirne School of Law, The University of Queensland, Brisbane, QLD, Australia

Gabriel Garcia Cantero born in the Basque Country (San Sebastián 1927), after had exercised judicial functions (1951–1967), he was Professor of Civil Law at the Universities of Santiago de Compostela, San Sebastián and Zaragoza, where he continued to teach Comparative Law and European Law. He is a titular member of the AIDC and the Association of European Lawyers Pavia and President of the Spanish Association of Comparative Law. At the Teheran International Congress (1974) and Brisbane (2002), he was General Rapporteur for Law themes of filiation and family.

Facultad de Derecho, Zaragoza, Espagne

Ton Liefwaard holds the UNICEF Chair in Children's Rights at Leiden University, Leiden Law School. He teaches and publishes on children's rights, child law and juvenile justice from an international and comparative perspective and has published widely on the meaning of the UN Convention on the Rights of the Child and related international and regional instruments for the position of children at the national level. He is the programme director of the Master's Programme (LLM) *Advanced Studies in International Children's Rights*, which starts in September 2015. He also coordinates in the Leiden Summer School on International Children's Rights.

Ton Liefwaard regularly works as a consultant for international organisations, including agencies of the United Nations, the Council of Europe and the European Union, on issues related to children's rights, juvenile justice, child-friendly justice, child protection, alternative care and violence against children. He is furthermore a deputy juvenile judge at the District Court of Amsterdam and a member of the State Commission advising the Dutch Government on changing parental relationships and the position of children.

His key publications include *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (Intersentia 2008), 'Juveniles in Transition from Juvenile Justice to Adult Criminal Justice' (in: R. Loeber et al. (eds.), *Persisters and Desisters in Crime from Adolescence into Adulthood: Explanation, Prevention and Punishment*, Ashgate 2012), 'Child Soldiers: Towards A Rights-Based Imagery' (in: C. Brants, A. Hol and D. Siegel (eds.), *Transitional Justice: Images and Memories*, Ashgate 2013), *Litigating the Rights of the Child* (Springer 2014, edited with J.E. Doek) and 'Juvenile justice from a children's rights perspective' (in: W. Vandenhoele et al. (eds.), *Routledge International Handbook of Children's Rights Studies*, Routledge 2015).

Department of Child Law, Leiden Law School, Leiden, The Netherlands

Machteld Vonk is an assistant professor and research fellow of Child and Family Law at the Child Law Department of Leiden University Law School. Her research interests concern the position of children in their families and include research into multi-parent families, same-sex families, families through surrogacy, the legal position of transgender children, the child's right to know his/her origins in the context of these new families and child participation in family matters. Machteld Vonk holds a PhD in Comparative Family Law from Utrecht University (2007), a Master in Law from the University of Amsterdam (2002) and a Master in English from VU University Amsterdam (1991). Machteld Vonk publishes in international and national journals and books. In the summer of fall of 2014, she was a visiting scholar at the University of British Columbia in Vancouver and the University of Victoria in British Columbia, amongst others to do research on the new BC Family Law Act.

Department of Child Law, Leiden Law School, Leiden, The Netherlands

Jenny Driscoll is lecturer in Child Studies and programme director of the MA in Child Studies/International Child Studies at King's College London, where she moved after over a decade of practice at the Independent Family Law Bar in London, specialising in child protection. Her research interests are at the intersection of children's rights and child protection, particularly in relation to children in the care of the state. She is currently an academic advisor to the NGO 'shadow' submission to the UN Committee on the Rights of the Child in response to the UK government's 5th periodic report on implementation of the UN Convention on the Rights of the Child.

Department of Education and Professional Studies, King's College London, London, UK

Nora V. Demleitner Dean Demleitner received her JD from Yale Law School, her BA from Bates College, and an LLM with distinction in International and Comparative Law from Georgetown University Law Center. After law school Dean Demleitner clerked for the Supreme Court Justice Samuel A. Alito, Jr., then a member of the US Court of Appeals for the Third Circuit.

Dean Demleitner teaches and has written widely in the areas of Criminal, Comparative, Human Rights, with a focus on women and children, and Immigration Law and Legal Education. At conferences around the country and abroad, she regularly speaks on sentencing matters, often in a comparative context, and issues pertaining to the state of legal education.

A native of Germany, Dean Demleitner has served as a visiting professor at the University of Michigan Law School, the University of Freiburg in Germany, St. Thomas University School of Law in Miami, and the Sant'Anna Institute of Advanced Research in Pisa, Italy. She has also been a visiting researcher at the Max Planck Institute for Foreign and International Criminal Law in Germany, funded by a German Academic Exchange Service grant. Before joining Washington and Lee University, she was the dean at the Maurice A. Deane School of Law at Hofstra University in New York and a faculty member at St. Mary's University School of Law in San Antonio, Texas.

Dean Demleitner is an editor of the *Federal Sentencing Reporter* and serves on the Board of Editors of Nijhoff Publishers' Studies in Intercultural Human Rights. She is the lead author of *Sentencing Law and Policy*, a major casebook on sentencing law, published by Wolters Kluwer. Her articles have appeared in the Stanford, Michigan, and Minnesota law reviews, amongst others.

Dean Demleitner is an elected member of the American Law Institute, the European Law Institute, and the International Society of Comparative Law and a Fellow of the American Bar Foundation. In 2014 *Virginia Lawyers Weekly* named her one of 'Virginia's Leaders in the Law'.

Washington and Lee University School of Law, Charlottesville, Virginia, USA

Iroda Djuraeva graduated from Tashkent State University of Law (TSUL) where she obtained her master's degree (2003). She holds a PhD in Law from TSUL (2007). She conducted her doctoral studies on *Personal and Property Rights of Spouses in Private International Law* under the supervision of Academic Professor Rakhmankulov H.R.

Recently, she has participated as a researcher in the framework of the project 'Comparative Legal Research on Eurasian Law' at Max Planck Institute for Comparative and International Private Law in Hamburg, Germany (2011–2012). As a result her manuscript on *Personal Non-property Rights of Minors in Uzbekistan* has been published in Germany (2014).

Dr. Iroda Djuraeva currently works as an attorney at law firm 'Mukhiddinova and Partners'. Her main lines of research are International Family Law, Children's Rights and Civil Law.

Tashkent city, Uzbekistan

Alberto Blanco-Uribe Lawyer (1983) and specialist in administrative law (1987) at the Central University of Venezuela (UCV). DESS (Diploma of higher specialized studies) of Environmental Law (1988) and DEA (Diplôme d'études appliquées) of public law (1989) at the Robert Schuman University, Strasbourg, France. Constitutional Justice Specialist (2006) and Human Rights Specialist (2008) at the University of Castilla-La Mancha, Toledo, Spain. Professor of Constitutional Law (undergraduate) and Human Rights (third cycle) at the Central University of Venezuela (UCV). Several specialized legal publications. Advisor, consultant and litigator in partnership with Lawyers Klemprer, Rivas, Perez & Associates.

Caracas, Venezuela

Rights of the Child in a Changing World

The UN Convention on the Rights of the Child: 25 Years After

Olga Cvejić Jančić

The author is indebted to Penny Booth, Law Professor, for her invaluable assistance in the linguistic revision of this paper.

IV A. Droit international public/Public international law.

O.C. Jančić, Ph.D. (✉)

Faculty of European Legal and Political Studies – Novi Sad, Educons University - Sremska Kamenica, Serbia

e-mail: olgacvejic@gmail.com

© Springer International Publishing Switzerland 2016

O. Cvejić Jančić (ed.), *The Rights of the Child in a Changing World*,

Ius Comparatum - Global Studies in Comparative Law 13,

DOI 10.1007/978-3-319-23189-1_1

1 Introduction

Starting from a theoretical and legislative point of view, the importance of the United Nation Convention on the Rights of the Child^{1,2} (New York, 20 November 1989) is very salient, having in mind the number of countries that have signed and ratified this Convention. Namely, 195 countries³ have so far signed and ratified the Convention, while the USA and Somalia have started this process but still have not finished. This Convention, which is among those with the highest number of ratifications, is the result of long-term and persistent international efforts in order to improve the social, economic, health and legal position, and well-being of children around the world.

¹The general report is based upon the contribution of the 21 national reports from almost all continents (except from Africa) and covers the implementation of children's rights in States Parties of the Convention on the Rights of the Child, which submitted papers for the congress. Although at the time of the congress more than 21 countries, through their national committee, have announced their participation in the Congress, the only 21 mentioned countries submitted their reports. The authors of national reports come from Australia (RITA SHACKEL), Canada (MICHELLE GIROUX, CARMEN LAVALLÉE), Croatia (NENAD HLAČA, SANDRA WINKLER), Denmark (CHRISTINA G. JEPPESEN DE BOER, ANNETTE KRONBORG), France (ADELINE GOUTTENOIRE), Germany (STEFANIE SCHMAHL), Greece (ELENI MICHA), India (VISHNUPRIYA YADLAPALLI), Iran (HABIB ALLAH AHMADI), Japan (YOSHIKI OHMURA), Portugal (MANUELA BAPTISTA LOPES), Romania (DANIELA-ANCA DETEȘEANU), Scotland (FRANKIE McCARTHY), Serbia (NEVENA VUČKOVIĆ ŠAHOVIĆ, IVANA SAVIĆ), Solomon Islands (JENNIFER CORRIN), Spain (GABRIEL GARCÍA CANTERO), The Netherlands (TON LIEFAARD, MACHTELD VONK), UK (JENNY DRISCOLL), USA (NORA V. DEMLEITNER), Uzbekistan (IRODA DJURAEVA) and Venezuela (ALBERTO BLANCO-URIBE). National reports have been written on the basis of the questionnaire drawn up by the general reporter, with the possibility of each author to add all that is considered to be important for the realisation of children's rights in his/her country. The questionnaire has not encompassed all rights of the child guaranteed by the Convention, but only several of them, which author of the questionnaire deemed as essential and in some way of general value for children. Some important issues in respect of children's right are not included in the reports, such as protection of the child in armed conflicts; protection of the child against prostitution, pornography and prohibition of the sale of children; and protection of the right of the child through the possibility to bring a complaint before the UN Committee on the Rights of the Child, which are part of separate Optional protocols to the Convention (Optional Protocol to the CRC on the involvement of children in armed conflict; the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography; and the Optional Protocol to the CRC on a communications procedure), as well as some others, because it deserves much more spaces and may be a particular topic for some of the Congresses that follow.

²Thereafter UN CRC, CRC or simply Convention.

³The last two are the State of Palestine which accessed to the Convention on 2 April 2014, available at the website https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (access to the site on 1 July 2014) and South Sudan which accessed to the Convention on 23 January 2015, available at the website https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (access to the site in May 2015).

These efforts date back to 1924, when the League of Nations adopted the Declaration of the Rights of the Child, commonly known as the Geneva Declaration.⁴ However, many politicians, scholars and other persons and organisations concerned with the rights and welfare of children deemed it insufficient and advocated the adoption of a separate internationally binding document on this matter. This did not happen until 1989, when the UN Convention on the Rights of the Child was adopted, even though in the meantime (in November 1959) the UN General Assembly adopted the second Declaration of the Rights of the Child. Although the governments of a large number of countries have realised that some measures and steps should be taken in order to improve the position of children and to this end have signed and ratified the Convention, it does not automatically mean that the position of children worldwide will indeed be significantly and evenly improved.

Therefore, what are the practical effects of this international instrument in the everyday life of children, are there any outcomes in terms of improvement of their status around the world and the conditions under which they live in the 25 years, since the Convention came into force⁵? The great significance of the Convention is evident firstly from the simple fact that the governments of the numerous countries recognised that 'in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration'⁶ and therefore were ready to undertake necessary measures for improvement of the rights of the child in their countries. The first measure was signature and ratification of this Convention. This was the preliminary step to further measures in the implementation of the provisions of the Convention. However, is that enough for any child to live a better, safer and healthier life? The implementation and realisation of the objectives of the Convention is a process that requires time, resources, efforts, and first and foremost, the willingness to achieve them. Signature and ratification will never be sufficient. Albeit this process is far from being completed, 25 years of the life of the Convention is enough to make some comparative review of its implementation and some evaluations of the achieved results.

It is important to state that after its adoption by the General Assembly of the United Nations (1989), there was and remains significant resistance to the Convention. The most common objections and reasons for non-approval have been directed to the limitation of parental rights and responsibilities owing to the allegation that the child as a legal entity has too many rights and freedom, which weakened

⁴The Draft Declaration was created thanks to the efforts of Ms. Eglantyne Jebb and her sister Dorothy Buxton, who, confronted with the horrors of World War I established in London the Save the Children Fund. Later, in 1923, the International Union of Save the Children prepared a Draft Declaration on the Rights of the Child, which then, in February 1924, Eglantyne Jebb submitted to the League of Nations for approval. Declaration on the Rights of the Child was adopted on 26 September of the same year. See more at <http://www.humanium.org/en/childrens-rights-history/references-on-child-rights/geneva-declaration/>.

⁵The UNCRC was adopted by resolution 44/25 of the General Assembly of the United Nation of 20. November 1989, entered into force of 2 September 1990, available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>. Accessed 8 January 2014.

⁶Preamble of the CRC, recital 10.

the position and authority of parents. However, these objections are not justified, since the purpose of the Convention is, in the first place, to provide that '[S]tates Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, (States Parties)⁷ shall take all appropriate legislative and administrative measures'.⁸ Many other provisions of the Convention are also directed at the States Parties, to which are imposed considerable commitments to undertake all necessary measures to support the realisation of the guaranteed rights of the child in order to '[e]nsure to the maximum extent possible the survival and development of the child'.⁹ The right to life, survival and development (Art. 6 CRC) is, at the same time, one of the four principles on which the rights of the child are based. The other three are prohibition of discrimination or right to nondiscrimination (Art. 2 CRC),¹⁰ the right to participation (Art. 12 and 13 CRC), and the right to have the best interests of the child respected (Art. 3/1 CRC).

In order that implementation of the Convention would not be left to the goodwill of the States Parties and, in particular, that the Convention would not eventually become a 'dead letter', the Convention established a special body vested with a task to monitor the implementation of it.¹¹ This body is the Committee on the Rights of the Child (thereafter Committee or ComRC), which consists of ten experts nominated by member states.¹²

Member States are obliged, under the provisions of the Convention, to submit to the Committee a report on the measures they have adopted in order to implement the Convention and on the progress made in that regard. Reports should be submitted every 5 years.¹³ A national report should include information on the measures undertaken by the State Party in order to implement the Convention, as well as possible difficulties that affect the fulfilment of the obligations under the Convention (Article 44 paragraph 2 of the CRC).

⁷ *Added by the author.*

⁸ Article 3, paragraph 2 of the CRC.

⁹ Article 6, paragraph 2 of the CRC.

¹⁰ The CRC does not use the term of 'right to nondiscrimination', but this phrase is used in General Comment No. 4 (2003) of the Committee on the Rights of the Child, adopted on the 33rd session of the Committee, which took place from 19 May to 6 June 2003, no I/6.

¹¹ In Article 43 of the CRC, it is expressed very clearly: 'For the purpose of examining the progress made by States Parties in achieving the realisation of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided'.

¹² Each state party may nominate one person for the Committee, but the final election will be performed by secret ballot from a list of persons nominated by States Parties (Art. 43 paragraph 3 of the CRC). The mandate of the members of the Committee shall be for 4 years and they may be reelected if they would be renominated (Art. 43 par. 6).

¹³ After the CRC entered into force, Member States were under obligation to submit their first reports within 2 years and thereafter every 5 years (Article 44 paragraph 1, points a. and b.).

2 The Definition of the Child under the National Laws of the States Parties

The CRC defines the child as ‘[e]very human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier (Article 1)’. As for the definition of the child in the national laws of the States Parties which submitted national reports, the prevailing situation is that there is no explicit, clear and proper definition of the child as in the CRC (except for several countries, such as the Republic of Uzbekistan, UK and Romania) but rather indirect definition through the determination of the age of majority and the acquisition of full legal capacity, which indirectly leads to conclusion that from that moment the person is no longer a ‘child’.

In the Republic of Uzbekistan, the Law on Guarantees of the Rights of the Child (2008) sets the legal definition of the child as a person below 18 years; in Romania, the Law no. 272/2004 regarding the protection of the child defines ‘child’ as being any person who is below the age of 18 and does not have full civil capacity; in the UK, the Children Act 1989 Section 105 defines the child as ‘a person under the age of eighteen’, while the Family Law Reform Act 1969 s1(1) states that ‘a person shall attain full age on attaining the age of eighteen’ (England and Wales).¹⁴

Apart from these few countries, for most of the others, mainly in the absence of an explicit definition of the child, the notion of the child may be deduced from the notion of majority. According to the submitted national reports, the child acquires the age of majority in most cases at the age of 18. This is the case with Australia; the Canadian province of Quebec (Article 153 of the Civil Code of Québec); Croatia (Article 120, paragraph 1 of the Croatian Family Act); France, in which it is regulated by the French Code Civil (Art. 388 Code civil français); Germany where it is also regulated by the Civil Code (Section 2 of the Bürgerliches Gesetzbuch); India (The Indian Majority Act); Portugal (Article 122 of the Portuguese Civil Code); Scotland (Age of Majority Act 1969); Serbia (Article 37 of the Constitution and Article 11 of the Family Act); Spain (Article 12 of the Constitution); and the Netherlands (Article 1:233 of the Dutch Civil Code); and in Northern Ireland (under the Children Order 1995 s2(2) and the Age of Majority Act 1969 s1(1)), the similar provisions are in effect.

In few countries, the age of majority is lower than 18 (Iran) or higher (some province and territories of Canada, Japan, Solomon Islands) than 18 years. For instance, in Iran, the Civil Code (Article 1210, note 1) provides for the age of majority for boys is 15 lunar years and for girls 9 lunar years.¹⁵ The issue of majority in Iran is raised in connection with the age of maturity for marriage and has particular importance since Article 1041 of Iranian Civil Code sets out that ‘[M]arriage before the age of majority is prohibited’. Given that such a low age for marriage endangers or may endanger development of children, especially girls, the human rights

¹⁴ See national reports, Uzbekistan, Romania and UK.

¹⁵ A lunar year is a slightly shorter than a solar year.

defenders advocated for a change of this provision in order to raise the threshold for marriageable age. Their efforts were rewarded, so the threshold for girls was raised to 13 and for the boys to 15 years. Even this modest success is compromised by the power of the child's guardian (i.e. his or her father or paternal grandfather, who are, *ex lege*, the guardians of the child) to consent to marriage of the girl or boy before reaching these ages, if it is, according to their perception, in the child's best interest.¹⁶

In several Canadian provinces, such as British Columbia, New Brunswick, Newfoundland, Nova Scotia and the three territories, majority is attained at the age of 19 years,¹⁷ while under the Japanese Civil Code (Article 4), the age of majority is 20, but the notion of the 'child' and 'minor' differs.¹⁸ The specific statutes regulate different age threshold for some rights or obligations of the child.

In the Solomon Islands, the age of majority is not regulated by statute, although the Child's Rights Bill had been drafted in 1993, but still not enacted. Hence, the age of majority is governed by the common law (which is in force in the Solomon Islands) under which the age of majority is 21, while the Child's Rights Bill (drafted in 1993, but still not enacted) provides for 18 years as the age of majority.¹⁹ In the USA, there is no general rule that regulates the age of majority because the competence to regulate this issue is divided between the federal and states governments. Although most people deem 18 years as the age of majority, in select areas the specific age at which the child is legally considered an adult varies depending on the context.²⁰ In Venezuela under Organic Law for the Protection of Boys, Girls and Adolescents (2007), a distinction is made between the child and adolescent. The child is a person under the age of 12, while an adolescent is person older than 12 but younger than 18 (Article 2 of the Organic Law).²¹

In addition to this universal notion of majority (where applicable) as the boundary of childhood, after which starts the period of adulthood and the child acquires a full legal capacity, there is the so-called qualified capacity of the child for the enjoyment of specific rights and protection or for the responsibility, if the child committed a tort or crime, in which cases the age limit for this 'qualified capacity' is less than 18. This 'qualified capacity of the child' is governed by different statutes in different areas of law and differs from country to country, as regards the terms, the ages and the like. In some national reports, it is emphasised that terminology for a minor child is not uniform and that some statutes use the term 'the child' for an underage child until the child reaches some specified years, and then after that period use the term of younger minor, older minor, and then juvenile, adolescent and other similar words, according to the specific years provided for in respective national legislations.

¹⁶National report, Iran.

¹⁷National report, Canada, 3.

¹⁸National report, Japan, 1

¹⁹National report, the Solomon Islands, Personhood and Age of Majority.

²⁰National report, USA, I.

²¹National report, Venezuela, II/2.

3 Legal Instruments Devoted to the Rights of the Child

Member States regulate the rights of the child through constitutional guarantee (basic rules and principles), family law legislation and provisions on children's rights, which can be found in the other statutes that govern special areas of law ('sectoral laws'), and, finally, through special statutes on the rights of children. However, although the implementation of the CRC through enactment of a special statute dedicated only to the rights of the child is very desirable,²² it is very interesting that there are not many countries that had acted in this way. Enactment of special statutes on the rights of the child in each State Party would be very welcome by the ComRC with regard to need to ensure global and equal application of the CRC for all children on whole territory of the States Parties, as expressed by the ComRC in the comments addressed to some countries.²³

Such a special statute is enacted in Spain (the Organic Law on the Legal Protection of Minors from 15 January 1996), in Romania (the Law no. 272/2004 regarding the protection of the child), in Venezuela (the Organic Law on the Protection of Boys, Girls and Adolescents, 2007, as well as the law on special procedures in the field of family protection of boys, girls and adolescents, 2010), and in Uzbekistan (the Law on Guarantees of the Rights of the Child no 139, from 7 January 2008).²⁴

There are also two drafts of similar legal acts, which were prepared but still not enacted (in Serbia, Draft of the Act on the Rights of the Child 2011, and in Wales, the Rights of Children and Young Persons Measure 2011), while in Scotland, the Children and Young People Act is enacted in 2014, but will come into force in the next 2–3 years.²⁵

4 Best Interests of the Child

Best interests of the child is one of the four core principles of the CRC.²⁶ Although this is not a new principle, the CRC, we would say, for the first time, puts a strong emphasis on its importance and need to its universal, holistic and comprehensive

²² 'The Committee welcomes the development of consolidated children's rights statutes, which can highlight and emphasise the Convention's principles. But the Committee emphasises that it is crucial in addition that all relevant 'sectoral' laws (on education, health, justice and so on) reflect consistently the principles and standards of the Convention'; see general comment of the Committee on the Rights of the Child, no. 5 (2003) (General measures of implementation of the Convention on the rights of the child, paragraph 22). General comments adopted on the 34th session of the Committee, which took place 19 September 2003.

²³ See, for instance, national report Australia, III; national report Canada, Preliminary Remarks; national report the Solomon Islands, Conventions and Protocols; national report UK, Introduction.

²⁴ See national reports of respective countries.

²⁵ See national reports of respective countries.

²⁶ See more about the topic in Jacqueline Rubellin-Devichi, 'The Best Interests Principle in French Law and Practice', *International Journal of Law and Family* 8/1994, Philip Alston, 'The Best

application when child's issues are at stake. The CRC explicitly mentions the best interests of the child in eight articles: 3/1, 9/1 and 9/3, 18/1, 20/1, 21/1, 37/c, 40/2 (b), iii and 40/4.

In Article 3/1, it is provided that the best interests of the child shall be a primary consideration in *all actions concerning children*, no matter 'whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'. Family surroundings are not mentioned. A content of this principle is clearly elaborated neither by the Convention nor by any other similar international document. This is very often raised as a problem and objections are raised regarding the application of this principle and the Convention itself. However, such a task and efforts to define a full and precise content of the best interest principle would be very problematic to achieve and, in addition, unfruitful. Why is it so? First of all, because this principle is very complex and should be very broadly applied on a case-by-case basis. This means that the best interests of the child should be taken into account in all situations where the child's rights are decided upon, no matter which field of (sectoral) law is at stake, and in each situation, all concrete circumstances of the case should be considered and assessed. All these situations and circumstances cannot be predicted in advance. Secondly, as it is stressed by the Committee, 'The best interests of the child is a dynamic concept that encompasses various issues which are continuously evolving'.²⁷ This dynamism and evolving concept of the best interest principle is often neglected.

Despite all the difficulties in defining the content of the best interest of the child, the Committee adopted 'General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration' in which it points out, inter alia, the following parts: 'Legal analysis and links with the general principles of the Convention (IV)' and 'Implementation: assessing and determining the child's best interests (V)'. This Comment should serve as a useful guide for States Parties, i.e. its authorities, while applying the Convention and could be helpful in providing a better understanding of the new position of children as the holders of the rights proclaimed and guaranteed by the Convention and as 'a framework for assess-

Interests Principle: Towards a Reconciliation of Culture and Human Rights', *International Journal of Law and Family* 8/1994, J. Eekelaar, 'The Interests of the Child and Child's Wishes: The Role of Dynamic Self-Determinism', *International Journal of Law and the Family* 8/1994, U. Basset, The Changing Standard of the 'Best interest of the Child' and its Impact on the Exercise on Parenting and on Children, *International Journal of the Jurisprudence of the Family, Volume 2/2011*, R. Farrugia, Challenges in Balancing Parental Rights and the Child's Best Interests: A Preliminary Analyses of the Malta Divorce Referendum, *International Journal of the Jurisprudence of the Family, Volume 2/2011*, U. Novakovic, Najbolji interes deteta - Zajednicko vršenje roditeljskog prava (The Best Interests of the Child – Joint Exercise of Parental Rights) *Pravni život (Legal life) no.10/2011*, V. Vlaškalić, Problem određivanja najboljeg interesa deteta ('The Best Interests of the Child' – Problem of Definition), *Anali Pravnog fakulteta u Beogradu (Annals of the Law Faculty in Belgrade)*, LX, 1/2012.

²⁷General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), Adopted by the Committee at its 60-s session (14 January–1 February 2013), paragraph 11.

ing and determining the child's best interests' without of intention to prescribe what is best for the child in any given situation at any point in time.²⁸

The expression 'primary consideration' according to the Comment of the Committee means 'that the child's best interests may not be considered on the same level as all other considerations', i.e. have high priority due to the special situation of the children, such as dependency, maturity, legal status, and, often, voicelessness.²⁹

In addition to the right of the child to have his or her interests taken as a primary consideration in all actions, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child must also be taken into account in case of separation of the child from his or her parents. Namely, Art. 9 CRC provides that 'the 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'.³⁰ Having in mind Art. 3 CRC, the best interests of the child shall also be a primary consideration here.

Something similar is regulated in Art. 20/1 which mentions the best interest of the child when the child is temporarily or permanently deprived of his or her family environment, or when *in his or her best interests* cannot be allowed to remain in that environment, the child shall be entitled to special protection and assistance provided by the State. Thereupon, the best interests of the child is to be taken into account under Article 40/2 (b), iii, if the child is alleged as or accused of having infringed the penal law, in which occasion he or she should have at least a guarantee that the matter will be 'determined without delay by a competent, independent, and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, *unless it is considered not to be in the best interest of the child* (emphasised by the author), in particular, taking into account his or her age or situation, his or her parents or legal guardians'. In the same Article, paragraph 4 mentions *thewell-beingof the child* in the context of a variety of dispositions, which shall be available to the competent authority in order to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Only Article 18/1 regulates that the best interest of the child has to be taken into account in family law relations, well, not only when someone out of the family decides on children rights but also when the child's parents or guardians do so, since they have the primary responsibility for the upbringing and development of the child, and therefore *the child's best interests* should be their basic concern. Thus, this Article regulates the common responsibilities of both parents (or of the child's legal guardians) for the upbringing and development of the child, in which case the best interests of the child will be their basic concern.

²⁸ Ibidem.

²⁹ See General Comment No. 14, paragraph 37 and 39.

³⁰ Emphasised by the author.

However, in the field of adoption, CRC uses stronger criterion when regulating this issue, using the wording that the best interests of the child shall be the paramount consideration (Art. 20/1).

In the Model Family Code,³¹ as well as in the Principles of European Family Law Regarding Parental Responsibilities,³² the best interest principle is considered also in the ambit of parents–children relations. The Model Family Code proclaims that in all matters concerning these relations, paramount regard must be given to the best interests of the child (Article 3.1). Schwenger underlines that the child’s best interests are neither merely one of many considerations nor a primary consideration but *the* primary consideration.³³ As the author explains, this does not mean that interests of the child’s parent should not to be taken into account but that, in cases of conflicting interests, the child’s interests always should take priority. In the Principles of European Family Law Regarding Parental Responsibilities, the emphasis is also put on the request that the best interests of the child in all matters *concerning parental responsibilities* (emphasised by the author) should be the primary consideration. Thus, the best interests of the child should always be ‘the decisive criterion’.³⁴ In neither of the two mentioned is the content of this principle discussed in detail. It is explained that the principle is a changing notion and as such depends on many factors, for instance, the prevailing values of the concerned society as regards children, and then the individual situation of each child regarding the age, maturity, personality, needs, abilities, etc.³⁵

The best interests principle is represented in all respective States Parties, but as might be expected, not with the same understanding and content. There are great differences between the national legislations regarding protection of children and their well-being, although all of them have ratified the CRC and thus undertook international commitments to recognise the rights of the child, based on the four core principles, and to provide protection of the child and his or her legal position as a holder of these rights.

The way of promotion of the best interest principle varies. From the submitted National reports can be seen that this principle is constitutionally promoted and guaranteed as a general principle only in the Constitution of Venezuela (1999), while in other countries, it is promoted and guaranteed indirectly. The Constitution of Venezuela proclaims (in Art. 78) that ‘[T]he State, families and society shall guarantee full protection of children and adolescents as an absolute priority, taking into account their best interests in actions and decisions concerning them...’.³⁶ In

³¹I. Schwenger, in collaboration with M Dimsey, Model Family Code from a Global Perspective, Intersentia, 2006, p. 92, Article 3.1.

³²K. Boele-Woelki, F. Ferrand, C. G. Beilfuss, M. Jänterä-Jareborg, N. Lowe, D. Martiny, W. Pintens, Principles of European Family Law Regarding Parental Responsibilities, Intersentia, 2007, p. 34 Principle 3.3.

³³I. Schwenger, op.cit.

³⁴K. Boele-Woelki and other, op. cit. p. 38.

³⁵Ibidem.

³⁶National report, Venezuela.

addition, the Venezuelan Constitution guarantees every person the enjoyment and exercise of human rights, respect of which is mandatory for public authorities, if they (i.e. human rights) *contained in treaties signed and ratified by the Republic* (emphasised by the author) or any laws developing the same (Art. 19). Thereupon, the Constitution explicitly enshrines the precedence of international treaties concerning human rights over the national laws (Art. 23).³⁷

In the Serbian Constitution (2006), the best interests of the child is also constitutionally promoted, not as a general principle but related to the deprivation of parental rights, which can occur only if it is in the best interest of the child (Article 65 of Serbian Constitution).³⁸ However, in several countries, this principle has become constitutionally guaranteed, implicitly, through the constitutional provisions governing primacy of ratified international treaties over national law, which therefore apply directly or through decisions of the national Supreme Court, which approves direct application of the CRC, or just through the judicial practice of the courts of lower jurisdiction, which protect the best interests principle enshrined in the different areas of national legislation.

In France, the Supreme Court admits direct application of Article 3 of the CRC, which, as already mentioned, concerns the best interests of the child and very severely supervises decisions of the lower courts in that regard.³⁹ In the Solomon Islands, where the welfare principle may be in collision with the patriarchal values and customary laws, the courts strive to promote the welfare principle through case law.⁴⁰ In other countries, the best interest of the child is mostly enshrined in the Family Code, Civil Code and similar statutes which regulate some specific field of legal relations (labour law, for instance, and other legal provisions which regulate protection of children and juveniles at risk, Roma children, disabled children, and so on). That is the case in Canada,⁴¹ Japan, Greece, Portugal, Romania, Serbia (in addition to the constitutional provision), Scotland, the Netherlands, UK, USA, Uzbekistan and Venezuela.⁴²

³⁷Article 23 of the Venezuelan Constitution reads: ‘The treaties, pacts and conventions relating human rights which have been executed and ratified by Venezuela have a constitutional rank, *and prevail over internal legislation, insofar as they contain provisions concerning the enjoyment and exercise of such rights* that are more favourable than those established by this Constitution and the laws of the Republic, and shall *be immediately and directly applied* by the courts and other organs of the Public Power’, available at <http://venezuela-us.org/live/wp-content/uploads/2009/08/constitucioningles.pdf>. Accessed 24 May 2014.

³⁸Although the Serbian Constitution (2006) in Art. 64 contains a special provision dedicated to the rights of the child, it has been omitted to proclaim the best interest of the child as a general constitutional principle.

³⁹National report, France.

⁴⁰National report, the Solomon Islands.

⁴¹Canadian report refers mostly to the legislation of Quebec.

⁴²National reports of respective countries.