

The Rise and Demise of Children's International Human Rights

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PART A – Introduction

Writing in 1973, Hillary Rodham Clinton proclaimed that “The phrase ‘children’s rights’ is a slogan in search of a definition.”¹ While this assessment may have been accurate in 1973, the intervening 36 years have rendered this comment obsolete. As my paper will demonstrate, the United Nations has now achieved outstanding success in promulgating a comprehensive set of international human rights for children. Sadly, however, these normative standards have not yet been translated into the delivery of tangible benefits and services to children on the ground in many countries. Part B of my paper will briefly trace the historical development of children’s rights at the national level. Part C will survey the emergence of children’s international human rights during the course of the 20th century. Part D will involve a contemporary stocktake or report card on the degree to which these international human rights have favourably impacted on children’s lives. Part E will endeavour to identify those factors which are impeding a fuller realization of children’s international human rights. Finally, Part F will articulate a “14-Point Plan” in terms of reform proposals designed to achieve more effective implementation of these international normative standards.

PART B – The Historical Development of Children’s Rights Under National Law

(1) Early Maltreatment

The notion that children have, or should have, rights is of relatively recent origin. Historically, children were regarded as socially insignificant and were consequently maltreated. Children

received no special care or protection by the State. The use of children as political hostages and as security for debts is recorded in Babylonian history.² Sexual abuse of children, child sacrifices and the infanticide of female and illegitimate children occurred in the ancient world.³ As unwanted or weakling children were considered a drain on the family, they were frequently abandoned or sold into slavery or prostitution.⁴ What we now consider to be *childhood* was thought to be an unimportant transient period of physical and mental immaturity culminating in the assumption of adult responsibilities at an early age. Even as late as the 18th century, children were commonly regarded as human chattels, economic assets or property of the parents (predominantly the father). Parents enjoyed an absolute right to their children’s obedience, services and earnings, and full control over their person and property.⁵

(2) The *Patria Potestas* Doctrine

Until the 19th century, the ability of parents to mistreat their children with virtual impunity was attributable to the pervading and enduring influence of the Roman civil law doctrine of *patria potestas*, translated as paternal power or authority. This Latin phrase denoted the aggregate of those powers and rights which, by the Roman civil law, belonged to the father as

¹ H. Rodham “Children under the Law” (1973) 43 *Harvard Educational Review* 487.

² D. Weisberg “Evolution of the Concept of the Rights of the Child in the Western World” (1978) 21 *The Review* (International Commission of Jurists) 43, 44.

³ *Ibid.*

⁴ M. Black *The Children and the Nations: The Story of Unicef* (1986) 198.

⁵ Stoljar “Children, Parents and Guardians” 4 *International Encyclopedia of Comparative Law* Chapter 7 16-25.

head of a family in respect of his wife and children.⁶ Originally it was of very extensive reach, entailing prerogatives of ownership in the children themselves and virtually unfettered paternal control over them. Western legal systems, civil and common law alike, adhered to a modern, mitigated version of *patria potestas* until the 18th century.⁷ The *puissance paternelle* of the French Civil Code gave the father unchecked authority over his child's person and property until age 21.⁸ According to Sir William Blackstone, the common law regarded the father in most cases as his children's guardian.⁹

(3) The Common Law and the *Parens Patriae* Doctrine

Despite the support of the early common law for paternal authority and its rigours, in time the English Courts of Chancery relied increasingly on the *parens patriae* doctrine to extend benevolent protection to the vulnerable child. Literally translated, this Latin phrase means father or parent of the country,¹⁰ and it was used to describe the power of the King or the Crown to act *in loco parentis* to protect the person or property of children.¹¹ *Parens patriae* legitimated State intervention on behalf of children whose families were unwilling or unable to fulfil basic responsibilities of maintenance and protection. The common law gradually evolved to recognize parental obligations to nurture and protect their children and to provide them with a basic education sufficient to prepare them for adult life.¹²

4) The Emergence of 'Childhood' as a Separate Stage of Life

According to historians, the concept of *childhood* is a fairly recent European social construct. Plumb asserts that the very idea of childhood is a European invention of the last 400 years.¹³ Before then, there was little separation or differentiation between children and adults. As soon as a child could live without the constant solicitude of the mother, the child was assimilated with adult society.¹⁴ As from the 17th century, however, children engaged in recreation apart from adults, and toys and books written for children began to emerge.¹⁵ It became increasingly recognized that children required special protection which was not being sufficiently provided by the common law and the *parens patriae* doctrine. Public opinion against cruelty towards children and concern for their physical and emotional welfare intensified in the late 18th century and the 19th century. The writings of Charles Dickens raised the humanitarian conscience of readers by graphically depicting the appalling working conditions faced by children of the Industrial Revolution era. The development of the concept of childhood resulted in children becoming increasingly segregated from adult society, with their greater involvement in formal education and removal from the workforce.¹⁶

(5) The Emergence of the Child's Juridical Personality

The 19th century marked the attribution to children of a legal personality. The elevated social status of children was an essential precondition of the acceptance of the notion that children

⁶ H. Jolowicz *Historical Introduction to the Study of Roman Law* (2nd ed., 1961) 118-20.

⁷ A. Pappas "Introduction to Law and the Status of the Child" (1981-82) 13 *Columbia Human Rights Law Review* xxviii.

⁸ Weisberg, *op.cit.*, 46.

⁹ W. Blackstone *Commentaries on the Laws of England* Vol. 1 (1829) 461.

¹⁰ *Black's Law Dictionary* Rev. 4th ed. (1968) 1269.

¹¹ H. Foster *A "Bill of Rights" for Children* (1974) 4.

¹² Blackstone, *op.cit.*, 446.

¹³ J. Plumb *In the Light of History* 153, cited in R. Franklin (ed.) *The Rights of Children* (1986) 8.

¹⁴ P. Aries *Centuries of Childhood* (1962) 128.

¹⁵ *Id. passim*.

¹⁶ L. Pollock *Forgotten Children: Parent-child relations from 1500 to 1900* (1983) 262.

are persons under the law, possessing rights as well as duties.¹⁷ The beginnings of a children's rights movement can be traced to the middle of the 19th century when Jean Valles attempted to establish a league for the protection of children's rights in the aftermath of the Paris Commune.¹⁸ In 1852, an article by Slogvolk entitled "The Rights of Children" was published.¹⁹

Actuated by the growing perception of children as vulnerable and dependent, the State, as *parens patriae*, enacted special legislation to protect the physical, mental and moral welfare of children. While this legislation sought to protect children from the rigours of dealing with the outside world, it pursued a policy of minimal interference with the parent-child relationship.²⁰ The State did interpose itself, however, between the child and the family to restrict the largely unfettered authority of the father. This spurred the demise of the common law notion that the father should always have custody of his children and the emergence of the vague standards of "the best interests of the child".²¹ Both parents acquired a common duty to nurture and protect the child.

Child welfare legislation enacted in the wake of the Industrial Revolution provided for the imposition of criminal sanctions and the termination of parental rights in extreme cases of breach of parental duties towards children.²² Compulsory education laws were introduced to provide children with a basic general education and vocational training, thereby withdrawing them from the labour force. Child labour laws²³ restricting daily working hours and regulating working conditions continued this trend. Advances in medicine, nutrition and psychology in the latter half of the 19th century reaffirmed the view that children were not simply miniature adults, but had special characteristics and needs of their own.²⁴ By the end of the 19th century in the industrialized nations, children had been removed from adult prisons, orphanages had been founded and better treatment secured for physically and mentally handicapped children.²⁵ As the result of a recommendation of the legal and social work professions urging the creation of special and more humane procedures and courts for dealing with children in trouble with the law, a separate court system for juveniles was established.²⁶

Apart from the contributions of national legislatures to the development of children's rights, some national courts have developed a vigorous jurisprudence in this field. Working within the framework of a written constitution and entrenched bill of rights has enabled judges of the United States Supreme Court and other federal courts to extend numerous procedural due process rights to children.²⁷ The catalyst for change occurred in 1967 when the Supreme Court ruled for the first time in *In re Gault*²⁸ on the issue of the required procedural

¹⁷ Weisberg, *op.cit.*, 45.

¹⁸ T. Zeldin *France 1848-1945* (1973), cited by M. Freeman "The Rights of Children in the International Year of the Child" (1980) 33 *Current Legal Problems* 12.

¹⁹ Slogvolk "The Rights of Children" 36 *Knickerbocker* 489-90.

²⁰ R. Geiser "The Rights of Children" (1976-77) 28 *The Hastings Law Journal* 1027, 1031.

²¹ Foster, *op.cit.*, 5.

²² See the *Poor Law Amendment Act 1868* (UK); *Prevention of Cruelty to, and Protection of, Children Act 1889* (UK).

²³ See, for example, the *Act to Regulate the Labour of Children and Young Persons in the Mills and Factories of the United Kingdom 1833* (UK).

²⁴ Black, *op.cit.*, 199.

²⁵ C. Cohen "The Human Rights of Children" (1983) 12 *Capital University Law Review* 369, 370.

²⁶ Mack "The Juvenile Court" (1909) 23 *Harvard Law Review* 104.

²⁷ Geiser, *op.cit.*, 1034.

²⁸ (1967) 387 U.S.1.

safeguards for children in juvenile proceedings, recognizing children as ‘persons’ under the United States Constitution. The Supreme Court held that children involved in juvenile court proceedings are entitled to most of the rights accorded adults in criminal proceedings, including the rights to obtain counsel,²⁹ to receive prompt notice of the charges,³⁰ to avoid self-incrimination,³¹ and to confront and cross-examine witnesses.³² Since the *Gault* decision, United States courts have held that children have the right to freedom of speech,³³ the right to proof of guilt beyond a reasonable doubt,³⁴ and the rights to notice and a hearing in school discipline cases where suspension is threatened.³⁵

PART C – The International Children’s Rights Movement

The early part of the 20th century was characterized by the internationalization and institutionalization of humanitarian ideals by such groups as the International Committee of the Red Cross, the League of Nations and the International Labour Organization.³⁶ Children were one of the first groups to benefit from this process. One of the first treaties which specifically dealt with children as a group was the International Agreement for the Suppression of the “White Slave Traffic”³⁷ signed at Paris on 18 May 1904. The international protection of children’s rights received a further impetus in 1919 with the setting up of the League of Nations and the International Labour Organization. Part XIII, ‘Labour’, of the *Treaty of Versailles* concluded on 28 June 1919 adverted to the protection of children and young persons in its *Preamble*. The International Labour Conference adopted at its first session the *Minimum Age (Industry) Convention*³⁸ and has since adopted numerous conventions and recommendations concerning the minimum age for employment in diverse activities, as well as hours and conditions of work. Within a decade of its founding, the League of Nations had adopted the *International Convention for the Suppression of Traffic in Women and Children 1921*³⁹ and the *Slavery Convention 1926*.⁴⁰

(1) Declaration of the Rights of the Child 1924 (Declaration of Geneva)

In 1923, Eglantyne Jebb, an Englishwoman who had set up the “Save the Children” fund nearly a decade earlier, initiated the idea of a charter for children. The first *Declaration of the Rights of the Child*⁴¹ (commonly known as the *Declaration of Geneva*) was adopted by the League of Nations on 26 September 1924. Amongst other things, the *Declaration* provided that the child must be given the means requisite for its normal material and spiritual development and must be protected against every form of exploitation.⁴² The *Declaration of Geneva* represented the first step towards the development of international norms concerning the global protection of children, as earlier international agreements had merely focussed on

²⁹ *Id.* 34 ff.

³⁰ *Id.* 31-34.

³¹ *Id.* 47 ff.

³² *Id.* 56.

³³ *Tinker v Des Moines Independent Community School District* (1969) 393 U.S. 503.

³⁴ *In re Winship* (1970) 397 U.S. 358.

³⁵ *Goss v Lopez* (1975) 419 U.S. 565.

³⁶ C. Cohen “Freedom from Corporal Punishment: One of the Human Rights of Children” (1984) 2 *Human Rights Annual* 95, 112.

³⁷ League of Nations, *Treaty Series*, Vol. I 84.

³⁸ No. 5, 1919.

³⁹ League of Nations, *Treaty Series*, Vol. IX 415.

⁴⁰ League of Nations, *Treaty Series*, Vol. LX 253.

⁴¹ League of Nations, *Official Journal*, Special Supplement No. 23, Records of the Fifth Assembly, Geneva, 1924, at 177.

⁴² See respectively Principles I and IV.

particular problems affecting children such as working conditions and slavery. Its five basic principles for child welfare and protection formed the foundation of the *Declaration of the Rights of the Child 1959*⁴³ which went on to formulate more precise standards. The *Declaration of Geneva 1924* did not entail the assumption of legal obligations by States; it merely purported to be a declaration of a set of moral duties. It was essentially an aspirational document, the League of Nations having invited its Member States to be guided by its principles in undertaking child welfare. Thus, it was left to each League Member State to take appropriate action within its resources and particular circumstances.

(2) United Nations Children's Fund

The drive towards the internationalization and institutionalization of humanitarian ideals gained momentum with the creation of the United Nations Organization in 1945. Within a decade of its establishment, a number of inter-governmental organizations affiliated with the United Nations, including the World Health Organization, were set up to address various aspects of child maltreatment.

In 1946, the Economic and Social Council recommended to the United Nations General Assembly that a United Nations International Children's Emergency Fund (commonly referred to as UNICEF) be created to help mend the lives of children whose countries had been ravaged by World War II. On 11 December 1946, the General Assembly created UNICEF pursuant to Resolution 57(1).⁴⁴ Although UNICEF has continued to assist children who have been affected by war, drought, famine and other emergencies, its activities have been broadened to include health and nutrition programmes designed to combat high infant mortality rates, ill-health and hunger amongst the children of developing countries. Since 1961, UNICEF aid has been committed in increasing amounts to education and vocational training, family and child welfare, and family planning. UNICEF functions as the lead agency for children within the United Nations system.⁴⁵

(3) Universal Declaration of Human Rights 1948

On 10 December 1948, the *Universal Declaration of Human Rights 1948*⁴⁶ was unanimously adopted by the U.N. General Assembly in its Resolution 217A (III). In elaborating upon the human rights provisions of the *United Nations Charter*, the *Universal Declaration* marked the first step towards securing an International Bill of Rights. The *Universal Declaration* is essentially a generally accepted and comprehensive catalogue of the principal human rights that U.N. Member States considered in 1948 ought to be recognized as a matter of good policy. Its intended original and limited purpose was that of a 'pioneering' statement of ideals and aspirations. The *Universal Declaration* did not purport to have the status of a legally binding instrument. In its six decades of existence, however, the *Universal Declaration* has come to be perceived as "an authoritative guide ... to the interpretation of the [human rights] provisions in the [U.N.] Charter."⁴⁷ Most commentators contend that the provisions on civil

⁴³ To be discussed in greater detail *infra*.

⁴⁴ United Nations, *United Nations Action in the Field of Human Rights* (1980) 209.

⁴⁵ Other United Nations agencies and U.N.-affiliated inter-governmental organizations concerned with children's issues include the World Health Organization (reduction of infant and child mortality rates in developing countries), the International Labour Organization (the principal international body concerned with child labour), the United Nations Educational, Scientific and Cultural Organization (promotion of educational and cultural programmes), the United Nations High Commissioner for Refugees (particular interest in the well-being of unaccompanied refugee children in armed conflicts and natural disasters), the United Nations High Commissioner for Human Rights, and the U.N. Committee on the Rights of the Child.

⁴⁶ U.N. Doc. A/810 at 71 (1948).

⁴⁷ I. Brownlie *Principles of Public International Law* (4th ed., 1990), 570-1.

and political rights contained in the *Universal Declaration* have gained such universal consensus that they are regarded as having attained the status of customary international law, that is binding on all States.⁴⁸ Although most of the human rights proclaimed by the *Universal Declaration* are equally applicable to adults and children,⁴⁹ two of its provisions explicitly refer to ‘children’. Article 25(2) states:

Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

The second provision – Article 26 – is a general provision concerning the right to education. Although Article 25(2) had recognized the entitlement of childhood to “special care and assistance”, the children’s non-governmental lobby remained dissatisfied, believing that it did not, by itself, adequately reflect the unique needs of children.⁵⁰ The special needs of children justified, it was argued, a separate and more comprehensive document.

(4) Declaration of the Rights of the Child 1959

On 20 November 1959, the U.N. General Assembly adopted unanimously the *Declaration of the Rights of the Child 1959*. The *Declaration* was the first international instrument to contain a comprehensive, albeit incomplete, statement of children’s rights or, perhaps more accurately, claims or entitlements. Until the *Convention on the Rights of the Child 1989*, the *Declaration* had embodied “the most important policy statement [on children’s rights] adopted by the [United Nations] General Assembly”⁵¹ and represented the greatest step forward in raising children and their needs higher on the national and international agendas.⁵² While the *Declaration of Geneva 1924* had reflected concern for the material needs of children afflicted by the devastation of World War I, the *Declaration of the Rights of the Child 1959* addressed the needs and interests of children in a wider social welfare context, covering such areas as housing, social security, health and medical care, food and nutrition,⁵³ education⁵⁴ and each child’s entitlement from birth to a name and a nationality.⁵⁵ Principle 5 of the later *Declaration* introduced the concept of affirmative action for the handicapped child. Principle 9 added a general prohibition on all forms of neglect, cruelty and traffic, as well as calling for a minimum age for employment and a prohibition on any employment which would prejudice the child’s health, development or education.

The *Declaration of 1959* essentially reaffirmed and expanded the provisions of the *Declaration of 1924*, and applied generally to children in a more specific manner the provisions of the *Universal Declaration of Human Rights*. Unlike the *Universal Declaration*, however, the *Declaration of 1959* is devoted almost exclusively to economic, social and cultural rights, omitting such important classical civil rights as life and liberty, criminal due process, and freedom from cruel, inhuman or degrading treatment or punishment. Although the *Declaration of 1959* tends to be too general and vague in parts, this was necessary to secure its acceptance by so many U.N. Member States of such diverse social conditions and cultural traditions.

⁴⁸ See, for example, G. Butcher “The Relationship of Law to the Hunger Problem” (1987) 30 *Harvard Law Journal* 193, 197.

⁴⁹ P. Alston “Children’s Rights in International Law” (1986) 10 *Cultural Survival Quarterly* 59.

⁵⁰ M. Black, *op.cit.*, 198.

⁵¹ P. Alston, *op.cit.*, 59.

⁵² M. Black, *op.cit.*, 200.

⁵³ Principle 4.

⁵⁴ Principle 7.

⁵⁵ Principle 3.

As a species of instrument, a declaration proclaims a set of principles or aspirational ideals generally accepted by governments and the international community but which do not as yet constitute specific legal obligations. Accordingly, the *Declaration of 1959*, like its predecessor, merely created unenforceable programmatic obligations on governments to provide for the care and protection of children through child welfare programmes and other legislative and administrative measures. Nevertheless the wide acceptance in 1959 of the rights recognized in the *Declarations of the Rights of the Child* marked a substantial step towards their legal recognition 30 years later in the *Convention on the Rights of the Child 1989*.

(5) The Twin Covenants

The adoption of the *Universal Declaration of Human Rights* by the U.N. General Assembly in 1948 marked the completion of the first stage of the U.N. human rights agenda to achieve an “International Bill of Rights”. The second stage envisaged the adoption of an international convention which would transform the principles contained in the *Universal Declaration* into legal obligations for those states ratifying the convention. On 16 December 1966, the U.N. General Assembly adopted⁵⁶ the *International Covenant on Civil and Political Rights*⁵⁷ and the *International Covenant on Economic, Social and Cultural Rights*.⁵⁸ Together with the *Universal Declaration*, these instruments comprise the “International Bill of Rights”, embracing an impressive panoply of civil, political, economic, social and cultural rights. Both *Covenants* are part of conventional international law and, as such, are legally binding on those States which have ratified them. The *Covenants* are general and widely accepted international human rights agreements which have attributed the force of law to a more detailed version of the human rights catalogued by the *Universal Declaration*.

(6) International Covenant on Civil and Political Rights

The *International Covenant on Civil and Political Rights 1966* recognizes such classical civil rights as life, liberty and security of the person, equality before the law, and due process of the law. Various provisions of the *Covenant* refer to the terms ‘juvenile’, ‘children’ or ‘child’. Article 10(2)(b) states that “[a]ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.” Article 14(4) specifies that “[i]n the case of juvenile persons, the procedure [before the courts and tribunals] shall be such as will take account of their age and the desirability of promoting their rehabilitation.” Article 24 is the most comprehensive *Covenant* provision pertaining to children:

(1) Every child shall have ... the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

(2) Every child shall be registered immediately after birth and shall have a name.

(3) Every child has the right to acquire a nationality.

⁵⁶ G.A. Resolution 2200 (XXI), 21 U.N. G.A.O.R., Supp. No. 16 at 49, 52.

⁵⁷ U.N. Doc. A/6316 (1966) (adopted 16 December 1966; entered into force 23 March 1976).

⁵⁸ U.N. Doc. A/6316 (1966) (adopted 16 December 1966; entered into force 3 January 1976).

Some *Covenant* articles which do not explicitly mention children clearly apply to them, such as “the inherent right to life” guaranteed to “every human being” by Article 6(1) and the stipulation in Article 8(1) that “[n]o one shall be held in slavery...” Other *Covenant* rights, such as the right to form and join trade unions⁵⁹ and the right to vote,⁶⁰ are of less relevance to children.

(7) International Covenant on Economic, Social and Cultural Rights

The *International Covenant on Economic, Social and Cultural Rights 1966* prescribes in some detail such rights as the right to work, the right to social security, the right to education, and the right to an adequate standard of living. The type of legal obligation assumed by States Parties has been described as ‘programmatically’ in nature, in the sense that a State Party “undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized [thereunder].⁶¹ Certain *Covenant* provisions specifically mention the terms ‘child’ or ‘children’. Article 10(1) states that “[t]he widest possible protection and assistance should be accorded to the family ... while it is responsible for the care and education of dependent children.” Article 10(3) recites:

Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 12(2)(a) obliges States Parties to take steps “for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child.” Other *Covenant* provisions apply to children by necessary intendment, even though they do not refer specifically to children. Article 13, recognizing “the right of everyone to education”, must surely include children within its ambit. Other examples include “the fundamental right of everyone to be free from hunger”⁶² and “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.⁶³

(8) International Year of the Child: 1979

In amplifying and attributing legal force to the provisions of the *Universal Declaration of Human Rights 1948* pertaining to children and those of the *Declaration of the Rights of the Child 1959*, the provisions of both *Covenants* which apply to children, explicitly or by necessary intendment, constituted an important development in the international legal protection of children. Nevertheless, Joan Bel Geddes, of UNICEF, writing in 1977 estimated

⁵⁹ Article 22 (1).

⁶⁰ Article 25.

⁶¹ Article 2 (1).

⁶² Article 11 (2).

⁶³ Article 12 (1).

that “for the most part ... the principles of the United Nations Declaration of the Rights of the Child have not yet been translated into the constitutions and legal codes of individual nations, with the result that clear affirmation and protection of the child’s rights is [sic] still lacking in the world today.”⁶⁴ Research and data collection undertaken during the 1970’s had revealed that violations of children’s rights were a global phenomenon largely ignored by the international community.⁶⁵ A perception that childhood is the most crucial period in human development and that children require special safeguards beyond those granted as human rights to adults because of their physical and mental immaturity and consequent dependence and vulnerability, crystallized. A belief that national legislation alone was inadequate to deal with the problem and the recognition that external intervention through the medium of uniform minimum international legal standards was also necessary, also gained currency at this time. Calls were made for a more systematic approach at the international level concerning the protection of children’s rights and monitoring the instances of their violation. By 1976, UNICEF had become so concerned about the appalling conditions suffered by children the world over that its Executive Branch petitioned the U.N. General Assembly to declare 1979 as the “International Year of the Child” (hereinafter referred to as the ‘IYC’).⁶⁶ In response to these developments and to commemorate the 20th anniversary of the adoption of the *Declaration of the Rights of the Child 1959*, the General Assembly proclaimed the year 1979 the IYC,⁶⁷ urging governments to expand their efforts at the national and community levels to provide lasting improvements in the well-being of their children.

(9) Realization of the Convention Initiative

As one of its contributions to the IYC, the Polish Government submitted to the United Nations Commission on Human Rights in early 1978 a proposed text for a draft *Convention on the Rights of the Child* with a view to its adoption in 1979. The Polish initiative was inspired by the desire to transform the aspirational ideals of the *Declaration of the Rights of the Child 1959* into legally binding international obligations. To complement this initiative, participants of 19 countries of Western and Eastern Europe attended a Conference on the Legal Protection of the Rights of the Child held in Warsaw in 1979. The Conference agreed unanimously on various provisions concerning the legal protection of the rights of the child in such areas as education, health, recreation, child labour, refugee children and social security.⁶⁸ The Conference participants also adopted a resolution supporting the commencement of work on an international children’s rights convention. In recognizing that “the law can provide forms of partial legal capacity” for children commensurate with their age and development, Principle 15 of the *Official Statement of Principles* supported the proposition that children’s rights reach beyond their social welfare needs, which were the main theme of former international instruments.

The U.N. General Assembly responded positively to these initiatives by authorizing the U.N. Commission on Human Rights to draft an international convention on children’s rights.⁶⁹ The Commission favoured a comprehensive document which would not only build on the

⁶⁴ J. Bel Geddes “The Rights of Women in World Perspective” in B. Gross (ed.) *The Children’s Rights Movement* (1977) 214, 215.

⁶⁵ Defence for Children International (U.S.A.) *The Children’s Clarion: Database on the Rights of the Child* (1987) A-25.

⁶⁶ D. Burgess “An International Perspective on Children’s Rights” in P. Vardin and I. Brody (eds) *Children’s Rights: Contemporary Perspectives* (1979) 99, 125.

⁶⁷ Resolution 31/169 (21 December 1976).

⁶⁸ O. Stone “Warsaw Convention on the Legal Protection of the Rights of the Child” (1979) 17 *Alberta Law Review* 555, 558-60.

⁶⁹ U.N. Doc. A/34/424 (1979).

Declaration of the Rights of the Child 1959 but codify existing international law on children's rights and seek additional consensus on the progressive development of international norms as well. After a decade of drafting efforts, the General Assembly adopted the *Convention on the Rights of the Child* without a vote on 20 November 1989 to commemorate the 30th anniversary to the day of the adoption of the *Declaration of 1959*.⁷⁰ The *Convention* entered into force on 2 September 1990,⁷¹ thus capping a drive of some 65 years towards formal international legal recognition of the human rights of children. The *Convention on the Rights of the Child 1989* is today the most widely ratified convention in United Nations history. It is beyond the scope of this paper to engage in a detailed analysis of its individual provisions, but suffice it to say that the *Convention* is the first international human rights instrument to attempt a comprehensive definition of children's rights. Although numerous international conventions and declarations dating back to the early part of the 20th century have been concerned with the protection of children, their texts have been drawn up separately with scant regard for children's global needs. The so-called "Children's *Magna Carta*" represents the first universal and detailed international instrument on children's rights to prescribe minimum legally binding obligations. Two additional protocols have since been adopted by the U.N. General Assembly – the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography 2000*⁷² and the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000*.⁷³

PART D – A Contemporary Stocktake

It would now appear from the foregoing survey that the phrase "children's rights" need no longer search for definition. Detailed international human rights normative standards have now been formulated for the better protection and empowerment of the world's children. As the *Universal Declaration* had served as a cornerstone of the human rights norms enshrined in the *Twin Covenants*, the *Declaration of the Rights of the Child 1959* provided the source and anchor of the more precise guarantees contained in the *Convention on the Rights of the Child*. These international standards were informed by national laws and policies adopted at the urging of, amongst others, humanitarian groups, church leaders, philosophers, novelists, jurists, judges, social workers and parliamentarians. As nearly all of the world's states have become a party to the *Convention*, it will be the turn of international law to inform national law in this field.

It has now been 20 years since the *Convention* was adopted by the U.N. General Assembly and it may, therefore, be timely to formulate a "report card" on the progress which has been made during that period to effectively and meaningfully implement its human rights provisions. Writing in 1992, this author observed:

Much more remains to be done, however, to effectively implement the rights catalogued in the *Convention* [on the rights of the child]. This will present the next challenge to, and stage of, the children's rights movement. The extent to which

⁷⁰ U.N.G.A. Doc. A/RES/44/25 (5 December 1989).

⁷¹ Pursuant to Article 49(1) of the *Convention on the Rights of the Child* which states that "The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession."

⁷² (2000) 39 I.L.M. 1285, 1291.

⁷³ (2000) 39 I.L.M. 1285, 1288.

the Convention can deliver tangible benefits to children will depend on how many resources and services can be allocated in achieving its aims, set against a backdrop of world economic recession, increasing regional ethnic conflicts and population displacements, and the continued preoccupation of governments with costly and sophisticated weaponry.⁷⁴

Seventeen years on, we have entered the grips of an even worse world economic recession, and the other problems I have noted in the foregoing passage have arguably become exacerbated. The effects of these and other problems affecting children have produced horrendous symptoms, both within developing and developed States. In developed States, teen suicide rates have escalated in recent years. Although access to the Internet has entailed greater educational opportunities for children within those countries, it has also resulted in a loss of the innocence of youth, a shortening of the period of childhood, their use in the creation of child pornographic visual images, and their greater exposure to Internet child predators.⁷⁵ Despite attempts at both the national and international levels over the past two decades to address the related problems of child trafficking, child prostitution, child sex tourism, and child pornography, these problems remain and, in some areas, have actually got worse.⁷⁶ One can only recoil at the attempts of child traffickers and paedophiles to exploit the plight of orphaned and homeless children in the wake of the devastating 2008 Burmese typhoons. The phenomenon of homeless or so-called “street children” has continued unabated, leading some of them into involvement with gangs and organized crime as drug couriers and child prostitutes. Persistent allegations have been received over the past 20 years by the U.N. Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography that street children in certain South and Central American countries have been murdered so that their organs can be used in transplant operations.⁷⁷ Children are now increasingly bearing the brunt of religious fanaticism and fundamentalism. Consider the indoctrination of children by so-called religious cults as a result of excessive parental and pastoral influence and the recent use of children as suicide bombers in the belief that through such martyrdom they will attain paradise. In certain countries within the Middle East and Asia, a female adolescent may run the risk of having disfiguring acid thrown in her face, being buried alive or being stoned or burned to death for being perceived to be in defiance of the authority exercised by male members of her family or having brought dishonour to them.⁷⁸ And according to statistics contained in the UNICEF report *The State of the World's Children 2008*,⁷⁹ female genital mutilation, a practice banned by the United Nations

⁷⁴ D. Hodgson “The Historical Development and ‘Internationalisation’ of the Children’s Rights Movement” (1992) 6 *Australian Journal of Family Law* 252, 278.

⁷⁵ See the statistics on Internet usage compiled by the International Telecommunications Union (Geneva) as contained in Table 5 of UNICEF’s *The State of the World’s Children 2008* (2007) 130-3.

⁷⁶ D. Hodgson “A Critical Evaluation of the Effectiveness of International and National Legal Regulatory Responses to the Problems of Child Trafficking, Prostitution and Sex Tourism” (2008) 4 *Forum on Public Policy* 1; D. Hodgson “Sex Tourism and Child Prostitution in Asia: Legal Responses and Strategies” (1994) 19 *Melbourne University Law Review* 512.

⁷⁷ S. Scarpa “Child Trafficking: International Instruments to Protect the Most Vulnerable Victims” (2006) 44 *Family Court Review* 429, 434.

⁷⁸ See Articles 12, 13 and 14 of the *Convention on the Rights of the Child 1989* which respectively secure to each child the right to express individual views in all matters, the right to freedom of expression, and the right to freedom of thought, conscience and religion.

⁷⁹ (2007) 146-7 (Table 9).

Convention on the Rights of the Child 1989,⁸⁰ remains a common and widespread practice in numerous African States.

Children continue to fare poorly in the workplace and in areas of armed conflict. Despite attempts by the International Labour Organization to regulate and prohibit child labour since the 1920's, rates of child labour remain unacceptably high, particularly within Africa.⁸¹ The phenomenon of debt bondage and the use of so-called "sweat shops" persist within Asia, despite self-serving, self-regulating codes of ethical conduct promulgated by some multinational corporations. And despite attempts by the international community to extend protection to child victims of armed conflict and to regulate the use of child soldiers,⁸² too many children continue to die and suffer serious disability from the effects of armed conflict in such places as Rwanda, the Balkans,⁸³ Iraq, and most recently in Gaza.

The child's human right to a formal education is still not being adequately fulfilled, despite the good work of UNESCO⁸⁴ and numerous international human rights instruments recognizing such a right.⁸⁵ The UNESCO Institute for Statistics has recently estimated that the worldwide youth literacy rate for males is 91% while only 85% for females.⁸⁶ This gender disparity in the youth literary rate is even more pronounced in Sub-Saharan Africa and South Asia,⁸⁷ despite numerous international human rights instruments guaranteeing the equal rights of men and women.⁸⁸ But perhaps the biggest concern for the world's children today is the unacceptably high child mortality rate in the context of young children and infants dying of preventable diseases and illnesses. Thousands of children have expired in Zimbabwe since the beginning of this year from cholera and malaria epidemics.

Child mortality is, according to UNICEF, a sensitive indicator of a country's development and telling evidence of its priorities and values.⁸⁹ According to statistics compiled by UNICEF, 41 States had a 10% or greater under-five child mortality rate in 2006.⁹⁰ The main proximate causes of child deaths are pneumonia, diarrhoeal diseases, malaria, measles, malnutrition, and AIDS.⁹¹ The underlying and structural causes of child mortality include food insecurity, poorly resourced health and nutrition services, lack of hygiene and access to safe water and adequate sanitation, female illiteracy, and exclusion of children from access to essential health and nutrition services due to poverty and political and geographical

⁸⁰ Article 24(3) requires States Parties to take "all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children."

⁸¹ UNICEF *The State of the World's Children 2008* (2007) 146-7 (Table 9).

⁸² See, for example, Articles 77 and 78 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*; Article 4(3) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*; Article 38 of the *Convention on the Rights of the Child 1989*; *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000*.

⁸³ Particularly the 1996 Srebrenica genocidal massacre of thousands of adolescent male children.

⁸⁴ United Nations Educational, Scientific and Cultural Organization.

⁸⁵ D. Hodgson *The Human Right to Education* (1998).

⁸⁶ UNICEF *The State of the World's Children 2008* (2007) 133 (Table 5).

⁸⁷ *Ibid.*

⁸⁸ See, for example, the United Nations *Convention on the Elimination of All Forms of Discrimination Against Women 1979*.

⁸⁹ UNICEF *The State of the World's Children 2008* (2007) vi.

⁹⁰ *Id.* 113.

⁹¹ *Id.* 8.

isolation.⁹² Sadly, in some States in southern Africa, current rates of HIV and AIDS, a 25-year-old phenomenon, have reversed previously recorded declines in child mortality.⁹³ As of 2006, 2.3 million children worldwide under the age of 15 were living with HIV.⁹⁴ Many of these children lose their parents to AIDS, increasing the number of orphaned and vulnerable children. By 2010 it is estimated that the number of children orphaned by AIDS in Sub-Saharan Africa will grow to some 15.7 million. These children will miss out on educational opportunities and the opportunity to develop to the maximum of their potential, with some becoming street children.⁹⁵ Although inadequate sanitation facilities have long been identified as a major underlying and structural cause of child mortality, only 59% of the world's population in 2004 used adequate sanitation facilities, with Sub-Saharan Africa and South Asia each having a 37% figure.⁹⁶

It is true that progress had been made. Since 1960 a 60% decrease has occurred in the number of annual deaths among children under the age of five.⁹⁷ Nevertheless, the annual loss of nearly 10 million children under the age of five is unacceptable, in light of the fact that many of these deaths are preventable. At the current rate of progress, the world will be hard pressed to achieve Millennium Development Goal 4 which aims to reduce the global under-five mortality rate by two-thirds between 1990 and 2015.⁹⁸ This brief but poignant survey of the problems which face the world's children today represents a truly sad indictment on our ability and willingness to better protect and nurture them.

PART E – Factors Impeding a Fuller Realization of Children's International Human Rights

To begin with, children's needs are accorded a lower priority because they have little political clout, either individually or as a group. Since children cannot vote and seldom lobby or otherwise participate in public affairs, they must depend on adults, not only to represent their interests but to grant rights to them and to ensure that such rights are enforced.⁹⁹ There are, of course, some phenomena which undermine the implementation of children's rights in relation to which the international community has little or no control. The vagaries of the world's financial markets and natural disasters, either climate change-induced or otherwise, are two such examples. Nevertheless, there are other events and conditions over which the international community and individual nations have a much greater degree of control. Since World War II, the level of armed conflict occurring within States has markedly increased, resulting in population displacements, family separation and refugee flows across national borders. Despite the dismantling of the Berlin Wall and the end of the Cold War some 20 years ago, expenditure on armaments and defence budget appropriations have increased, thereby diverting funds away from sorely needed illiteracy eradication programmes and health and sanitation improvement initiatives. But perhaps the greatest obstacles to a fuller realization of children's international human rights are politicization of, and paralysis within, international inter-governmental organizations including the United Nations, an inability to

⁹² *Id.* 3.

⁹³ *Id.* iii.

⁹⁴ *Id.* 129 (Table 4).

⁹⁵ *Id.* 42.

⁹⁶ *Id.* 125 (Table 3)

⁹⁷ *Id.* iii.

⁹⁸ Of the 62 countries making no or insufficient progress towards Millennium Development Goal 4 on child survival, nearly 75% are in Africa: UNICEF *The State of the World's Children 2008* (2007) iii.

⁹⁹ D. Hodgson "The Historical Development and 'Internationalisation' of the Children's Rights Movement" (1992) 6 *Australian Journal of Family Law* 252.

effectively implement and enforce such rights, and a phenomenon which this author refers to as “rights fatigue”. Each obstacle will be briefly discussed in turn.

As previously canvassed in Part 3 of this paper, the international community, through the United Nations system, has now succeeded in articulating an impressive and wide-ranging catalogue of civil, socio-economic, and cultural human rights normative standards applicable to children. But, without more in terms of implementation and enforcement, they are largely empty and hollow promises to the world’s children. Upon the adoption by the U.N. General Assembly of the various international human rights instruments pertaining to children, governments, diplomats and international public policy-makers bask in a “feel good” mentality, having fulfilled, or being perceived to have fulfilled, their duty to children. Such a conscience-salving exercise is fatal to the upholding of children’s rights as there is little or no follow-up to ensure that these rights are translated into tangible benefits at the grass roots level.

The second significant obstacle is the manner in which children’s international human rights are perceived. Are they strictly enforceable legal rights or merely moral or ethical rights aspired to over time? When a State ratifies or accedes to a human rights treaty, its government agrees to implement in good faith the treaty obligations it has undertaken.¹⁰⁰ The assumption of such obligations will be meaningless for the intended human rights beneficiaries unless those obligations are transformed into the municipal or domestic law of each State Party. In relation to most nations, such an incorporation will be required for there to arise a directly enforceable legal right for the benefit of the intended human rights beneficiary.¹⁰¹ Sadly, States Parties to the *Convention on the Rights of the Child 1989* have been slow to integrate into their national law many of the rights conferred by this treaty. The upshot is that children residing in these States have no direct and judicially enforceable *Convention* rights secured to them. If children’s international human rights are effectively genuine legal rights, they must equate to claims enforceable by legal means, such as by sanctions and remedies, against persons, corporate bodies, and governments.¹⁰² This is not the case at the moment in many States Parties, and this undermines *pacta sunt servanda*¹⁰³ and the credibility of commitment to solemnly undertaken treaty obligations.

A related obstacle to the more effective realization of children’s international human rights is the evident lack of ability and/or unwillingness of the United Nations itself to effectively implement these rights. Generally speaking, the monitoring committees set up by the mainstream international human rights instruments are really nothing more than “toothless tigers” in terms of enforcing compliance with the normative standards by States Parties. The Committee on the Rights of the Child, set up by the *Convention on the Rights of the Child 1989*, is no exception in this respect. True it may be that the Committee vets periodic reports submitted by States Parties on the measures they have adopted which give effect to the *Convention* rights and on the progress made in the enjoyment of those rights.¹⁰⁴ But the Committee lacks any power or authority to compel recalcitrant or defaulting States Parties to comply with their obligations. It is confined to making suggestions and general

¹⁰⁰ Article 26 of the *Vienna Convention on the Law of Treaties 1969*.

¹⁰¹ Unless the particular treaty is perceived to be self-executing in nature, as some treaties are in the treaty practice of the United States of America.

¹⁰² A temporal qualification must be made in the case of certain ‘programmatic’ socio-economic rights which are highly resource-dependent.

¹⁰³ Treaty obligations voluntarily undertaken are to be observed and implemented in good faith.

¹⁰⁴ See Article 44 of the *Convention on the Rights of the Child 1989*.

recommendations and to engaging in so-called “constructive dialogue” with governmental representatives.¹⁰⁵ Such a policy of positive engagement has not worked as hoped. Nor can a child, or a representative on his or her behalf, bring a complaint directly before the Committee that the State Party in question is not complying with its *Convention* obligations.

The principal U.N. organs similarly lack the authority, interest, or political will to enforce children’s international human rights. The General Assembly lacks power under the *Charter of the United Nations 1945* to make legally binding decisions against U.N. Member States.¹⁰⁶ Despite the end of the Cold War, the U.N. Security Council continues to be paralysed into inaction by the threat or casting of a veto by one or more of the permanent Security Council members. Children caught up in the Darfur Conflict failed to benefit for too long a period by concrete Security Council action, with children’s human rights playing “second fiddle” to the politics of oil and foreign investment. Nor has the principal judicial organ of the United Nations – the International Court of Justice – really ever been utilized, in either its contentious or advisory jurisdiction, to advance or secure compliance with these rights.

PART F – Reform Proposals: A Suggested 14 - Point Plan

There is no real point to critiquing the faults and shortcomings of a particular system unless one can offer a better solution or at least offer suggestions on how that system might be improved. What follows is this author’s views on what steps and initiatives might be considered and undertaken by the international community to achieve a fuller and more meaningful realization of the international human rights of children. Some suggested reform proposals are modest in scope while others are more radical. The obstacles to reform are formidable but not insurmountable. A suggested 14 – point Reform Plan follows:

- (i) There must be a greater “regionalization of responsibility” for monitoring compliance with, and enforcement of, children’s international human rights. It is unfair and unrealistic to expect the United Nations to assume exclusive responsibility in this matter. Regional organizations such as the Council of Europe, the African Union, and the Organization of American States must assume their fair share of responsibility.
- (ii) Steps must continue to be taken by UNESCO, in partnership with U.N. Member States, to improve youth literacy rates and, particularly, to reduce the current gender disparity in such rates.
- (iii) U.N. Member States which are found to have persistently violated children’s international human rights should be subject to a more significant embarrassment sanction than they currently are. United Nations bodies such as the General Assembly and the Economic and Social Council (ECOSOC) should not feel any compunction about engaging in direct “name and shame” campaigns.
- (iv) U.N. Member States which are found to have committed persistent and egregious violations of children’s international human rights should have their General Assembly voting rights and membership of U.N. committees suspended until the violations have ceased and remedial steps undertaken.

¹⁰⁵ *Id.* Article 45(d). National reports of States Parties are often brief and evasive and Committee members lack the necessary time and resources to rigorously scrutinize them.

¹⁰⁶ See Chapter IV of the U.N. *Charter*.

- (v) In the most serious cases of children's human rights being violated, such as is occurring in Zimbabwe today, States and regional organizations such as the Council of Europe must be prepared to take the hard decisions, such as the imposition of unilateral and collective trade and investment sanctions and the suspension of military aid and alliance co-operation.
- (vi) Greater use should be made, as and when a suitable opportunity arises, of the International Court of Justice, particularly within its advisory jurisdiction, and regional human rights courts¹⁰⁷ to advance and protect children's international human rights.
- (vii) U.N. Special Rapporteurs whose mandates involve an examination of children's international human rights issues must be vested with greater coercive and investigatory powers than they currently possess. The co-operation of the U.N. Member State being investigated must be considered a right rather than a privilege or concession grudgingly extracted from its government.
- (viii) As children's international human rights must be capable of enforcement to be truly effective, the *Convention on the Rights of the Child 1989* should be amended¹⁰⁸ to require States Parties to enact domestic legislation, including criminal sanctions, to enforce the most important provisions of the *Convention*.¹⁰⁹ This could also be achieved through the adoption of an *Additional Protocol*. At the same time, consideration could also be given to the amendment of those *Convention* provisions dealing with monitoring and implementation of the *Convention* so as to vest in the Committee on the Rights of the Child a power to take legally binding decisions against *Convention* States Parties, preferably in the context of an individual complaints mechanism.
- (ix) In terms of filling vacancies to United Nations committees and senior posts whose mandates directly concern children's welfare, there should be an attempt to minimize the incidence of political and networking appointments and a concerted effort to co-opt independent outside experts who possess a lifetime of experience in working with children and addressing their problems at a grass roots level.
- (x) Although Article 7 of the *Convention on the Rights of the Child 1989* states that the child shall be registered immediately after birth and shall have the right from birth to name and the right to acquire nationality, every year the births of some 51 million children go unregistered.¹¹⁰ As the consequences of non-registration are often severe and permanent, a systematic attempt to reduce this figure will constitute an important step towards children and their mothers accessing essential services.

¹⁰⁷ Such as the European Court of Human Rights, the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights.

¹⁰⁸ Pursuant to Article 50.

¹⁰⁹ A precedent for this can be found in Articles 2 and 4 of the United Nations *International Convention on the Elimination of All Forms of Racial Discrimination 1965*.

¹¹⁰ UNICEF *The State of the World's Children 2008* (2007) 22. Levels of birth registration are lowest in South Asia and Sub-Saharan Africa. Unregistered children are mainly from poor or displaced families or from countries where registration systems are not functional.

- (xi) Efforts should be made to achieve a greater institutionalization of co-operation between those United Nations specialized agencies and subsidiary organs whose mandates directly concern the welfare of children, including UNICEF, UNESCO, the International Labour Organization and the World Health Organization. Achievable target-setting measured against objective criteria should continue to be pursued. An even more far-reaching reform would be the creation of a United Nations umbrella organization for children possible styled the Children's Welfare Organization (UNCWO) to integrate and better co-ordinate these mandates.
- (xii) Those States which contribute personnel and resources to INTERPOL should seek to establish a specialized child abuse victims unit in relation to such practices as child trafficking and child prostitution, with a view to achieving greater resourcing and co-ordination over time.
- (xiii) Investing in the health of children and their mothers is not only a human rights imperative but a sound economic strategy for a State to strive for a better future.¹¹¹ Although noteworthy progress has been made in improving the survival rates and health of children, even in some of the poorest countries, over the past 50 years, more needs to be done to address the devastating impact of preventable illnesses such as pneumonia, diarrhoea, malaria, severe acute malnutrition and HIV. More widespread adoption of basic health interventions, including breastfeeding, immunization, vitamin A supplementation, the use of insecticide-treated mosquito nets to prevent malaria, improved water and sanitation, and access to affordable essential drugs, are all essential.¹¹²
- (xiv) The constituent instrument of the International Criminal Tribunal, the *Rome Statute 1998*, should be amended¹¹³ to include as one of the discrete crimes over which the ICC has jurisdiction "crimes against children" comprising such horrendous practices as child trafficking, child prostitution, child sex tourism, child pornography and the exploitation of child labour. This would signify in more than a symbolic manner the abhorrence and contempt these practices are held in by the international community.

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¹¹¹ *Id.* vi.

¹¹² *Id.* iii, vi.

¹¹³ Pursuant to Article 121.