Geraldine Van Bueren, The International Law on the Rights of the Child

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Abstract

This review critiques "The International Law on the Rights of the Child" by Professor Van Bueren.
BOOK REVIEWS

ARON BROCHES, SELECTED ESSAYS: WORLD BANK, ICSID AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW

Reviewed by Victor Essien*

With the possible exception of international peace and security, global economic development has been the dominant theme in international law and international relations since the end of the Second World War. The tenor and intensity has varied over the decades, but the objectives, centering on institutional arrangements and programs to promote the global economy, have remained the same.

The institutional arrangements started with the twin organizations of the Bretton Woods Conference and the International Bank for Reconstruction and Development ("IBRD"), popularly known as the World Bank and the International Monetary Fund ("IMF"). While the IMF has been charged with regulating the international monetary system, IBRD's operations have concentrated on financing for global economic development. The IBRD created the International Finance Corporation ("IFC") in


4. Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 99. The International Monetary Fund ("IMF") was established in 1945. Id.
1955 and the International Development Association\(^8\) ("IDA") in 1960 in order to enlarge its risk capital portfolio and provide less burdensome loans.\(^9\) The IBRD further launched its dispute settlement institution by creating the International Centre for the Settlement of Investment Dispute\(^10\) ("ICSID") in 1965 and the Multilateral Investment Guarantee Agency\(^11\) ("MIGA") in 1988. These instruments attempt to foster security in international investments.\(^12\)

Apart from MIGA, which was created more recently, Aron Broches was intimately connected with the formation of each of the institutions associated with the IBRD. In the case of ICSID, Broches is frequently referred to as its creator.\(^13\) Broches' collection of essays, originally written between 1957 and 1992, attests to his intimate knowledge of the workings of the IBRD and its related agencies. In addition to providing both the history and the jurisprudential analysis of these institutions, these essays constitute a discourse on public as well as private international law. They contribute, moreover, to a progressive development of the international law of foreign investment.

This book contains twenty-five essays and is divided into six parts: (1) the International Bank for Reconstruction and Development; (2) Registration of Treaties and International Agreements; (3) the International Center for the Settlement of Investment of Disputes; (4) International Commercial Arbitration; (5) Investment Disputes; and (6) a section devoted to miscellaneous topics.

The lead essay in Part I is titled "International Legal Aspects

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9. See Hoffmeyer, supra note 5, at 33-39 (discussing changes in IBRD structure that led to better exchange rates and diversification).
12. See Malcolm Rowat, Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA, 33 Harv. Int'l L.J. 103, 105-44 (1992) (discussing recent activities of International Centre for Settlement of Investment Disputes ("ICSID") and Multilateral Investment Guarantee Agency ("MIGA").
of the Operations of the World Bank." Written in 1959, it was originally published as part of the courses on international law given at the Hague Academy. Its pedagogical value is at once perceptible. In a sense, it reads like a course on public international law using the World Bank as a case study. It touches on the subjects of, among other things, international law, statehood, sovereignty, international personality, international organization, treaty-making capacity, and the registration of treaties.

In this essay, the analysis of the term "international personality" is most instructive. He takes to task those writers like Oppenheim and Lauterpacht who, when at pains to distinguish between states and international organizations, claim that States are entities that possess "full, perfect and normal" international personality while international organizations have less than full international personality. In response, Broches flatly states that "[t]here seems to be no need for gradations in personality." International personality is a quality that an entity either does or does not possess. Therefore, if an entity possesses international rights and can act on the international plane, then it is an international person.

According to Broches, the World Bank is an international person. He arrives at this conclusion applying the reasoning of the International Court of Justice ("ICJ") in the Reparation for Injuries Suffered in the Service of the U.N., when the court had to decide on the international personality of the United Nations ("U.N."). In this case, the ICJ ruled that the U.N. Charter had conferred on the organization a complex bundle of rights and obligations where it was impossible to operate "except on the international plane and as between parties possessing interna-

15. Id.
16. See 1 Lassa F.L. Oppenheim, International Law, A Treatise 117-18 (1955). Oppenheim asserted that a "full sovereign state" is an international person, while a "not-full sovereign state" is only subject to international law in a limited capacity. Id.
19. Id.
20. Id. at 22.
tional personality.” By the same token, Broches argues that the Articles of Agreement establishing the World Bank conferred on the Bank certain rights and obligations. “The Bank, being . . . a subject of international law, . . . it possesses international personality.”

Part I, Chapter Two discusses how the activities of the World Bank have influenced the development of international law. This chapter also details the creation of the IFC, the IDA, and the ICSID. With regard to establishing these organizations, Broches explains that the Bank acted outside of its day to day operations in order to sponsor the establishment of new international relationships.

Part I, Chapter Three covers the role of the World Bank in international transactions. It reflects the missionary zeal with which Aron Broches undertook his work at the Bank and also the way the World Bank sees itself in the international investment process. Essentially, in the relationship between capital-exporting developed countries and capital-importing developing countries, the World Bank sees itself as a neutral facilitator working towards bringing the two parties together in a financially sound and mutually rewarding partnership.

Part II addresses the registration of treaties and international agreements. Article 102 of the U.N. Charter requires the registration of all treaties and international agreements entered into by any Member State and provides sanctions for non-compliance. Broches, after considering the practice of the World Bank with respect to registration pursuant to Article 102, concludes that the Bank has not registered any agreements other than loan and guarantee agreements and related documents.

Broches then examines the attitude of the ICJ and its failure to address treaty non-registration by reviewing five cases where the issue of registration should have been raised but was ignored.

22. 1949 I.C.J. at 179.
23. BROCHES, supra note 14, at 22.
24. Id. at 79-84.
25. Id. at 79.
26. See id. at 96 (discussing how World Bank's neutral position permits it to exert considerable influence over form and substance of transactions).
27. Id. at 100.
28. Id. at 129.
by the Court in their resolution of the disputes.\textsuperscript{29} These cases are the Corfu Channel Case,\textsuperscript{30} The Asylum Case,\textsuperscript{31} the Case of the Monetary Gold removed from Rome in 1943,\textsuperscript{32} The Anglo-Iranian Case,\textsuperscript{33} and the Electricite de Beyrouth Case.\textsuperscript{34} Based on this review, Broches concludes, first, that the Court will not apply the penalty of Article 102(2) to every instance of non-compliance with the mandate of registration\textsuperscript{35} and, second, that none of the instances in which the Court permitted unregistered or belatedly registered agreements to be invoked violated the spirit of Article 102.\textsuperscript{36} The better view, of course, is that the non-compliance of the Article 102 mandate has never been the \textit{ratio decidendi} of any known ICJ case.

In truth, this issue has never really been before the ICJ. Consequently, there is no indication of how the Court would apply the Article 102(2) sanction. As the 1994 postscript to this essay indicates, the position of the law on these issues has not changed since 1957, when the article was first written.

Part III is devoted to the ICSID. In ten essays, Broches dissects this dispute resolution institution and delves into the provisions of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States\textsuperscript{37} ("Convention"), which formed and governs the ICSID. He discusses, among other things, jurisdiction, applicable law and default procedure, arbitration clauses versus institutional arbitration, case studies of ICSID arbitrations and the finality of ICSID awards.

Several of the essays reprise the question of the jurisdiction of the ICSID. Broches emphasizes that consent is the "cornerstone of the jurisdiction of the centre"\textsuperscript{38} and that consent must be given by both parties and in writing. Using the Report of the Executive Directors ("Report") that accompanied the text of the Convention\textsuperscript{39} as \textit{travaux préparatoires}, Broches delves into the

\begin{itemize}
  \item \textsuperscript{29} Id. at 180-58.
  \item \textsuperscript{30} 1949 I.C.J. 244 (Dec. 15) (judgment).
  \item \textsuperscript{31} 1950 I.C.J. 266 (Nov. 20) (judgment).
  \item \textsuperscript{32} 1954 I.C.J. 19 (June 15) (preliminary question and judgment).
  \item \textsuperscript{33} 1952 I.C.J. 93 (July 22) (preliminary objection and judgment).
  \item \textsuperscript{34} 1955 I.C.J. 41 (Oct. 20) (order).
  \item \textsuperscript{35} BROCHES, supra note 14, at 144.
  \item \textsuperscript{36} Id.
  \item \textsuperscript{37} Convention, supra note 10, 17 U.S.T. at 1270, 575 U.N.T.S. at 159.
  \item \textsuperscript{38} BROCHES, supra note 14, at 168.
  \item \textsuperscript{39} Report of the Executive Directors on the Convention on the Settlement of
\end{itemize}
meaning and significance of Article 25(1) of the Convention. He suggests that the context of Article 25(1) indicates that one of the parties to the dispute must be a Contracting State and the other a national of another Contracting State. In other words, private versus private and state versus state disputes are excluded from the jurisdiction of the ICSID. Furthermore, the non-state party must be a "national of another Contracting State."42

Article 25(2) (b), however, provides an exception for juridical persons that, by reason of requirements of local incorporation, may be nationals of the state party to the dispute. In such a situation, it may meet the jurisdictional requirements if the state party to the dispute had agreed to treat it as a national of another Contracting State because of foreign control.43

In discussing jurisdiction ratione materiae, Broches sheds light on what Article 25(1) defines as a "legal dispute arising directly out of an investment." Broches confides that during the negotiations surrounding the formation of the Convention, the drafters considered and rejected several definitions of "investment." Ultimately, the drafters decided to dispense with a definition for "investment" because it would be taken care of by the consensual nature of the jurisdiction.44

The Report also indicates that the legal dispute must involve a "conflict of rights" as opposed to a "conflict of interests." In addition, "[t]he dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of legal obligation."45 Broches ex-

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41. BROCHES, supra note 14, at 167.
42. Id.
43. Id. at 168.
44. Id. at 208.
plains how the parties give their consent and notes that a consent once given cannot be unilaterally withdrawn.46

Broches further explains that, under the Convention, the home country of the investor may not invoke diplomatic protection.47

From the legal point of view, the most striking feature of the convention is that it firmly establishes the capacity of a private individual or a corporation to proceed directly against a State in an international forum, thus contributing to the growing recognition of the individual as a subject of international law.48

After a closer study of Convention Article 27,49 which deals with invocation of diplomatic protection, Broches concludes that the Article does not operate as a permanent bar to diplomatic protection and that it may be revived if the Contracting State fails to abide by and comply with an award in favor of the investor.50 Furthermore, it is within the rights of the investor’s home state to engage in informal diplomatic exchanges in order to facilitate the settlement of a dispute.51

In discussing applicable law, Broches distinguishes between procedural and substantive law.52 With respect to the procedural law, Broches takes the view that the Convention, being a treaty, constitutes the *lex fori*53 and as such excludes the applicability of any national *la loi de l'arbitrage*54 except where the Convention specifically refers to it.55

47. *Id.* at 214.
48. *Id.* at 198.
51. *Id.*
52. *Id.* at 220-32.
53. *See* 8 THE OXFORD ENGLISH DICTIONARY 875 (2d ed. 1989). *Lex fori* is the Latin term for the law of the country in which an action is brought as determining the nature and mode of the proceeding. *Id.*
54. *See* Broches, *supra* note 14, at 221-22. *La loi de l'arbitrage* is the French terminology for Latin term *lex fori*, which means that law of the country in which the tribunal is seated is the law that governs procedure. *Id.*
55. Broches, *supra* note 14, at 224. Broches refers to the relevant sections of the Convention that spell out this *la loi de l'arbitrage*. Articles 37 to 40, on the composition of the arbitral tribunal; Articles 56 to 58, on the replacement and disqualification or arbitrators; Article 45, on failure of a party to appear; Article 48, on production of evidence, and; Article 44, on the right of the tribunal to decide on questions of procedure not covered by the Convention. *Id.* at 224-25.
On the question of the applicable substantive law, Broches points out that unlike the procedural law provisions, which are scattered throughout the Convention, only Article 42 deals with substantive law. Article 42 acknowledges the party autonomy principle. In the absence of an agreement by the parties, however, the law of the Contracting State party, including its rules on conflict of laws and relevant rules of international law, will apply.

With regard to the question of the hierarchy between international and national law within the context of Article 42, Broches concludes that international law is superior to national law. This conclusion, however, is arrived at through a self-contrived analytical process. Broches asserts that an arbitral tribunal will first look to the law of the host state and that state law will, in the first instance, be applied to the merits of the dispute. The result will then be tested against international law to determine whether or not it violates international law. If it does, then the substantive law will not be applied.

While Broches argues that the Report supports his position with regard to the supremacy of international law in this realm, in actuality, the Report does not contribute to this contention. Neither the text of the Convention nor the Report provide a hierarchy of national and international law. Rather, this is a position that has worked its way through as a result of ICSID case law, and, in particular, the decision of the first ad hoc Committee in *Klockner et al. v. The United Republic of Cameroon*. *Klockner*, which interprets Article 42 of the Convention, states that rules of international law are given a dual role to complement and correct state law. Subsequent ICSID decisions have relied on *Klockner* on the issue of hierarchy of norms.

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56. Id. at 225.
57. Id. at 227-28.
58. Id. at 229.
60. BROCHES, supra note 14, at 229.
62. Id.
63. See Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1 (citing to Kockner as authority). Excerpts of the award are reprinted in 24 I.L.M. 1022 (1985).
Broches discusses the finality of ICSID awards in the last chapter of Part III. Admittedly, Broches wrote this piece in response to the slew of criticisms that greeted the annulment proceedings in *Klockner, Amco Asia Corp. v. Republic of Indonesia*, 64 and *MINE v. The Republic of Guinea*. 65 While Broches is quick to point out that the annulment proceedings have been instituted in only three out of the twenty-four disputes submitted to ICSID arbitration, 66 his criticisms, nevertheless, predicted the breakdown of the ICSID system.

In examining the sections of Article 52 that provide for the annulment remedy, Broches notes that: Section 52(1)(b) addresses violations of the excess of power provision; Section 52(1)(d) permits a request for annulment where there are serious departures from fundamental rules of procedure; and recovery for failure to state reasons is found under section 52(1)(e). 67 Broches discusses how each of the annulment proceedings have treated these issues and concludes, reassuringly, that the ICSID annulment process is "on track" 68 and will fulfill the limited purposes for which it was established. He reckons that there is no basis for the position that the finality of awards is taking a back seat to annulment. 69

Part IV deals with international commercial arbitration. Here, Broches flirts with other arbitral fori, in particular, the U.N. Commission on International Trade Law ("UNCITRAL") system. In Part IV, Chapter Sixteen, Broches undertakes what he calls a "superficial treatment" of other arbitration conventions and makes suggestions for their improvement. 70 Then in Part IV, Chapter Seventeen, Broches gives a detailed account of the 1985 UNCITRAL Model Law on International Commercial Arbitration. 71 His discussion is steeped in the legislative history of UNCITRAL'S model law. He first tells of the Commission's choice to work toward a convention, a uniform law, or a model

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64. Id.
65. ICSID Case No. ARB/84/4.
66. BROCHES, supra note 14, at 309.
67. Id. at 311-33.
68. Id. at 352.
69. Id.
70. Id. at 363.
71. Id. at 375-432. In Part IV, Chapter Seventeen Broches focuses his discussion on the development, adoption, and effect of the Model Law on Commercial Arbitration. Id.
law and how the Commission eventually settled on a model law. Broches then discusses a comment made in one of the working sessions about the difficulty of unifying procedural law. While this concept may be true as a matter of general proposition, Broches argues that it does not apply to the law of arbitration. He notes that in arbitration national traditions, such as the differences between common law and civil law jurisdictions, play a relatively minor role.

It is also in this section where Broches delves into a discussion of features of the model law including competence, conduct of proceedings, rules applicable to substance of dispute, setting aside, recognition, and enforcement of arbitral awards. He then ends on his characteristically optimistic evaluation of the model law and praises Canada for being the first country to adopt federal legislation based on the model law.

Part V deals with investment disputes. Part V, Chapter Nineteen shows the link between arbitration of investment disputes and the plethora of bilateral investment protection treaties that have evolved between capital importing and capital exporting countries. The remaining three chapters discuss the regional perspectives to the investment dispute settlement process. One of the issues first highlighted here is the promotion of pacific settlement of investment disputes through such instruments as multilateral and bilateral conventions, guidelines, draft codes of conduct, and U.N. resolutions in the area of economic development.

Broches explains that the use of these various instruments is reflective of the differing viewpoints on the subject. The 1967 OECD Draft Convention on the Protection of Foreign Property, for example, aims to assure the security and protection of foreign investment. This draft convention served as the basic model for the bilateral investment treaties. The OECD was to

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72. Id. at 384.
73. Id.
74. Id. at 375-419.
75. Id. at 415-16.
76. Id. at 498.
78. BROCHES, supra note 14, at 498.
79. Id.
follow this in 1976 with its Guidelines for Multinational Enterprises.\(^8\)

In addition, there were the various U.N. resolutions on foreign investment, beginning with the more conciliatory 1962 Resolution on Permanent Sovereignty Over Natural Resources\(^8\) and ending with the hotly contested 1974 Charter of Economic Rights and Duties of States.\(^8\) Between these polarities lies the Draft United Nations Code of Conduct for Transnational Corporations.\(^8\)

As Broches notes, this Draft Code reached an impasse on account of the lack of agreement with respect to the treatment of transnational corporations, and he predicts that even when concluded, this Code is not likely to be anything but a soft law much like the OECD Guidelines.\(^8\)

In Part VI, which he classifies as miscellaneous, Broches ironically puts the rest of the essays in their natural context, the context of development. In Chapter Twenty-Three he writes about the dimensions of development. Originally written in 1973, the themes he sounds still resonate with equal clarity and fidelity. He chastises the international community for having failed to improve the quality of life of its poorer and weaker members. The reasons he offers for this state of affairs are sobering. He writes:

[W]e failed to meet adequately the moral obligations accepted in all civilized societies since the beginning of time, the obligations of the strong to help the weak. These moral obligations which international law is moving, however slowly and painfully, to recognize as legal obligations, exist not only between rich and poor societies, but also between any given society and its poor members.\(^8\)

In the end, Broches challenges his audience, the membership of the International Law Association, then meeting in Brussels in August 1973, to take up the task of rectification. He asked them, “to help create the conditions for economic and social progress, with dignity and in freedom, remembering that the ultimate ob-

\(^8\) Id. at 500.
\(^8\) BROCHES, supra note 14, at 503. Regulations promulgated by the OECD are considered "soft law" because they have no binding force.
\(^8\) Id. at 514.
ject of law is the welfare of mankind.”

The subject of development is addressed again in Chapter Twenty-Four, this time in relation to one of the principal actors in global development: the multinational corporation. This essay begins with a discussion about the appropriateness of the term “multinational corporation.” Broches states flatly that “from a lawyers’ point of view the term . . . has . . . no validity.” His reason is that “there is no corporation that is created and exists under the law of more than one state.” From an entity theory perspective this position is incontrovertible. From an enterprise theory perspective, however, a corporation can exist under the law of more than one state. Better still, more than one state might assert legislative competence over a corporation. Although Broches, in 1974, could not foresee a “multinational control or regulation” of foreign investment as a realistic possibility, in 1995 it is believed to be inevitable that multinational corporations or transnational enterprises are subject to some form of international regulation.

In this section Broches also refers to and comments on the issues raised by the Group of Eminent Persons appointed by the United Nations to report on “Multinational Corporations in World Development.” Moreover, Broches touches upon the unequal bargaining position between the foreign investor and the developing countries in negotiating the entry of investment. He believes that strengthening the bargaining capacity of host countries is in the interest of both the investor and the host country, and that inequitable agreements are strictly non-viable. To clarify, it appears that Broches meant to describe the

86. Id. at 516.
87. Id. at 517.
88. Id. at 518.
89. See Philip I. Blumberg, The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality 79-81 (1993). Entity theorists define the term “agency” loosely, treating corporations and their subsidiaries as one entity. Id.
90. See id. at 70-79. The enterprise theory establishes that there may be separate enterprises within a corporation. Id.
91. Id. at 78-79.
92. Broches, supra note 14, at 518.
94. Broches, supra note 14, at 519.
95. Id.
inequalities between parties with regard to the negotiating skills or bargaining skills, not bargaining positions. In fact, the bargaining positions of the various sides to the investment process are bound to be unequal.96

In addition to bargaining skills, there are other factors that may affect the position of each party at the negotiating table. As Smith & Wells, in their seminal book, Negotiating Third World Mineral Agreements97 point out, bargaining positions tend not only to be unequal but also to be dynamic.98 For the developing host country, this may depend on the quantity and global availability of national resources, the amount of control it wants in the investment, whether it desires downstream or upstream integration, and other localization concerns.99 For the foreign investor, their bargaining position will be influenced by the importance of the technology to be transferred, its financial resources, its managerial resources, the investor willingness to share control of the investment, and how the particular investment relates to the investor’s overall goals.100

Broches next draws attention to the need for review of long term development contracts. Apparently, Broches’ advice has been heeded by development lawyers, as renegotiations are now a regular feature in most development contracts.101 Broches then raises the problem of transfer pricing but mixes his discussion with the issue of host country participation in joint-ventures.102 Ultimately, it is difficult to say what his “interesting approach to a solution” relates to.103

When Broches waltzes into the realm of extraterritorial application of U.S. legislation to U.S. owned subsidiaries abroad, it becomes obvious that he is out of his league. Again his com-

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97. Id.
98. Id. at 4.
99. Id. at 6-18.
100. Id.
102. BROCHES, supra note 14, at 520.
103. Id.
ments are strictly based upon an entity theory\textsuperscript{104} and are innocent of the growing extraterritorial application of antitrust legislation, securities legislation, tax legislation, and an enterprise doctrine\textsuperscript{105} that is embraced with different degrees of enthusiasm in the developed world.

Fortunately, Broches promptly returns to arbitration and dispute settlement where his brilliance shows once again. Essentially, this is a book about arbitration and dispute settlement, with its history told and explained by one who was present at its creation. Broches puts international arbitration into both the contexts of private and public international law. Even though we may disagree with him on occasion, there is a lot of passion and scholarship displayed in his two decades of writing.

\textsuperscript{104} See supra note 89 (defining entity theory).
\textsuperscript{105} See supra note 90 (defining enterprise theory).
GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD

Reviewed by Roger J.R. Levesque*

A great deal of ambition and optimism characterizes the current international children's rights movement. The sentiments are well justified; nothing short of a revolution is taking place. A prominent sign of this revolution is the almost universal ratification of the United Nations Convention on the Rights of the Child.1 This Convention recognizes and seeks to ensure a series of substantive and procedural rights, making it the most comprehensive United Nations human rights treaty in force.2 In addition to enumerating the entire range of civil, political, economic, psychological, social, and cultural rights of children, the Convention proposes a series of important, perhaps even radical, guiding principles. When nations design and implement policies affecting children and their families, they now must consider the children's best interests,3 take into account individual children’s evolving capacities,4 and respect and ensure the inherent dignity of all children.5

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4. This is perhaps the most radical aspect of international children’s rights. Although it is explicitly stated in Article 12, its focus on allowing children to participate in decisions that affect them affects most rights enumerated in the Convention. UNCRC, supra note 1, art. 12, U.N. Doc. A/RES/44/25, at 8, 1992 Gr. Brit. T.S. No. 44, at 6.

5. This standard, of course, is a fundamental aspect of human rights law: the promotion of human dignity; UNCRC, supra note 1, 2nd prir para. See Roger J.R. Levesque, Sexual Use, Abuse and Exploitation of Children: Challenges in Implementing Children's Human Rights, 60 BROOK. L. REV. 959, 997 (1994) [hereinafter Implementing Children's
These developments are truly remarkable and momentous. They essentially make one demand. Simply stated, the international children's rights movement asks individual governments to take children's interests seriously when enacting laws for them. In order to enact policies that take children's interests seriously, all laws must be evaluated and examined from the child's point of view.6

An examination of the current international children's rights movement from the child's point of view, however, reveals considerable schisms between international principles and the state of the world's children.7 Indeed, in several instances, children are in much greater peril than they were before the children's rights movement blossomed.8 The gap between rhetoric and reality illustrates the need to move beyond examining broad legal mandates and lofty principles. This discrepancy forces each nation to examine their existing laws and to focus their energies on implementing children's rights in a manner that truly protects children's interests.

If the proper standard to evaluate the international children's rights movement is the extent to which it encourages countries to take children's interests seriously and the extent to which it provides an adequate guide for reform, then a text examining international law should be evaluated by a similar stan-

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6. This task is much more difficult than it may appear. Indeed, taking children's interests seriously often means enacting somewhat "radical" policies. See generally Roger J.R. Levesque, Prosecuting Sex Crimes Against Children: Time For "Outrageous" Proposals?, 20 L. & PSYCHOL. REV. (forthcoming Spring 1995) (proposing that current child protection system is doomed to continued failure because of its inability to approach child protection "from the child's point of view"); Roger J.R. Levesque, The Peculiar Place of Adolescents in the HIV-AIDS Epidemic: Unusual Progress & Usual Inadequacies in "Adolescent Jurisprudence," 27 LOY. U. CHI. L. J. (forthcoming 1996) (attributing failure to address dramatic increase in adolescent HIV-AIDS cases to inability to respect adolescents' needs and ensure that adolescents' perspectives are taken into account when decisions are being made on their behalf).


8. See Implementing Children's Human Rights, supra note 5, at 959-60 (citing examples which indicate that despite initial optimism, there are signs that children's rights are not being taken seriously).
standard. More specifically, a text examining children's rights in international law should detail existing international principles, should document the disparity between current law and international standards, should address needed reforms, and should never lose sight of the reality of children's situations. While there are several texts examining children's rights, only Professor Van Bueren's *The International Law on the Rights of the Child* has attempted this complex task. Given the challenges facing such an endeavor, Professor Van Bueren's text is simply exceptional.

Professor Van Bueren directly examines the complex issues involved in defining and understanding children's rights. Her analysis of formal international law relating to the rights of the child is invaluable and would stand on its own. The text, however, does more than meticulously detail the rights of children in international law as enshrined in U.N. documents. Van Bueren also explores how other international fora and different countries are struggling with children's rights, both in theory and in practice. Those interested in international children's rights as they are applied in different countries will welcome the elusive citations. This research is useful for exploring critical principles and themes as well as future trends and obstacles in children's rights. These citations also indicate the immense progress in recognizing children's rights.

*The International Law on the Rights of the Child* is a text of mammoth proportions, containing fourteen well researched chapters. The first three chapters are devoted to examining the international children's movement and defining the place of children in international law, both in terms of legal definitions of children and in terms of children's rights and their relation

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11. Id. at 1-116.

12. Id. at 32-66.
to the rights of other family members. The middle chapters explore children's substantive rights. The last chapter documents organizations and treaty implementing bodies that have taken it upon themselves to ensure children's rights.

Although all of the chapters are highly informative, several deserve highlighting. The discussion of juvenile justice is especially outstanding. Professor Van Bueren does more than detail the rights of juveniles under the Convention. She also examines how the rights are embodied in other international instruments, particularly guidelines detailing the international community's approach to juvenile crime. In addition, she details existing conflicts between international instruments and state practices, and emphasizes the need for reform.

The discussion of the status of a child within the family is also exceptionally thorough. It attests to the breadth of international law as well as the need to examine its implementation. For example, the rights of children are examined in several cases, ranging from adoption in India to cases before the European Commission of Human Rights and the European Court of Human Rights. In addition, the analyses introduce us to important international agreements addressing children's rights, including: the African Charter on the Rights and Welfare of the Child, separate Hague Conventions dealing with child abduction and adoption, the European Convention on the Adoption of Children, the European Convention on Human

13. Id. at 67-116.
14. Id. at 117-377. These substantive rights include: preservation of their identity; freedom of expression, thought, conscience, and religion; protection from exploitation and arbitrary judicial intervention, and; the right to education and survival. Id.
15. Id. at 578-422.
16. Id. at 169-231.
17. Id. at 199.
18. Id. at 67-116.
19. See id. at 96 (reviewing Lakshmi Kant Pandey v. Union of India (Supreme Court of India)).
22. Id. at 78.
23. Id. at 90-93.
24. Id. at 99-100.
25. Id. at 98-99.
Rights, and the International Convenant on Civil and Political Rights.

The International Law on the Rights of the Child, however, is much more than an outstanding resource and thorough examination of children's rights. The text urges one to imagine a world in which children's interests come first. Envisioning such a world is rather difficult and the obstacles to implementing policies to reach that end are staggering. Primary among these obstacles are the need for tremendous resources, the need to recognize positive rights, the need for adequate research to guide implementation efforts, and the general societal will to consider reforms. In addition, there is the need to combat deep societal prejudices against children and the need to resist projecting adult feelings, thoughts, and attitudes onto childhood. A world in which children's interests are the primary concern is difficult to envision. It often results in a perilous and controversial path, yet it is the path that the international children's rights movement urges all nations to take.

Regrettably, there is one serious charge which can be levied against Van Bueren's otherwise impressive text. While the text describes the laws that will set the stage for the future of children's rights, it fails to directly address the nature of the "postmodern world.”

26. Id. at 75-86.
27. Id. at 75-77.
28. In wealthier countries, the foster care system serves as a prime example of the difficulties blocking appropriate child welfare reform efforts. See generally Roger J.R. Levesque, The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint, 6 Md. J. Contemp. Legal Issues 1 (1994) [hereinafter Failures of Foster Care Reform]. In poorer countries, child sexual exploitation highlights the failure of social development programs. Implementing Children's Human Rights, supra note 5, at 978-87.
30. See supra note 6 and accompanying text (examining two controversial areas dealing with children's welfare).
31. The intellectual roots and current manifestations of postmodernism are complex and dependant on the contexts in which it is applied, ranging from social criticism, to architecture, to social science, to the law. Despite differences, postmodernism stands for a general distrust of grand theories, universal truths, totalizing discourses, and all-encompassing ideologies. In terms of children's rights, postmodernism challenges universal rights and, just as important, the universal implementation of rights. The movement also urges us to move beyond the necessity of bestowing rights on particular individuals or groups (either child, parent, or community) and challenges us to question whether the notion of "rights" is a useful way to achieve intended goals.
The emergence of the postmodern children's rights movement has coincided with somewhat radical challenges to all aspects of existence and established worldviews. This common emergence should not be seen as a mere coincidence. To a large extent, it is precisely because of postmodern criticisms of prevailing worldviews and entrenched social institutions that the children's rights movement has gained so much momentum. Yet, Professor Van Bueren's text generally lacks a healthy criticism of law itself. For example, the text fails to question the ability of legal mandates to ensure children's rights, to analyze some possible gaps in international children's rights, to address internal conflicts facing the children's rights movement, and to critically engage with the evolving capacities literature.


33. Although this change has been awkwardly characterized as a shift to a postmodern view of the world, exactly what the "postmodern" view of the world is has been a subject of debate and criticism. If anything, debate and criticism are the hallmarks of the postmodern world. See generally Jorge Larrain, The Postmodern Critique of Ideology, 42 SOC. REV. 219 (1994). For general discussions of the "postmodern" world, see STEVEN CONNOR, POSTMODERNIST CULTURE (1989); DAVID HARVEY, THE ORIGIN OF POSTMODERNITY (1989).

34. History is replete with laws enacted for children's interests that backfire and fail to take into account changing social conditions. See, e.g., Failures of Foster Care Reform, supra note 28, at 13-22 (detailing failure of well-designed legislative scheme).

35. In this regard, it is important to note that the notion of evolving capacities seemingly does not trouble Professor Van Bueren. VAN BUEREN, supra note 10, at 3-5. She argues, for example, that "denying that children are capable of exercising entire categories of rights is too simplistic." Id. at 5. Professor Van Bueren's claim that children can participate to the extent of their abilities seems on target. Unfortunately, there is no discussion of what such participation would do to the notion of "rights," she does not discuss the possible ramifications of taking an "evolving capacities" approach. For example, Article 12 focuses on giving weight to a child's views, consistent with that child's age and maturity. UNCRC, supra note 1, art. 12, U.N. Doc. A/RES/44/25, at 8, 1992 Gr. Brit. T.S. No. 44, at 6. This focus on evolving capacities could be troublesome. For example, does it follow that if they do not have "capacity" their views and voices will be ignored? The possibility of a positive answer is not far-fetched. A leading commentator of children's procedural rights has argued that "this would seem to indicate that a teenager's views would be of greater weight than those of an infant .... This approach seems to give less attention to the younger child." Leonard P. Edwards & Inger J. Sagatun, Who Speaks for the Child?, 2 U. CHI. L. SCH. ROUNDTABLE 67, 72 (1995); see generally Elizabeth S. Scott et al., Evaluating Adolescent Decision Making in Legal Contexts, 19 L. & HUM. BEHAV. 221 (1995) (discussing notion of capacity as empirical and legal issue and emphasizing need to expand narrow approaches to determining capacity).

and to predict further developments in children's rights.\textsuperscript{37}

If postmodern theorists have taught us anything, it is that we need to question and criticize that which seems most self-evident. Those concerned with children's rights would therefore benefit from listening closely to emerging critiques of those laws. This critical posture remains of utmost significance; the children's rights movement is replete with instances in which children's situations were worsened in the name of their rights.\textsuperscript{38}

In addition to heeding the lessons of postmodernists, a look at children's current life circumstances should be revealing. It should be clear by now, despite continued commentaries to the contrary, that legal rules cannot by themselves spur societal re-

\textsuperscript{37} Professor Van Bueren notes, for example, that a backlash against children's rights seems imminent. \textit{Van Bueren, supra} note 10, at 25. Yet, she fails to assist the effort to combat the backlash. Professor Van Bueren simply ends her discussion of the right of the child to freedom of thought, conscience, and religion by noting that "the family is likely to become a major testing ground for the success or failure of international human rights law in the next century." \textit{Id.} at 163. Despite a comprehensive analysis of current law and recognizing its centrality to children's human rights, Professor Van Bueren fails to discuss how child, parent, and state conflicts might be resolved. In all fairness, however, given that her discussion is one of the first to examine these children's issue from an international perspective, this criticism is somewhat undue. Even commentators writing about more established children's rights have failed to explore adequately disagreements and concerns. "Kiddy libbers," for example, aim to liberate children from the hold of parent's and state's powers. Their general claim is that children's autonomy should be dictated by their "evolving capacities." See Martha L. Minow, \textit{The Role of Families in Medical Decisions,} 1991 \textit{Utah L. Rev.} 1 (1991) (advocating for allowance of capable minors to make abortion decisions without parental or judicial intervention). Such analyses, however, run counter to deeply held societal perceptions. Although this is not to propose that kiddy libbers are theoretically off-track, the extent to which they will succeed necessarily turns on their ability to address prevailing perceptions.

\textsuperscript{38} \textit{Children's Human Rights, supra} note 31, at 286 n.243 (listing examples of child welfare reforms that need to be undone).
If children themselves are to be taken seriously, there must be more than legal reform. Societal reform must be coupled with a massive infusion of public resources. These limitations of *The International Law on the Rights of the Child*, however, are excusable. Instead of championing a single approach to children’s rights, Professor Van Bueren seeks to present a balanced, thorough examination of current international law and representative states’ practices. As such, her book serves as a powerful presentation of the international community’s new approach to children and families. The text is an exceptional documentary of a momentous shift in international law, which has finally recognized the legal personhood of children. The text reveals how the international community is taking this shift seriously, through an increasing willingness to support, and if necessary, intervene in the everyday lives of peoples of all nations. These are incredible developments. *The International Law on the Rights of the Child* clarifies this new approach to international law while detailing the areas that will need to be contested if children’s rights are to be implemented and taken seriously.

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39. For example, courts have limited power to combat strong community sentiments and foster social change. See generally Gerald N. Rosenberg, Hollow Hope: Can Courts Bring About Social Change? (1991).

40. This is not to say that Professor Van Bueren fails to recognize the need for political will. Unfortunately, the recognition comes in the last paragraph of her text. Van Bueren, *supra* note 10, at 413. This is where another discussion should begin.

41. This recognition goes beyond granting children procedural rights. International law now actually recognizes that children have a right to an identity. Van Bueren, *supra* note 10, at 117-27 (discussing this new right in international law).

42. Id. at 106. International law is no longer law between nations, international law now, for example, aims to intervene in family life. Id. (noting reconceptualization of areas of legitimate international legal protection for individual family members). “International law provides the global community with the power to intrude and impose internationally recognized human rights standards.” *Implementing Children’s Human Rights*, *supra* note 5, at 998. But that is only the first step.