

# Twenty-one years of the CRC: a coming of age?

ALICE DIVER,

EUGENE MCNAMEE

AND

LIAM THORNTON<sup>1</sup>

*University of Ulster*

## 1 Twenty-one years of the CRC

In 2010, the Convention on the Rights of the Child (CRC)<sup>2</sup> reached the age of 21 and, arguably, “came of age”. The CRC was not, however, the first international instrument that attempted to protect the rights of the child: 1924 saw the enactment of one of the first legal instruments to explicitly recognise that children, as human persons, ought to enjoy certain inalienable rights. It was recognised that children are often the first and most severely affected in times of conflict or economic hardship. The 1924 Geneva Declaration of the Rights of the Child outlined the duty of all nations, and indeed individuals within states, to protect weak, marginalised, or impoverished children.<sup>3</sup> The Universal Declaration of Human Rights further highlighted the need to protect the rights of the child to receive “special care and assistance”.<sup>4</sup> In 1959, the United Nations General Assembly adopted the Declaration of the Rights of the Child which contained 10 principles, recognising inter alia the duty of non-discrimination in the enjoyment of such rights, the concept of best interests of the child as a “guiding principle” (in respect of education and child development), the right to play, the right to social security, protection from trafficking, and the need to adopt special measures to ensure that disabled children would also enjoy such

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1 Lecturers in law, University of Ulster, and organisers of the University of Ulster (Magee) and International Society of Family Law (ISFL) conference, “The Children’s Convention at 21: The rights of the child come of age?”, which took place in Derry/Londonderry on 19 and 20 June 2010. The authors would like to express their appreciation to all those who presented at the conference and submitted manuscripts for consideration. The authors also wish to express their appreciation to the editorial board of the *Northern Ireland Legal Quarterly* for its patience and assistance in bringing this project to fruition.

2 Convention on the Rights of the Child, GA Res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989), entered into force 2 September 1990. See also, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, New York, 25 May 2000, UN, Treaty Series, vol. 2173, p. 222 and Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, New York, 25 May 2000, UN, Treaty Series, vol. 2171, p. 27.

3 In 1924 the League of Nations adopted the Geneva Declaration of the Rights of the Child which inter alia protected the right to food, the right to health care, protection from exploitation and the right to ‘receive relief in times of distress’.

4 Article 25, Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810 at 71 (1948).

protections.<sup>5</sup> Some 30 years after this declaration, and a decade after the International Year of the Child, the UN General Assembly approved the text of the CRC and opened it for signature and ratification by states.<sup>6</sup>

By 2010, the CRC had been ratified by every state in the world, with the exception of Somalia and the United States.<sup>7</sup> The CRC ostensibly represented a fundamental commitment to the recognition of the civil, political, economic, social and cultural rights of children. The “best interests of the child” principle is now deemed to be the primary, if not paramount, consideration in all public and private legal actions which relate to children.<sup>8</sup> From the right of children to be heard (i.e. when decisions are made which will affect them)<sup>9</sup> to protections for asylum-seeking and refugee children,<sup>10</sup> the right to life,<sup>11</sup> freedom from torture,<sup>12</sup> and a right to a decent standard of living,<sup>13</sup> the CRC seeks to provide a comprehensive declaration of the basic rights of all children.

## 2 Select issues on the rights of the child

The papers selected for inclusion in this special edition of the *NILQ* have been drawn from the works of the keynote speakers, established academics and emergent scholars, who participated in the University of Ulster conference – “The Children’s Convention at 21: The rights of the child come of age?” – which took place in Derry/Londonderry on 19 and 20 June 2010. These contributions touch upon a wide range of issues relevant to the notion of children’s rights; cultural and religious relativism; the Convention’s ability (or otherwise) to persuade domestic and international jurists of the need to meaningfully embed the concept of child rights; children’s need for familial contact; juvenile justice and the treatment of vulnerable young offenders; the extent of domestic compliance with the principles of the Convention.

Dr Ursula Kilkelly’s article analyses the impact of the Children’s Convention and discusses the scope of this impact upon children’s rights. Kilkelly emphasises the legal qualities of the CRC and rejects arguments that it is somehow legally unenforceable noting the “holistic review” that takes place through state reporting to the Committee on the Rights of the Child.<sup>14</sup> While countries may not *explicitly* incorporate the CRC into their domestic legal systems, evidence suggests a heightening of protection for children’s rights in ratifying countries.<sup>15</sup> The CRC, rather than contributing to the disaggregation of international human rights law,<sup>16</sup> has led to a cross-fertilisation of children’s rights within and between differing domestic, supra-national and international legal systems.<sup>17</sup> The CRC’s

5 Declaration of the Rights of the Child, GA Res. 1386 (XIV), 14 UN GAOR Supp. (No. 16) at 19, UN Doc. A/4354 (1959). See also, ILO Convention No. 138, Minimum Age Convention (1973), which came into force on 19 June 1976.

6 See n. 2 above. For further comment on the CRC drafting process, see in this edition U Kilkelly, “The CRC at 21: assessing the legal impact” (2011) 62(2) *NILQ* 143–52.

7 For a list of ratifying states, dates of signature and ratification, and declarations and reservations to the CRC, see <http://treaties.un.org>.

8 Article 3 CRC.

9 Article 12 CRC.

10 Article 22 CRC.

11 Article 6 CRC.

12 Article 37 CRC.

13 Article 27 CRC.

14 Kilkelly, “CRC at 21”, n. 6 above, pp. 145.

15 *Ibid.* p. 146–7.

16 See further below, p. 141.

17 Kilkelly, “CRC at 21”, n. 6 above, pp. 146–52.

ability to sway courts in jurisdictions not bound by its provisions is highlighted as a significant, if controversial, endorsement of the Convention's potential.<sup>18</sup>

From an assessment of the impact of the CRC after 21 years, to highlighting recurring issues relating to religious relativism within children's rights, Professor Javaid Rehman argues that rigid interpretations of Sharia negate the rights of children under the CRC (and other international human rights instruments).<sup>19</sup> Placing the context of his arguments within wider debates on religion, culture and law,<sup>20</sup> Rehman examines the application of *kafalah*,<sup>21</sup> child marriages and the "option of puberty"<sup>22</sup> in relation to the rights of the child under international law. Issues relating to child marriage within Sharia are regarded as "archaic" and not reflecting progressive moves within Islam to evolve beliefs and practices to respect the rights of children. Rehman discusses the notion of guardianship as an alternative to formal adoption models (*kafalah*) and examines the role of the guardian (*wali*) in protecting the best interests of the child.<sup>23</sup> Ultimately, he notes the inherent flexibility of Sharia principles, and expresses confidence in their ability to embrace "the evolving norm of child rights and gender-based equality".<sup>24</sup>

Lorenzo Wakefield, an emerging children's rights scholar working in South Africa, examines the theme of juvenile justice in light of South Africa's recent legislative reforms. Wakefield examines South Africa's obligations under Article 40 of the CRC<sup>25</sup> in light of the recently enacted Child Justice Act 2008. After an outline of the 2008 Act's key provisions,<sup>26</sup> Wakefield examines four core issues relating to children's rights and the criminal justice system: criminal capacity,<sup>27</sup> pretrial release and detention,<sup>28</sup> diversion<sup>29</sup> and sentencing.<sup>30</sup> Wakefield argues that while the 2008 Act may not create a pattern of full compliance with the CRC, measures such as core principles relating to the minimum age of criminal responsibility, shorter pretrial detention periods, legislative recognition and support for diversion programmes, and the specific inclusion of five objectives to be considered when a judge is deciding on punishment, mean that the Act goes quite some distance towards such compliance.

Catherine Kenny examines the protection of family reunification within the CRC<sup>31</sup> and how the Republic of Ireland conforms (or otherwise) to this core protection. Noting the

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18 Kilkelly, "CRC at 21", n. 6 above, pp. 146–52, where the decision of the majority within the United States Supreme Court's decision in *Roper v. Simmons* is highlighted as one example of cross-judicial reliance on the CRC.

19 In this edition, J. Rehman, "Religion, human rights law and the rights of the child: complexities in applying the Sharia in modern state practices" (2011) 62(2) *NILQ* 152–66.

20 *Ibid.* p. 160.

21 *Ibid.*

22 *Ibid.* pp. 160–5.

23 *Ibid.* pp. 162–5.

24 *Ibid.* p. 166.

25 Article 40 CRC requires signatory states to take "appropriate measures" to ensure that children accused of committing offences are treated in a manner that would ensure their best interests are upheld.

26 L. Wakefield, "The CRC in South Africa 15 years on: does the new Child Justice Act 75 of 2008 comply with international children's right instruments?" (2011) 62(2) *NILQ* 167–82.

27 *Ibid.* pp. 169–71.

28 *Ibid.* pp. 171–3.

29 *Ibid.* pp. 173–6.

30 *Ibid.* pp. 178–81.

31 Article 10(1) CRC requires states parties to ensure that applications for family reunification involving children should be dealt with in a "positive, humane and expeditious way".

increased anti-refugee measures in place in Europe,<sup>32</sup> Kenny argues that the right to family unity for those unable to return to their countries of origin is protected under international human rights law.<sup>33</sup> The key protections under the CRC and the pronouncements of the Committee on the Rights of the Child tend to suggest widespread state disregard for this important right.<sup>34</sup> Kenny then documents the procedural delays<sup>35</sup> and the failure to consider the views of the child<sup>36</sup> that suggest a disregard by Ireland of its international obligations under the CRC with regard to family reunification.

Dr Anne Egan examines the rights of children to remain in meaningful contact with their parents following the breakdown of a relationship. While Articles 9(3) and 7(1) ostensibly support child–parent contact; Irish law has yet to incorporate such provisions into its domestic legislative framework. Egan examines how the Irish courts have dealt with difficult issues relating to parental access to children.<sup>37</sup> Drawing upon her research (involving practitioners, separated and divorced parents, and unmarried parents),<sup>38</sup> she questions whether incorporation of the Convention would strengthen the rights of children affected by familial breakdown and further the best interests of the child. Incorporation of the CRC could lead to a situation where the rights of the child are vindicated through sustained and ongoing contact with both parents (subject to the best-interests principle and the right of the child to be heard).<sup>39</sup> The proposed wording of an Irish constitutional amendment on the rights of the child<sup>40</sup> will be beneficial to children, she argues, in terms of equality, the right to be heard, and child welfare being the paramount concerns within all issues relating to children.<sup>41</sup> However, as Egan concludes, the CRC retains its lowly level of guidance, rather than law, within child custody disputes (and other child-related proceedings).<sup>42</sup>

Dr Linda Moore examines the issue of Convention compliance in Northern Ireland, in respect of children in custody and juvenile justice. Moore outlines the key international legal instruments and principles that broadly set down legal standards and best practice in issues relating to children in custody.<sup>43</sup> The unique circumstances of Northern Ireland are highlighted, given the difficult “social, economic and political context”<sup>44</sup> that continues to impact upon the lives of children. Recent legislative reforms to the juvenile justice system are also examined, with a view to gauging whether meaningful compliance with the Children’s Convention is being achieved.<sup>45</sup> Moore draws upon her recent (and ongoing) qualitative research into the treatment of incarcerated young people in Northern Ireland,

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32 C Kenny, “Positive, humane and expeditious? An analysis of Ireland’s implementation of its obligations in relation to family reunification under the CRC” (2011) 62(2) *NILQ* 183–98.

33 *Ibid.* p. 184.

34 *Ibid.* pp. 193–4.

35 *Ibid.* pp. 196–7.

36 *Ibid.* p. 197.

37 A Egan, “Access and the non-custodial parent in the Republic of Ireland” (2011) 62(2) *NILQ* 199–215.

38 *Ibid.* pp. 208–10.

39 *Ibid.* pp. 211–13.

40 *Ibid.* p. 213.

41 *Ibid.*

42 *Ibid.* pp. 214–15.

43 L Moore, “The CRC comes of age: assessing progress in meeting the rights of children in custody in Northern Ireland” (2011) 62(2) *NILQ* 217–34.

44 *Ibid.* p. 217.

45 *Ibid.* p. 224–6.

and questions the extent to which international rights and standards are being adhered to, not least in respect of those most at risk of harm.<sup>46</sup>

### 3 Conclusion

Initially, it was suggested that the Convention might bring about significant progress in respect of protections for the rights of the child.<sup>47</sup> While, as evidenced by the work of the UN Committee on the Rights of the Child, factors such as a lack of government or societal support seem to have prevented full realisation of the rights of the child for now, 21 years on, the CRC continues to have profound impact on national and international legal systems. As Hammarberg argued, the CRC as a whole was at least instrumental in ensuring increased awareness of and respect for the “three Ps”: *provision* for basic needs to ensure all children can enjoy all the rights set down in the Convention; *protection* from harmful act and practices and, not least, *participation*.<sup>48</sup> Despite lingering concern that the conceptualisation of distinct rights for persons under 18 might serve to separate “children’s rights” from other, more general “human rights”,<sup>49</sup> the language of “children’s rights” has nevertheless become ingrained within human rights discourses. Rather than undermining the rights of the child, such a development can arguably be viewed as emphasising the special regard which international human rights law ought to hold for all children.

One core overarching theme which can be drawn from these contributions as a whole is that the task of protecting the best interests of the child cannot be carried out in isolation from citizens, legislators, policymakers, jurists, scholars or, indeed, parents or guardians. Kilkelly clearly outlines the impact of the CRC on wider international and domestic legal systems, evidenced by Wakefield and Moore’s conclusions that in *certain parts* of the respective state juvenile justice regimes, there have been improvements, in large part based on maintaining key legal standards as set down in the CRC. As Egan notes, current political and societal concerns in the Republic of Ireland on the issues of children’s rights have seen reliance on elements of the CRC in arguing for more child-centred approaches to difficult issues. However, challenges still remain. As evidenced by Rehman’s and Kenny’s articles, religion, culture and immigration can have profound impacts on the rights of the child, yet the CRC has not fully pierced the sovereign veil on issues often seen as private and thus exceptionally sensitive.

Clearly, a multi-faceted approach is needed to achieve a greater degree of child protection across the wide range of difficulties and dangers that childhood can present. The Children’s Convention appears to have survived its infancy relatively unscathed: the same cannot be said of many of the children who feature in the case law and empirical research referred to by the contributing authors.

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46 Moore, “The CRC comes of age”, n. 43 above, pp. 226–32.

47 See, D A Balton, “The Convention on the Rights of the Child: prospects for enforcement” (1990) 12(1) *Human Rights Quarterly* 121, p. 121; M Jupp, “The UN Convention on the Rights of the Child” (1990) 12(1) *Human Rights Quarterly* 130, pp. 135–6.

48 T Hammarberg, “The UN Convention on the Rights of the Child – and how to make it work” (1990) 12(1) *Human Rights Quarterly* 97, pp. 99–100.

49 A Quennerstedt, “Children, but not really humans: critical reflections on the hampering effect of the ‘3Ps’” (2010) 18 *International Journal of Children’s Rights* 619, pp. 621–3 and 629 *et seq.*

