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The CRC at 21: assessing the legal impact

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Introduction

The Convention on the Rights of the Child (CRC) is an international treaty which sets out the rights of children across all areas of their lives. The CRC is celebrated for its comprehensive scope and detail and the terms of the Convention have become the common interdisciplinary language of those who work with and for children in a variety of settings. The Convention's relevance to the study and implementation of children's rights in theory and in practice ranges from healthcare to education, from adoption and alternative care to children in conflict with the law. Researchers seeking to evaluate respect for children's rights in practice use the Convention's legal standards as a benchmark and those who campaign and advocate for better protection of children's rights use the Convention's legal status to underpin their work. In many contexts, those working to improve children's rights invoke the Convention's legally binding force to support their calls for further implementation, and training for professionals working with children uses the Convention as a means of enhancing awareness and understanding about children's rights. Being able to have recourse to a legal instrument greatly strengthens the work of researchers and advocates in all areas of children's rights.

The aim of this article, therefore, is to explore the legal impact of the Convention and to consider the extent of its influence in the national and international legal systems. The article begins by examining the Convention's status as a legal instrument. Then, in two sections, it considers what contribution the CRC has made to national and international law on children's issues. The first section addresses the extent to which the Convention has become part of national law and in some cases constitutional law in states which have ratified the Convention. It also considers some examples of where recourse to the Convention has had positive effect in the national courts. The second section considers the international contribution of the CRC, notably its impact on other legal instruments dealing with children's issues, and its influence on caselaw in regional courts like the European Court of Human Rights. The article concludes with a review of the Convention's legal status.

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L Lundy and U Kilkelly, "Using the Convention on the Rights of the Child as an auditing tool" (2006) 18(3) CFLQ 331–50.

² U Kilkelly, "Operationalising children's rights: lessons from research" (2006) 4(1) Journal of Children's Services 35–45.

The legal status of the Convention

THE DRAFTING PROCESS

The CRC was drafted following a Polish initiative to mark the UN-sponsored International Year of the Child in 1979.³ Apart from the desire to draft a children's rights instrument that was widely relevant and applicable – and could be ratified by as many states as possible – the intention was to adopt an instrument that would have binding legal effect. This was especially important given that there already existed two non-binding declarations in this area - one limited instrument was adopted by the League of Nations in 1924 while the United Nations adopted a more detailed declaration in 1959.5 The case for a legal instrument codifying children's rights was also supported by the fact that in 1966 the UN had adopted two instruments, namely the International Covenant on Civil and Political Rights⁶ and the Covenant on International, Economic and Social Rights⁷ – reflecting its commitment to promote respect for human rights through the adoption of binding human rights standards. With the decision to draft the CRC, the UN showed its support for an international instrument on children's rights that would be legally binding on states that ratified it as well as being widely applicable across political, economic and social divides. Although the drafting process was not entirely smooth, the strength of the commitment to the objectives of drafting a legally binding treaty to which all states could sign up meant that any stumbling blocks had to be overcome through political compromise, instead of being allowed to derail the process altogether.8

The drafters were largely successful in achieving their objectives. The Convention was adopted unanimously by the General Assembly on 20 November 1989⁹ and 30 days after the requisite 20 instruments of ratification had been received the Convention came into force just over nine months later, on 2 September 1990. It has now been ratified by 193 states parties, two short of universal ratification; as is well known, it has been signed but not ratified by the United States of America and Somalia. 10

THE OBLIGATION TO IMPLEMENT THE CRC

The status of the Convention as a legally binding instrument of international law is thus unequivocal. The core obligation to implement the Convention is set out in Article 4, which provides as follows:

³ J Fortin, Children's Rights and the Developing Law 3rd edn (Cambridge: CUP 2009), pp. 38-9.

⁴ G van Bueren, International Law on the Rights of the Child (Dordrecht: Martinus Nijhoff 1995), pp. 13-16.

Declaration of the Rights of the Child (1959) GA Res. 1386 (XIV), 14 UN GAOR Supp. (No 16) at 19, UN Doc. A/4354. See, generally, S Detrick (ed.), The UN Convention on the Rights of the Child. A guide to the travaux preparatoires (Dordrecht: Martinus Nijhoff 1992).

⁶ Adopted and opened for signature, ratification and accession by GA Res. 2200A (XXI) of 16 December 1966.

⁷ Adopted and opened for signature, ratification and accession by GA Res. 2200A (XXI) of 16 December 1966.

⁸ See T Hammarberg, "The Convention on the Rights of the Child and how to make it work" (1990) 12 HRQ 97–105. See also LJ LeBlanc, "The Convention on the Rights of the Child" (1991) 4(2) Leiden Journal of International Law 281–91.

⁹ Adopted and opened for signature, ratification and accession by GA Res. 44/25 of 20 November 1989. The Convention entered into force on 2 September 1990, in accordance with Article 49.

¹⁰ The US signed the Convention on 15 February 1994 and Somalia signed on 9 May 2002. For full details of ratification, reservations and declarations see www.ohchr.org. See S Kilbourne, "The wayward Americans – why the USA has not ratified the UN Convention on the Rights of the Child" (1998) 10 CFLQ 243 and also R Lawrence-Karski, "Legal rights of the child: the United States and the UN Convention on the Rights of the Child" (1996) 4 International Journal of Children's Rights 19–44.

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.

Although the second sentence of this Article provides, with regard to economic, social and cultural rights, that states must undertake such measures to the maximum extent of their available resources, it is important that Article 4 imposes a clear duty on states to take all appropriate measures, including the passing of legislation, to implement the Convention. This further illustrates the Convention's legal authority. Indeed, mindful of this, states have entered reservations seeking to limit the application of the Convention in specific areas, although under Article 51(2) a reservation incompatible with the object and purpose of the Convention shall not be permitted. States have also sought to limit the influence of the Convention by entering interpretive declarations, which allow them to assert their views inter alia on the meaning of particular provisions. 12

MONITORING IMPLEMENTATION

Although appearances might deceive, the Convention's legally binding status is not affected by its lack of an enforcement mechanism. Like other international human rights instruments, implementation of the CRC is monitored by a committee of independent experts – the Committee on the Rights of the Child – established under Article 43. Currently, there is no system for the determination of individual complaints, although discussions on an optional protocol to allow individuals to petition the Committee on the Rights of the Child are at an advanced stage. Although it is important to have a system of individual petition under the CRC, it is equally important to note the particular merits of the reporting mechanism. As a system designed to evaluate the extent to which states have implemented the Convention's provisions, it offers the opportunity for an holistic review – both by states themselves and by national non-governmental organisations – of measures taken to realise children's rights under the Convention. Where states engage constructively with the Committee in its review process, it can and does lead to reform of law and policy as well as improvements in practice.

The legal obligation on states to implement the CRC – set out in Article 4 – also informs the Committee's approach to the reporting process. For instance, from the outset, the Committee's reporting guidelines on initial reports requested states to provide it with information on the measures taken to harmonise national law and policy with the Convention. ¹⁶ In addition to seeking information from states that enables it to assess the implementation of the Convention in practice, information as to the "legislative, judicial,"

¹¹ The extent to which the CRC has been subjected to reservation, entered by states parties on ratification, impinges on the status of the Convention. This issue is, regrettably, beyond the scope of this paper, but see, further, W Schabas, "Reservations to the Convention on the Rights of the Child" (1996) 18(2) HRQ 472–91.

¹² A significant proportion of the declarations entered concern the application of the Convention to the unborn child, by virtue of the open-ended definition in Article 1. See, further, R Joseph, *Human Rights and the Unborn Child* (Dordrecht: Martinus Nijhoff 2009).

¹³ See comments by the Committee on the Rights of the Child on the proposal for a draft optional protocol prepared by the chairperson-rapporteur of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure, A/HRC/WG.7/2/3 13 October 2010, available at www.ohchr.org

¹⁴ See, further, U Kilkelly, "The UN Committee on the Rights of the Child: an evaluation in the light of recent UK experience" (1996) 8 CFLQ 105.

¹⁵ Ibid.

¹⁶ Committee on the Rights of the Child, General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties under Article 44 para. 1(a) of the Convention, UN Doc. CRC/C/5 1991, para. 9(a).

administrative and other measures" taken to further implementation of the Convention at national level is seen as key to the success of the monitoring function.¹⁷

As is explained further below, in some cases, the Convention enjoys the status of national law particularly in states with a monist system where incorporation into the domestic legal system is automatic on ratification. Where this is the case, the CRC can be litigated in the domestic courts and authorities can be challenged about the failure to secure Convention rights to children. Where the Convention is not part of the national legal order, however, those who seek to have children's CRC rights vindicated may struggle to find an effective avenue of redress. This enforcement deficit may give rise to the impression that the Convention is not a binding treaty. Of course, the inability to rely on the CRC in the domestic courts is not an indicator of the Convention's legal status or its importance in a legal sense. What it does mean, however, is that innovative ways must be found to give the Convention more practical effect, especially at national level. This is explained further below.

Impact of the CRC at national level

Article 4 of the CRC requires states to take all appropriate measures to implement the Convention. According to the Committee on the Rights of the Child, this requires states to ensure that law reform takes place in line with the Convention. As to how progress can be measured in this area, the CRC reporting process, notably the concluding observations issued by the Committee on the Rights of the Child after the review of each state party report, offers an objective assessment of the extent to which the Convention has been implemented in each state party. In its concluding observations, the Committee usefully documents the state's efforts to reform law and policy in line with the CRC and offers an assessment of what further measures need to be taken to achieve greater compliance. Analysis of this data is an important way to track the progress made by states over time in the achievement of greater implementation. ²¹

Studies have also undertaken assessments of progress at a more global level. In one important study undertaken by the UNICEF Innocenti project in 2007, the steps taken by 52 states parties to the CRC to implement the Convention were examined.²² The study found that the number of countries which has engaged in a process of law reform following their ratification of the CRC is very high. According to UNICEF, its results are "impressive" in that "the Convention has been incorporated directly into the law of two thirds of the countries studied".²³ Furthermore, "provisions on the rights of children have

¹⁷ For example, this information is requested at paras 15 (in respect of civil rights), 16 (in respect of family support and alternative care), 19 (in respect of basic health and welfare), 21 (in respect of education, welfare and leisure activities), and 23 (in respect of special protection measures): General Guidelines, n. 16 above. See this emphasis on measures to harmonise national law and policy with the Convention in other treaty reporting guidelines. See CRC Treaty Specific Reporting Guidelines, Harmonised According to the Common Core Document, CRC/C/58/Rev. 2, para. 19, available at www.ohchr.org.

¹⁸ See further A Aust, Handbook of International Law (Cambridge: CUP 2010), pp. 74-80.

¹⁹ See C M Lyon, "Interrogating the concentration on the UNCRC instead of the ECHR in the development of children's rights in England?" (2007) 21(2) Children and Society 147–53.

²⁰ Committee on the Rights of the Child, General Comment No. 5, General Measures of Implementation UN Doc. CRC/GC/5 (2003) available at www.ohchr.org.

²¹ On the experience of Ireland, see U Kilkelly, Children's Rights in Ireland: Lam, policy and practice (Dublin: Tottel 2008), pp. 4–8.

²² UNICEF Innocenti Research Centre, Law Reform and Implementation of the CRC (Florence: UNICEF 2007). The study included 9 states from Asia and the Pacific, 8 from Central and Eastern Europe, 11 Islamic states, 6 from sub-Saharan Africa, 14 from the Americas and 4 from Western Europe: p. 1.

²³ Ibid. p. viii.

been incorporated into the constitutions of one third of the countries studied".²⁴ Although the research found great diversity among the measures states had taken to give the Convention legal effect in their national systems, it concluded that no single model could or should be advocated as a "blueprint" for incorporation.²⁵

Just as it is arguable that there is little connection between ratification of a human rights treaty and better human rights protection, ²⁶ it cannot be concluded simply that giving the Convention the force of domestic or even constitutional law is the most effective route to greater protection for children's rights at national level. Although its effect may be difficult to measure, it is significant, nonetheless, that Article 4 requires legislative measures to implement the Convention. More in-depth study is needed, however, to determine whether a particular model of incorporation would reap greater rewards.

What is impressive about the results of the UNICEF study is the extent not only of incorporation of the CRC – including those states for whom incorporation requires an Act of parliament - but also the number of states which have shown the ultimate legal commitment to the CRC by giving it, or some of its provisions, constitutional status. Africa arguably leads the way here with provisions of new constitutional instruments in Burkina Faso, Ethiopia, Rwanda and South Africa (which has the most extensive provision) all containing express protection for children's rights.²⁷ In Europe, the constitutions of Poland, Romania, Slovenia and Ukraine contain articles dedicated exclusively to the rights of children, and in Asia and the Pacific, new constitutions were adopted by Nepal in 1990, by Vietnam in 1992 and by Fiji in 1997, which contain some (limited) protection for children's rights.²⁸ In Europe, by contrast, the UNICEF study found that only two countries - Iceland and Belgium - had given express constitutional protection to children's rights. Moreover, recent proposals to give express constitutional protection to children's rights in Ireland have floundered,²⁹ and efforts to ensure that children's rights are incorporated into the Bill of Rights for Northern Ireland have met with little success to date. 30 Although constitutional protection of children's rights is often seen as the high-water mark in the protection of children's rights at national level, as Tobin reminds us, it is both an important indicator of the political and social status of children, while also saying something but not everything about the status of children in a particular society.³¹

It is important then to look beyond constitutional protection and, indeed, beyond incorporation, when measuring the Convention's impact at a national level. Here, too, the UNICEF study comments favourably on the extent to which states parties have brought their national law into line with the Convention. According to UNICEF:

²⁴ Innocenti Research Centre, Law Reform, n. 22 above,

²⁵ Ibid.

²⁶ This is a vast area of legal scholarship. See, for example, O A Hathaway, "Do human rights treaties make a difference?" (2002) 111 Yale Law Journal 1870 and R Goodman and D Jinks, "Measuring the effects of human rights treaties" (2003) 14(1) Eur J Int Law 171–83.

²⁷ See Innocenti Research Centre, Law Reform, n. 22 above, pp. 13–14.

²⁸ Ibid. p 15.

²⁹ See Kilkelly, Children's Rights, n. 21 above, pp. 71-83.

³⁰ See U Kilkelly, "Children's rights in the Bill of Rights: meeting or exceeding international standards" (2001) 52 (3&4) NILQ 286–95. However, the latest proposals contain no provision for children's rights. See Northern Ireland Office, Consultation Paper: A Bill of Rights for Northern Ireland – next steps (Belfast: NIO November 2009).

³¹ J Tobin, "Increasingly seen and heard: the constitutional recognition of children's rights" (2005) 21(1) South African Journal on Human Rights 86–126, p. 88.

Nearly all of the countries studied have made serious efforts to bring their legislation into greater conformity with the Convention, either by adopting children's codes, or the gradual, systematic reform of existing law or both.³²

Examples of best practice in this context include Romania which adopted comprehensive codifying legislation concerning the rights of the child – the Law on the Protection and Promotion of the Rights of the Child – in 2004.³³ And even those states – like the United Kingdom – that resisted widespread reforms following ratification of the CRC, have been seen to take legislative action gradually to ensure greater compliance between the CRC and national law since that time.³⁴ Incorporation should thus not be seen as the only way in which implementation of the Convention can be achieved, especially given the diversity of approaches taken by states.³⁵ Indeed, gradual reform of domestic law, in line with the Convention, may achieve better results over time.³⁶

Impact of the CRC at international level

In addition to the impact of the CRC at national level, it is important to consider the horizontal impact that the Convention has had at an international level. As noted above, the CRC is a highly ratified treaty which enjoys the force of binding international law. Although the Convention only binds states parties that have undertaken to implement it through ratification, it is apparent that the Convention has resulted in a proliferation of children's rights instruments at international level. Although there is no scientific study identifying with precision the cause and effect between the adoption of the Convention and the proliferation of international children's rights instruments, it is at least arguable that the unparalleled legal and political status enjoyed by the CRC has had a positive knock-on effect on international standard-setting activities.

The most direct manner in which the Convention has contributed to international law is in the adoption of two Optional Protocols – on the Sale of Children, Child Prostitution and Pornography³⁷ and on the Involvement of Children in Armed Conflict.³⁸ In addition, and more generally, the Committee on the Rights of the Child has itself contributed to international law on children's rights through the adoption of general comments under Article 45 of the Convention.³⁹ Although not binding on states, these documents represent the Committee's authoritative view of the application of the Convention to specific areas and they also reflect the priorities of the Committee as it attempts to guide states and others on how to interpret and apply particular provisions of the Convention in specific contexts. To date, the Committee has published 13 general comments, including on: the Aims of

³² Innocenti Research Centre, Law Reform, n. 22 above, p. viii.

³³ Ibid. p. 20. On the position of Serbia, see O Cvejic, "Rights of the child under Serbian law: harmonisation with European and international conventions" (2008) 42(1) Zbornic Radora 145–66.

³⁴ The same point can be made with respect to Sweden, Innocenti Research Centre, Law Reform, pp. 21-2.

³⁵ On the role of policy, see J Williams, "Incorporating children's rights: the divergence in law and policy" (2007) 27(2) Legal Studies 261–87.

³⁶ Analysis of the role of the judiciary is unfortunately outside the scope of this paper. However, for some discussion, see J Harrington, "The democratic challenge of incorporation: international human rights treaties and national constitutions" (2007) 38 Victoria University of Wellington Law Review 217.

³⁷ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted and opened for signature, ratification and accession by GA Res. A/RES/54/263 of 25 May 2000. It entered into force on 18 January 2002.

³⁸ Adopted and opened for signature, ratification and accession by GA Res. A/RES/54/263 of 25 May 2000. It entered into force 12 February 2002.

³⁹ Article 45 provides that in order to foster implementation of the Convention, the committee may inter alia make suggestions and general recommendations based on information received pursuant to Articles 44 and 45 of the present Convention.

Education (No. 1); Adolescent Health (No. 4); General Measures of Implementation (No. 5); Child Rights in Early Childhood (No. 6); Children with Disabilities (No. 9); Juvenile Justice (No. 10); and on Implementation of Article 12 (No. 12). 40 Although the legal status of the comments is not clear, they are worthy of attention to the extent that they clarify states' obligations to implement and respect the provisions of the CRC in a wide range of areas. They may be a useful supplement in litigation where they illuminate the obligations on the state in the area of children's services.

The CRC and, indeed, the guidance of the Committee on the Rights of the Child have also had an influence on human rights law-making in other areas of the UN. In particular, the Convention on the Rights of Persons with Disabilities⁴¹ not only contains a provision dedicated to the rights of children with disabilities – under Article 7 – but, in addition, the terms of that provision reflect the guidance of the Committee on the Rights of the Child which identified as general principles the values of non-discrimination (Article 2 of the CRC), best interests of the child (Article 3) and the right of the child to be heard (Article 12).⁴²

In Europe, the Convention has arguably had a much greater impact on standard-setting in both the Council of Europe and the European Union (EU). Developments in the EU have been more recent but they may, ultimately, result in deeper implementation of children's rights standards in EU member states. The EU Charter of Fundamental Rights and Freedoms contains a provision dedicated solely to children's rights.⁴³ Article 24 contains both two of the general principles of the CRC - the best-interests standard and the right to be heard - while also making substantive provision in Article 24(1) for the child's right to protection and care, and in Article 24(3) for the child's right to maintain a personal relationship and direct contact with his/her parents on a regular basis. As with the Convention on the Rights of Persons with Disabilities, it is significant that the accepted wording of the CRC in these areas has been reiterated here 44 and there is cause for optimism that the introduction of these principles into the Charter will result in a greater child focus being brought to bear on areas of free movement, immigration and asylum, for example. In terms of the potential of the Charter to create a level playing field for children in the exercise of their rights, it is significant also that Article 24 is included in a category headed 'Equality'. Two provisions - Articles 20 (equality before the law) and 21 (no discrimination inter alia on grounds of age) – serve to strengthen the protection of children from differential treatment. Taken together with Article 7 on the right to respect for private and family life and Article 14, which provides for a right to education, it is already apparent that the presence of these standards in the Charter has galvanised political support and action in support of greater children's rights in law and policy-making within the EU,

⁴⁰ These documents are all available on the website of the Committee on the Rights of the Child at www.ohchr.org.

⁴¹ The Convention on the Rights of Persons with Disabilities was adopted by the General Assembly on 13 December 2006 by GA Res. A/RES/61/106. It was opened for signature in March 2007 and came into force on 3 May 2008.

⁴² Indeed, the CRC is credited with making a mark for the rights of children with disabilities. See M Jones and L A B Marks, "Beyond the Convention on the Rights of the Child: the rights of children with disabilities in international law" (1997) 5 International Journal of Children's Rights 177–92.

⁴³ See C McGlynn, "Rights for children? The potential impact of the European Union Charter of Fundamental Rights" (2002) 8 European Public Law 387–400. The charter came into force as part of the Lisbon Treaty on 1 December 2009.

⁴⁴ However, see the concerns of C McGlynn, Families and the European Union: Law, politics and pluralism (Cambridge: CUP 2006), pp. 70–1.

notably in the recent adoption of the EU Agenda for the Rights of the Child.⁴⁵ Here, it is evident that the CRC has generated sufficient consensus to drive implementation of children's rights in practice, as well as in law and policy, at a European level.

The impact of the CRC is also visible on the broader, political landscape occupied by the Council of Europe. The Council of Europe has drafted several binding treaties in the areas of child and family law, many of which have either been revised or adopted following the entry into force of the CRC. These include the Convention on the Adoption of Children, ⁴⁶ the Convention on Contact Concerning Children, ⁴⁷ and the Convention on the Exercise of Children's Rights, concerning the procedural rights of children in family law matters. 48 As Fortin notes, this latter treaty was specifically drafted to remedy a perceived weakness of the CRC, that children might not be able to exercise their substantive rights without the adoption of specific procedural measures to support them.⁴⁹ Also notable in this area is the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse which came into force in July 2010.⁵⁰ The existence of such a range of children's rights treaties, all informed by the terms of the United Nations Convention but adopted within the political context of the Council of Europe is further evidence of the Convention's dominant influence. Although not all 47 member states of the Council of Europe have yet ratified each treaty, in developing such a body of human rights law on children's issues, the Council is itself reflecting a consensus in favour of giving legal protection to children's rights at international level. The strength of political support for implementation of the CRC is also seen in the development by the Council of Europe of a programme specifically dedicated to children's rights. As part of its children's programme launched in 2005 - Building a Europe with and for Children - the Council of Europe is committed to developing standard-setting instruments and implementing a range of activities to promote children's rights and protect children from violence.⁵¹ In November 2009, the Council of Europe adopted its Guidelines on Integrated National Strategies for the Protection of Children from Violence and, in November 2010, the Committee of Ministers adopted its Guidelines on Child Friendly Justice developed for the first time with the direct input of young people themselves.⁵² Further standard-setting instruments are being drafted, directed at the development of child-friendly healthcare and in the area of parental responsibility.⁵³ Although these do not create legally binding obligations on states - nor are they designed to - their fit with the provisions and principles of the CRC make their supplementary nature very clear. Their innate value, in fact, is to help states work

⁴⁵ Communication from the Commission to the Euopean Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An EU Agenda for the Rights of the Child, com/2011/0060, http://ec.europa.eu/justice/policies/children/policies_children.

⁴⁶ European Convention on the Adoption of Children (CETS No. 58) and European Convention on the Adoption of Children Revised (CETS No. 202).

⁴⁷ The Convention on Contact Concerning Children (CETS No. 192).

⁴⁸ The European Convention on the Exercise of Children's Rights (ETS No. 160).

⁴⁹ Fortin, Children's Rights, n. 3 above, p. 236, citing M Killerby, "The draft European Convention on the Exercise of Children's Rights" (1995) 3 International Journal of Children's Rights 127.

⁵⁰ The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201).

⁵¹ The programme is currently implementing a three-year strategy covering 2009–2013. See details at www.coe.int/children.

⁵² See U Kilkelly, Listening to Children about Justice: Report of the Council of Europe Consultation on Child Friendly Justice (Strasbourg: Council of Europe 2010), available at www.coe.int/childjustice.

⁵³ See also Recommendation CM/Rec. (2008) 11 of the Committee of Ministers to member states on the European rules for juvenile offenders subject to sanctions or measures drawing on the CRC provisions on youth justice and detention.

towards greater implementation at a national level of both Council of Europe standards and, indeed, the CRC itself.

IMPACT ON THE ECHR

Staying within the Council of Europe, the impact of the CRC has long since been visible on the caselaw of the European Court of Human Rights (ECtHR). One of the now welldocumented uses to which the CRC has been put is the recourse to its provisions made by the ECtHR in its implementation of the European Convention on Human Rights (ECHR).⁵⁴ Although first signs of this approach were noted in the physical punishment case of A v UK.55 it is apparent that caselaw in a whole range of areas concerning children has clearly been influenced either directly or indirectly by the principles and provisions of the CRC.⁵⁶ Most notable here are those cases concerning the right of the child to be heard. For instance, in a series of cases against Germany,⁵⁷ and in the case of C v Finland,⁵⁸ the judgments of the ECtHR appear to have been directly informed by the duty under Article 12 to ensure that children's views are heard and taken into account in decisions that concern them.⁵⁹ This principle has also formed part of the court's decision-making in the criminal cases of T, V and SC against the UK. 60 Here, the influence of Article 12 of the CRC is evident on the court's development of the principle of "effective participation" as part of the child's right to a fair trial under Article 6 of the ECHR. It is difficult to imagine that these principles would have emerged through the ECtHR's caselaw were it not for the influence of the CRC. The caselaw in other areas also bears witness to the CRC's influence; the identity case of Mikulic v Croatia61 and the many significant child protection cases epitomised by Z and Others v UK,62 to name but two. Moreover, the 2008 case of Maslov v Austria arguably saw a significant shift in the court's approach to the use of the Convention.⁶³ This case concerned the deportation of the applicant who had been convicted of a number of criminal offences as a child. According to the court, where expulsion measures against a juvenile offender are concerned, the obligation to take the best interests of the child into account includes an obligation to facilitate the child's reintegration, in line with Article 40 of the Convention, which makes reintegration an aim to be pursued by the juvenile justice system. In the court's view, reintegration would not be achieved by severing the child's family or social ties through expulsion. The CRC was thus

⁵⁴ U Kilkelly, "The best of both worlds for children's rights? Interpreting the European Convention on Human Rights in the light of the UN Convention on the Rights of the Child" (2001) 23(2) HRQ 308–26.

⁵⁵ Av UK (1999) 27 EHRR 611.

⁵⁶ See Kilkelly, Listening to Children, n. 52 above; U Kilkelly, "Effective protection of Children's rights in family cases: an international approach" (2002) 12(2) Transnational Law and Contemporary Problems 336–54 and U Kilkelly, "Strengthening the framework for enforcing children's rights: an integrated approach", in M Ensalaco and LC Majka (eds), Children's Human Rights: Progress and challenges (Boulder: Rowman and Littlefield 2005), pp. 53–80.

⁵⁷ See, for example, Sahin v Germany (2003) 36 EHRR 765 [GC] and Sommerfeld v Germany (2004) 38 EHRR 35 [GC].

⁵⁸ C v Finland [2006] 2 FLR 597.

⁵⁹ Clearly, however, these are judgments of considerable complexity. See, further, Fortin, *Children's Rights*, n. 3 above, p. 312.

⁶⁰ T v UK (1999) 30 EHRR 121; V v UK (1999) 30 EHRR 121; SC v UK (2004) 40 EHRR 10. On these cases and related international standards, see U Kilkelly, "Youth courts and children's rights: the Irish experience" (2008) 8(1) Youth Justice 39–56.

^{61 (2004) 48} EHRR 43.

^{62 [2001] 2} FCR 246.

^{63 [}GC] 23 June 2008.

one of the grounds used to find that the expulsion was a disproportionate interference with the applicant's rights under Article 8.

Conclusion

This brief survey of the Convention's legal status and impact considered the extent of the Convention's influence nationally and internationally. It was by no means an exhaustive account of those issues; nor did it consider the Convention's role in domestic jurisprudence, in the pursuit of policy objectives, or in practice: all of which are important topics worthy of complete analysis in their own right. Rather, the aim of this piece was to reflect on the Convention's role and its contribution to law itself through incorporation at national level and its support for a proliferation of instruments, binding and non-binding at international level.

Although further study is necessary to fully evaluate the nature of the Convention's influence, any assessment of the Convention's involvement in the development of legal standards, nationally and internationally, is likely to acknowledge this contribution as nearing the top end of the scale. This is arguably due to the increasing cross-fertilisation of legal standards that has coincided with an increasingly globalised world, which has seen the principles and provisions of the CRC being argued before national, regional and international bodies with increasing frequency and effect. This convergence takes place not just, as this article has shown, at an international level, or between the international and the domestic fora, but also between the international, the regional and the national. As the CRC continues to influence the caselaw of the ECHR, for example, so too will its impact be felt in those legal systems in which the ECHR has become part of national law, even where the CRC has not. As competence in the EU grows in this area, the effect of the CRC will become more direct both through the EU Charter and through instruments like the Brussels Regulation on parental responsibility that are already directly effective in national law.⁶⁴

At national level, the ultimate example of the influence of the CRC is arguably its use by the Supreme Court of the United States in *Roper v Simons*,⁶⁵ the juvenile death penalty case decided in 2005. Here the court drew on the CRC ban on the death penalty notwithstanding that the US has neither ratified nor incorporated the Convention into national law. Although not uncontroversial, the acceptance of the Convention's standards by a court not bound by those standards is truly significant. These developments suggest that uncharted territory may lie ahead for the Convention which may prove fertile ground for researchers and for lawyers; they also offer significant potential, opportunity and indeed challenge for all those seeking to maximise the Convention's use to ensure greater protection of the legal rights of children.

⁶⁴ Council Regulation 2201/2003/EC of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing reg. 1347/2000/EC, OJ 2003 L338/1. For a children's rights analysis see H Stalford, "Brussels II and beyond: a better deal for children in the EU?", in K Boele-Woelki (ed.), Unification and Harmonisation of Family Law (Antwerp: Intersentia 2003), pp. 471–82.

^{65 543} US 551 (2005).