



## Introduction

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When the United Nations General Assembly adopted the Convention on the Rights of the Child<sup>1</sup> on 20 November 1989, it signalled a seismic shift in the legal status of children and young people. Rather than being the objects of adult munificence and protection, they became fully-fledged rights-holders, a point reinforced by the United Nations Committee on the Rights of the Child, established to monitor compliance with the Convention:

States must see their role as fulfilling clear legal obligations to each and every child. Implementation of the human rights of children must not be seen as a charitable process, bestowing favours on children.<sup>2</sup>

The acid test, of course, lies in the extent to which the rights guaranteed to the world's children and young people by the Convention are being given effect in policy, law and practice in countries throughout the world. The focus of this volume is the implementation of Article 3, making the best interests of the child a primary consideration in all actions concerning children and requiring States Parties to ensure their care and protection. This Introduction provides an overview of the Convention before highlighting the salient themes surrounding implementation of Article 3 and discussed in the book.

### Scope and Content of the Convention

While there had been previous domestic and international efforts directed at gaining recognition of children's rights,<sup>3</sup> none equalled the

<sup>1</sup> United Nations Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989, entered into force 2 September 1990.

<sup>2</sup> Committee on the Rights of the Child, *General Comment No. 5: General Measures of implementation of the Convention on the Rights of the Child* (2003), CRC/GC/2003/5, para. 11.

<sup>3</sup> Principal amongst them are the Geneva Declaration of the Rights of the Child of 1924 and the United Nations Declaration of the Rights of the Child of 1959, U.N. Doc. A/4354.

status and scope of this Convention.<sup>4</sup> It is global, holistic and specific. In global terms, it is designed to apply to all children and young people, regardless of where they are located, in peacetime and in time of conflict.

It is holistic in that it addresses the whole child by recognising his or her social, economic and cultural rights, as well as the child's civil and political rights. Historically, civil and political rights were accorded a degree of priority, placing them ahead of economic, social and cultural rights. That approach gave credence to the view of human rights as an essentially Western or European construct, unsuited to countries in Africa and Asia that were seeking to rid themselves of the residue of colonialism.<sup>5</sup> The Vienna Human Rights Declaration of 1993 has described all human rights as 'universal, indivisible, interdependent, and interrelated',<sup>6</sup> a stance endorsed by the Committee on the Rights of the Child in the context of that Convention with the words, 'Enjoyment of economic, social and cultural rights is inextricably intertwined with enjoyment of civil and political rights.'<sup>7</sup>

Alongside its global and holistic application is the Convention's emphasis on the unique nature of each child through its requirement for individualised decision-making focusing on the needs and circumstances of each specific child. The value placed by the Convention on the individual child is evident from the opening paragraphs of the Preamble and has been reiterated in successive General Comments issued by the UN Committee on the Rights of the Child.<sup>8</sup>

<sup>4</sup> On the history of children's rights, see, Philip Veerman, *The Rights of the Child and the Changing Images of Childhood* (Dordrecht: Martinus Nijhoff, 1992) and Philip Alston and John Tobin, *Laying the Foundation for Children's Rights* (Florence: UNICEF Innocenti Centre, 2005), pp. 3–9.

<sup>5</sup> José A. Lindgren Alves, 'The Declaration of Human Rights in Postmodernity' 22 *Human Rights Quarterly* 478 (2000) and Makau Mutua, 'Savages, Victims and Saviors: The Metaphor of Human Rights' 42 *Harvard International Law Journal* 201 (2001).

<sup>6</sup> Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23, 25 June 1993, para. 5.

<sup>7</sup> United Nations Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child* (2003), CRC/GC/2003/5, para. 6.

<sup>8</sup> The Preamble to the Convention refers to the requirement that the child be 'fully prepared to live an individual in society ... in the spirit of peace, dignity, tolerance, freedom, equality and solidarity'. See also, e.g., *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1) (2013), CRC/GC/2013/14, para. 3, in which the UN Committee directs that 'the concept of the child's best interests ... should be adjusted and defined on an individual basis' and 'must be assessed and determined in light of the specific circumstances of the particular child'.

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Opponents of children's rights often claim that, by accepting children as rights-holders, there is the danger of granting them autonomy and, thereby, depriving them of the protection adults should be providing for them.<sup>9</sup> Some see recognition of children's rights as posing a danger to the family and to society. In this, they misunderstand – one suspects, sometimes wilfully – the whole nature of the UN Convention on the Rights of the Child. Unlike the 'child liberationists' of the 1970s,<sup>10</sup> the drafters of the Convention did not seek to leave children to their own devices. Rather, their awareness of the rich and varied nature of childhood and of child development led them to recognise both the evolving capacities of children and young people and the central role of parents and, where appropriate, the wider family group, in the child's life.<sup>11</sup>

Many attempts have been made to classify Convention rights<sup>12</sup> and one of the best known – and appealing for its sheer simplicity – is that of

<sup>9</sup> See, for example, Michael King, 'Against Children's Rights' 1996 *Acta Juridica* 28; Bruce C. Hafen and Jonathan O. Hafen, 'Abandoning Children to their Autonomy: The United Nations Convention on the Rights of the Child' 37(2) *Harvard International Law Journal* 449 (1996); Martin Guggenheim, *What's Wrong with Children's Rights?* (Cambridge, MA: Harvard University Press, 2005); and Clark Butler (ed.), *Child Rights: The Movement, International Law and Opposition* (West Lafayette, ID: Purdue University Press, 2012).

<sup>10</sup> Richard Farson, for example, saw children's rights as including not only the more traditional rights to education and justice, but also the more controversial rights to sexual freedom and choice of living arrangements: Richard E. Farson, *Birthrights* (New York: Macmillan, 1974). John Holt's list was similar and included the right to experiment with drugs: John C. Holt, *Escape from Childhood* (New York: E.P. Dutton, 1974), pp. 249–265.

<sup>11</sup> Article 5 brings all of these elements together, referring to the 'evolving capacities of the child' as well as 'the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians and other persons legally responsible for the child'. By adopting this particular phraseology, the Convention recognises that the Western notion of the nuclear family is not the only model. Thus, the wider family groups, recognised in other cultures, like the African, First Nation Canadian and Native American tribe, the Hawaiian 'ohana, the Maori whānau and so forth, are given their place in the Convention's scheme.

<sup>12</sup> Vitit Muntarbhorn classifies Convention rights as follows: general rights; rights requiring protective measures; rights concerning the civil status of children; rights concerning government and welfare; rights concerning children in special circumstances or in 'especially difficult circumstances'; and procedural considerations: Vitit Muntarbhorn, 'The Convention on the Rights of the Child: Reaching the Unreached?' (1992) 91 *Bulletin of Human Rights* 66, pp. 66–67. Lawrence J. LeBlanc adopts and adapts the classification of Jack Donnelly and Rhoda Howard, addressing human rights more generally, and classifies Convention rights under four heads: survival, membership, protection, and empowerment rights: Lawrence J. LeBlanc, *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights* (Lincoln, NE: University of Nebraska Press, 1995), pp. xviii–xix.

Thomas Hammarberg who grouped Convention rights according to ‘the three Ps’: provision or ‘the right to get one’s basic needs fulfilled’; protection or ‘the right to be shielded from harmful acts or practices’; and participation or ‘the right to be heard on decisions affecting one’s own life’.<sup>13</sup>

Four general principles, themselves Convention rights, underpin the UN Convention: the child’s right to freedom from discrimination (Article 2); the child’s best interests as a primary consideration in all actions concerning children (Article 3); the child’s right to life, survival and development (Article 6); and the child’s right to participate in decision-making (Article 12).<sup>14</sup> It is through the application of these general principles that the Convention marries together the empowerment of children and seeks to ensure their protection.

### Article 3

Due to their youth, inexperience and lack of political power, children and young people are not well placed to protect their own interests or to take care of themselves. Thus, Article 3 places the obligation to do so firmly on States Parties to the Convention and provides:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the

<sup>13</sup> Thomas Hammarberg, ‘The UN Convention on the Rights of the Child – And How to Make It Work’ (1990) 12 *Human Rights Quarterly* 97, pp. 99–100.

<sup>14</sup> United Nations Committee on the Rights of the Child, *General Comment No. 3: HIV/AIDS and the rights of the child* (2003), CRC/GC/2003/3, p. 3, para. 5, referring to the ‘rights embodied in the general principles of the Convention’ and referring to these four articles. See also, *General Comment No. 5*, CRC/GC/2003/5, para. 12, again referring to the same ‘general principles’.

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areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

In *General Comment 14*, the UN Committee on the Rights of the Child signalled the pervasive nature of ‘best interests’, describing it as ‘a threefold concept’, being a substantive right, a fundamental interpretive legal principle and a rule of procedure.<sup>15</sup> By according best interests the status of a substantive right, it had the following in mind:

The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general.<sup>16</sup>

The effect of best interests being a fundamental interpretive legal principle is that, ‘If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child’s best interests should be chosen.’<sup>17</sup> In terms of best interests being a rule of procedure, the Committee meant that, where a decision will affect a child or children, the decision-making process must include evaluation of the impact of the decision on them, with the decision-maker demonstrating expressly how the child’s or children’s best interests have been taken into account.<sup>18</sup>

Article 3(2) and 3(3) lay the crucial foundations for the state’s obligations in respect of the care and protection of children and its standard-setting and oversight role in respect of institutions, services and facilities designed to meet that end, obligations that are expanded upon later in the Convention.

### The Dynamism, Evolution and Impact of the Convention

The speed with which the requisite twenty states ratified the Convention meant that it entered into force less than a year after its adoption by the UN, more quickly than any other human rights instrument.<sup>19</sup> By 2015,

<sup>15</sup> *General Comment No. 14 on the rights of the child to have his or her best interests taken as a primary consideration* (2013), CRC/C/GC/14, para. 6.

<sup>16</sup> *Ibid.*, para. 6(a). <sup>17</sup> *Ibid.*, para. 6(b). <sup>18</sup> *Ibid.*, para. 6(c).

<sup>19</sup> Upon ratification, States may make reservations, excluding or modifying the legal effect of certain Convention provisions, albeit, no reservation ‘incompatible with the object and

there were 196 parties to the Convention<sup>20</sup> and it is ironic, given its very significant contribution to the drafting process,<sup>21</sup> that the United States is the only UN Member State not to have ratified the Convention.

The Convention's entry into force was, of course, only the beginning of a dynamic and evolutive process. One part of that dynamism is provided for in the instrument itself through the mechanism whereby States Parties self-report, two years after ratification and periodically, every five years thereafter, on their progress in complying with the Convention.<sup>22</sup> These country reports are then scrutinised by the UN Committee on the Rights of the Child, which, in turn, publishes its Concluding Observations on the State Party's progress in fulfilling its obligations under the Convention. The premise is that, through this iterative process of reporting, evaluation and feedback, individual state compliance with all of the Convention's provisions will improve over time.

The Committee makes further contributions to the Convention's evolution through its *Days of General Discussion* when it explores specific aspects of, and challenges to, its implementation.<sup>23</sup> In the wake of the economic crisis that rocked the world in the early years of this century, for example, it devoted its 2007 *Day of General Discussion*, to the issue of limited state resources and the implications for children's rights, later publishing its recommendations.<sup>24</sup>

Rather more directive are the UN Committee's *General Comments*, where it provides guidance to States Parties and others on what it

purpose' of it is permissible: Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, Article 19(c).

<sup>20</sup> The total of 196 comprises 192 of the 193 UN Member States plus the Cook Islands, the Holy See, Niue and the State of Palestine. Up-to-date information on ratification can be found on the UN Treaty Collection website: <https://treaties.un.org/> and the Office of the High Commissioner of Human Rights website: <http://indicators.ohchr.org/> There was a frisson of excitement when, on 20 January 2015, UNICEF announced on its website that Somalia had ratified: [www.unicef.org/media/media\\_78732.html](http://www.unicef.org/media/media_78732.html) In the event, it was not until 1 October 2015 that Somalia's instrument of ratification was lodged, bringing the Convention into force there, in accordance with Article 49(2), on 31 October 2015.

<sup>21</sup> Cynthia Price Cohen, 'The Role of the United States in the Drafting of the Convention on the Rights of the Child' (2006) 20 *Emory International Law Review* 185.

<sup>22</sup> Article 44.

<sup>23</sup> For details of the Days of General Discussion, see, [www.ohchr.org/EN/HRBodies/CRC/Pages/DiscussionDays.aspx](http://www.ohchr.org/EN/HRBodies/CRC/Pages/DiscussionDays.aspx).

<sup>24</sup> Office for the High Commissioner for Human Rights, *Resources for the Rights of the Child – Responsibility of States* (2007): [www.ohchr.org/EN/HRBodies/CRC/Pages/DiscussionDays.aspx](http://www.ohchr.org/EN/HRBodies/CRC/Pages/DiscussionDays.aspx).

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understands the various Convention obligations to mean.<sup>25</sup> Strictly speaking, these interpretations are not binding on States Parties, since the UN Convention, like other human rights treaties, does not give the relevant treaty body express power to adopt binding interpretations of the treaty.<sup>26</sup> However, it is widely accepted that the views expressed in General Comments are ‘non-binding norms that interpret and add detail to the rights and obligations’<sup>27</sup> contained in the treaty or as a distillation of the particular committee’s views<sup>28</sup> and they are of immense help to those charged with implementing the obligations.

Nor has the Convention itself remained static and there are now three Optional Protocols to it. The first two, addressing the involvement of children in armed conflict<sup>29</sup> and the sale of children, child prostitution and child pornography,<sup>30</sup> each adopted in 2000, have garnered significant support.<sup>31</sup> The third, providing for a right of individual complaint to the UN Committee through what is described in UN parlance as a ‘communications procedure’, dates from 2011 and has not, as yet, proved particularly popular with states.<sup>32</sup>

The UN Convention has been in force for over a quarter of a century and there is no doubt that it has had significant impact on international, regional and domestic policy-makers, legislators, courts and those

<sup>25</sup> The Committee’s General Comments can be found at: [www2.ohchr.org/english/bodies/crc/comments.htm](http://www2.ohchr.org/english/bodies/crc/comments.htm).

<sup>26</sup> International Law Association: Committee on International Human Rights Law and Practice, *Final Report on the Impact of Finding of the United Nations Human Rights Treaty Bodies* (London, 2004), paras. 16 and 18.

<sup>27</sup> Helen Keller and Leena Grover, ‘General Comments of the Human Rights Committee and their Legitimacy’ in Helen Keller, Geir Ulfstein and Leena Grover (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge: Cambridge University Press, 2012), p. 131.

<sup>28</sup> Philip Alston, ‘The Historical Origins of the Concept of “General Comments” in Human Rights Law’ in de Laurence Boisson de Chazournes and Vera Gowlland-Debbas, *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (The Hague: Martinus Nijhoff, 2001), p. 775.

<sup>29</sup> Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2172 UNTS 222, adopted 25 May 2000.

<sup>30</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2171 UNTS 227, adopted 25 May 2000.

<sup>31</sup> See, UN Treaty Collection website: <https://treaties.un.org/> and the Office of the High Commissioner of Human Rights website: <http://indicators.ohchr.org> for details of the states that are parties and their current status.

<sup>32</sup> Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, A/RES/66/138, adopted 19 December 2011.

working with children and has been the catalyst for reform of policy, law and practice.<sup>33</sup>

That the Convention should hold considerable sway with international organisations is, perhaps, unsurprising. As Adam Lopatka, the Chair-Rapporteur of the Working Group that drafted the Convention, observed:

The Convention has become the framework for all of UNICEF's programmes and activities. Moreover, provisions of the Convention are referred to by such international organizations as UNESCO, WHO and ILO. Improvement of the welfare of the child has been given priority in the activities of the United Nations and other international organizations.<sup>34</sup>

At a regional level, the Convention's impact on the content of regional children's rights instruments, including the African Charter on the Rights and Welfare of the Child<sup>35</sup> and the European Convention on the Exercise of Children's Rights,<sup>36</sup> is tangible. Regional human rights courts, like the Inter-American Court of Human Rights, use the provisions of the UN Convention when interpreting more general regional human rights instruments.<sup>37</sup> Indeed, the Grand Chamber of the European Court of Human Rights gave it the following unambiguous endorsement:

The human rights of children and the standards to which all governments must aspire in realising these rights for all children are set out in the Convention on the Rights of the Child.<sup>38</sup>

The goal of the UN Convention, of course, is that it will have impact at the domestic level and Article 4 requires States Parties to 'undertake all appropriate legislative, administrative, and other measures for the implementation of the rights' contained in it. Implementation is defined

<sup>33</sup> For an analysis of the impact of the Convention in terms of a number of different steps or phases, see, for example, Philip Alston and John Tobin, *Laying the Foundation for Children's Rights* (Florence: UNICEF Innocenti Centre, 2005): [www.unicef-irc.org/publications/pdf/ii\\_layingthefoundations.pdf](http://www.unicef-irc.org/publications/pdf/ii_layingthefoundations.pdf).

<sup>34</sup> *Legislative History*, vol. 1, p. xlii.

<sup>35</sup> OAU Doc. CAB/LEG/24.9/49, 1990, entered into force 29 November 1999.

<sup>36</sup> CETS No. 160, 25 January 1996, entered into force 1 July 2000.

<sup>37</sup> See, Monica Feria-Tinta, 'The CRC as a Litigation Tool Before the Inter-American System of Protection of Human Rights' in Ton Liefgaard and Jaap Doek (eds.), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Dordrecht: Springer, 2015), pp. 231–248.

<sup>38</sup> *Sommerfeld v Germany* (2004) 38 EHRR 35, para. 37. For a recent and somewhat unusual use of the best interests principle by the European Court of Human Rights, see, *SL and JL v Croatia*, Application No 13712/11, judgment of 7 May 2015.



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by the UN Committee on the Rights of the Child as, ‘the process whereby states parties take action to ensure the realization of all rights in the Convention for all children in their jurisdiction’.<sup>39</sup>

When considering the impact of the Convention on the domestic law of a given jurisdiction, it is important to remember that the domestic status of international obligations varies from one country to another. In a 2007 study of the implementation of the Convention in fifty-two countries, chosen for geographic distribution, the UNICEF Innocenti Research Centre found that, in twenty-two of them, treaty obligations are not only incorporated into national law automatically, they take precedence over it.<sup>40</sup> In a further ten countries in the study, treaty obligations form part of domestic law, ranking equally with locally generated provisions. In either case, formal incorporation is unnecessary. In addition, some countries, like South Africa, have incorporated parts of the Convention into the domestic constitution.

In the absence of automatic or proactive incorporation, the status of Convention rights in a given jurisdiction will be dependent on domestic law. As many of the chapters in this volume demonstrate, countries around the world have passed legislation and adopted procedures designed to implement the Convention’s provisions, and domestic courts make extensive use of them.<sup>41</sup> It is a tribute to the Convention that in the United States, which, it will be remembered, has not ratified it, the Convention featured in the landmark Supreme Court decision striking down the juvenile death penalty.<sup>42</sup>

## Emerging Themes

While each of the following chapters offers its own exploration of the implementation of aspects of Article 3 and, thus, warrants reading in full,

<sup>39</sup> See the Introduction to United Nations Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child* (2003), CRC/GC/2003/5.

<sup>40</sup> *Law Reform and Implementation of the Convention on the Rights of the Child* (Florence: UNICEF Innocenti Research Centre, 2007), pp. 5–7. More recent research examined twelve countries and found that the UN Convention had been formally incorporated into the law in three of them: Belgium, Norway and Spain. See, Laura Lundy, Ursula Kilkelly, Bronagh Byrne and Jason Kang, *The UN Convention on the Rights of the Child: A Study of Implementation in 12 Countries* (London: UNICEF UK, 2012), para. 1.3.

<sup>41</sup> Further illustrations of the use made of the convention in domestic courts in a range of countries can be found in Liefgaard and Doek, *Litigating the Rights of the Child*.

<sup>42</sup> *Roper v Simmons* 543 US 541, 577; 125 S Ct 1183, 1199 (2005).

some significant themes surrounding Article 3 and explored in this volume are highlighted in the sections that follow.

### *Article 3(1)*

Article 3(1) has no shortage of supporters and critics in the courts, the academic literature and beyond and the contributors to this volume offer their own, sometimes challenging, observations on it and its place in the Convention. Ursula Kilkelly critiques its place in human rights discourse, noting that Article 3(1) is one of very few substantive provisions of the Convention that does not contain the word ‘right’ and she questions whether it contains an obligation.<sup>43</sup> She concludes, nonetheless, that the best interests principle can act as a unifying force between professionals and as ‘a gateway to children’s rights’.<sup>44</sup>

The potential for conflict between the best interests principle, as articulated in the UN Convention, and the protection against state interference afforded by the European Convention on Human Rights, is the subject of Janys M. Scott’s analysis. She explores the application of each over a range of contexts and concludes that any such conflict is ‘a myth’.<sup>45</sup> Marit Skivenes and Karl Harald Søvig reach a similarly encouraging conclusion, noting that the European Court of Human Rights sometimes references the UN Convention in the context of child protection and non-consensual adoption and is developing its own list of factors relevant to such decisions that bear ‘a resemblance’ to the elements found in *General Comment 14*.<sup>46</sup> Trynie Boezaart highlights subtle, but important, differences between the best interests test, as framed in the UN Convention, with that in the African Charter on the Rights and Welfare of the Child.<sup>47</sup>

Elaine E. Sutherland notes that the twin concerns that so troubled the drafters of Article 3(1), the vagueness of the best interests test and the

<sup>43</sup> Ursula Kilkelly, ‘The Best Interests of the Child: A Gateway to Children’s Rights?’, Chapter 2 in this volume, p. 58.

<sup>44</sup> *Ibid.*, p. 66.

<sup>45</sup> Janys M. Scott, ‘Conflict between Human Rights and Best Interests of Children: Myth or Reality?’, Chapter 3 in this volume, p. 80.

<sup>46</sup> Marit Skivenes and Karl Harald Søvig, ‘Judicial Discretion and the Child’s Best Interests: The European Court of Human Rights on Adoptions in Child Protection Cases’, Chapter 20 in this volume, p. 355.

<sup>47</sup> Trynie Boezaart, ‘Baby Switching: What Is Best for the Baby?’, Chapter 10 in this volume, pp. 186–187.