

INCORPORATING THE UN CONVENTION ON THE
RIGHTS OF THE CHILD INTO NATIONAL LAW

INCORPORATING THE
UN CONVENTION ON
THE RIGHTS OF THE CHILD
INTO NATIONAL LAW

Edited by
Ursula KILKELLY
Laura LUNDY
Bronagh BYRNE

 INTERSENTIA

Cambridge – Antwerp – Chicago

Intersentia Ltd
8 Wellington Mews
Wellington Street | Cambridge
CB1 1HW | United Kingdom
Tel: +44 1223 736 170
Email: mail@intersentia.co.uk
www.intersentia.com | www.intersentia.co.uk

*Distribution for the UK and
Rest of the World (incl. Eastern Europe)*
NBN International
1 Deltic Avenue, Rooksley
Milton Keynes MK13 8LD
United Kingdom
Tel: +44 1752 202 301 | Fax: +44 1752 202 331
Email: orders@nbninternational.com

Distribution for Europe
Lefebvre Sarrut Belgium NV
Hoogstraat 139/6
1000 Brussels
Belgium
Tel: +32 (0)800 39 067
Email: mail@intersentia.be

Distribution for the USA and Canada
Independent Publishers Group
Order Department
814 North Franklin Street
Chicago, IL 60610
USA
Tel: +1 800 888 4741 (toll free) | Fax: +1 312 337 5985
Email: orders@ipgbook.com

Incorporating the UN Convention on the Rights of the Child into National Law

© The editors and contributors severally 2021

The editors and contributors have asserted the right under the Copyright, Designs and Patents Act 1988, to be identified as authors of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

Artwork on cover: Seb Antoniou / sebantoniou.com

ISBN 978-1-78068-992-0

D/2021/7849/76

NUR 828

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

CONTENTS

<i>List of Cases</i>	ix
<i>List of Authors</i>	xv

Introduction

Ursula KILKELLY, Laura LUNDY and Bronagh BYRNE	1
1. Introduction	1
2. Ratification	2
3. Incorporation	3
4. Introducing this Volume	5

PART I. FIRST STAGE OF THE INCORPORATION JOURNEY

Incorporating the CRC in Australia

John TOBIN	11
1. Introduction	12
2. The Legal Landscape	14
3. Non-Legislative Measures	24
4. A Typology for Classifying the Impact of the Convention	31
5. Challenges to the Implementation of the Convention	41
6. Conclusion	43

Incorporating the CRC in China

Hongwei ZHANG	47
1. Introduction	47
2. Country Overview and Context	49
3. Indirect Incorporation	56
4. Legal Status of the CRC	62
5. Future Directions	66

PART II. SECOND STAGE OF THE INCORPORATION JOURNEY

Incorporating the CRC in New Zealand

Nessa LYNCH	73
1. Introduction	74
2. Context	74
3. The Convention in the Courts	83
4. Incorporation into Domestic Legislation	87
5. Non-Legal Measures of Implementation.....	93
6. Future Directions	96

Incorporating the CRC in Wales

Simon HOFFMAN.....	99
1. Introduction	99
2. Towards an Agenda for Children’s Rights	101
3. Incorporation: A Focus on Mainstreaming.....	103
4. Operationalising Attention to Children’s Rights	106
5. The Impact of the Measure	109
6. What Next for Children’s Rights in Wales?	117
7. Conclusion.....	121

Incorporating the CRC and its Optional Protocols in the United States

Jonathan TODRES.....	123
1. Overview and Context.....	123
2. Legal Status of the CRC	128
3. Incorporation into Domestic Law	129
4. Use of the CRC and Optional Protocols in Litigation.....	134
5. Challenges, Opportunities and Future Directions.....	139
6. Conclusion.....	143

PART III. THIRD STAGE OF THE INCORPORATION JOURNEY

Incorporating the CRC in South Africa

Ann SKELTON.....	147
1. Introduction	147
2. Country Overview and Context.....	149

3. The Constitution	149
4. South Africa’s Approach to Incorporation of International Law Treaties	153
5. The Drafting of the Children’s Rights Section of the Bill of Rights	155
6. Impact of Incorporation on Domestic Law	162
7. Use of the CRC in Litigation	166
8. Future Directions	175

Incorporating the CRC in Ireland

Louise FORDE and Ursula KILKELLY	177
1. Introduction	177
2. Country Overview and Context	178
3. Incorporation into Domestic Legislation	186
4. The Convention in the Courts	192
5. Non-Legal Measures of Implementation	197
6. Future Directions	201

PART IV. FOURTH STAGE OF THE INCORPORATION JOURNEY

Incorporating the CRC in Sweden

Rebecca Thorburn STERN	205
1. Introduction	205
2. Country Overview and Context	207
3. The Incorporation Process	212
4. The Legal Status of the CRC in Swedish Law	215
5. The Impact of Incorporation on Domestic Law	218
6. Use of the CRC in Litigation	224
7. Same but Different? Future Directions	227

Incorporating the CRC in Norway

Kirsten SANDBERG	231
1. Country Overview and Context	232
2. The Process of Incorporation and the Arguments	233
3. Legal Status of the CRC	236
4. Legal Measures to Implement the CRC	238
5. Use of the CRC in Litigation	250
6. Future Directions	259

Incorporating the CRC in Mexico

Nicolás ESPEJO-YAKSIC 261

- 1. Country Overview and Context 262
- 2. Legal Status and Process of Incorporation of the CRC 263
- 3. Impact of Incorporation on Domestic Law 265
- 4. Use of the CRC in Litigation 272
- 5. Lessons and Challenges 276

Incorporating the CRC in Iceland

Hrefna FRIÐRIKSDÓTTIR 281

- 1. Introduction 281
- 2. Country Overview 282
- 3. The Legal Status of the CRC 285
- 4. Summary and Future Directions 300

Incorporating the CRC in Scotland

Kasey MCCALL-SMITH 303

- 1. Introduction 303
- 2. The Scottish Opportunity to Implement the CRC 305
- 3. The Drive for Incorporation 307
- 4. Belts and Braces Implementation in Scotland 312
- 5. The CRC in Scottish Courts 325
- 6. On the Threshold of Maximalist Incorporation 330

The Convention on the Rights of the Child: A Thematic Analysis of the Incorporation Journey

Ursula KILKELLY, Laura LUNDY and Bronagh BYRNE 333

- 1. Introduction 333
- 2. The Incorporation Journey 335
- 3. Drivers and Brakes on the Incorporation Journey 344
- 4. Indicators of Successful Incorporation 348
- 5. Conclusion 351

Index 353

LIST OF CASES

INTERNATIONAL

EUROPEAN COURT OF HUMAN RIGHTS

European Court of Human Rights (Application No 71552/17)	299
<i>SC v United Kingdom (App No 60958/00)</i> (2005) 40 EHRR 10	38
<i>T v United Kingdom (App No 24724/94)</i> (2000) 30 EHRR 121	38

NATIONAL

AUSTRALIA

<i>Bernieres v Dhopal</i> [2015] FamCA 736	26
<i>Blaze v Grady</i> [2015] FamCA 1064	26
<i>DPP (Vic) v SL</i> [2016] VSC 714	38
<i>DPP v TY (No. 3)</i> (2007) 18 VR 241	26
<i>Gupta v State of South Australia</i> [2014] FCCA 414	21
<i>Koowarta v Bjelke-Petersen</i> (1982) 153 CLR 168, 193 (Gibbs CJ), 224–25 (Mason J)	13
<i>Lam v Minister for Immigration and Multicultural Affairs</i> (2003) 214 CLR 1	25
<i>Minister for Immigration and Ethnic Affairs v Teoh</i> (1995) 183 CLR 273, 286–87 (Mason CJ and Deane J), 298 (Toohey J)	13, 24–25
<i>Murad v Assistant Minister for Immigration and Border Protection</i> [2017] FCAFC 73	25
<i>RDF v State of Queensland (Education Queensland)</i> [2018] QCAT 254	20
<i>Re Alex: Hormonal Treatment for Gender Dysphoria</i> (2004) 31 Fam LR 503	38
<i>Re Kerry (No. 2)</i> [2012] NSWCA 127	27
<i>Re Tracey</i> [2011] NSWCA 43	27
<i>Re: Jamie</i> [2013] FamCAFC 110	25–26
<i>Royal Women’s Hospital v Medical Practitioners Board of Victoria</i> [2006] VSCA 85	24
<i>Secretary, Department of Human Services</i> (2011) 36 VR 221	27
<i>State Central Authority v Castillo</i> [2015] FamCA 792	26
<i>SZRTN v Minister for Immigration and Border Protection</i> [2014] FCAFC 129	25
<i>Till and Others v Sunshine Coast Regional Council</i> [2016] QCAT 530	20
<i>ZZ v Secretary, Department of Justice</i> [2013] VSC 267	27

ENGLAND AND WALES

<i>Christian Institute and Others v The Lord Advocate</i> (Scotland) [2016] UKSC 51	327
<i>R (Brown) v Secretary of State for Work and Pensions</i> [2008] EWHC 3158	107–108
<i>R (Smith) v Secretary of State for the Home Department</i> [2006] 1 AC 159	329

ICELAND

Supreme Court of Iceland, 10 March 2020 (Case 58/2019)	290–291, 299–300
Supreme Court of Iceland, 22 January 2009 (Case No 506/2008)	298
Supreme Court of Iceland, 25 January 2018 (Case No. 35/2017)	299
Supreme Court of Iceland, 29 November 2017 (Case No. 703/2017)	299
Supreme Court of Iceland, 3 November 2016 (Case No. 466/2016)	299
Supreme Court of Iceland, 30 March 2017 (Case No. 367/2016)	299

IRELAND

<i>Child and Family Agency and M.L. and Orla Ryan v G.</i> [2019] IECA 109	195
<i>Child and Family Agency and T.J. and D.J. v. the Adoption Authority of Ireland</i> [2018] IEHC 310.	195
<i>D.P.P. v A.B.</i> [2017] IEDC 12	197
<i>D.P.P. v J.H.</i> [2017] IECA 206	197
<i>D.P.P. v S.W.</i> [2016] IEDC 14	197
<i>D.P.P. v T.C.</i> [2017] IEDC 07.	197
<i>Dos Santos and Others v The Minister for Justice and Equality, the Attorney General and Ireland</i> [2015] IECA 210.	193–194
<i>F.B. v Minister for Justice and Equality (No. 2)</i> [2018] IEHC 716.	194
<i>F.G. v The Child and Family Agency, the Ombudsman for Children, Judge Geoffrey Browne and Her Honour Doirbhile Flanagan</i> [2016] IEHC 156.	192
<i>F.P. v The Information Commissioner</i> [2016] IEHC 771	192
<i>Health Service Executive v S.O. & P.S.A.</i> [2013] IEDC 19.	192
<i>K.R.A. and B.M.A. (A Minor) v The Minister for Justice and Equality</i> [2017] IECA 284	193
<i>M.S. v. A.R.</i> [2018] IEHC 181	196
<i>McD v L & M</i> [2007] IESC 81.	182
<i>Minister for Justice and Equality v R.P.G.</i> [2013] IEHC 54	192
<i>N. v N.</i> [2008] IEHC 382	196
<i>O.P.I (A Minor) v The Refugee Appeals Tribunal, the Minister for Justice and Law Reform, the Attorney General and Ireland</i> [2015] IEHC 408	192, 194

<i>O.S. (A Minor) v The Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice Equality and Law Reform, Attorney General and Ireland</i> [2009] IEHC 450.	192
<i>Olaniran and Others v The Minister for Justice, Equality and Law Reform, Attorney General and Ireland</i> [2010] IEHC 83	194

MEXICO

SCJN, <i>Acción de Inconstitucionalidad 8/2014</i>	274
SCJN, <i>Amparo Directo 18/2010</i>	273
SCJN, <i>Amparo Directo en Revisión 1072/2014</i>	275–276
SCJN, <i>Amparo Directo en Revisión 1187/2010</i>	273
SCJN, <i>Amparo Directo en Revisión 139/2017</i>	273
SCJN, <i>Amparo Directo en Revisión 1674/2014</i>	274
SCJN, <i>Amparo Directo en Revisión 2479/2012</i>	273
SCJN, <i>Amparo Directo en Revisión 2672/2011</i>	273
SCJN, <i>Amparo Directo en Revisión 3797/2014</i>	276
SCJN, <i>Amparo Directo en Revisión 4122/2015</i>	273
SCJN, <i>Amparo Directo en Revisión 6179/2015</i>	273
SCJN, <i>Amparo Directo en Revisión 644/2016</i>	273
SCJN, <i>Amparo Directo en Revisión ADR 2554/2012</i>	274
SCJN, <i>Amparo en Revisión 1049/2017</i>	274
SCJN, <i>Amparo en Revisión 1621/2010</i>	274
SCJN, <i>Amparo en Revisión 203/2016</i>	274
SCJN, <i>Amparo en revisión 272/2019</i>	273
SCJN, <i>Amparo en Revisión 279/2019</i>	275
SCJN, <i>Amparo en Revisión 584/2016</i>	275
SCJN, <i>Amparo en Revisión 645/2011</i>	273
SCJN, <i>Amparo en Revisión 714/2017</i>	273, 275
SCJN, <i>Amparo en Revisión 852/2017</i>	273
SCJN, <i>Contradicción de Tesis 293/2011</i>	265

NEW ZEALAND

<i>Attorney-General v Taylor</i> [2018] NZSC 104	76
<i>Attorney-General v Youth Court at Manukau</i> [2007] NZFLR 103 (HC).	85
<i>Child Youth and Family Services v Television New Zealand Ltd</i> (2005) 24 FRNZ 857 (HC)	83
<i>DP v R</i> [2015] NZCA 476, [2016] 2 NZLR 306	86
<i>H v F</i> (1993) 10 FRNZ 486 (HC)	83–84
<i>Hemmes v Young</i> [2005] NZSC 47, [2006] 2 NZLR 1	83–84
<i>Huang v Minister of Immigration</i> [2020] NZHC 956.	84
<i>HX v Police</i> [2019] NZYC 548	87

<i>Jiang v Chief Executive of the Ministry of Business, Innovation and Employment</i>	
[2020] NZHC 1439	84
<i>Martin v Police</i> HC Wellington CRI-2006-485-163, 19.03.2007	85
<i>Mooney v Film and Literature Board of Review</i> [2002] 2 NZLR 754 (CA)	83
<i>New Zealand Air Line Pilots' Association Inc v Attorney-General</i> [1997]	
3 NZLR 269 (CA)	79
<i>Norman v Attorney-General</i> [2020] NZHC 336	84
<i>Ochibulu v Immigration and Protection Tribunal</i> [2020] NZHC 792	84
<i>Police v CL</i> [2018] NZYC 702	86
<i>Police v ET</i> [2015] NZYC 412 (delay)	85
<i>Police v FW</i> [2018] NZYC 331	86
<i>Police v H (A Young Person)</i> [2004] DCR 97 (YC)	84
<i>Police v Ponniah</i> [2014] DCR 75 (DC) (delay)	85
<i>Police v SY</i> [2018] NZYC 463	86
<i>Police v TG</i> [2018] NZYC 261	86
<i>Pouwhare v R</i> [2010] NZCA 268	85
<i>Puli'uvea v Removal Review Authority</i> [1996] 3 NZLR 538 (CA)	83
<i>R v H</i> CA215/02, 26.07.2002	85
<i>R v Kaukasi</i> HC Auckland T014047, 04.07.2002 (Minute No. 5)	85
<i>R v Kaukasi</i> HC Auckland T014047, 13.06.2002 (Minute No. 4)	85
<i>R v UGT</i> HC Rotorua CRI-2011-263-73, 21.07.2011	85
<i>Rajan v Minister of Immigration</i> [1996] 3 NZLR 543 (CA)	83
<i>Re AP (Vietnam)</i> [2020] NZIPT 504805	84
<i>Re the W Children</i> (1994) 12 FRNZ 548 (FC)	83–84
<i>Tavita v Minister of Immigration</i> [1994] 2 NZLR 257 (CA)	79, 83–84
<i>Whitcombe v Police</i> [2018] NZHC 1409	86
<i>Zhang v Minister of Immigration</i> [2020] NZHC 568	84

NORWAY

HR-2019-1230-A	255
HR-2019-2301-A	256
HR-2020-661-S	254
Rt. 2005, p. 1567	244
Rt. 2009, p. 1261	254
Rt. 2009, p. 903	257
Rt. 2010, p. 1313	257
Rt. 2011, p. 206	257
Rt. 2012, p. 2038	252
Rt. 2012, p. 1985	252
Rt. 2015, p. 1388	252–253, 255
Rt. 2015, p. 93	254

SCOTLAND

<i>AAS and SAAS v Secretary of State for the Home Department</i> [2010]	
CSIH 90	326
<i>C v McM</i> [2005] Fam LR 36	328
<i>Christian Institute and Others v The Scottish Ministers</i> [2015] CSOH 7	327
<i>DM v Locality Reporter and the Lord Advocate</i> [2018] CSIH 73	328
<i>Fowler v Fowler</i> [1981] SLT 9	327
<i>Greig v HM Advocate</i> [2013] JC 115	329
<i>Hibbard v HM Advocate</i> [2011] JC 149	328–329
<i>Kinlan and Boland v HM Advocate</i> [2019] HCJAC 47	329
<i>LRK v AG</i> [2019] SAC (Civ) 33	326
<i>McCormick v HM Advocate</i> [2016] HCJAC 50	328–329
<i>ME, Re Judicial Review</i> [2012] CSOH 2	326
<i>Natasha Tariro Nyamayaro and Another v Secretary of State for the Home Department</i> [2019] CSIH 29	326–327
<i>OHara v HM Advocate</i> [2016] HCJAC 107	328
<i>Petition of ABC v Principal Reporter and Others</i> [2018] CSOH 81	328
<i>Shields [or Cunningham] v Shields</i> [2002] SLT 57; [2002] SC 342	327–328
<i>VE v HM Advocate</i> [2018] HCJAC 12	329

SOUTH AFRICA

<i>AB and Another v Pridwin Preparatory School and Others</i> [2020]	
ZACC 12	169
<i>C v Department of Health and Social Development, Gauteng</i> [2012]	
ZACC 1	167–168
<i>Centre for Child Law v Media 24 Limited</i> [2019] ZACC 46	173
<i>Centre for Child Law v Minister of Justice</i> [2009] ZACC 18	170
<i>Centre for Child Law v The Governing Body of Hoërskool Fochville</i> [2015] ZASCA 155	168–169, 175
<i>Equal Education v Minister of Basic Education, Gauteng High Court,</i> Pretoria Case No. 22588/2020	173
<i>Freedom of Religion South Africa v Minister of Justice and Constitutional Development</i> [2019] ZACC 34	172
<i>Government of the Republic of South Africa v Grootboom</i> [2000] ZACC 19	159
<i>J v National Director of Public Prosecutions (CCT 114/13)</i> [2014]	
ZACC 13	151, 169
<i>Masiya v Director of Public Prosecutions, Pretoria</i> [2007] ZACC 9	151
<i>Radhuva v Minister of Safety and Security</i> [2016] ZACC 24	170
<i>S v M</i> [2007] ZACC 18	167, 171
<i>S v Williams</i> [1995] ZACC 6	151
<i>Teddy Bear Clinic for Abused Children v Minister of Justice</i> [2013]	
ZACC 35	170, 175
<i>YG v S</i> [2017] ZAGPJHC 290	151, 171–172

SWEDEN

Prop. 1979/80:147.....	210
Prop. 1985/86:17.....	210
Prop. 1993/94:117, Supreme Court judgment NJA 2012 s. 1038.....	210
Prop. 1997/98:182.....	223
Prop. 2009/10:165.....	222
Prop. 2009/10:80 En reformerad grundlag, 187.....	220
Prop. 2017/18:186.....	215–217

UNITED STATES

<i>Ayala-Caballero v Coleman</i> , 58 Fed.Appx. 669, 672 (9th Cir. 2002).....	135
<i>Batista v Batista</i> , 992 WL 156171, at 6–7 (Superior Court Connecticut, 1992) ..	134
<i>Cooper Butt ex rel Q.T.R. v Barr</i> , 954 F.3d 901, 905 (6th Cir. 2020).....	135
<i>Fedorova v United States</i> 2018 WL 2445037 (SD Cal. 2018).....	134
<i>Fernando v Haekkerup</i> , 2013 WL 11318853.....	135
<i>Filártiga v Peña-Irala</i> , 630 F.2d 876 (2d Cir. 1980).....	135
<i>Flomo v Firestone Nat. Rubber Co., LLC</i> , 643 F.3d 1013, 1021–22 (7th Cir. 2011).....	138–139
<i>Flores-Nova v Attorney General of U.S.</i> , 652 F.3d 488, 495 (3rd Cir. 2011).....	138
<i>Graham v Florida</i> , 560 U.S. 48 (2010) (life without parole).....	136
<i>Mejia v Holder</i> , 492 Fed. Appx. 780, 781 (9th Cir. 2012).....	138
<i>Miller v Alabama</i> , 567 U.S. 460 (2012) (life without parole).....	130, 136
<i>Murray v The Charming Betsy</i> , 6 U.S. (2 Cranch) 64, 118 (1804).....	139
<i>People v Brazile</i> , 2001 WL 1423739 (Cal. Ct. App., 2001).....	135
<i>Roper v Simmons</i> , 543 U.S. 551, 578 (2005).....	130, 135–136
<i>Segovia-Plata v Gonzales</i> 205 Fed.Appx. 304, 306 (5th Cir. 2006).....	135
<i>The Cherokee Tobacco</i> , 78 U.S. (1 Wall.) 616, 620 (1871).....	139
<i>The Paquetta Habana</i> , 175 U.S. 677, 700 (1900).....	139
<i>U.S. v Bollinger</i> , 798 F.3d 201 (4th Cir. 2015).....	132
<i>United States v Martinez</i> , 599 F.Supp.2d 784 (W.D. Tex 2009).....	132
<i>United States v Park</i> , 938 F.3d 354, 360 (D.C. Cir. 2019).....	132
<i>United States v Savage</i> , No. CRIM.A. 07-550-03, 2012 WL 4068416, at 2 (E.D. Pa. 2012).....	139

LIST OF AUTHORS

Bronagh Byrne

Senior Lecturer at the Centre for Children's Rights at Queen's University, Belfast, Northern Ireland

Louise Forde

Lecturer in Law at Brunel Law School, Brunel University London, United Kingdom

Hrefna Frioriksdottir

Professor of Family Law, University of Iceland, Iceland

Simon Hoffman

Professor of Law, Hillary Rodham Clinton School of Law, Swansea University, Wales

Ursula Kilkelly

Professor at the School of Law, University College Cork, Ireland

Laura Lundy

Professor at the Centre for Children's Rights at Queen's University, Belfast, Northern Ireland

Nessa Lynch

Associate Professor, Faculty of Law, Te Herenga Waka – Victoria University of Wellington, New Zealand

Kasey McCall-Smith

Senior Lecturer in Public International Law, University of Edinburgh Law School, Scotland

Kirsten Sandberg

Professor of Law, Department of Public and International Law, University of Oslo, Norway

Ann Skelton

Professor of Law, University of Pretoria, South Africa

Rebecca Thorburn Stern

Professor of Public International Law, Uppsala University, Sweden

John Tobin

Professor of Law, University of Melbourne, Australia

Jonathan Todres

Distinguished University Professor and Professor of Law, Georgia State University College of Law, United States

Nicolás Espejo Yaksic

Researcher at the Centre for Constitutional Studies (CEC) of the Supreme Court of Justice of Mexico

Hongwei Zhang

Professor, Juvenile and Family Law Research Center, Jinan University, China