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# International Children’s Rights: Reflections on a Complex, Dynamic, and Relatively Young Area of Law

Ursula Kilkelly and Ton Liefaard

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## Abstract

This chapter reflects on the aim of the International Children’s Rights volume to provide those wishing to study, research, and practice international children’s rights law with a contemporary and comprehensive legal text. It recaps on the themes that emerged from the process of commissioning and editing the various contributions from some of the world’s leading and emerging legal scholars in the area of children’s rights. It marks the progress that has been made in the implementation of children’s rights law and the many challenges that still exist in the implementation of the CRC and associated international instruments. It

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notes that legal scholarship in the field of children's rights is still developing and that, although multidisciplinary research and analysis is valuable, it is important to reaffirm children's rights as a field of law and legal practice. International children's rights is a complex, dynamic, and relatively young area of law. As the contributions to the collection show, it is diverse and evolving, with many new aspects and issues worthy of analysis and scrutiny. This chapter encapsulates the aspiration of the volume editors that the book contribute to the scrutiny of the legal implications of the CRC, recognizing the unique features of international children's rights law, adding to the ongoing development of this important area of law.

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## 1 Introduction

Even by human rights standards, international children's rights law is a relatively young and evolving field of international law. Its formal beginnings are marked out by the adoption by the UN General Assembly of the Convention on the Rights of the Child (CRC) in 1989, although its emergence to this point had occurred with the benefit of the nonbinding Declarations on the Rights of the Child adopted by the League of Nations in 1924 and the newly formed United Nations in 1959. Since its adoption, the CRC has been supplemented by three Optional Protocols – on Armed Conflict, Sexual Exploitation, and Individual Communications – and regional bodies like the **Organization of African Unity** and the Council of Europe have adopted substantive children's rights instruments like the African Charter on the Rights and Welfare of the Child, which came into force in 1999 and the European Guidelines on Child-friendly Justice, adopted in 2010, respectively. Dedicated provisions are now found in general human rights treaties like the European Union's Charter on Fundamental Rights and Freedoms, in specific human rights instruments like the UN Convention on the Rights of Persons with Disabilities and the Conventions of the International Labour Organization and in international law more widely. Children's rights now feature, explicitly or implicitly, in the instruments of humanitarian, developmental, and environmental law showing beyond doubt that children's rights law is an area of both great depth and wide reach, something which has been achieved over a relatively short period of time.

It was the aim of this book to provide those wishing to study, research, and practice international children's rights law with a contemporary text that both presented these instruments and analyzed their impact. In doing so, it was important that the book address the fundamental children's rights law subjects like education, health, violence against children, alternative care, family law, justice, and detention. It was also important that the book engage with especially vulnerable children, by focusing on migrant and refugee children, children with disabilities, children caught up in armed conflict, and the rights of indigenous children for instance. Equally, the book explores modern challenges of children's rights law like child labor and multi-nationals, sustainable development goals, and environment and digital technologies. Given the move internationally from the development of international standards to their implementation and enforcement, it is vital that a legal text on children's rights

engages with these issues. Consequently, the book contains three chapters that consider complaints and remedies, monitoring and implementation, and advocacy and standard setting. The result, we hope, is a comprehensive detailed and contemporary children's rights text that draws on and contributes to international law, enabling scholars and lawyers to better understand both the broad themes and the specific details of this important legal field, recognizing the linkages that can usefully be made across and between domestic, regional, and international legal environments.

While much of this analysis indicates that the CRC is remarkable more in the breach than in the observance, the book also demonstrates the complexity of the task of implementation and compliance. Notwithstanding the structure of international law, which is clear that the state is the duty bearer, the growing influence of private actors – in healthcare, education, and detention settings, for example – and the reach of multinational corporations presents genuine challenges to children's rights implementation.

International children's rights law grew out of the well-established broader field of human rights law and so sits naturally with discussions of economic and social rights, education, and detention. For many, however, children's rights are related not to human rights so much as family law and the newer field of child law, which dominate discourse and legal analysis at national level. To some extent, children's rights are caught in the twilight as many doubt whether children, like adults, are autonomous rights holders or seek to displace the state for the parent as the principal duty bearer. Although the implementation of the CRC is advanced in many respects, the acceptance of a rights-based approach to children's issues is not. This reinforces the importance of ensuring that children's rights as a field remains connected both to human rights and to law, the core principle on which this text is based.

Against this backdrop and through the process of developing the book and editing the respective contributions from legal scholars around the world, a number of themes arose. These are presented here in this concluding chapter as reflections on contemporary international children's rights law as a field of human rights and of law in its own right.

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## 2 Legal Scholarship: Still an Emerging Discipline

With the adoption of the UN Convention on the Rights of the Child (CRC) in 1989 and its entry into force only 1 year later, the international community embraced the rights of the child as part of International Human Rights Law. More than 27 years later, it is fair to conclude that "international children rights" has manifested itself as a field of law, through which the international community aims to protect a special group of individual human beings – children – at the domestic level (Liefwaard and Sloth-Nielsen 2017). The CRC and the numerous related instruments have proven to be rather successful in increasing awareness around children as rights holders, resulting in law reform at the domestic level, the use of the CRC in domestic and regional jurisprudence (Liefwaard and Doek 2015), and further standard-setting on

specific children's rights themes at the regional level, in particular in Europe (Van Bueren 2007; Nolan and Kilkelly 2016; Kilkelly 2017).

It is, however, also fair to conclude that legal scholarship focusing on international children's rights as a specific area of law is relatively limited. In the past quarter of a century, there have been an increasing number of publications – books, edited volumes, and journal articles – with a focus on children's rights. These publications have resulted in a rich and diverse analysis of international children's rights (Fottrell 2000; Buck 2014). But ironically perhaps there are few who offer a comprehensive legal perspective on the key, interdependent, and interrelated rights of the child. Despite the recent emergence of numerous edited volumes and essay collections on children rights (see Brems et al. 2017; Ruck et al. 2017; Kilkelly and Lundy 2017; Cvejic Jancic 2016; Liefwaard and Sloth-Nielsen 2017; Vandenhoe et al. 2015; Liefwaard and Doek 2015; Vuckovic Sahovic et al. 2012; Freeman 2012; Invernizzi and Williams 2011) and the availability of many monographs related to individual children's rights or to specific cohorts of children (see for example Mahgoub 2015; Smyth 2014; Parkes 2013; Nolan 2011), it is telling that the only comprehensive monograph on international law on the rights of the child (Van Bueren 1995) dates from more than two decades ago. The academic books and volumes that have been developed since then have certainly added to the body of knowledge by offering multidisciplinary, critical, theoretical, and/or rather specific legal perspectives on children's rights; sometimes with a global or regional focus and sometimes with a focus on specific jurisdictions or themes. The attempts to offer multidisciplinary, critical, and/or theoretical perspectives are commendable, since they move the field beyond a discussion about the implementation of children's rights toward a more cross-cutting perspective on children's rights, including a needed critical reflection on legal concepts and principles. However, not surprisingly, these books do not offer the level of legal scrutiny that one can expect from legal scholarship in the field of international children's rights law. Nor do they contribute to a comprehensive analysis of children's rights in legal practice. One could point to the numerous publications on children's legal matters in academic journals, among others in the *International Journal of Children's Rights*. However, the majority of these publications offer theoretical, interdisciplinary, and non-legal perspectives and if they have a legal focus, they are not necessarily focused on children's rights law but rather on areas of domestic law without a rights lens – the expansion of the area of child abduction is a case in point. In this regard, there seems to be a disconnect between scholarship on international children's rights law and scholarship on fields of domestic law, such as family law, migration law, child protection law, and criminal law. Moreover, the field of international children's rights is not always seen in connection with other areas of international law, such as international humanitarian and criminal law, international labor law, or private international law.

Consequently, the literature has heretofore been without a comprehensive legal book that reflects on the meaning of the CRC and related relevant legal instruments and case law for children across the globe. This is regrettable for a number of reasons. First, it means that there is a lack of attention on and scrutiny of the

complexity of the legal implications of the CRC and its meaning in legal practice in domestic and international jurisdictions. Second, it does not recognize the unique features of this area of law and third, it does not contribute to the development of this relatively young area international human rights law, which may have a negative effect on its authority among legal professionals and academics. All three elements are necessary if the field of international children's rights law is to become more than a means to an end, that is: the advancement of children's interests toward the development of a stimulating and challenging academic subject, which can feed intellectual ambition and curiosity. Our hope is that this book will make a modest but important contribution in this regard.

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### 3 International Children's Rights – A Complex, Dynamic, and Relatively Young Area of Law

This book clearly shows the breadth and richness of the field of international children's rights law as it moves through the twenty-first century. The book builds on many of the publications mentioned above, but it offers important legal scrutiny of international children's rights law both with regard to substantive and procedural children's rights law, as well as a field of law in its own right. The complexity of the area of international children's rights law and its dynamics reveal a number of issues explored in the sections that follow:

#### 3.1 Complexity of International Children's Rights

The complexity of international children's rights is directly related to its coexistence and interaction with other legal systems, internationally as well as domestically (see the chapters of Doek, Sloth-Nielsen and Skelton; see also more specifically the chapters of Aptel, Sanghera and Chilemba). Each system comes with its own institutional setup and structure. On the one hand, this provides a rich and diverse institutional and regional landscape with different instruments, which can support and compel states to live up to their obligations under international children's rights law (Nolan and Kilkelly 2016; Kilkelly 2017). On the other hand, it can result in overlap, redundancy, fragmentation, and inconsistency, to the detriment of the effective protection of children's rights at the domestic level. In this regard, it seems promising that the UN Committee on the Rights of the Child (CRC Committee) has continuously called upon states to sign and ratify other international instruments that are relevant for children's rights, showing its awareness of the relevance of connecting children's rights to other areas of law that are more conducive to the realization of children's rights (see also Art. 41 CRC). Also, the CRC Committee recently developed three *joint* General Comments. First, a General Comment on the right of the child on harmful practice, together with the Committee on the Elimination of Discrimination against Women (2016b, No. 18) and, more recently, two General Comments on international migration, together with the

Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (2017a, b; see chapter of Smyth). These joint General Comments can contribute to a shared understanding of the implications of different international legal systems relevant for children and merge the different legal narratives with their own concepts and principles. Moreover, they can be used by the monitoring mechanisms under the different legal frameworks alike. An area in which this could be developed further is the area of economic, social, and cultural rights of the child and in this regard, the case law of the Council of Europe's European Committee of Social Rights could serve as an example (see Nolan's chapter in this book). The CRC Committee has included some of the core economic, social, and cultural concepts, developed under the International Covenant on Economic, Social and Cultural Rights, into its General Comment No. 19 on public budgeting for the realization of children's rights (2016a), which provides another example of integrating the different legal frameworks relevant for children. Legal scholarship could and should contribute to the further integration of the different legal frameworks at the international and regional level. This contribution should also reach out the global sustainable development agenda (see Arts in this book) and should not overlook emerging areas that may not be (fully) covered by the existing legal frameworks (see, e.g., Lievens et al. and Kaime in this book).

The broad scope of international children's rights law and the applicability of the rights and principles embedded in the CRC and related instruments to a wide variety of contexts (see Khazova, Sandberg, Lundy & O'Lynn, Sanghera, Tobin, Todres, Rap & Daly, Smyth and Liefwaard in this book) and to different groups of children (see Espejo-Yaksic and Chilemba in this book) also underscore the complexity of this field. All contributions in this book make clear that in order to understand the dynamics behind children's rights implementation through the different actions listed in article 4 of the CRC and evaluated and pushed forward by international, regional, and domestic monitoring mechanisms, one needs to take into account the specific context in which children's rights is situated (see in particular Sloth-Nielsen in this book). The book aims to inform the readers on the specific implications of children's rights and specific implementation challenges. At the same time, it can be used to identify its common and cross-cutting features of the relevant international legal instruments, including the general principles as identified as such by the CRC Committee (see Peleg and Assim in this book). There are many difficult legal questions to consider when it comes to children's rights implementation in light of the contextual complexity. These include matters relating to the universality of children's rights framework (see Doek in this book) and its justiciability (see, e.g., Skelton and Nolan in this book), to the role of state and non-state actors in monitoring and implementation (see, e.g., Sanghera), to the relationship between parents, family, the state, and children (Sandberg and Khazova in this book), and to the issue of and frameworks for international cooperation, not only by states but also by non-state actors (see, e.g., Plevin et al.).

The particular complexity of children's rights enforcement and implementation revolves around the recognition that the CRC is above all a legal framework with corresponding obligations for states parties. Because of its multilayered structure, as



well as its diversity in substantive provisions and implications, legal scholarship has an important role to play in the continuous scrutiny of the developments in this complex field of law. Of course, law has its limitations, and other (academic and practical) perspectives are needed to fill in the norms that have been left open or regarding which states have a wide margin of appreciation. Other academic disciplines are also needed in order to collect empirical information on the role of law in relation to children's lives, well-being, and development and to give us a true understanding of the lived experiences of children under the CRC.

### 3.2 Dynamics of International Children's Rights

Different studies have shown that international children's rights law is a dynamic area of law, which has had significant impact at the domestic level, through law reform, jurisprudence, advocacy, and other activities of civil-society organizations, education and training (also at university level), and international and domestic monitoring (see e.g., Sloth-Nielsen 2008, 2012; Lundy et al. 2012; Arts 2014; Liefwaard and Doek 2015). More recently, the private sector, in particular business, has become much more visible in children's rights implementation, which shows the move beyond the traditional approach toward human rights – with the state as duty bearer and the child as rights holder – toward a more horizontal approach that recognizes the significant influence of non-state actors like parents and private providers.

The field of international children's rights is evolving as we speak. Some may wonder whether the CRC is fit for the challenges of the twenty-first century, while one could also argue that the CRC should be seen as a living instrument, which evolves over time (Doek) and does not necessarily call for modification or adjustments (see, e.g., Lievens et al. and Kaime in this book). An area that has recently gained significant attention concerns children's access to justice. With the adoption and entry into force of the third Optional Protocol to the CRC on an individual communications procedure, the international community has recognized the importance of children's access to justice, which revolves around the right to an effective remedy (Skelton in this book). However, this is only one theme. Another relates to biomedicine and areas in which traditional approaches toward children's autonomy and parental representation may be challenged, such as in relation to medical care and research. In addition, it has been argued that specific groups of children, such as transgender and intersex children (see, e.g., Zillen et al. 2017 and Liefwaard et al. 2017), or specific themes, such as surrogacy (see Wade 2017; Achmad 2017; Wells-Greco 2015), have not been sufficiently recognized in international law. Moreover, the biomedical field shows, as do other fields, that it is difficult for law to keep up with the speed of emerging and developing technologies. While gaps in CRC provision frustrate, they provide the opportunity to mold and shape its flexible provisions to the modern context.

The dynamics behind these evolving fields – and many more exist – confront us with ongoing questions and challenge existing positions. To a certain extent, one can



respond to this by elaborating on the existing frameworks and concepts underlying the CRC. At the same time, one may have to recognize that some areas have not been covered sufficiently or at all by international children's rights law, at least not when considered in isolation from other fields of international and national law. This book shows some of these emerging fields, but in essence confirms that this field of law requires ongoing attention in order to keep up with the most recent developments both legally and with respect to the dynamic nature of modern childhood. Despite a fatigue among certain international organizations for the adoption of new international standards, gaps continue to emerge as the existing legal framework fails to stretch and mould. Increasing connectivity means that new instruments are now more likely to draw on existing standards rather than to forge higher standards or entirely new ground, but it remains the case that the scale of international standard-setting can sometimes result in new instruments either duplicating or ignoring existing standards. At any rate, in some fields it can be hard for scholars, never mind states, to keep up and this is especially challenging in light of the proliferation of children's rights standards at regional levels. Combined with the pace of change and reform at the national level, this creates continuous challenge for Government ministries and agencies that have responsibility for implementation across children's rights and those scholars who monitor and analyze their efforts.

### **3.3 A Relatively Young Area of Law**

Although it has been less than 30 years since the CRC was adopted, it has absorbed the attention of legislators, policymakers, judicial authorities, civil society, businesses, other private actors, and academics all over the world. The very active role of the CRC Committee as the CRC's treaty body (responsible for, among others, 23 General Comments in roughly 17 years and over 700 Concluding Observations since the early 1990s) and the standard-setting and advocacy activity of inter-governmental organizations across Africa, the Americas, Europe, South Asia, and Southeast Asia are impressive. And yet, children's rights law continues to evolve and mature. Within academia, international children's rights law remains a relatively niche subject, the legal academic community is small and can, at times, be somewhat disconnected from broader fields of legal research. Accepting the value of interdisciplinary studies and programs of children's rights, legal research and related activities, including the education and training of future researchers and professionals, is needed to strengthen the area within the legal discipline. This book has aimed to contribute to the development of legal scholarship, not only by covering many different substantive and procedural areas of children's rights law as explained above, but also by bringing together scholars from different generations and from different parts of the world. This explains why some contributions focus on specific regions of the world (see, e.g., Sanghera, Chilemba, Espejo Yaksic, Assim), while others represent a more international or global approach (see e.g., Todres, Tobin, Liefwaard). Welcome as these contributions are, it was challenging at times to identify scholars with an expertise in international children's rights law and a wider

viewpoint to counter the “Western” perspective that dominates much of the legal writing in this field.

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## 4 Conclusion

The book leaves many legal questions unanswered and some children's rights areas underdeveloped. And like any text of its kind, there are unavoidable gaps and omissions. However, it should be seen as an ongoing and evolving work, both online and offline. In the long term, it would be good to focus more specifically on issues related to the regionalization and localization of international children's rights law, to address the changing nature and composition of duty bearers and to address technical legal issues, like extraterritorial jurisdiction, which is now increasingly important in the context of conflict and children on the move.

With all its limitations, international children's rights is above all an *area of law*, of international human rights law, which comes with obligations for states that have ratified the relevant instruments and agreed upon substantive standards, at the international and/or regional level. As much as we believe in children's rights, we believe in the value and importance of the role and rule of law in shaping how states treat their children. Above all, we are optimistic about the future of our field and we are hopeful that it can, in time, lead to an enhanced respect for the rights of the child, nationally, regionally, and internationally.

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## 5 Cross-References

- ▶ [Child Labor, International Law, and Multinational Enterprises](#)
- ▶ [Children and the Justice System](#)
- ▶ [Children's Economic and Social Rights](#)
- ▶ [Children's Right to Health](#)
- ▶ [Children's Rights and Digital Technologies](#)
- ▶ [Children's Rights and the Environment](#)
- ▶ [Children's Rights and the Sustainable Development Goals](#)
- ▶ [Children's Rights Law on Alternative Care and Adoption](#)
- ▶ [Children's Rights: Advocacy and International Agenda Setting](#)
- ▶ [Civil Rights and Freedoms of the Child](#)
- ▶ [Convention on the Rights of the Child](#)
- ▶ [Deprivation of Liberty of Children](#)
- ▶ [International Children's Rights Law: Child and the Family](#)
- ▶ [International Children's Rights Law: Complaints and Remedies](#)
- ▶ [International Children's Rights Law: General Principles](#)
- ▶ [International Law on the Rights of Children with Disabilities](#)
- ▶ [International Laws on the Rights of Indigenous Children](#)
- ▶ [Migration, Refugees, and Children's Rights](#)
- ▶ [Monitoring and Implementation of Children's Rights](#)

- ▶ [The Education Rights of Children](#)
- ▶ [The Human Rights of Children: An Introduction](#)
- ▶ [The Protection of Children in Armed Conflicts](#)
- ▶ [Violence, Exploitation, and the Rights of the Child](#)

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