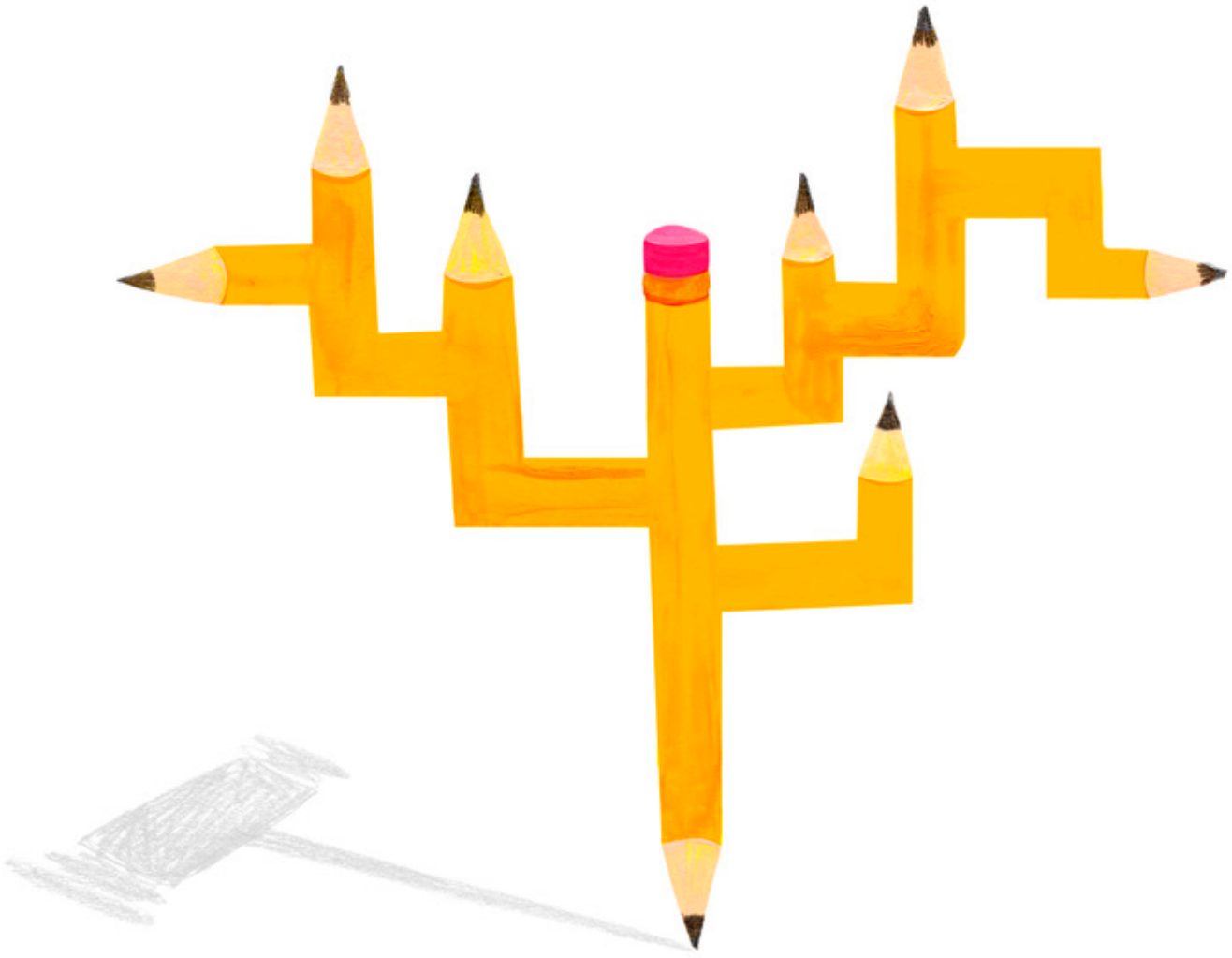
CRIN CHILD RIGHTS INTERNATIONAL NETWORK

RESEARCH REPORT

REALISING RIGHTS?

THE UN CONVENTION ON THE RIGHTS OF THE CHILD IN COURT



Acknowledgements

CRIN is a global children's rights advocacy network. Established in 1995, we press for rights - not charity - and campaign for a genuine shift in how governments and societies view and treat children. We link to nearly 3,000 organisations that between them work in children's rights in every country in the world and rely on our publications, research and information sharing.

CRIN would like to thank the many lawyers that have supported this work and without whom this project would not have been possible. In particular we would like to express our thanks to Skadden, Arps, Slate, Meagher & Flom LLP for their invaluable and ongoing support in contributing case summaries to the CRC in Court database.

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FOREWORD

A child rights jurisprudence based on the Convention on the Rights of the Child (CRC) is a work in progress. With all but one state party having now ratified the CRC, can we hope that domestic courts all over the world are moving toward a shared conceptualisation of children's rights in their judgments?

CRIN started compiling a 'CRC in Court' database of case law in 2009, which has grown to 354 as at the time this study was undertaken in 2017. The database has gathered judgments from all over the world that relied on the CRC, and made them available to child rights activists and lawyers arguing children's rights cases across the globe. This report goes much further than information sharing – it has provided an analysis of the accumulated cases.

The report focuses on cases where the CRC was relied upon in a meaningful way. The CRIN analysis measures the cases against the compatibility with the CRC as a whole, and the way that it has been applied by the Committee on the Rights of the Child in its General Comments and concluding observations. The report provides a fascinating glimpse into the way that the courts are using the CRC, and the results are equivocal.

On the positive side, there are some memorable examples of courts giving full voice to the CRC provisions, providing quotable quotes that can be used as precedents elsewhere. But on the negative side, there are examples where domestic courts have done little more than pay lip service to the CRC – in particular, with regard to the application of the best interest principle, and provided outcomes that fall short of the spirit of the CRC. CRIN's analysis grapples with the complex contextual situations – in countries with a dualist tradition, the CRC is more likely to be used to interpret local constitutions and law, while in monist systems it might be more directly applied.

However, a surprise finding is that in practice, the division is not as neat as one might have expected, and just how the courts use the CRC depends on a range of factors such as local constitutions and laws. Another interesting fact is that even though the United States has not ratified the CRC, its articles have been referred to in case law by the US Supreme Court. Is this proof that the CRC has become international common law?

CRIN has provided activists and lawyers with a thought-provoking analysis which is the first of what, hopefully, will be many explorations to mine the valuable seam of information in the database – and I am sure that practitioners and academics alike will be triggered by reading this to dig deeper into the wealth of case law that the database offers. The publication of the report is timely, just as the Committee on the Rights of the Child is developing its own jurisprudence under the 3rd Optional Protocol to the CRC.

Ann Skelton

Member of the UN Committee on the Rights of the Child and Director of the Centre for Child Law at the University of Pretoria, South Africa

PART I
INTRODUCTION

During the 28 years since the Convention on the Rights of the Child entered into force, it has become the world's most ratified human rights treaty and a powerful tool for advancing children's rights. The Convention is the canonical statement of children's rights, but it is also an enforceable legal instrument being applied around the world to protect children's rights.

CRIN launched the CRC in Court case law database in 2009 to highlight important court decisions that quote and discuss the Convention. Since then, the database has grown to include more than 350 cases from over 100 countries.

This report draws out the ways the CRC has been used around the world to challenge abuses of children's rights, but also where it has been misunderstood and misapplied by national courts. It addresses the use of the Convention in general, and features more detailed analysis of three of the most cited rights under the Convention and the divergent ways they have been applied and interpreted.

When we first launched the database, we hoped it would be a tool for lawyers to use in their own advocacy. By publicising the creative use of international children's rights law across different legal systems and traditions, we hoped to support and inspire children's rights advocates to challenge the violations of children's rights that persist across the world. We also hope that the database has developed into a tool for lawyers and advocates in their own work - to find arguments successful before courts in other jurisdictions to progress their own litigation.

CRIN believes in a world where children's rights are recognised, respected and enforced. This means ensuring that for every violation there is a remedy - using the CRC as the legal tool it was always supposed to be is a step towards making this ambition a reality.

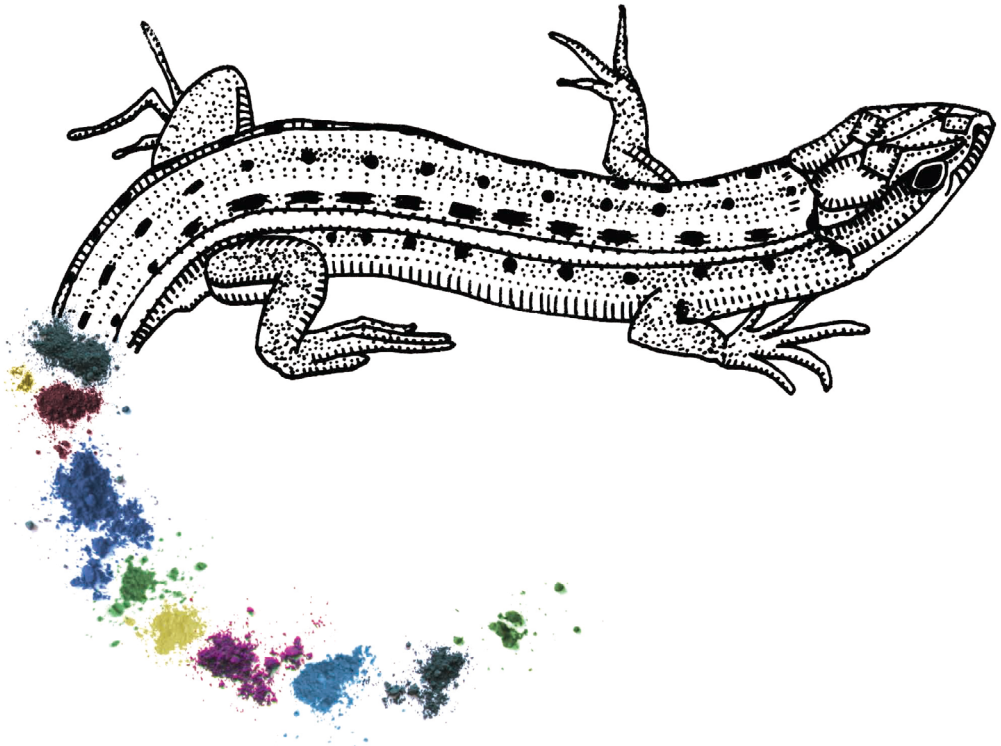
PART II
METHODOLOGY

This report is based on summaries of cases hosted in CRIN's CRC in Court Database. These summaries have been written by CRIN and law firms working with CRIN on a pro bono basis. The database includes 354 case summaries from 103 countries. Each summary addresses the facts of the case, outcome, the analysis of the Convention on the Rights of the Child by the court and the compatibility of the decision with the Convention on the Rights of the Child.

Cases were chosen to include a range of jurisdictions and issues and to highlight the progressive development of children's rights through landmark cases. The database is not a random sample of cases that reference the Convention and particularly focuses on areas that CRIN is active on in our policy and advocacy work. Statistics included within this report should not be seen as indicative of how the CRC is used globally, but are included to show some of the trends that we have seen through our analysis of the way that the Convention has been used in court.

In producing this report, each case was "coded" according to a research questionnaire to enable analysis of common features of the cases. This involved reading each case summary and placing them into set categories relating to indicators such as citation and application of CRC articles, compatibility and reasons for incompatibility, theme, issue and branch of law. Percentages and averages could then be calculated for each indicator, and comparisons made between indicators, to assist in our analysis of factors affecting use of the Convention in court.

PART III
USING THE CRC IN NATIONAL COURTS



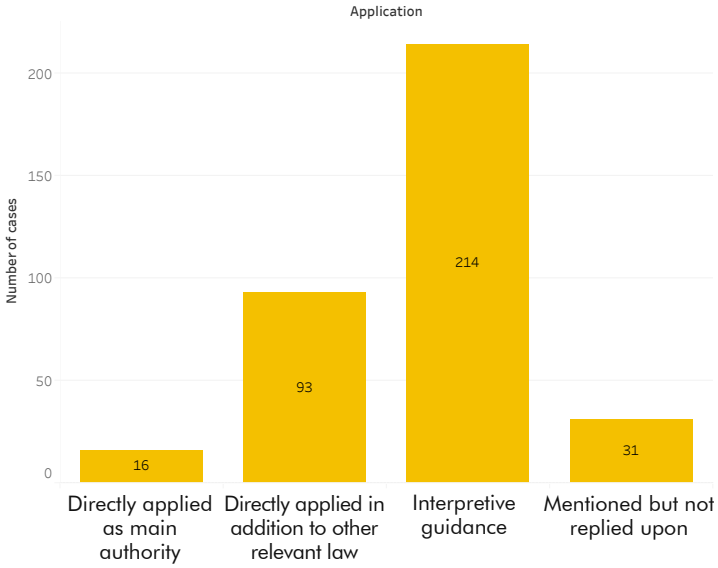
A. How are courts using the CRC?

The Convention on the Rights of the Child (CRC) is the most ratified human rights treaty in the world, yet its place in national law is far from consistent. Some jurisdictions afford the Convention constitutional status, while for others it is more of a guiding force, used for interpretation or moral support. A look at the way courts have used the CRC and the weight they have given it, shows the impact the Convention can have.

At the strongest end of the spectrum are those countries that have been willing to clearly enforce the Convention over conflicting national law. In 2010, for instance, the Supreme Administrative Court of **Bulgaria** struck down a national legal provision barring families with children from adopting, in part because the Convention prevails over contradictory legislation.[1] The Supreme Court of the **Dominican Republic**, too, has directly applied the CRC's provisions on the best interests of the child in custody decisions.[2] Around a quarter of decisions in the database directly applied the CRC, enforcing its rights directly, while five percent went further, by applying the CRC as the main authority within the case.

While many courts have been willing to directly enforce the provisions in this way, in the majority of the cases in the database, the CRC has been used as an interpretive guide to develop national law. This approach was adopted in 60 percent of the cases in the database and most common among the Commonwealth States that have not incorporated the Convention into domestic law.[3] The High Court of **Fiji**, for example, has made use of the CRC's best interests provisions in determining how much weight to place on the need of a parent to be free to care for dependant children in making decisions about pre-trial detention.[4] Similarly, the Supreme Court of **Nauru** has used the Convention to interpret its legislation on adoption.[5]

A substantial minority of cases - nine percent - mentioned the CRC but placed no weight on it. In 2005, for example, the **United States** Court of Appeal discussed the best interests provisions and the right to a nationality under the



Convention in an immigration case in response to a claim that the provisions had become customary international law.[6] The court refused to rule on this matter on the basis that even if it were true, the court would be obliged to apply conflicting national legislation.

The approach States take to applying the CRC in different jurisdictions largely reflects the approach the national legal system takes towards the enforceability of international law. Monist systems largely allow for the direct enforcement of ratified treaties by national authorities and in national courts, whereas dualist systems first require the "incorporation" of the treaty into national legislation to make it directly enforceable. Reservations to specific articles will also restrict a court's ability to apply the CRC, and constitutional principles and structures such as parliamentary sovereignty and the separation of powers may further limit options for a court confronted with problematic laws and policies. Yet the divide is not neat. Some dualist countries, such as **Finland**, have incorporated the CRC allowing their courts to directly apply the Convention, while some monist countries, including **France**, only permit the direct application of specific provisions of the Convention.[7]

It might be expected that countries that do not treat the CRC as directly enforceable law would be less likely to make decisions in line with the Convention's provisions, but the cases in the database do not show this clear divide. For every case within the database, CRIN addressed its compatibility with the Convention - whether the way the court applied the CRC was consistent with the Convention as a whole and with the way it has been applied by the Committee on the Rights of the Child in its general comments and reviews of

1 Kerezov v. Minister of Justice [2002] Supreme Administrative Court of Bulgaria, Case No. 2829/2002. Case summary and full judgment available at: www.crin.org/node/70.

2 Zoraida Ferreiras Bencosme v. Angel Mieses Devers [2007] Sentencia de; 3- Mayo del 2007. Summary and full judgment available at: www.crin.org/node/7068.

3 For discussion, see CRIN, Rights, Remedies and Representation: A global report on access to justice for children, February 2016. Available at: www.crin.org/node/42383.

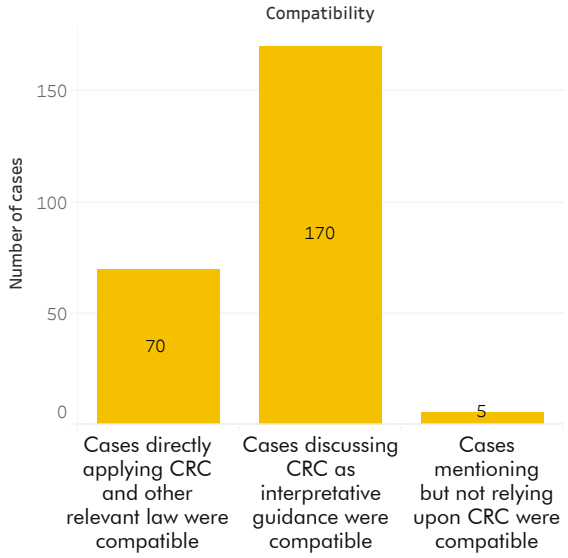
4 Devi v. the State [2003]FJHC 47. Summary and full judgment available at: www.crin.org/node/38799.

5 Re: Lorna Gleeson [2006] Supreme Court of Nauru, NRSC 8; Miscellaneous Case No. 4 of 2006. Case summary and full judgment available at: www.crin.org/node/7086. Chief Justice Robin Millhouse: "I am told that Nauru is a signatory to the Convention [on the Rights of the Child]. Whether it has become part of the domestic law of Nauru is a moot point. Whether it is or is not part of our domestic law, I feel able to take the Convention into account in considering the cases state…"

6 Olivia v. United States Department of Justice [2005] 433 F.3d 229. Summary and full judgment available at: www.crin.org/node/43030.

7 For further discussion, see CRIN, Rights, Remedies and Representation: A global report on access to justice for children, February 2016, p. 13.

States. There was no significant gap in terms of compatibility between decisions that directly applied the Convention and those that used the Convention as interpretive guidance. This is because the compatibility of decisions is affected by factors other than the application of the CRC, most significantly, the content of domestic law. Nonetheless, only 16 percent of the cases which mentioned but ultimately excluded use of the CRC were deemed by CRIN to be compatible, and this substantial difference suggests that engagement with the CRC is important.



A,B,C, D and Norwegian Organization for Asylum Seekers (NOAS) v. The Immigration Appeals Board (**Norway**, Supreme Court, 2012)
A couple arrived in Norway from Bosnia and Herzegovina in 2003. They claimed asylum in the country and while their application was being processed, they had two children. The family's asylum claim was denied, they appealed and their case ultimately reached the Supreme Court, where they argued that the refusal to allow the family to remain in the country violated their right to private and family life under the European Convention Human Rights and the best interests principle under the Convention on the Rights of the Child. The court found that there had not been a breach of either right and that it was not possible to grant a declaratory judgment for breaching the CRC, because the Convention did not provide an explicit obligation to provide an effective remedy.

Zoraida Ferreiras Bencosme v. Angel Mieses Devers (**Dominican Republic**, Supreme Court, 2007).
A father was awarded custody of his daughter after a court case in which a psychologist gave evidence that the girl had stated that she wished to live with her father. The mother appealed against the decision. The court applied the right of children to express their opinions freely, to be listened to and to have their views taken into account in accordance with their evolving capacities in line with national law and the CRC to find that the court legitimately considered the daughter's view as to who she wanted to live with.

Devi v. The State (**Fiji**, High Court, 2003)
A mother was charged and held in custody, accused of counterfeiting money. Her application for bail was denied and she appealed against the decision on the basis that the court should consider the best interests of her four-year-old child under the CRC in deciding whether she should be released pending trial because of the child's need for parental care. The court used the best interests principle under article 3 of the CRC to interpret the Fijian Bail Act and granted the woman bail.

Pharmaceutical and Health Care Association of the Philippines v. Health Secretary and ors. (**Philippines**, Supreme Court, 2007)
Pharmaceutical and Health Care Associations challenged a Department of Health Administrative Order that included a ban on advertising breastmilk substitutes. The court declared certain provisions of the Order void, discussing the Convention on the Rights of the Child, but refusing to apply its provisions as they were not sufficiently specific on the use of marketing of breastmilk substitutes.

Oliva v. U.S. Dept. of Justice (**United States**, Court of Appeals, 2005)
A Guatemalan citizen entered the United States illegally without a visa and a judge ordered his deportation. The man appealed arguing that he was entitled to seek relief from removal on the basis of his children's rights under the CRC. He claimed that national law should be interpreted in line with international law where it is ambiguous, but the court was unwilling to make use the CRC as it found that national law was unambiguous.

B. How do courts treat the different articles of the CRC?

All human rights are interdependent and indivisible, those within the CRC no less so. Yet, this foundation stone of human rights is less clearly recognised in the use of the CRC in courts. While some articles are cited with a reassuring regularity, others are neglected and seldom brought before the courts.

The selective use of Convention rights before national courts is clear from the database. The four most cited articles are the best interest of the child (article 3), detention and punishment (article 37), separation from parents (article 9) and protection from all forms of violence (article 19). Selection bias on the part of CRIN potentially affects these figures - CRIN campaigns on sentencing and deprivation of liberty, which would be likely to increase the number of cases related to these issues included within the database. More detailed analysis, nonetheless, indicates that while some articles are being widely applied and discussed before courts, others are set aside, even when relevant. For each case in the database, we tracked the articles that were explicitly cited as well as those that were relevant to the case, but were not mentioned in the judgment. Article 40 on the administration of juvenile justice, for example, was relevant but uncited in 27 cases within the database, while article 9 on family separation was relevant but uncited in 39 cases. Most cases on family separation were resolved with reference to the best interests of the child, while complaints raising issues related to article 40 were largely resolved by applying article 37, on torture and detention.

In some situations, the reasoning behind this selective application of the Convention is clear. **Belgium**, for example, has established that only provisions that are considered to be "directly applicable" can be applied and take precedence over national law.[8] This clear rule would explain why the court would rely on those provisions in making its decisions and why lawyers approaching the court would frame their arguments in terms of the articles that can be directly applied. Similarly, some of the CRC's articles clearly complement national law, making courts more able to discuss the Convention's application. In the **United Kingdom**, the Convention has not been incorporated into national law and cannot be directly applied, but areas of the law have been reformed to correspond with Convention rights, including article 3 on the best interests of the child.

Ruling in a deportation case in 2011, the **Supreme Court** found that "the spirit, if not the precise language" of article 3 had been translated into national law,[9] allowing the court to discuss the right in some detail. That the European Court of Human Rights has considered the best interests principle in its case law also allowed the UK court to make use of the best interests principle in applying the rights under the European Convention on Human Rights, as UK law allows national courts to take account of judgments of the European Court of Human Rights in interpreting rights provisions.[10]

In other judgments, the reasoning behind the selective approach to the CRC's provisions is less apparent. In a case before the **Supreme Court of Singapore** on the payment of child maintenance for children born out of wedlock, the court recognised that Article 18 sets out the principle that both parents are responsible for the upbringing of a child, but concluded that the CRC does not compel Singapore to equate the situation of children born within and without marriage.[11] The court did not consider the Convention's protection against discrimination on the basis of birth, which clearly applies to the facts of the case and would prohibit discrimination on the basis of the marital status of a child's parents. This selective application may show a lack of knowledge of the Convention and its application. It is worth noting that lawyers before the court did not raise the CRC in court and so there were no arguments as to the application of relevant provisions. The case may also indicate a judge selectively looking for support within the Convention.

Certainly it is true that Article 18 does not explicitly deal with the rights of children born outside wedlock in addressing parental responsibilities as the judge noted, but it is not the only article in the Convention relevant to the issue.

A small number of cases within the database make only a reference to the Convention as a whole. Clearly, in these examples there would be many relevant rights that would go unmentioned, and it might be expected that in these cases the CRC could not be directly applied in any meaningful way. Many of these cases are those in which the court ruled on whether and how the CRC can be applied in the first place and so the general application is obvious.[12] Perhaps counterintuitively, however, a small number of these cases directly applied the CRC as a whole, suggesting that courts might view the spirit of the CRC as commanding and enforceable. For example, the **Supreme Court of Nauru,**[13] ruling on an inter-country adoption case in 2006, applied the CRC in general without citing any specific article alongside provisions of the Nauruan constitution, overturning the lower court's interpretation of the Adoption of Children Ordinance for being *"contrary to the spirit of the United Nations Convention on the Rights of the Child"*.

8 See CRIN, Access to justice for children: Belgium, April 2015, p. 1. Available at: www.crin.org/node/41373.

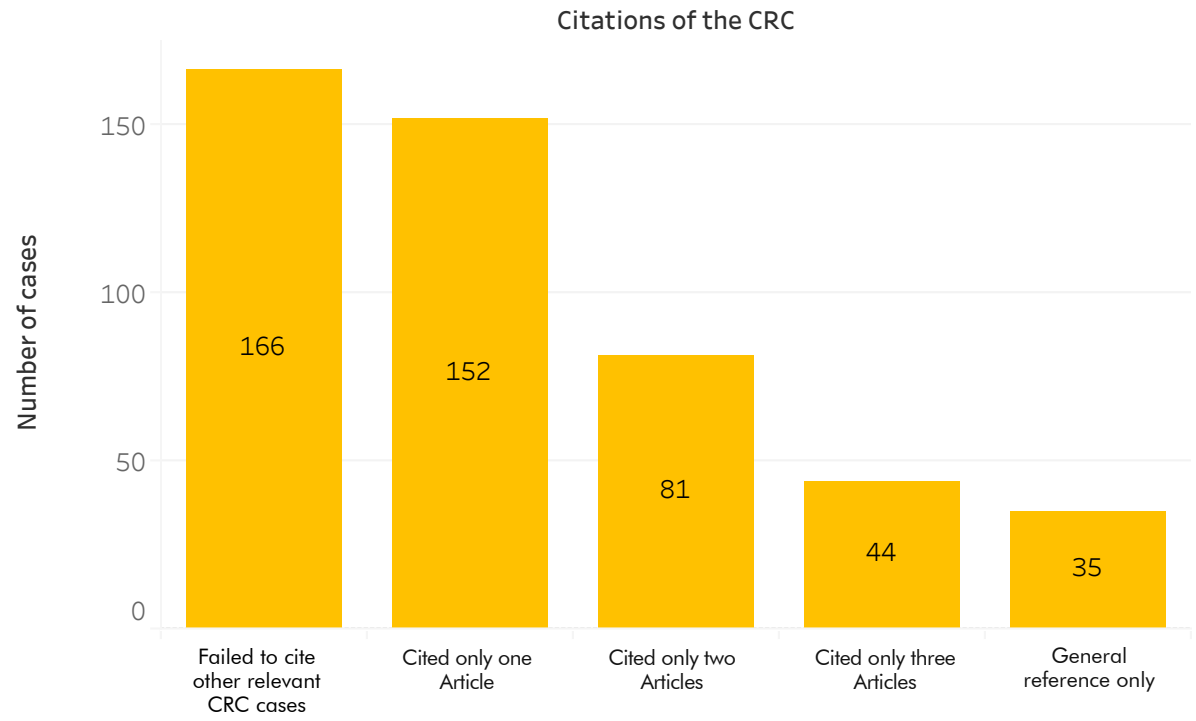
9 ZH v. Secretary of State [2011] UKSC 4. Summary and full judgment available at: www.crin.org/node/7047.

10 Human Rights Act, Section 2(1)(a). Available at: https://www.legislation.gov.uk/ukpga/1998/42/contents.

11 AAG v. Estate of AAH [2009] SGCA 56. Summary and full judgment available at: https://www.crin.org/en/library/legal-database/aag-v-estate-aah

12 See, for example, Comilang v. Commissioner of Registration [2012] HKCU 1282. Summary and full judgment available at: https://www.crin.org/en/library/legal-database/comilang-v-commissioner-registration

13 In re Lorna Gleeson [2006] NRSC 8. Summary and full judgment available at: https://www.crin.org/en/library/legal-database/re-lorna-gleeson


Citations of the CRC
Number of cases
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50
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166
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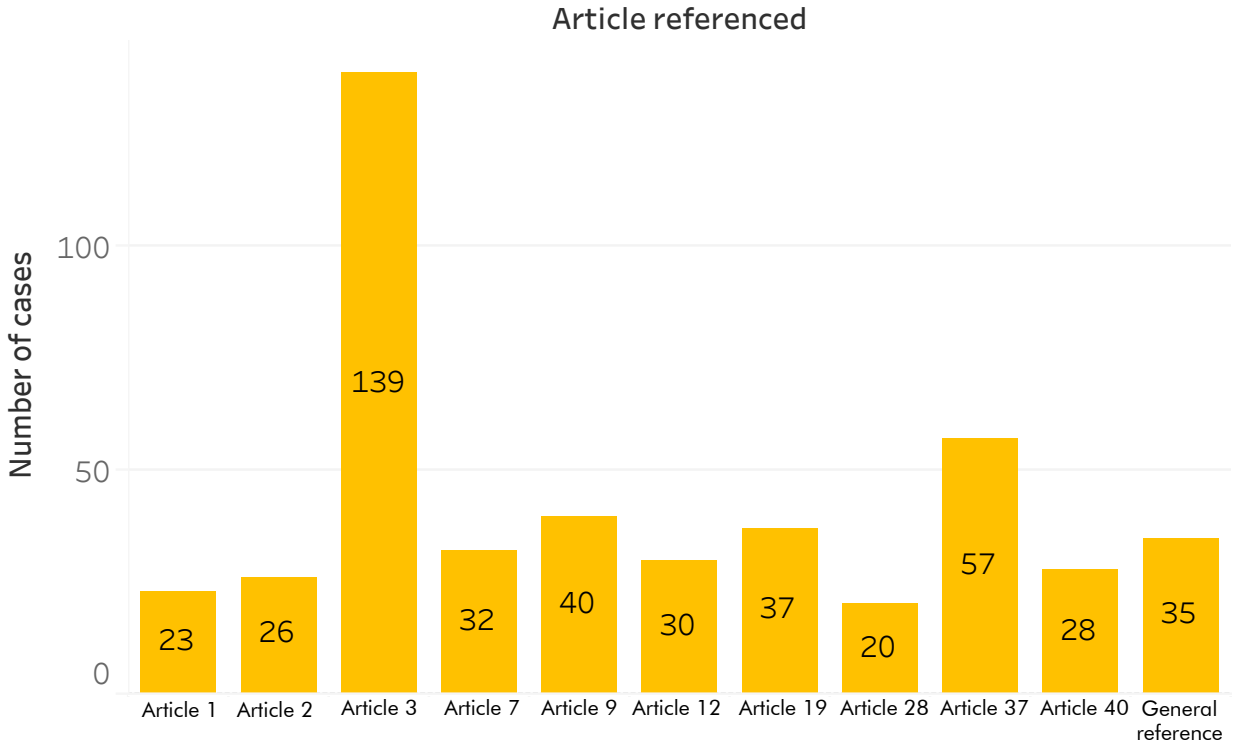
35
Failed to cite other relevant CRC cases
Cited only one Article
Cited only two Articles
Cited only three Articles
General reference only


Article referenced
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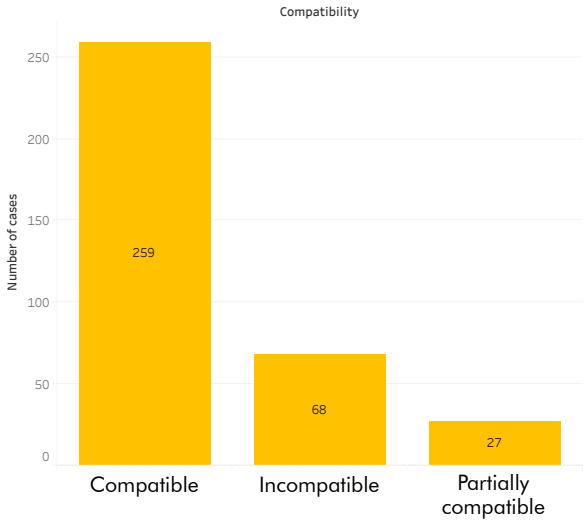
37
20
57
28
35
Article 1
Article 2
Article 3
Article 7
Article 9
Article 12
Article 19
Article 28
Article 37
Article 40
General reference

C. Compatibility

For every decision in the CRC in Court database, CRIN determined its compatibility with the Convention - whether the way the court applied the CRC was consistent with the Convention as a whole and with the way it has been applied by the Committee on the Rights of the Child in its general comments and reviews of States. Where aspects of the judgment were compatible with these considerations, but the decision fell short of the full requirements of the CRC, cases were classified as "partially compatible".



Of the 354 judgments within the database, CRIN considered more than 73 percent to be compatible with the CRC, 19 percent incompatible and 8 percent partially compatible. Because of CRIN's interest in landmark cases and positive developments in children's rights, it is unlikely that this success rate is replicated across all cases in which the CRC has been considered. It is also possible that courts willing to cite and engage with the CRC are more predisposed to make decisions in line with its rights.

Hosking and Hosking v. Runting and Pacific Magazines NZ Ltd (**New Zealand**, Court of Appeal, 2004)
A celebrity complainant petitioned the court to prevent a magazine from publishing photographs of his children. Mr. Hosking was unsuccessful at the High Court and appealed. The Court of Appeal held that the court was able to provide remedies for breach of the right to privacy and that the common law should be developed in line with New Zealand's international obligations, including those under the CRC. On the facts of the case, the court found that there had not been a violation of the right to privacy as the photos had been taken in public where there was no reasonable expectation of privacy. Despite being guided by Article 16 of the CRC (right to privacy), the court did not seriously contemplate whether photographs of children may require greater protection than those for adults. The magazine was allowed to publish the photographs.

Perception of compatibility

In the vast majority of cases - 94 percent - judges gave the impression that they believed their decisions were compliant with the CRC. Even across decisions that clearly contradict the CRC's principles and provisions, courts claimed that the Convention supported, or at least did not conflict with, their judgment.

Many of these decisions turned on a superficial analysis of the Convention. The **Israeli Supreme Court**, for example, heard a case in 2006 about the restrictions on contact between Israeli citizens and their spouses of children living in the Palestinian Territories.[14] The court's majority briefly considered that the CRC's family reunification provisions under article 10, finding that there was no specific provision providing for legal claims to family reunification. This finding was despite the fact that article 10 explicitly references the Convention's related provisions on the separation of children from their parents, provisions that did not feature in the majority's analysis. It was only in the dissent that one of the judges recognised the broad range of rights under the Convention that were violated by the law restricting contact between children and their parents.

Even in cases in which judges engaged in relatively detailed analysis of the CRC, there are examples in which they nonetheless took a restrictive approach to its provisions, or assumed that its requirements were easily satisfied. For example, in 2014, the **Canadian Supreme Court** heard a complaint calling for the court to strike down a law allowing parents and teachers to use "reasonable force" against children in their care.[15] The judgment considered the best interests of the child (article 3), the protection from all forms of violence (article 19) and the prohibition of cruel, inhuman and degrading treatment (article 37) in some depth, but concluded that the Convention did not explicitly ban mild corporal punishment and that the "reasonable under the circumstances" requirement in the Criminal Code was a sufficient limit to avoid the kind of harm prohibited under the Convention. The decision is particularly striking given the categorical prohibition under the Convention of "all forms of physical or mental violence", the consistent position of the Committee on the Rights of the Child that all forms of corporal punishment to violate the prohibition on violence, and a specific recommendation to Canada on the topic the year before the Supreme Court decision.[16]

14 Adalah et al v. Minister of Interior et al [2006] H.C. 7052/03; ILDC 393 (IL 2006). Summary and full judgment available at: www.crin.org/node/6973.

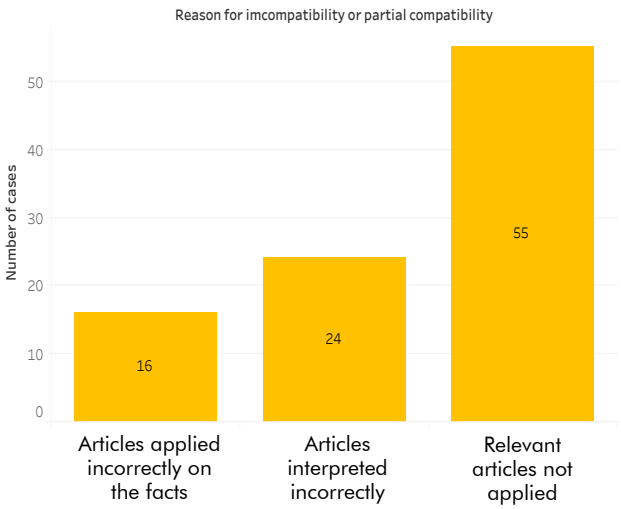
15 Canadian Foundation for Children, Youth and the Law v. Canada (Attorney-General) [2004] 1 SCR 76; 2004 SCC 4. Summary and full judgment available at: www.crin.org/node/6870.

16 UN Committee on the Rights of the Child, Concluding observations on the second periodic report of Canada, CRC/C/15/add.215, 27 October 2003, para. 32.

Reasons for incompatibility

The most common reason for incompatibility or partial incompatibility among the sample was that the relevant articles were simply not applied.

Just under half of the incompatible or partially incompatible cases were so because the articles had been interpreted or applied incorrectly. There is often only a subtle distinction between misinterpretation and misapplication of Convention articles. In cases involving the latter, courts initially demonstrate an understanding of the Convention articles by engaging in a correct analysis of what the Convention entails but then failed to properly apply this to the specific circumstances of the case.



For example, the **Supreme Court of Tonga**[17] considered a case concerning the sentencing of a boy who pleaded guilty to seven separate offences involving housebreaking and theft, who had previously undergone various diversion and rehabilitation schemes. The court placed Article 37 (deprivation of liberty) at the heart of the decision, reasoning that it had exhausted all options and as a last resort must sentence the boy to the shortest appropriate prison term for reasons of public safety and deterrence. While this reasoning is consistent with Article 37, the court sentenced the boy to a prison term of 18 months despite recognising that there are no juvenile detention centres in the country, and so the boy could not be detained in a facility that met the standards set by the Convention.

Highly sensitive and politicised issues may sometimes be particularly susceptible to the manipulation and misinterpretation of Convention articles. Immigration and deportation is the issue with the highest number of incompatible cases within the database, and an above-average proportion of these cases were found to be incompatible for reasons of misinterpretation, although it must be acknowledged that the sample size here is rather small.

A 2007 decision by the **Court of Final Appeal in Macao** illustrates how immigration and deportation cases prioritising national interests may be more susceptible to court misinterpretation of the CRC.[18] The case concerned applications for Stay Permits for the children of foreign guest workers. The court gave somewhat strained interpretations of Articles 2 (non-discrimination), 3 (best interests of the child) and 9 (separation from parents) to justify excluding the right of foreign unskilled workers to live with their children. The court found that there was no violation of the prohibition of discrimination under Article 2 because the government did not treat the applicants differently from other *non-residents* on the basis of race, gender or religion; there was no violation of the principle of the child's best interests because, given Macau's small size, there is no obligation to grant rights of residence to children of foreign workers as this would compromise the safety, education and housing of the people living in the region; and that there was no violation of Article 9 because the government did not force the separation of the child from his parent, and the applicants could give up their jobs in Macau and return to their country of origin. The problem of misinterpretation is not limited to immigration and deportation, however, and there have even been instances in which courts use the CRC to justify problematic laws.

Constitutionality of Part 1 of Article 6.21 of the Code of Administrative Offences of the Russian Federation in relation to the complaint lodged by citizens Alexeev N. A., Evtuschenko Y.N. and Isakov D.A. (**Russian Federation**, Constitutional Court, 2014)
Three men were fined under an administrative sanction for protesting against a law banning "gay propaganda". The men challenged the law, arguing that it was unconstitutional. Dismissing the men's case, the court cited several articles of the CRC, including on parental guidance (article 5), survival and development (article 6), sexual exploitation (article 34) to emphasise the duty of the State to ensure children's development and their protection from all forms of abuse. The court held that the CRC establishes the need to adapt information to a child's age and reasoned that the prohibition on "gay propaganda" protected the constitutional values related to the protection of the family and childhood, as well as preventing harmful effects on the child's health and moral development.

17 R v. Valu [2008] Tonga LR 44. Summary and full judgment available at: https://www.crin.org/en/library/legal-database/r-v-valu

18 Court of Final Appeal of Macau [2007] Case No. 21/2007. Summary and full judgment available at: https://www.crin.org/en/library/legal-database/court-final-appeal-macau-case-no-21/2007

Incompatibility: variation between CRC articles, themes and issues

Cases involving certain CRC articles or certain specific issues were far more likely to result in decisions that were compatible with the Convention. Where courts dealt with Article 7 (name and nationality) or Article 28 (the right to education), for example, they were significantly more likely to reach decisions that were compatible with the CRC.

The number of cases included within the database are too small to draw strong conclusions, but it may be that these rights are seen to be less controversial, perhaps because of their common place across international human rights law and their recognition within national legal systems.

For example, in 2009 **Swaziland's High Court** heard a complaint on behalf of former mine workers and parents of school-aged children seeking an order compelling the government to provide free education in public schools as provided under the Constitution.[19] The court drew on the CRC alongside the International Covenant on Economic, Social and Cultural Rights to require the government to establish free primary education for all children, though the case was overturned by the Supreme Court.

Similarly with cases involving Article 7 (name and nationality), courts rarely ruled in a way that was incompatible with the CRC. The **Armenian Court of Cassation** heard a case in 2013 on a mother's application to have her deceased partner recognised as the father of her children.[20] The court cited article 7 of the Convention to support its decision to lower the standard of proof and permit indirect evidence that the deceased partner recognised himself to be the father of the children. Again, the key role of birth registration in establishing legal status and the guarantee against statelessness within the CRC, and international human rights law more generally, may have influenced the court.

By contrast, cases citing other articles were significantly more likely to be incompatible with the CRC. Cases within the database involving the best interests of the child (article 3) and separation from parents (Article 9) were particularly likely to fall short of the standards set by the Convention and the Committee on the Rights of the Child. Both of these provisions incorporate the principle of the best interests of the child into decisions concerning children and may indicate that courts are struggling to make decisions based on broad considerations about the welfare of children.[21]

Cases involving deportation or immigration often heavily involve decisions about the best interests of children and were also significantly more likely to fall short of the standards set by the Convention. This might be expected given the highly political nature of immigration in many countries and the tension between national law and international human rights standards. Many of the deportation cases in the database show this tension and a very narrow reading of relevant rights under the CRC. In 2007, **Tokyo's District Court in Japan**, heard an appeal against a deportation order issued against a Turkish national, a Philippine national and their Japanese-born daughter.[22]

The couple had entered Japan separately, overstayed their visas and remained in the country illegally for over ten years. The court dismissed their appeal and justified deportation by reading Article 9 (separation from parents) as only requiring that a State provide information about the whereabouts of the absent/deported family member and not as a prohibition on the separation of parents from their children in connection with a deportation proceeding. The court held that the best interests of the child may be considered as a factor in determining whether or not the Minister of Justice issues special permissions to remain in Japan, but that non-issuance alone would not constitute a breach or abuse of authority. The court noted in any case that international conventions including the CRC do not govern the decisions of the Ministry of Justice.

The use of reservations limiting States commitments are also evident in immigration cases. In a 2016 case before **Hong Kong's Court of First Instance**, the court declined to overrule a deportation decision in line with the CRC because the Convention had not been incorporated, and in any case, there was a reservation in place excluding its application to immigration legislation.[23]

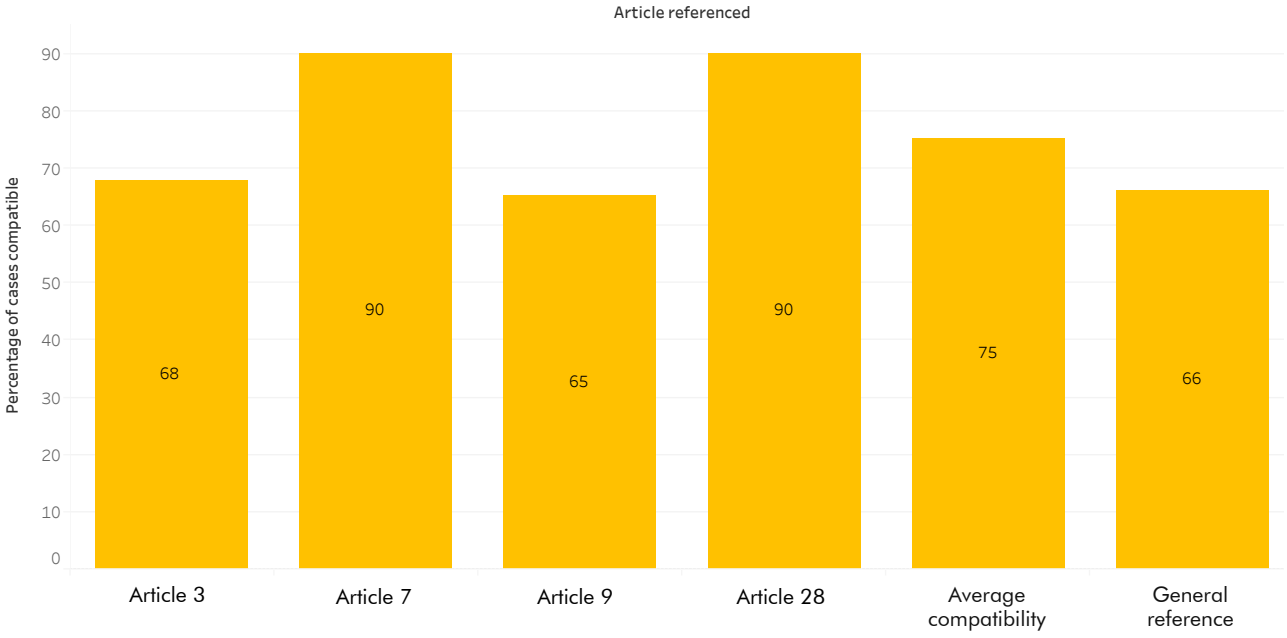
19 Swaziland National Ex-Miners Workers Association v. The Minister of Education and others [2009] SZHC 104 (16 March 2009). Summary and full judgment available at: www.crin.org/node/40892.

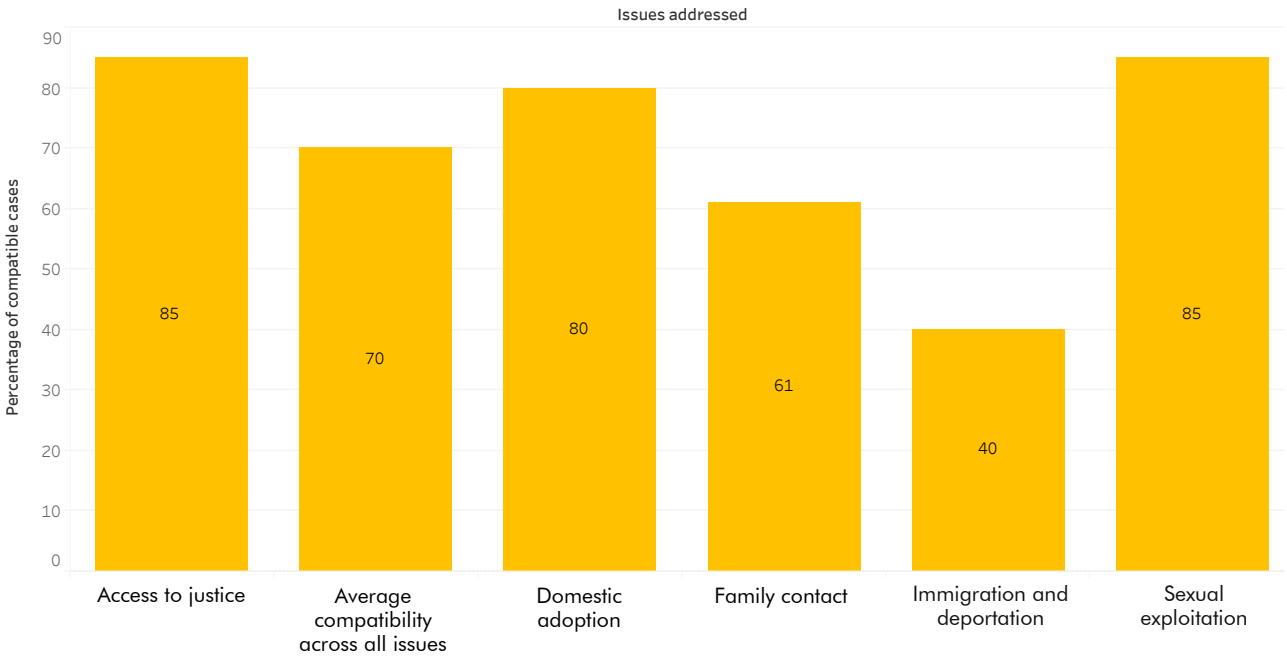
20 Case No. LL/0023/02/12 [2013]. Summary and full judgment available at: www.crin.org/node/43008.

21 For more detailed discussion about courts' use of the best interests of the child, see Chapter IV at p. 19 below.

22 Demand for rescission of a deportation order [2007] 204 (Gyo-U) 111. Summary and full judgment available at: www.crin.org/node/7098.

23 Pagtama, Victorina Alegre v. Director of Immigration [2016] HKCU 83; HCAL 13/2014; HCAL 45/2014; HCAL 56/2014 (12 January 2016). Summary and full judgment available at: www.crin.org/node/42946.


Article referenced
Percentage of cases compatible
90
80
70
60
50
40
30
20
10
0
68
90
65
90
75
66
Article 3
Article 7
Article 9
Article 28
Average compatibility
General reference


Issues addressed
Percentage of compatible cases
90
80
70
60
50
40
30
20
10
0
85
70
80
61
40
85
Access to justice
Average compatibility across all issues
Domestic adoption
Family contact
Immigration and deportation
Sexual exploitation

D. Impact

Human rights litigation is often brought with the intention of advancing a broader cause and challenging injustice affecting whole communities. For each case in the database, CRIN has attempted to track the broader impact of the case - whether it led to the law being amended, triggered a change in government policy or brought about a formal apology. For many of the cases included, it has not been possible to trace the outcome beyond the judgment itself, but where this has been possible examples show the way that courts using the CRC can have a powerful impact in challenging widespread children's rights abuses. Examples also abound of the ultimately limited power of the courts to tackle some of the most persistent violations.

The **European Court of Human Rights** case on sexual abuse in **Ireland** encapsulates many of these features and contradictions.[24] An Irish woman was sexually abused by a teacher while she was a student at a Roman Catholic-owned school in the 1970s. Her parents complained at the time, but the teacher was moved on to another school where he continued to sexually abuse children. More than 20 years later, the perpetrator was charged with 386 offences related to abusing former pupils and the survivors of the abuse sought to hold the State accountable for failing to protect them. The European Court of Human Rights found the State responsible for violating the prohibition on torture, inhuman or degrading treatment under the European Convention on Human Rights for failing to protect the children from sexual abuse, using the CRC to bolster its arguments. The Prime Minister of Ireland immediately responded to the judgment by making an apology and the case triggered the establishment of a compensation mechanism. The compensation scheme has, however, been controversial because of the limited circumstances in which it will make payments to victims and litigation is ongoing to ensure all victims are able to seek compensation.

Such cases show the power of judgments to provide remedies to large numbers of children affected by a human rights abuse, but other cases lead to related but broader change. In 2006, the **Australian High Court** heard a case over whether the State was able to criminalise sexual offences committed by its citizens outside of the country in jurisdictions where the conduct was legal.[25] In the case of a man who had been convicted of engaging in sexual or indecent relations with a child in Thailand, the court found that Australian law could criminalise such behaviour. The ruling quoted the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC), highlighting the role that the State had played in the drafting process and the fact that Australia had not yet ratified the treaty. Within six months of the judgment, Australia formally ratified the OPSC.

Leading cases have also resulted in courts developing their own procedures to better address the needs of children. During the case of Thomas Lubanga Dyilo at the **International Criminal Court**, the court was faced with dealing with the evidence of children who had been recruited into armed forces. The judgment set out general guidelines on the participation of victims in proceedings, including by addressing children's right to be heard under the CRC, but also triggered a long process for the ICC in determining how it included children within its proceedings, leading to the office of the prosecutor to develop its own policy on children.[26]

24 O'Keefe v. Ireland [2014] App. No. 35810/09. Summary and full judgment available at: www.crin.org/node/40340. Case study available at: www.crin.org/node/41282.

25 XYZ v. Commonwealth of Australia [2006] HCA 25; (2006) 227 ALR 495; (2006) 80 ALJR 1036 (13 June 2006); ILDC 528 (AU 2006). Summary and full judgment available at: www.crin.org/node/6996.

26 The Office of the Prosecutor, Policy on Children, November 2016. Available at: https://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF.

PART IV
THE BEST INTERESTS OF THE CHILD

Article 3(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.*

The best interests of the child is perhaps the most referenced children's rights principle in international law, cited within the database in almost 40 percent of cases. This is hardly surprising. That the best interests of the child must be a primary consideration in all actions concerning a child is a general principle under the Convention - used to interpret all rights under the CRC - gives the principle a core role in children's rights cases. The best interests principle is also explicitly mentioned in seven other articles of the Convention, covering rights provisions as diverse as separation from parents and family reunification to adoption and detention,[27] cementing its fundamental place within the CRC.

The Committee on the Rights of the Child has set out the best interests principle as a three-fold concept: a substantive right, a tool for interpretive guidance and a rule of procedure.[28] First, the best interests principle is an obligation on States to ensure that the best interests principle is implemented whenever a decision concerning a child is made. Second, public authorities must pursue interpretations of the law that best serve the best interest of the child. Third, any decision-making process must include a full and formal "child rights impact assessment". The Committee acknowledges the best interests principle is complex and liable to manipulation, but that it gains its strength from its flexibility and adaptability, requiring determination on a case-by-case basis and adjustment according to the specific situation of the child concerned.

The problem of indeterminacy

One of the strengths of the best interests principle is its flexibility and adaptability - the requirement to consider the specific situation of a child on a case-by-case basis. This very flexibility can, however, leave the principle liable to manipulation[29] and leave courts and decision makers with little guidance on how to apply the standard. The **South African Constitutional Court** considered this very issue in an appeal against a prison sentence for a single mother with three children:

"Once more one notes that the very expansiveness of the paramountcy principle creates the risk of appearing to promise everything in general while actually delivering little in particular. Thus, the concept of the best interests has been attacked as inherently indeterminate, providing little guidance to those given the task of applying it."[30]

While the best interests standard offers a strong yet malleable legal principle, its application is much more controversial. In many circumstances, the principle can appear subjective in nature, leading to a consideration of what is in the best interests of the child in light of the values held by society in general and judges in particular. In family law cases especially, the issue comes to the fore, leading parties to compete with each other to argue that the best interests are in line with their own.

The difficulty in making decisions based on the best interests principle is perhaps best illustrated by the most complicated child custody decisions. In 2017, the **High Court of England and Wales** heard a case to decide whether five children aged between 2 and 12 who were living with their ultra-orthodox Jewish mother, would be allowed to have direct contact with their other parent who had transitioned and was living as a woman.[31] Since the parents had separated, the children remained with their mother and had no contact with their other parent because of the mother's fear that the ultra-orthodox community would ostracise the family if they did. The court heard evidence from rabbis, school teachers, community experts, child experts and the children themselves to find that they were "caught between two apparently irreconcilable ways of living". Ultimately, the court decided that the children should not have direct contact with their transgender parent, allowing her to have limited contact by writing to the children four times a year.

Throughout the judgment, the court regretted the difficulty of the case and continuously asserted the supremacy of the children's best interests, finding that the benefit of direct contact would be outweighed by the negative impact of the children being excluded from the community that they had grown up within. Despite the emphasis on the best interests principle played in the decision and the range of experts who gave evidence, the Court of Appeal found that the judge had lost sight of the best interests of the child and should have tried harder to make it possible for the children to have direct contact with their transgender parent.[32] The High Court will now have to reconsider the case.

27 Convention on the Rights of the Child, Articles 9(1); 9(3); 18(1); 20(1); 21; 37(c); 40(2)(b)(iii).

28 UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013, para. 6. Available at: http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf.

29 Ibid. at para 34.

30 S v. M [2008] (3) SA 232 (CC) 261. Summary and full judgment available at: www.crin.org/node/7001.

31 J v. B (ULtra-Orthodox Judaism: Transgender) [2017] EWFC 4, [2017] All ER (D) 108 (Jan). Summary and full judgment available at: www.crin.org/node/43223.

32 In the matter of M (Children) [2017] EWFC 4. Summary and full judgment available at: www.crin.org/node/43451.

The problem of rigidity

While courts often wrestle with the indeterminacy of establishing what is in a child's best interests, applied elsewhere, the standard has also resulted in excessive rigidity. Often framed in the form of legal presumptions, legislators and judges assume that a certain course of action will be in the child's best interests, unless it is proved to be otherwise. In this way, generalised and often mistaken beliefs about child welfare harden into legal standards.

An **Irish Supreme Court** decision from 2006 illustrates this problem.[33] The biological family and prospective adoptive parents of a two-year-old child entered into a custody dispute. The biological parents had originally consented to the adoption, but changed their mind after the child had been placed with the adoptive parents and sought to regain custody. Bound by precedent, the court unanimously ruled in favour of the biological parents on the basis of a constitutional presumption that a child's welfare is best served by living with their biological family, unless there are strong reasons to suggest otherwise. In the absence of evidence that the girl's biological parents were incapable of caring for her, the court was compelled to award custody to them. The chief justice in making the ruling was critical of the way the presumption was applied as "so exacting that it would be difficult to see it being met other than in the most extreme circumstances". The weight of the presumption about what is in the best interests of children forced debate away from what was actually in the best interests of the child before the court.

Similarly, the Supreme Court of the **Philippines** discussed Article 3 of the CRC on the best interests of the child in awarding sole custody to a child's mother, on the basis that there is a "tender age" presumption that children under the age of seven should be cared for by their mothers.[34] Despite citing the CRC explicitly, the court did not enter into an analysis of what was in the best interests of the two children involved in the case.

Jackson Davis v. The Republic (**Tanzania**, Court of Appeal, 2009)
A man appealed against his conviction for sexually abusing a child, claiming that the trial judge should not have permitted the child victim and child witness to give evidence without taking an oath. The court overturned the conviction, finding that the trial judge had failed to adequately assess the children's ability to give evidence, and declined to order a retrial, finding that this would not be in the child's best interests. The court found that ordering a retrial five years after the alleged assault would re-traumatise the child and run against his best interests under to the CRC.

FHY v. GJS (**Hong Kong**, District Court, 2008)
A father applied for joint custody of his children and requested the court's permission to leave Hong Kong with the children, because he was unable to find work. The court held that the starting point for custody decisions was to grant joint custody unless there is a good reason not to do so, in recognition of the role of both parents in protecting the interests in line with article 18 of the CRC. Unusually, Article 3 (best interests) was not cited in the decision and aspects of the decision raise the question of whether the focus on the presumption of joint custody may have clouded the primacy of the best interests of the child:
"[58] It is clear that a joint custody order may sometimes in appropriate cases be made for the purpose of encouraging parents to overcome their differences and co-operate for the benefit of their children."

R. 390. XLVI, "Reintegro de Hijo" (**Argentina**, Supreme Court, 2010)
A father approached the court asserting his entitlement for his child to be returned to the United States on the basis that the child had been removed under the terms of the Hague Convention on the Civil Aspects of International Child Abduction. The mother countered that there were numerous reasons why the child should remain in Argentina, including that it would be in the best interests of the child under Article 3 of the CRC. The court held that it was not necessary to look at the best interests of the child separately from the Hague Convention, and ruled that the child should be returned to the United States. This was because the Hague Convention was specifically designed to protect the best interests of the child in those cases, and indeed, Article 13 establishes that a judicial or administrative authority is not bound to order the return of the child if it is proved that this would expose them to a "grave risk" of physical or psychological harm, or otherwise place the child in an "intolerable situation".

However, the Hague Convention is primarily about jurisdiction and is concerned with preserving the custody arrangements that existed before the wrongful removal, and a court in a Hague Convention case is not supposed to look at substantive issues, except when a party is seeking to prove that, for example, a grave risk of harm exists - a standard with a much higher threshold than the best interests principle. While this is aimed at ensuring the functioning of the Convention and for the deterrence of illegal child abductions, it is not a given that the Hague Convention - or any other international law instrument - was suitably designed to protect and prioritise the best interests of the child. The Hague Convention came into force before the CRC, and considering the lack of mainstreaming of children's rights in international legal documents, it would not necessarily be unreasonable for courts to allow examination of compatibility with Article 3.

33 N and another v. Health Service Executive and others [2006] IESC 60. Summary and full text available at: www.crin.org/node/7101.

34 Agnes Gamboa-Hirsch v. Hon. Court of Appeals and Franklin Harvey Hirsch [2007] GR No. 174485, 11 July 2007. Summary and full judgment available at: www.crin.org/node/7188.

Best interests as a "primary consideration"

The Convention's requirement that the best interests of a child must be a primary consideration clearly implies that it is a factor that must be at the centre of decisions involving children, but beyond this, courts have often been unclear about the precise weight to place on a child's interests.

Many of the decisions where the best interests of children have given way to other interests revolve around welfare issues, where the best interests of individual children may conflict with broader economic policies. For example, in 2014, the **Court of Appeal in England and Wales** heard a challenge against a system of "caps" on the amount of welfare benefits a person could claim.[35] For anyone receiving more than the cap, this meant a reduction in the financial support they were receiving. The most likely reason for exceeding the cap was having a large number of children or receiving a high level of housing benefit because a family was living in an expensive city.

Complainants brought a challenge to the new caps, claiming that they violated the best interests of children under the CRC and arguing that there was no evidence that the government minister responsible for the new regulations had treated the best interests as a primary consideration in making the relevant regulations. The court dismissed the appeal, including by finding that Article 3 does not create an obligation on decision-makers to consider the best interests of the child first, nor an obligation to address conflicting considerations of public policy in any particular order, as long as the judge gives "appropriate weight to the interests of children as a primary consideration in the overall balancing exercise".

Cases involving the deportation proceedings involving parents who have entered a country illegally, overstayed a visa or whose asylum claims have been rejected also commonly lead to a more detailed analysis of how the best interests of a child must be applied and weighed against other interests. The **Canadian Supreme Court** entered into this analysis in 1999, when it heard a deportation case involving a mother.[36] Ms. Baker, a Jamaican citizen in Canada with four Canadian children, faced deportation proceedings because she had overstayed her visa and was working illegally. She was the sole caregiver for two of the children and applied for an exemption from the rule requiring people to apply for permanent residence from outside of the country. An immigration officer denied her request. Ultimately the Supreme Court found that the use of the immigration officer's discretion was unreasonable as the immigration officer's notes showed that there was a real risk of bias. In making this decision, the court examined the role that the welfare of the children had made in the decision and the weight it should be given:

"for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C [humanitarian and compassionate] claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable."

The **United Kingdom Supreme Court** entered into similar reasoning in a deportation appeal a decade later.[37] A mother of two British children appealed against her deportation from the UK to Tanzania. The court held that the best interests of the children must be considered first and, as part of this analysis, set out a list of factors that should be considered in determining whether it would be reasonable to expect any child to move to another country in pursuit of a deported parent.

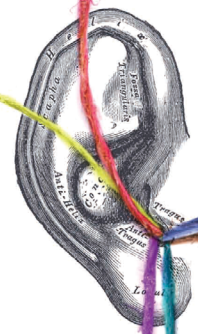
The factors included: how integrated the child is in his or her current country and how long that child has been absent from the other country; where and with whom the child would live in the other country, and the potential childcare arrangements that would be made; the strength of the child's relationships with parents or other family members that would be severed if the child has to move away; and the child's identity as a citizen of the UK. The court also advised immigration authorities to seek the opinion of children in seeking to determine their best interests.

35 R (on the application of SG and others) v. Secretary of State for Work and Pensions [2014] EWCA Civ 156. Summary and full judgment available at: www.crin.org/node/39969.

36 Marvis Baker v. Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817. Summary and full judgment available at: www.crin.org/node/7183.

37 ZH v. Secretary of State for the Home Department [2011] UKSC 4. Summary and full judgment available at: www.crin.org/node/7047.

PART V
THE RIGHT TO BE HEARD



Article 12
(1)*: States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
(2)*: For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

Procedure, substance and weight

Under the CRC, children have a right to be heard in all matters that concern them and for their views to be given weight in accordance with their age and maturity. The right is broad, applying to a range of decision-making processes - from court hearings and custody decisions to decisions about health and environmental policy. The right is at its most explicit, though, in judicial and administrative proceedings concerning children, where they have a right to be heard whether directly or through an appropriate representative. It is hardly surprising, therefore, that the right has been widely used in courts in a variety of settings.

Some of the most basic applications of the right to be heard are largely procedural, recognising that a decision that fails to take account of the right of the child to be heard is fundamentally flawed. The **Czech Constitutional Court** considered just such a case in 2010.[38] A mother appealed against a decision of a lower court to remove her daughter from her care. The District Court had ordered for the child, who had health problems, to be placed in emergency care and for custody to be transferred to a local children's home, but the mother picked her up from a psychiatric facility and fled abroad before eventually returning to the Czech Republic and expressing a desire to care for the child. The Constitutional Court ruled that the proceedings had violated the child's right to be heard under Article 12 of the CRC because the girl had not been given the opportunity to express her views and for those views to be considered in determining the outcome of the case. The court therefore ordered for new proceedings to be initiated to remedy these failings.

Other cases take on a more substantive element - interpreting and giving effect to the views of the child. These decisions are perhaps most common in family law cases, where competing parental demands risk overshadowing those of the child.

In a case before the **Court of Appeal of Hong Kong**,[39] a father applied under the Hague Convention on the Civil Aspects of International Child Abduction for the return of his children to the USA from Hong Kong, where their mother had taken them immediately following marital breakdown. The father attempted to effectively discount his children's stated preference to remain with their mother by arguing that the children had not expressed a preference to remain in Hong Kong but rather a preference to live with their mother, which they could do in the USA. The court rejected this argument, finding that refusal to listen to the children's views on a technicality would not only be artificial, but also in breach of Article 12 for failing to take into account the views of the child. *"From the child's point of view the place and the person in those circumstances become the same."*

Moving a step further, some courts have applied the child's right to be heard to not only take account of the views of the child at the point of the decision, but in framing flexible orders to reflect that the child's views may change over time. In a custody dispute before the **High Court of Malaysia** in 2011[40], the court upheld an order for the mother to have custody of the younger child and the father to have custody of the older child but, after interviewing both children, subjected the order to joint guardianship by both parents and to the wishes of the child. This meant that the children would be able to decide at any time afterwards whether they wanted to live with their mother or father. Subjecting a court order to the child's wishes in this way was a recognition that children's views and interests can change over time and is an attempt to give effect to this reality.

Courts have also considered the issue of what weight to place on the views of children and to challenge traditional views about children's competence. The views of children have also been traditionally excluded from criminal proceedings, with many countries imposing restrictions on the ability of children to give evidence. In a 2015 case before the **Court of Appeal in Fiji**[41], a man convicted of raping a child appealed against his conviction on the grounds that it was wholly based on the uncorroborated evidence of an eight-year-old child. At the time the Juveniles Act contained a provision stating that child witnesses under the age of 14 were subject to a competency inquiry to demonstrate an understanding of the nature and consequences of giving an oath before being deemed competent to give sworn evidence. A child who failed this test would be allowed to give unsworn evidence but this must be corroborated or the accused will otherwise be

38 Right of a minor child to be heard in proceedings in which decisions are made about his/her affairs [2010] III.ÚS 3007/09. Summary and full judgment available at: www.crin.org/node/7122.

39 JEK v. LCYP [2015] HKCU 1999. Summary and full judgment available at: https://www.crin.org/en/library/legal-database/jek-v-lcyp

40 Dr Aparna Sehgal v. Dr Jasmeet Singh Sucha Singh, Originating Summons No. F-24-58-2011. Summary and full judgment available at: www.crin.org/node/43001.

41 Kumar v. State [2015] FJCA 32. Summary and link to full judgment available at: www.crin.org/node/42562.

acquitted. The court dismissed the appeal, finding that the corroboration requirement was based on outdated myths and prejudices, against the child's best interests and therefore unconstitutional.

Decisions about weight are not always resolved to give effect to a child's right to be heard. In 2008, the **Montevideo Family Appeals Court in Uruguay** heard a case involving contact with a child's parents.[42] A father had applied to have visitation rights to visit his 14-year-old son. Both parents had a history of domestic violence. Despite the child expressing that he did not wish to see his father, the court ruled that it was important for the son to have a relationship with his father and ordered that the father and the son attend joint counselling sessions. The court reasoned that the child's interests would be better served by providing an opportunity for this relationship to develop than following the child's wishes not to see his father.

"[W]e must not lose sight of the fact that the opinion of the child is one factor among those which must be evaluated by a judge, as part of his/her critical analysis, with great care to avoid invading the sphere of parental decision-making with state control. Based on the above, it would not be fair to ignore the child's opinion, particularly given that the Convention on the Rights of the Child establishes the importance of this factor in Article 12. However, it is important to note that the importance of this factor does not necessarily require doing what the child wishes, but rather taking his opinion into account in conjunction with all other elements of the case, so that the child does not become the arbiter of issues which are beyond his responsibility and decision-making abilities."

Conflicting rights

The issue of what weight should be given to a child's views has often been controversial, however, particularly where it interacts with other rights under the Convention. The overlap between the best interests of the child and the right to be heard has been particularly problematic before courts, where a child may have views relevant to a decision but it may not be in their best interests to give evidence. The Committee on the Rights of the Child has prescribed a balancing exercise when rights are in conflict, to ensure a decision takes account of all relevant considerations and the situation of the individual child,[43] an approach which has been irregularly adopted.

In 2002, the **Austrian Supreme Court** heard an appeal against divorce proceedings where a child had been permitted to give her views on custody and visitation.[44] The child's mother had sought to prevent the hearing taking place on the grounds that it would adversely affect the child's welfare by causing a conflict of loyalty. The Supreme Court declined to hear the child's views on custody and visitation issues in divorce proceedings. This may only be justified where sharing those views would be detrimental to the child's welfare or the child did not have an understanding of the proceedings. This means that the cases in which a court might choose not to seek the opinion of the child are limited, but would include cases where the child is put in a position to choose between their parents to the detriment of their best interests. It might be questioned in such examples whether in individual cases preventing a child giving their view at all, rather than adopting a process in which the child can express their views without feeling as if they have divided loyalties, strikes the correct balance, but the reasoning is clearly an attempt to balance the competing rights of the child.

This balanced reasoning, however, is often absent in making decisions where the best interests of the child and their right to be heard may be in conflict. In 2009, the **Court of Appeal of Tanzania** heard an appeal by a man convicted of sexually abusing a child on the basis that the trial judge should not have permitted the child victim and child witness to give evidence without taking an oath.[45] The court overturned the conviction, finding that the trial judge had failed to adequately assess the children's ability to give evidence, and declined to order a retrial, finding that this would not be in the child's best interests. The court found that ordering a retrial five years after the alleged assault would re-traumatise the child and run against his best interests under the CRC. The judgment made no mention of the victim's right to be heard, did not attempt to balance the competing interests at stake or consider whether the child wished to give evidence.

42 Case No. 181/2008 [2008] Sentencia Tribunal Familia 1er Turno No. 181/2008. Summary and full judgment available at: www.crin.org/node/7170.

43 UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013, at V.A.2.

44 File No. OGH - 7Ob95-02z [2002]. Summary and full judgment available at: www.crin.org/node/7139.

45 Jackson Davis v. The Republic [2009] TZCA 2 (20 November 2009). Summary and full judgment available at: www.crin.org/node/7167.

PART VI
DEPRIVATION OF LIBERTY

The detention standards under the Convention on the Rights of the Child are among the most cited in our database, partially because of the overlap with our campaigning and policy areas, but also because detention most often occurs under the oversight of the courts and is a trigger for legal aid, enabling children affected by rights violations in detention to challenge their treatment.

Detention as a last resort

Article 37(b): *No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;*

That detention for children must be a last resort and for the shortest period is at the heart of international standards on juvenile justice.[46] In the abstract, this standard risks being too vague to meaningfully explain when children can be legitimately detained, but the way it has been applied in courts around the world has begun to draw out its meaning and to challenge the overuse of detention for children.

The most explicit reasoning around whether detention is truly a "last resort" appears in cases assessing whether the detention of an individual child has met this standard. In 2016, **South Africa's Constitutional Court** reviewed the arrest and detention of a 15-year-old.[47] Police had gone to the girl's home to investigate a complaint about her mother and when police tried to arrest the mother, the girl intervened. Police arrested both and detained them overnight at the nearest police station. Directly applying the last resort standard, the court found that the arresting police officer had not considered any alternatives to detention, despite the fact that the girl's father was available and willing to look after the girl and to ensure that she attended any court hearing if required.

This emphasis on whether alternatives to detention were considered and would have been effective is a common theme across litigation on deprivation of liberty for children involving the CRC. In 2016, the **Bahamas Court of Appeal** overturned the decision to deny a child bail. The boy had been detained on remand for ten months awaiting trial for robbery, during which he had been refused the right to see a doctor. The decision was primarily made on the basis that detention was not in the best interests of the child, the boy had been shot during the arrest, still had a bullet in his body at the time of the appeal and was in need of medical treatment, but the court also addressed the relevance of the "last resort" standard. The appeal court particularly found that the failure to consider alternatives to pretrial detention, including sureties, reporting conditions and ankle monitoring, violated the last resort standard. These cases about the detention of individual children require courts to be clear and specific about what aspects of the decision to detain a child fall short of the last resort principle, but they are also very fact-sensitive. Nonetheless, the CRC's core detention standard also applies to the more systematic use of detention, and has been used in national courts when discussing the compatibility of mandatory minimum detention sentences for children.

Though ultimately overturned on appeal, the reasoning of **Swaziland's High Court** dealt with whether mandatory minimum detention sentences could meet the requirement that detention of children be a last resort and for the shortest appropriate period shows the development of the CRC's principle nationally.[48] A teenage boy was convicted of rape and the court had no alternative but to sentence him to at least nine years' imprisonment. Applying the CRC, the court found that these mandatory sentences violated the prohibition on cruel, inhuman or degrading punishment, because of the "frailties of his physical, emotional and psychological circumstances", though also because detention could not be a last resort. The reasoning wasn't fully explained in the judgment, but the implication was that where there is no alternative to a specific detention sentence there is no means of ensuring that the detention is a last resort and for the shortest appropriate period. Detention cannot be a last resort, when it is also the first and it cannot be for the shortest appropriate period where there is an inflexible minimum term that must be served.

The Constitutional Court of South Africa heard a similar case in 2009, but was more explicit in its reasoning. The South African constitution enshrines the CRC's requirement that children can only be detained as a measure of last resort and for the shortest appropriate period of time. The Constitutional Court found that minimum criminal sentences for serious offences committed by 16 and 17-year-olds violated this provision, holding that the last resort principle requires an individual response to sentencing eschewing the rigid starting points that minimum sentencing entails.[49]

Similarly, in finding that life imprisonment for children violates the American Convention on Human Rights, the **Inter-American Court on Human Rights** has made

46 UN Standard Minimum Rules for the Administration of Justice (Beijing Rules), Rule 13.1; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 1; Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines), Guideline 18.

47 Raduvha v. Minister of Safety and Security and another [2016] ZAC 24. Summary and full judgment available at: www.crin.org/node/42898.

48 Masinga v. Director of Public Prosecutions and others [2011] SZHC 58. Summary and full judgment available at: www.crin.org/node/41062.

49 Centre for Child Law v. Minister for Justice and Constitutional Development et al [2009] ZACC 18. Available at: www.crin.org/node/41245.

novel use of the last resort standard to interpret the prohibition on arbitrary imprisonment. The court's case law has used this provision in the past to address unreasonable, unpredictable or disproportionate sentencing, but in applying it in the context of life imprisonment of children in **Argentina**, the court directly applied the CRC's provisions as guiding principles. The Court found that the life sentences were arbitrary, in that they were not exceptional, did not entail deprivation of liberty for the shortest possible time or for a period specified at the time of sentencing and that they did not permit periodic review of the need for deprivation of liberty.[50]

Though many of the cases dealing with the last resort principle revolve around the criminal justice system, case law is emerging using these standards in other settings, particularly immigration detention. The **European Court of Human Rights** has made use of this provision of the CRC in interpreting and applying its own provisions on the right to liberty and security. In 2011, the Court considered the case of a 15-year-old boy who had arrived in **Greece** from **Afghanistan** as an unaccompanied child.[51] The boy had been detained in a facility for refugees pending deportation alongside adults in poor conditions. The court drew on the CRC's requirement that detention be a last resort, as well as the requirement that all decisions concerning a child must treat the best interests of the child as a primary consideration in reaching the conclusion that the detention was unlawful under the ECHR. In particular, the court considered that the Greek authorities' failure to consider any alternatives to detention undermined its claim to be acting in good faith.

The combination of best interests and detention as a last resort reflects the way that the Committee on the Rights of the Child has begun to elaborate standards on the detention of children in the context of immigration, though the Committee has gone further than the ECHR so far, by recognising that the detention of a child on the basis of immigration status is never in the child's best interests.[52]

Detention as cruel, inhuman or degrading treatment or punishment

Article 37 (a): *No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age.*

Beyond the last resort principle, the Convention also singles out and bans the most extreme forms of punishment. The prohibition on the death penalty and life imprisonment without the possibility of release are explicitly ruled out in the CRC, appearing alongside the prohibition on torture or other cruel, inhuman or degrading punishment. Drawing on this connection, many challenges to life imprisonment for children argue that it is cruel, inhuman or degrading. The **Inter-American Court** was the first regional human rights court to explicitly recognise the use of life imprisonment for children as a violation of this right. The direct use of the CRC was limited in this part of the court's judgment, as the prohibition on torture, cruel or inhuman or degrading punishment is identical under the American Convention on Human Rights.[53] Much of the reasoning turned on the precise form of Argentinian life sentences - a 20 year period of detention before conditional release could be considered - so it remains unclear whether the court would consider all forms of life imprisonment to violate this prohibition.

Perhaps surprisingly, given that the **United States** is the only State that is yet to ratify the CRC, its early **Supreme Court** decisions on life imprisonment for children also made use of the CRC. In deciding that life imprisonment without the possibility of parole for children is unconstitutional for non-homicide offences in 2010,[54] the US Supreme Court did not rely on the CRC as an authority, but used the Convention as support to bolster its arguments. The US Constitution prohibits "cruel and unusual punishment", but in deciding whether a sentence meets this standard, the court found that "the overwhelming weight of international opinion" against the practice provided a confirmation of the court's decision.

Humanity, respect and dignity

Article 37(c): *Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular every child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.*

50 Mendoza et al v. Argentina [2013] Series C No. 260. Summary and full judgment available at: www.crin.org/node/40373.

51 Rahimi v. Greece [2011] Application No. 8687/08. Summary and full judgment available at: www.crin.org/node/40062.

52 Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration, para. 32. Available at: http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC_DGD-Childrens_Rights_InternationalMigration.pdf.

53 American Convention on Human Rights, Article 5(2). Available at: www.crin.org/node/6561.

54 Graham v. Florida [2010] 560 US ___. Summary and full judgment available at: www.crin.org/node/7008.

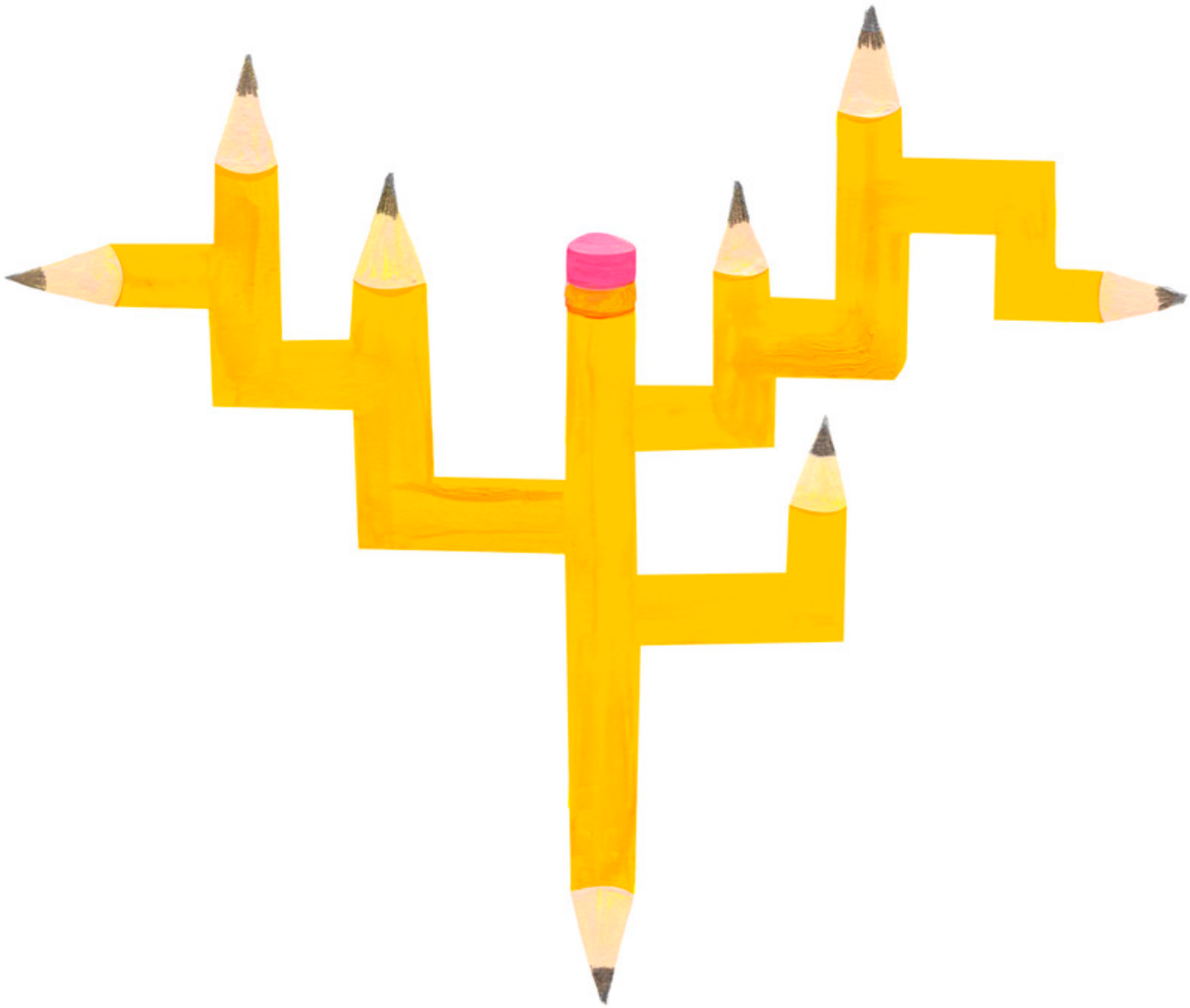
The CRC's requirement that children may never be detained with adults unless it is in the best interests of the child, has Convention.

Interpretation and application of the provision has largely been straightforward in cases that have addressed this provision of the CRC. Considering the case of a 16-year-old boy who had been detained with adults pending trial, the **Constitutional Court of Malawi** directly applied the CRC's provision preventing this practice in conjunction with similar Constitutional provisions to order the immediate release of the boy.[55] Similarly in a case challenging the systematic use of detention with adults for children who arrested for non-criminal matters, particularly vagrancy, the **Inter-American Commission on Human Rights** used the CRC in conjunction with national provisions to establish the responsibility of **Honduran** authorities to separate children from adults in detention.[56]

55 Evance Moyo v. Attorney General [2007] Constitutional Review, Constitutional Case no. 12 of 2007. Summary and full judgment available at: www.crin.org/node/7032.

56 Minors in detention v. Honduras [1999] Case 11.491, Inter-Am CHR, Report No. 41/99. Summary and full judgment available at: www.crin.org/node/7161.

PART VII
CONCLUSION



Almost three decades after the Convention on the Rights of the Child entered into force, its influence is being felt in courts around the world. There is a growing recognition of its legal value and its rights and principles are increasingly permeating national legal systems.

Despite this developing influence, children's rights in court - as in so many other settings - risk being subject and subservient to adults. Even with the cases in this database - all of which explicitly cite the CRC - the children who are directly affected by the case are too often sidelined, their involvement used to strengthen the case of the adults who are truly at the heart of the case. From the custody cases that draw on children's rights to further the interests of a parent, to the States misusing the rights of children to limit the human rights of people at large, not all litigation on children's rights places children at its heart.

Yet there is also cause for hope. Cases abound in which children and their advocates have used the courts to advance and protect the rights of children. Great strides have been made, setting aside regressive laws and reshaping national policy to improve the lives of children. The law and legal advocacy have proved a powerful tool for children, transforming the Convention from a grand statement of principle to a means of realising the rights it enshrines.

There is no doubt that there is a long way to go. Children are too often seen as objects of protection, rather than subjects of rights. But if the Convention is used as the legal tool it is meant to be, it can be the instrument that makes children's rights a reality.

CRIN CHILD RIGHTS INTERNATIONAL NETWORK

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