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Citation for published version:

McCall-Smith, K 2019, 'To incorporate the CRC or not – is this really the question?', *The International Journal of Human Rights*, vol. 23, no. 3, pp. 425-441. <https://doi.org/10.1080/13642987.2018.1558990>

Digital Object Identifier (DOI):

[10.1080/13642987.2018.1558990](https://doi.org/10.1080/13642987.2018.1558990)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

The International Journal of Human Rights

Publisher Rights Statement:

This is an Accepted Manuscript of an article published by Taylor & Francis in the International Journal of Human Rights on 16 Jan 2019, available online: <https://www.tandfonline.com/doi/full/10.1080/13642987.2018.1558990>.

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To incorporate the CRC or not – is this really the question?

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Abstract

International human rights law maintains a patchy record of implementation in national systems. Tangible implementation is sporadic at best and ill-conceived at worst, with the middle ground affecting a demeanour of sustained non-commitment to human rights. International human rights treaties universally contain a call to States Parties to implement or give legal effect to the obligations found in the treaty text; the UN Convention on the Rights of the Child (CRC) is no different. Most states that made some effort to incorporate the Convention have been selective in implementing the obligations, opting for an *à la carte* selection of rights protection rather than the full menu of rights. This situation stems from a range of legal and political realities. The article examines the concept of incorporation by surveying examples of CRC implementation across a number of states. The aim is to contribute to current debates about the value of incorporation of the CRC.

Keywords

human rights, incorporation, children's rights, UNCRC, treaty law, treaty bodies

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1 Introduction

International human rights law maintains a patchy record of implementation in national systems. Tangible implementation is sporadic at best and ill-conceived at worst, with the middle ground affecting a demeanour of sustained non-commitment to human rights. International human rights treaties universally contain a call to States Parties to implement or give legal effect to the obligations found in the treaty text; the UN Convention on the Rights of the Child (CRC) is no different.¹ As the most widely ratified international instrument, the content of the CRC has been voluntarily accepted by 196 states.² The impressive number belies the reality of practical implementation across the constituent States Parties. As a result of their unique political and social situations, most states that made some effort to incorporate the Convention have been selective in implementing the obligations, opting for an *à la carte* selection of rights protection rather than the full menu of rights.³ This article examines the concept of incorporation of the CRC across a number of states in order to contribute to current debates about the value of incorporation of the CRC.

It will first consider the unique character of the CRC and how this impacts the potential for incorporation. Next it introduces and explores a range of terms relevant to the implementation on international law into national law. Finally, it develops a taxonomy of ‘incorporation’ using direct and indirect examples of incorporation of the CRC as well as sectoral or piecemeal measures intended to implement international human rights law. In presenting a survey of existing implementation examples and successful approaches falling short of the promised benefits of direct incorporation, the article aims to challenge the existence of a perfect formula incorporating the international framework for children and young people’s rights. The national examples will be measured against the global interpretation of the CRC as developed by the Committee on the Rights of the Child (UNCRC), the treaty body

¹ Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, entered into force 2 September 1990, art 4 (CRC).

² ‘Ratification’ will be used to collectively refer to the act of ratification, or another form expressing a state’s consent to be bound to a treaty, in line with articles 2 and 11 of the 1969 Vienna Convention on the Law of Treaties. These expressions of consent are what create an international legal obligation for the state, and states giving such consent are described as ‘States Parties’.

³ Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007), 159.

that oversees implementation of the Convention. The survey of a range of states makes clear that there is no single approach to promoting, protecting and fulfilling children and young people's rights. Ultimately, it will contribute to the literature on children and young people's rights by presenting a compelling case for further entrenchment of the CRC, albeit through potentially widely varied approaches, and keeping in mind that 'A treaty is not the end of the process, but the beginning of another process.'⁴

2 Exploring the CRC

Since its adoption in 1989, the CRC has become a 'programming document'⁵ or 'governance architecture'⁶ for the realisation of children's rights. Despite being the most widely ratified human rights treaty, implementation has been less successful than anticipated in the celebratory aftermath and swift uptake of the treaty immediately following its adoption. Not only is the treaty subject of a large number of wide ranging reservations, it also suffers criticism in response to the heady mix of multifaceted rights that it protects.⁷ This criticism generally stems from an attempt to liken this international agreement to a national law. International lawyers are not strangers to vague language or obligations that are hortatory in nature and recognise that agreements framed in such terms are nonetheless binding at the international level.⁸ Thus, whatever one's view on the clarity of the language in the CRC, 196 states have consented to be bound and give effect to the obligations therein, however vaguely they are phrased.⁹ To give these obligations effect there must be some operational phase of implementation at the national level.

CRC Article 4 demands that 'States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights

⁴ Philip Allott, 'The Concept of International Law', *EJIL* 10 (1999): 31, 43.

⁵ Joel E. Oestreich, *Development and Human Rights: Rhetoric and Reality in India* (Oxford: Oxford UP, 2017), 86. See also Inger Eliasson, 'The Gap between Formalised Children's Rights and Children's Real Lives in Sport', *International Review for the Sociology of Sport* 52 (2017): 470, 473 et seq.

⁶ Tara Collins and Lisa Wolff, 'Work in Progress: Twenty-five Years of the Convention on the Rights of the Child – The General Measures of Implementation across the Globe', *Canadian Journal of Children's Rights* 1 (2014): 85, 86.

⁷ William A. Schabas, 'Reservations to the Convention on the Rights of the Child', *Human Rights Quarterly* 18 (1996): 472.

⁸ Vassilis Pergantis, *The Paradigm of State Consent in the Law of Treaties: Challenges and Perspectives* (Cheltenham: Edward Elgar, 2017), 74.

⁹ The United States is the only UN Member State yet to ratify the CRC and, at the time of writing, there are no plans for it to do so.

recognised in the [CRC].’ Therefore, ‘implementation’ is a broadly conceived and all-encompassing term denoting how states give effect to the CRC provisions and defined by the UNCRC as ‘the process whereby States Parties take action to ensure the realization of all rights in the Convention for all children in their jurisdiction.’¹⁰ Spanning 54 articles, these protections cut across civil, political, economic, social and cultural rights, resulting in the Convention being presented by detractors as a collection of rights and demands that are too unwieldy for full and direct incorporation and are more ‘aspirational’ than enforceable.¹¹ As Tobin notes, all individuals, including children, ‘can find themselves in relationships, whether in the public or private sphere, where the power differential renders them vulnerable to harm’ thus the protectionist agenda of the CRC is not really peculiar to children.¹² It is simply that the CRC is the only international treaty that explicitly protects children and consequently draws upon the protections set out across the other human rights treaties.

It is no doubt that *effective* implementation of the CRC is complex, as will be demonstrated below, yet much of this stems from the slow pace with which societies have come to understand the evolving capacities of children and the direct and indirect impact that law and policy can have on their lives. Despite these complexities, the UNCRC has reiterated that ensuring ‘that all domestic legislation is fully compatible with the Convention and that the Convention’s principles and provisions can be directly applied and appropriately enforced is fundamental [to the implementation of the CRC].’¹³ A growing body of literature supports the potential

¹⁰ UN Committee on the Rights of the Child (UNCRC), General Comment No. 5 General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), 27 November 2003, CRC/GC/2003/527, para. 1.

¹¹ See, for example, Swedish Government. ‘English summary of SOU 2016:19’, 55, <https://www.government.se/information-material/2016/06/english-summary-on-proposals-for-an-act-on-incorporation-the-un-convention-on-the-rights-of-the-child-crc-into-swedish-domestic-law-from-sou-201619.pdf/>. John Tobin has examined the progressive nature of recognising ESC Rights in particular in John Tobin, *The Right to Health in International Law* (Oxford: Oxford UP, 2011), chapter 5. See also, John Tobin, ‘Justifying Children’s Rights’, *International Journal of Children’s Rights* 21 (2013): 395; Sean D. Murphy, ‘Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms that Protect or Benefit Persons?’, in *The Role of Domestic Courts in Treaty Enforcement*, ed. David Sloss (Cambridge: Cambridge UP, 2009), 105-6. Murphy goes as far to argue that the wording of the CRC ‘weighs against implying... access to national courts’ at 106.

¹² John Tobin, ‘Understanding Children’s Rights: A Vision beyond Vulnerability’, *Nordic Journal of International Law* 84 (2015): 155, 162; Eliasson, ‘The Gap between Formalised Children’s Rights’, 473.

¹³ UNCRC, General Comment No. 5.

for full, direct incorporation as it can also ensure a rights-based approach to governance impacting children in many distinct ways.¹⁴

However, it is not enough to ensure that the CRC provisions are incorporated in national law.¹⁵ Implementation must include child-focused institutions, structures and engagement activities as part of a national programme for children in addition to dedicated child rights guarantors in the government and parliament, monitoring structures, collectively referred to as ‘general measures’ by the UNCRC.¹⁶ These collective measures work to embed a human rights culture across all levels of government and society, though it is not a something that can be achieved overnight.¹⁷ The process of incorporation is also extremely important. As has been highlighted in specific reference to the CRC, the process has a fundamental awareness-raising value and tends to send a clear message to rights holders, government actors and civil society that the rights the Convention protects are important both independently and as part of a comprehensive human rights culture.¹⁸ Recognition of the importance of the process is demonstrated the multi-year efforts to incorporate the CRC into Swedish law, which came full-circle in June 2018 when the Riksdag (Swedish Parliament) adopted a bill that will incorporate the CRC with effect in 2020 (discussed further below).¹⁹

Prioritising children’s rights is a ‘litmus test’ for the overall well-being of the state.²⁰ However, this prioritisation is achieved through different means. While there are definite trends toward giving human rights treaties elevated status in national

¹⁴ See Collins and Wolff, ‘Work in Progress’, 85, 88; John Tobin, ‘Increasingly Seen and Heard: The Constitutional Recognition of Children’s Rights’, *South Africa Journal of Human Rights* 21 (2005): 86, 88.

¹⁵ Collins and Wolff, ‘Work in Progress’, 85, 92; Tobin, ‘Increasingly Seen and Heard’, 86.

¹⁶ UNCRC, General Comment No. 5; UNCRC, General comment No. 19 (2016) on public budgeting for the realization of children’s rights (art. 4), 20 July 2016, CRC/C/GC/19. See Laura Lundy et al., *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries* (Belfast: Queen’s University Belfast and UNICEF UK, 2012), 4; UNICEF/Innocenti Research Centre, *Law Reform and Implementation of the Convention on the Rights of the Child* (Florence: UNICEF Innocenti Research Centre, 2007), 1.

¹⁷ Wouter Vandenhoe, ‘Child Poverty and Children’s Rights: An Uneasy Fit?’, *Michigan State International Law Review* 22 (2013): 609, 629 et seq.

¹⁸ Lundy et al., *The UN Convention on the Rights of the Child*, 4

¹⁹ Government Offices of Sweden, ‘Convention on the Rights of the Child will become Swedish law’, press release, 13 June 2018, <https://www.government.se/government-policy/childrens-rights/>.

²⁰ Agata D’Addato, Eurochild, ‘Measuring and Monitoring: A Child-rights Perspective’, 3-4 December 2009, 5, <http://ec.europa.eu/social/BlobServlet?docId=8262&langId=en>; see also Vandenhoe, ‘Child Poverty and Children’s Rights’.

constitutions,²¹ and some states have given children's rights particular pride of place, constitutional protection does not equate to comprehensive children's rights protection.²² The heart of implementation lies in the provision of sufficient human, technical and financial resources, which contribute to the general measures consistently reinforced by the UNCRC.²³ It is the collective nature of these measures that cushion any legal reform intending to give effect to provisions of the CRC. A holistic evaluation of all measures of implementation must be made and this generally begins with the clarification of the legal framework, however conceived, as a standard against which effective implementation can be assessed.

The most recent studies on implementation of the CRC indicate that a number of states have directly or indirectly incorporated the CRC – and a larger number of states have incorporated different aspects of the Convention using a piecemeal or sectoral approach. Even where incorporation has not been explicit, there are many non-legal measures being implemented across the globe, such as the establishment of children's action plans and children's commissions, suggesting a change in the perception of children's place in society.²⁴ The reality is that implementation, through incorporation and other measures, is not 'black and white when it comes to ... human rights standards but shades of grey that sit along a scale of implementation.'²⁵ The following section presents the various terms used to develop a baseline for examining this sliding scale of implementation in order to demonstrate the potential for the incorporation of children's rights through law reform, whatever form it may take.

3 Framing the Discussion of International Law in National Law

International law and national law operate on separate planes, which is why translating international law into national law is an imprecise art. However, due to the increasing regulatory nature of international law and the growing number of treaties that accord rights to individuals, namely human rights treaties such as the CRC, how these obligations are given force at the national level is now a dominant focus of

²¹ Dinah Shelton, 'Introduction', in *International Law and Domestic Legal Systems*, ed. Dinah Shelton (Oxford: Oxford UP, 2011), 1.

²² Lundy et al., *The UN Convention on the Rights of the Child*,

²³ UNCRC, General comment No. 19; UNCRC, Concluding observations on the fifth periodic report of France, UN Doc CRC/C/FRA/CO/5 (23 February 2016), paras 10, 14.

²⁴ UNCRC, General Comment No. 5, para.10.

²⁵ Kirsten Roberts Lyer and Philippa Webb, 'Effective Parliamentary Oversight of Human Rights', in *The International Human Rights Judiciary and National Parliaments*, eds. Matthew Saul et al. (Cambridge: Cambridge UP, 2017), 32-58, 42.

legal, political and social discourse.²⁶ As Aust highlights, ‘It should not be assumed that once a treaty has entered into force for a state it is then in force *in* that state; in other words, that it has become part of its law.’²⁷ And while international law demands that all states comply with their international obligations ‘in good faith’ it is not concerned with the method through which treaty obligations ‘become’ law at the national level.²⁸ The following examines incorporation as both a concept and as a collective term covering a range of legal processes that implement international law into national law and highlights the high tolerance for flexible approaches, particularly in the field of human rights.

3.1 Navigating terminology

In most national legal systems a further legislative action must be taken in order to implement an international legal obligation. Even in monist states, where international law is generally viewed as automatically part of the national legal system, a further legal act is typically necessary to give the international law direct effect in the national system.²⁹ Implementation does not follow a singular pattern even within a state, particularly in federated systems. Each state approaches implementation from a distinct perspective driven by its internal politics and procedures. Implementation of international human rights treaties is understood as the realisation of the rights through a state’s national legal and institutional system as well as the support for human rights by all branches of the government, including human rights budgeting, education and training, awareness raising, a human rights culture in society and

²⁶ See generally, Jacob Katz Cogen, ‘The Regulatory Turn in International Law’, *Harvard International Law Journal* 52 (2011): 321; Antony Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge: Cambridge UP, 2007), 178 et seq.

²⁷ Aust, *Modern Treaty Law*, 178 (emphasis original).

²⁸ Vienna Convention on the Law of Treaties, 23 May 1969, 115 UNTS 331, entered into force 27 January 1980. Article 26 states: ‘Every treaty in force is binding upon the parties to it and must be performed in good faith.’ The Vienna Convention also outlines that states may not invoke internal law for the purposes of avoiding international obligations, see article 27. See Gerald Staberock, ‘Human Rights, Domestic Implementation’, in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum, in MPEPIL, paras. 14-18, <http://opil.ouplaw.com.ezproxy.is.ed.ac.uk/view/10.1093/law:epil/9780199231690/law-9780199231690-e1734?rskey=wigK9B&result=4&prd=EPIL> (accessed June 18, 2018).

²⁹ The further act will depend on the individual state and its constitutional relationship with international law. For a fuller discussion of the distinction, or lack thereof, between monist and dualist states, see Dinah Shelton, ‘Introduction’, in *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*, ed. Dinah Shelton (Oxford: Oxford UP, 2011), 2-5; Malcolm N. Shaw, *International Law*, 8th ed. (Cambridge: Cambridge UP, 2017), 97-8; Aust, *Modern Treaty Law*, 183 et seq.

engagement with national and international human rights machinery.³⁰ Effective implementation is successful implementation; thus relevant measures of effectiveness must be employed when evaluating each measure through which implementation is realised.³¹ The range of measures also must acknowledge the evolving nature of human rights and therefore be agile enough to accommodate the evolution of rights. Implementation is therefore a holistic term with far-reaching implications trickling into every aspect of a state's social and governance structures.

3.1.1 *Incorporation*

In terms of human rights treaties, 'incorporation' has been described as a narrow conception of implementation, focusing predominantly on ensuring direct application and enforceability in national law and precisely linked to legal recognition of the treaty obligations at the national level realised through law reform and judicial decisions.³² Incorporation is a crucial step because unincorporated treaties otherwise become 'dead letters' as without some form of incorporation there is often a failure to implement the obligations contained in the treaties at any level.³³ It also signals the importance of the rights addressed and, therefore, delivers a strong prelude to prevention in the surrounding public discourse. The use of 'incorporation' in practice is laden with qualifying terms and covers a variable range of action by national parliaments and will be examined in detail further below.

3.1.2 *Direct application*

'Direct application' means that the international law provisions are capable of being invoked in national courts and must be applied by government institutions.³⁴ This must be distinguished from a treaty that has 'direct effect' or is 'self-executing', which generally refers to the automatic application of international law in national

³⁰ UNCRC, General comment No. 19; Staberock, 'Human Rights, Domestic Implementation', paras 2-3; Collins and Wolff, 'Work in Progress', 86; Lundy et al., *The UN Convention on the Rights of the Child*, 19.

³¹ See, for example, Vandenhole's comments on effectiveness and the right to participation in Vandenhole, 'Child Poverty and Children's Rights', 619.

³² Staberock, 'Human Rights, Domestic Implementation', para 2.

³³ Inter-Parliamentary Union and UN Office of the High Commissioner, *Human Rights: Handbook for Parliamentarians No 26* (Geneva: Inter-Parliamentary Union, OHCHR, 2016), 97

³⁴ Karen Kaiser, 'Treaties, Direct Applicability', in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum, in MPEPIL, paras. 1-2, <http://opil.ouplaw.com.ezproxy.is.ed.ac.uk/view/10.1093/law:epil/9780199231690/law-9780199231690-e1468?rskey=cshtm&result=2&prd=EPIL> (accessed June 28, 2018).

legal systems without the need for further legislative action and though the ‘automatic’ nature will generally be contingent on the language of the specific obligation (discussed further in section 4).³⁵ The determination of applicability is made by national law and speaks precisely to the enforceability of rights in the context of the CRC and, concomitantly, accountability structures within the national system. It will be for national law to also determine who, against whom and how the treaty obligations may be invoked, which is the core concern of incorporation discourse. For purposes of this article, ‘applicability’, and derivatives thereof, is the term used to denote that a provision of the CRC is capable of being invoked at the national level.

3.1.3 *Enforceability*

In the context of the CRC, enforceability is a constant source of contention due to the imprecise wording of many of the rights. Enforceability generally refers to the availability of institutions and procedures to provide a remedy for the breach of a right. A human rights remedy considers how these institutions both prevent breaches and deliver effective redress when a right is violated, which includes both judicial and administrative paths.³⁶ The complexities associated with delivery and justiciability across the broad range of the CRC are also raised as arguments against incorporation in a similar vein to those brought against economic, social and cultural rights (ESC rights). Article 4, in fact, echoes the International Covenant on Economic, Social and Cultural Rights³⁷ detailing that ‘With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources’.³⁸ As noted by Boyle and Hughes in relation to ESC rights, the difficulty associated with implementation does not negate the existence of the right and ‘the outstanding question comes down to how to provide an effective remedy in law

³⁵ Ibid.

³⁶ Dinah Shelton, ‘Human Rights, Remedies’, in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum, in MPEPIL, paras. 1-3, <http://opil.ouplaw.com.ezproxy.is.ed.ac.uk/view/10.1093/law:epil/9780199231690/law-9780199231690-e1738?rskey=QnwVH0&result=2&prd=EPIL> (accessed June 28, 2018).

³⁷ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, entered into force 3 January 1976.

³⁸ See discussion in relation to children’s rights and child poverty in Vandenhoe, ‘Child Poverty and Children’s Rights’, 626 et seq.

within legitimate justiciable parameters'.³⁹ The variable precision of the wording of CRC provisions has led some national jurisdictions to take a pick-and-mix approach to judicial recognition and remedy, thus blurring questions of enforceability.

3.2 Summary

Translating international law into national law is a multifaceted endeavour that varies among States Parties and within each state. Crucial to understanding the process is a clear picture of the terminology, including distinguishing between implementation, incorporation, applicability and enforceability. This work now turns to the variable methods of incorporation relating to law reform designed to implement the CRC.

4 Incorporating the CRC

There are three general approaches to the incorporation of international law into national law: direct incorporation, indirect incorporation and sectoral or piecemeal incorporation.⁴⁰ The taxonomy presented below draws upon a broad range of academic literature, policy discussion, and state practice in relation to incorporation of the CRC. The use of the term 'incorporation' may seem inappropriate under some of the categories presented; however, the aim of developing these categories is to challenge preconceptions about the term 'incorporation' and the extent to which the variable approaches expand the capacity of the state to protect children's rights and deliver effective remedies in the event of their breach.

4.1 Direct incorporation

Direct incorporation holds that through transformation or transposition of an international treaty, the entire treaty will form part of the national law, be binding on public agencies and enforceable in court.⁴¹ This method of incorporation includes those states that automatically give 'direct effect' to certain types of treaties as a result of their monist legal systems and those that have taken specific legislative action to make the treaty directly applicable in national law. The 1998 Human Rights Act in the United Kingdom is often cited as a good example of the treaty-by-treaty approach to

³⁹ Katie Boyle and Edel Hughes, 'Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights', *International Journal of Human Rights* 22 (2018): 43, 51.

⁴⁰ The three distinct categories align with Lundy et al., *The UN Convention on the Rights of the Child*, 3.

⁴¹ UNICEF/Innocenti, *Law Reform and Implementation*, 5.

direct incorporation where the Act expressly states that it is intended ‘to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights’.⁴²

The states introduced in this section demonstrate that though direct incorporation provides a solid legal point of reference, even direct incorporation of the CRC does not render the state ubiquitous in the protection of children and young people’s rights. Direct incorporation does, however, deliver the most potential in terms of a comprehensive framework for preventing breaches as the treaty then serves as a reference point against which questions of enforceability and remedy may be assessed in the national context. In these examples, incorporation amounts to the complete treaty being translated into national law and, if done effectively, it means that the treaty can be the sole basis for decision-making and case adjudication.

The most comprehensive studies on incorporation and implementation of the CRC were completed in conjunction with UNICEF, the most recent, in 2012, designed to outline which measures were feasible in the UK context.⁴³ The following analysis draws upon these examples, updating conclusions on various aspects of implementation where available, and goes further to include consideration of states that are further afield.

4.1.1 Belgium

The CRC became effective in the Belgian legal system when the Convention entered into force 1992 and was immediately given the status of law superior to the Belgian Constitution and other statutory law. Not long after, the first judicial decision recognising the direct effect of Article 12 was delivered.⁴⁴ In its initial report to the UNCRC, the state acknowledged the need for further legislation in order to ensure the applicability of other articles in the CRC.⁴⁵ The responsibility for children and young

⁴² Human Rights Act 1998, introduction. Notably, the Act explicitly excludes ECHR art 13, which ensures an effective remedy for a breach of the Convention, thus the extent to which it is full, direct ‘incorporation’ is debatable, see Vernon Bogdanor, *The New British Constitution* (Oxford: Hart, 2009), 60.

⁴³ Lundy et al, *The UN Convention on the Rights of the Child*.

⁴⁴ UNCRC, Initial reports of States Parties due in 1994: Belgium, 6 September 1994, CRC/C/11/Add.4, para. 5, noting the Mons Court of Appeal of 20 April 1993 ‘not only recognized the direct effect in Belgian domestic law of article 12 of the Convention, and hence the existence of a minor’s real subjective right to be heard, but also established the possibility for the minor to exercise this right through the procedural means of voluntary intervention in the judicial proceeding concerning him.’

⁴⁵ UNCRC, Initial reports of States Parties due in 1994: Belgium, paras. 5, 471.

people's rights predominantly lays with the federated sub-state Communities and Regions and is demonstrated by the many examples of good practice emanating from them, including extensive participation programmes and engagement with children and young people. In the Flemish Parliament and Government, for example, the Children's Rights Commissioner assesses all bills for compatibility with the CRC and investigates complaints of rights breaches. Assessment of proposed legislation and impact assessments play a crucial role in preventing the most obvious breaches of the CRC as children and young people's rights are expressly considered during the development of legislation and policy.

Despite incorporation and some positive examples of courts giving direct effect to certain CRC provisions, Belgian courts generally do not recognise the direct applicability of many provisions of the Convention due to the vague nature of their wording.⁴⁶ The perceived imprecision has underpinned one of several lines of tension for CRC implementation in Belgium, particularly the prohibition of corporal punishment. The continued failure of the Belgian government to expressly prohibit corporal punishment in the home, in early childhood care facilities or in schools is a consistent point of contention between the UNCRC and the state.⁴⁷ The Human Rights Council⁴⁸ and the Committee against Torture⁴⁹ have equally raised the issue of passing clear legislation banning corporal punishment and two collective claims have been raised with the European Committee of Social Rights in relation to the lack of clear and effective prohibition of corporal punishment in the home and care facilities. In 2016, a bill designed to amend the Civil Code to include that children 'cannot be subjected to degrading treatment or any other form of physical or psychological violence' was introduced; however the bill has not progressed any further as of the time of writing.⁵⁰ As recently as 2013, over 50% of Belgian parents surveyed viewed

⁴⁶ Lundy et al, *The UN Convention on the Rights of the Child*, 37.

⁴⁷ UNCRC, Concluding observations: Belgium, 18 June 2010, CRC/C/BEL/CO/3-4, para. 8.

⁴⁸ Human Rights Council, Report of the working group, 11 April 2016, A/HRC/32/8, paras. 139(15), 140(30).

⁴⁹ Committee against Torture, Concluding observations on third report, 3 January 2014, CAT/C/BEL/CO/3, para. 27.

⁵⁰ Chambre des représentants, Proposition de loi modifiant le Code civil en ce qui concerne le droit de l'enfant à une éducation non violente et l'interdiction de toutes formes de violences à son égard, Document parlementaire 54K1778, 20 April 2016, <http://www.dekamer.be/kvvcr/showpage.cfm?section=flwb&language=fr&cfm=/site/wwwcfm/flwb/flwb.cfm?dossierID=1778&legislat=54&inst=K>. For a fuller analysis of the issue of corporal punishment in Belgium, see Global Initiative to End All Corporal Punishment of Children, Country report for Belgium, <https://endcorporalpunishment.org/reports-on-every-state-and-territory/belgium/>.

corporal punishment as acceptable. Thus it is very clear that even with the ‘incorporation’ of the CRC, corporal punishment in contravention of the prohibition against violence remains prevalent despite the clear interpretation of the UNCRC on CRC Article 17.

4.1.2 *Venezuela*

Article 23 of the Venezuelan Constitution provides that human rights treaties ratified by the state are given constitutional hierarchy and have direct and immediate effect in the national legal system.⁵¹ Following ratification of the CRC in 1990, Venezuela ‘incorporated [the CRC] as State policy in all the institutions of State’ and, thereby, citizens are able to directly raise its provisions in court.⁵² This is further supported by the Constitution, which accords children and young people with full legal recognition, and the Children and Adolescent Protection Act, which is the basis of incorporation of CRC principles.⁵³ Full, direct incorporation has established a legal framework reference for the realisation of the CRC. While the state has taken great strides to harmonize preventative measures in the form of legal protection of children and young people’s rights, the UNCRC has highlighted that inadequate training of professional that are directly involved in children’s lives, from teachers to law enforcement, and lack of adequate resourcing continues to impede the realisation of the incorporated Convention.⁵⁴ The Committee repeatedly has called on the state to take comprehensive action to implement general measures that will give effect to the rights.

Poor child labour practices,⁵⁵ low education statistics, high levels of poverty⁵⁶ and wide-ranging incoherence with the CRC, including in relation to the concept of ‘best interests of the child’ and the minimum age for marriage, persist in Venezuela.⁵⁷

⁵¹ Eugenio Hernández-Bretón, ‘Venezuela’, in *International Law and Domestic Legal Systems*, ed. Dinah Shelton (Oxford: Oxford UP, 2011), 661. The treaties are first approved for ratification by the legislature.

⁵² UNCRC, Combined third to fifth periodic reports of the Bolivarian Republic of Venezuela, 13 October 2014, CRC/C/VEN/3-5, paras. 6, 8.

⁵³ *Ibid.*, paras 8-9.

⁵⁴ *Ibid.*, paras. 6-11.

⁵⁵ US Department of Labour, Child Labor Report: Venezuela (2015),

<https://www.dol.gov/sites/default/files/images/ilab/child-labor/Venezuela.pdf>.

⁵⁶ Humanium reports that almost 40% of Venezuelan children live below the poverty line and that one in 10 is not educated. Humanium, Children of Venezuela, <https://www.humanium.org/en/venezuela/> (accessed June 18, 2018).

⁵⁷ UNCRC, Concluding observation on the combined third to fifth periodic reports of the Bolivarian Republic of Venezuela, paras. 25-6, 30-1.

The state has taken great strides to reconstitute the relationship between the state and its children and young people and to change society's view of children, but there remains a long road ahead. The extensive dialogue between Venezuela and the UNCRC demonstrates that while direct incorporation delivers a clear point of reference for prevention and further entrenchment of rights, realising the rights in real terms demands a comprehensive commitment by the state that is embedded throughout all of its organs and accompanied by measures that effect change in society and its institutional structures.

4.1.3 Sweden

Shortly after ratifying the CRC Sweden committed to providing a 'variegated output of supportive measures' for children by setting out a plan to thoroughly embed a children's rights culture and giving effect to the UNCRC's comprehensive approach to protecting children and young people's rights.⁵⁸ The legal dimension to this commitment was predominantly implemented through sectoral laws and other general measures. Nonetheless, in 2015 the UNCRC highlighted that the lack of formal recognition of the CRC, the insufficient implementation of many of its obligations and the failure to specifically budget for implementation of the CRC resulted in incomplete and inconsistent protections for children and young people.⁵⁹ In particular, discrimination based on race, ethnicity, gender or sexual orientation continues to be an issue. Thus, despite the wide range of legal measures and policies that developed over the past three decades there remained clear gaps in protection.

Following a 2017 commitment by the Government to strengthen the rights of children and young people in Sweden 'in real terms'⁶⁰ the Swedish Parliament voted to incorporate the CRC on 13 June 2018.⁶¹ Direct incorporation will not result in all aspects of the CRC immediately being given equal recognition. Partisan infighting ultimately diluted the effectiveness of the bill that directly incorporated the CRC. In particular, the Optional Protocols to the CRC are not included, despite Sweden being

⁵⁸ UNCRC, Initial reports of States Parties due in 1992: Sweden, 23 September 1992, CRC/C/3/Add.1, para. 3.

⁵⁹ UNCRC, Concluding observations: Sweden, 5 March 2015, CRC/C/SWE/CO/5; see also Eliasson, 'The Gap between Formalised Children's Rights', 470; Hans Eklund, 'Article 12 of the "UN's Convention on the Rights of the Child" and the Procedural Status of Children in Sweden', *Scandinavian Studies in Law* 51 (2007): 163.

⁶⁰ Sweden, 'English summary of SOU 2016:19', 54.

⁶¹ Sweden, 'Convention on the Rights of the Child will become Swedish law'.

party to them, nor will all provisions have direct effect. The specific provisions that will be given direct effect are being left to the judiciary to determine on a case-by-case basis until further legislation fills some of the gaps. From the initial commitment of the government it had been clear that incorporation would not give the CRC primacy over other laws but would allow it to prevail over conflicting laws of a lesser status.⁶² However, the legislation acknowledges the importance of UNCRC jurisprudence and General Comments as guides to interpreting the provisions of the CRC, which is important in terms of evolution of the rights protected therein.⁶³ As a demonstration of its commitment to ensuring that incorporation translates into real rights protection, the CRC will not enter into effect in Sweden until 2020 in order to rectify gaps in current legislation and allow time to adopt general measures to fully transform the CRC into the Swedish institutional culture.⁶⁴

4.1.4 Summary

In reviewing children and young people's rights protection in states that have directly incorporated the CRC, it is clear that direct incorporation does not equate to consummate rights protection. These examples demonstrate that while the CRC provides a strong central framework for the development of children and young people's rights it takes comprehensive legislation and a dedicated commitment to institutional and societal change to deliver meaningful rights protection. How states address the insufficiencies in their national systems is the crux of determining the efficacy of the protections promised by the CRC.

4.2 Indirect incorporation

The second approach is indirect incorporation, which gives the treaty some effect in national law by means of another legal mechanism. This is generally achieved through a constitutional reference to ratified human rights treaties; however, effectiveness will be tempered based on whether the provisions have 'direct effect'. France is a monist state and ratified human rights treaties take precedence over

⁶² Government Offices of Sweden, 'Questions and answers on incorporating the UN Convention on the Rights of the Child into Swedish law', <http://www.government.se/articles/2017/07/questions-and-answers-on-incorporating-the-un-convention-on-the-rights-of-the-child-into-swedish-law/>.

⁶³ Kasey McCall-Smith, 'Interpreting International Human Rights Standards: Treaty Body General Comments as a Chisel or Hammer?', in *Tracing the Role of Soft Law in Human Rights*, eds. Stéphanie Lagoutte et al. (Oxford: Oxford UP, 2016), chapter 2.

⁶⁴ Sweden, 'Questions and answers on incorporating the UN Convention on the Rights of the Child'.

domestic law once published; however, unlike the example of Venezuela above, direct effect is not automatic. The CRC is viewed as a non-self-executing treaty in France and is not directly justiciable without further action by its parliament, a fact that has been raised repeatedly by the UNCRRC, resulting in limited applicability of the provisions of the CRC.⁶⁵ Thus, indirect incorporation without further comprehensive implementing legislation undermines the fact that the treaty is ‘part’ of the national law, but without real enforcement potential.

In the past thirty years many states have gone through substantial constitutional upheaval. Human rights have been a focus, or at least a part of the debate, in almost every constitutional restructuring. This is not a striking fact due to the fact that constitutions become the focus *par excellence* of post-conflict governments for reasons of both internal and external pressures.⁶⁶ The states reviewed below have indirectly incorporated the CRC through a constitutional reference to either the CRC or ratified human rights treaties generally.

4.2.1 Chile

Article 5 of the Chilean Constitution provides that ‘...The State has a duty to respect and promote such rights, as guaranteed in this Constitution and in the international treaties, ratified by Chile and that are in force.’⁶⁷ Chile ratified the CRC in August 1990 and it was proclaimed as national law the following month. In its first periodic report to the UNCRRC, it noted that while incorporation of the CRC implied constitutional status, it would only be through the ‘adaptation of the legislation, judicial practice and administrative system relating to minors’ that full implementation would be achieved.⁶⁸ Since then, it has taken substantial legislative steps to harmonise and give effect to children and young people’s rights, including amending its Family Courts Act No. 19968 to prohibit corporal and psychological punishment of children, establishing a General Education Act to aid in changing the way Chilean children are educated, establishing an intersectoral child protection

⁶⁵ UNCRRC, Concluding observations on the fifth periodic report of France, 23 February 2016, CRC/C/FRA/CO/5.

⁶⁶ Tobin, ‘Increasingly Seen and Heard’, 86; Bruce Ackerman, ‘The Rise of World Constitutionalism’, *Virginia Law Review* 83 (1997): 771; C.R. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford: Oxford University Press, 2001), 3-11, 239-243.

⁶⁷ Constitución Política de la República de Chile, art 5, para 2.

⁶⁸ UNCRRC, Initial report of States Parties due in 1993: Chile, 22 June 1993, CRC/C/3/Add.18, para 6.

system for children (Chile Grows with You), among other sectoral legislative and policy approaches.⁶⁹

While legislative measures have no doubt advanced the protection of children and young people's rights in Chile, the UNCRC has consistently noted that the failure to adopt a comprehensive law on the rights of children prevents effective implementation of the CRC.⁷⁰ Notably, the Committee has highlighted that Chile has not ensured that the fundamental principle of best interests of the child is effectively observed throughout its policy-making structures nor has it explicitly legally recognised children's right to be heard or right to participate in associations and society.⁷¹ In particular Chile has been chided for its repressive approach to student demonstrations and abusive use of detention measures in response to students demands for education system reform. This brief glimpse of Chile's indirect incorporation experience suggests that while indirect incorporation provides a clear reference for children and young people's rights, comprehensive sectoral laws must follow in order to effectively implement the CRC.

4.2.2 Morocco

As noted in its first periodic report in 1995, Morocco 'incorporated in its Constitution its commitment to human rights as they are universally recognized'.⁷² The 2011 Moroccan Constitution introduced a range of specific human rights principles and explicitly highlighted the importance of the relationship between national law and international law, including human rights treaties to which Morocco is a party.⁷³ Article 32 of the Constitution speaks directly to the rights of children, assuring juridical, social and moral 'consideration' and the right to a fundamental education. The article also establishes a Consultative Council of the Family and of Childhood. Article 33 approaches protection of 'youth' with the creation of a Consultative Council of Youth and of Associative Action to stimulate the participation of youth in a range of endeavours as well as to enrich their scholarly, social and professional

⁶⁹ UNCRC, Fourth and fifth periodic reports of States Parties due in 2012, Chile, 10 November 2014, CRC/C/CHL/4-5, para. 5.

⁷⁰ *Ibid.*, paras 8-9.

⁷¹ *Ibid.*, paras 26-9.

⁷² UNCRC, Initial reports of States Parties due in 1995: Kingdom of Morocco, 19 August 1995, CRC/C/28/Add.1, para 3.

⁷³ Moroccan Constitution of 2011, English translation by Jefri J. Ruchti, Title II at https://www.constituteproject.org/constitution/Morocco_2011.pdf?lang=en.

engagement. In parallel, a number of national monitoring bodies were established to ensure the compatibility of national laws with human rights obligations.

Despite giving clear indications of its willingness to advance universal human rights, including the CRC, Moroccan law and society continues to perpetuate a culture of gender discrimination and the enforcement of children and young people's rights are consistently under resourced.⁷⁴ The state has also failed to prohibit corporal punishment and other severe forms of violence against children in care facilities, schools or the home.⁷⁵ This examination of Morocco suggests that indirect incorporation must be accompanied by substantive legal reform as well as a host of comprehensive measures to shift policy-makers and society's views of children and young people's rights in line with the UNCRC's call for comprehensive general measures.

4.2.3 *Wales*

While the UK ratified the CRC in 1991, neither it, nor any of its devolved nations have directly incorporated the Convention. In 2017, Wales adopted a measure indirectly incorporating the CRC by placing a duty on the Welsh Government to 'have due regard' to the CRC, to produce a children's scheme and to promote the CRC throughout society and institutions.⁷⁶ While this duty sends a strong message about the value of children's rights, further general measures and increased funding to bring these commitments to fruition are necessary. UK-wide cuts to legal aid and lack of law harmonisation continue to restrict access to many of the most fundamental rights for children, such as participation.⁷⁷ Thus far, there have been no legal cases to provide a clearer picture of how effective the due regard duty will be in delivering rights. Studies also indicate that despite the monumental efforts to entrench rights in Wales, there is still little understanding of the CRC by children.⁷⁸ Thus, while this

⁷⁴ UNCRC, Concluding observations on the combined third and fourth periodic reports of Morocco, 14 October 2014, CRC/C/MAR/CO/3-4, paras. 10-11, 16-17.

⁷⁵ *Ibid.*, paras. 36-7.

⁷⁶ The Rights of Children and Young Persons (Wales) Measure 2011.

⁷⁷ UNCRC, Concluding observation on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, 12 July 2016, CRC/C/GBR/CO/5, paras. 30-1.

⁷⁸ Helen Dale and Arwyn Roberts, 'Little Voices Shouting Out: Children's Report from Wales to the Committee on the Rights of the Child, 1 July 2015, https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/GBR/INT_CRC_NGO_GBR_23430_E.pdf.

approach to indirect incorporation strengthens the potential protection of CRC rights, more research must be conducted to evaluate the efficacy of this approach.⁷⁹

4.3 Sectoral or piecemeal incorporation

The third approach is a piecemeal or sectoral approach, which sees various provisions of the treaty being integrated into national laws that are related to the subject matter of the specific treaty provisions but at some level less than incorporation of the full treaty. Arguably this is not ‘incorporation’ at all, but the cherry-picking of obligations and, as is often the case, done without direct reference to the treaty. While including this approach within the taxonomy of incorporation methods involves somewhat of a misnomer, it aligns with the definition set out above in that ‘incorporation’ simply means legal recognition of a treaty provision at the national level realised through law reform.

Piecemeal or sectoral approaches to incorporation are the most prevalent way in which provisions of the CRC are given effect in national legal systems. As demonstrated above, this approach is a crucial accompaniment to direct and indirect incorporation when more comprehensive legislation is necessary to ensure justiciability of treaty provisions that otherwise do not have direct effect. Sectoral laws also deliver greater harmonization. However, when not tied to a comprehensive CRC framework the sectoral approach results in the status of the implementing law being somewhat precarious as national legislation that otherwise has no constitutional hierarchy could be subject to suspension, amendment or repeal at the whim of the government.⁸⁰ In all of the approaches, but specifically in the indirect and sectoral approaches, an express reference to the relevant treaty is preferred, rather than a mere co-opting of terms if there is to be sufficient linkage between the international and national law, which also contributes to the entrenchment and potential for evolution of the individual rights.⁸¹ Despite this approach being the least preferred among children’s rights advocates, it can deliver effective, targeted implementation of specific CRC rights as the Australian example below demonstrates.

⁷⁹ See also Hoffman’s and Payne’s articles in this issue, for further analyses of the Welsh measure.

⁸⁰ See discussion in Alice de Jonge, ‘Australia’ Venezuela’ in *International Law and Domestic Legal Systems*, ed. Dinah Shelton (Oxford: Oxford UP, 2011), 27-8.

⁸¹ Kasey McCall-Smith, ‘Human Rights Treaty Bodies, Proceduralization and the Development of Human Rights *Jus Commune*’, *European Society of International Law 2015 Annual Conference*, 2015: 1.

4.3.1 *Australia*

The CRC has not been directly or indirectly incorporated in Australia. The state has implemented increased protections for children and young people through child-focused legislation and policy. In particular, the state has streamlined consideration of the CRC into all legislation through the Human Rights (Parliamentary Scrutiny) Act 2011, which requires the Parliamentary Joint Committee on Human Rights (PJCHR) to assess the compatibility of all proposed and existing legislation all human rights treaties ratified by Australia and for all parliamentarians to include a statement of compatibility for each new bill proposed.⁸² In 2015, for example, the PJCHR requested further information regarding compliance with the CRC in relation to the proposed Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015, and the Health Legislation Amendment (eHealth) Bill 2015.⁸³ The state has also adopted a number of non-legal measures designed to support children and young people at distinct points in their lives and protect them from violence, e.g. the National Early Childhood Development Strategy, the National Framework for Protecting Australian Children 2009-2020 and the National Plan to Reduce Violence against Women and their Children. It has also established a system of Children's Commissioners across the federal states and a National Children's Commissioner. In many respects, Australia delivers some models for best practice in terms of children and young people's rights.⁸⁴

Despite these innovations and its strong economic status, Australia continues to avoid pursuing child-specific approaches to budget planning which make it 'practically impossible to identify, monitor, report and evaluate the impact of investments in children and the overall application of the [CRC] in budgetary terms.'⁸⁵ Policies and practice for indigenous, refugee, migrant and disabled children in particular continue to be the focus of criticism.⁸⁶ Disabled girls continue to be subjected to serious rights breaches in the form of forced sterilisation, which is

⁸² Human Rights (Parliamentary Scrutiny) Act 2011, No 186, 2011, §§3, 8, <https://www.legislation.gov.au/Details/C2011A00186> (accessed June 18, 2018).

⁸³ National Children's Commissioner, *Children's Rights Report 2016* (Sydney: Australian Human Rights Commission, 2016), 56-9.

⁸⁴ Lundy et al., *The UN Convention on the Rights of the Child*, 34.

⁸⁵ UNCRC, Concluding observations: Australia, 28 August 2012, CRC/C/AUS/CO/4, para. 19.

⁸⁶ *Ibid.*, paras. 19, 29-30, 35-8, 46-7.

permitted under common law upon a court's determination that the child is legally incapable of making such decisions following the decision in *Marion's Case*.⁸⁷ The UNCRC consistently reiterates its call for Australia to deliver further comprehensive national legislation to give full effect to the entire CRC instead of having variable levels of protection and access to remedies for rights breaches dependent on the sub-state entities within its federal system.⁸⁸

4.3.2 Summary

It is evident that sectoral laws can and do provide strong protection for children and young people's rights. However, sectoral laws work best when coordinated through a common framework approach, which is naturally supplied by the CRC. The examples of direct and indirect incorporation each present the reality that giving effect to the CRC in national legal systems can only be achieved through comprehensive and child-tailored legal, institutional and social reform. Therefore, sectoral approaches should be viewed as a means of further entrenching the CRC, rather than the first step.

5 Conclusion

The truly global uptake of the CRC generates a solid platform for celebrating a common, almost universal support for the rights of children and young people. This celebration is, however, tempered by the reality that very few states have given direct effect to the CRC in national law. This article provides a glimpse into the various ways in which the CRC or some of its provisions have been implemented across the globe. Implementing a human rights treaty is an imprecise art and reflects the distinct and varied societal and political systems across which common obligations must apply. For this reason, human rights efficacy criticism cannot *begin* with the question of whether human rights treaties are effective. Nor can answers be articulated through quantitative analysis.⁸⁹ Direct incorporation of the CRC undoubtedly establishes a

⁸⁷ *Secretary, Department of Health and Community Services (NT) v JWB and SMB* (1992) 175 CLR 218 (*Marion's Case*). See discussion in Laura Elliott, 'Victims of Violence: The Forced Sterilisation of Women and Girls with Disabilities in Australia', *Laws* 6 (2017): §4.1; Susan Brady et al., 'The Sterilisation of Girls and Young Women: Issues & Progress', Australian Human Rights Commission, 2009, https://www.humanrights.gov.au/sites/default/files/content/disability_rights/sterilisation/sterilisation_report.pdf.

⁸⁸ UNCRC, Concluding observations: Australia, para. 12

⁸⁹ See, for example, Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference?', *Yale Law Journal* 111 (2002): 1935.

framework for implementing human right protections for children and young people. Indirect incorporation also provides a tangible threshold for implementing the CRC. Sectoral incorporation delivers necessary legal cohesion and a comprehensive entrenchment of children and young people's rights and can support the CRC framework when directly or indirectly incorporated into national law. All forms of incorporation aids in combatting allegations that international human rights are not democratically determined and that economic, social and cultural rights are not designed to be justiciable.

Ultimately, this article demonstrates that incorporation of the CRC is neither a purely aspirational goal, nor is it a panacea for protecting the rights of children and young people. Each state must facilitate legal, institutional and social change through comprehensive general measures. Incorporation is a term that covers a range of legal possibilities designed to facilitate greater implementation of international law. Demands for incorporation as a path to increasing the tangibility of children and young people's rights must be tempered to acknowledge the nuance required when trying to progress a 'common' standard of human rights protection. As acknowledged by the 2007 UNICEF/Innocenti report, 'no single approach can be envisaged as a blueprint best suited to all countries, and no single method is sufficient to translate the breadth of the Convention into the national legal framework.'⁹⁰ Implementation of the CRC boils down to a combination of factors and perhaps a dogmatic approach to direct incorporation is not the only approach if it sacrifices other necessary incremental progression in CRC implementation that firmly develops a children and human rights culture. It is hoped that in presenting a taxonomy of incorporation, it will shed some light on how the term is used as we move forward in embedding children and young people's rights and permit us to consider whether to incorporate or not is the most important question.

⁹⁰ UNICEF/Innocenti, *Law Reform and Implementation*, viii.