The application of the United Nations Convention on the Rights of the Child by national courts

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De toepassing van het Verdrag inzake de Rechten van het Kind door nationale rechters

Meda-Mihaela Couzens

The application of the United Nations Convention on the Rights of the Child by national courts

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List of acronyms

CC	Court of Cassation (France)
CE	Conseil d'État (Council of State, France)
CRC	the United Nations Convention on the Rights of the Child, 1989
ECHR	the European Convention on Human Rights and Fundamental Freedoms, 1950
ECtHR	the European Court of Human Rights
ECJ	the European Court of Justice
EU	the European Union
HCA	High Court of Australia
FCFC	Full Court of the Family Court (Australia)
ICCPR	the International Covenant on Civil and Political Rights, 1966
SCA	Supreme Court of Appeal (South Africa)
VSC	Victoria Supreme Court (Australia)

Chapter 1: Introduction

1.1 Introduction: Why the courts?

Children around the world continue to experience hardship, whether they live in developed or developing countries. They are vulnerable to mistreatment or neglect by adults, may be side-lined by states, or disproportionately affected by economic crises, conflict and environmental degradation. While progress has been made in improving the lives of children,[1] much remains to be done for the promises made in the United Nations Convention on the Rights of the Child, 1989[2] ('the CRC' or 'the Convention') to be fully realised. This remains a mammoth task for individual states as well as for states collectively. Much mobilisation of material and intellectual resources is needed, and the involvement of a wide variety of actors, domestic and international, state and non-state, individual and collective. Each can play a meaningful, albeit confined and specialised role, in giving effect to the CRC. No actor can claim a monopoly over the effective implementation, as all roles are interconnected and interdependent.

The mechanisms of implementation of the Convention can be better understood if attention is given to the separate elements of the machinery, without losing sight of their being part of a greater whole. With this is mind, this researcher has chosen to focus on a better understanding of the courts' engagement with the CRC.

The first decade or so of the existence of the Convention was dominated by its standard-setting role. In some jurisdictions, the CRC is a part of the national law through a process of automatic incorporation. In many countries, the CRC has influenced the drafting of child-focused provisions in national constitutions,[3] while in others it stimulated legal reform, especially in child protection, family law and juvenile justice.[4] Cases of 'integral or holistic application of

[1] For a presentation of various indicators and their evolution, see UNICEF (2017) *The State of the World's Children 2017: Statistical Tables* 146 (online).
[2] Full title and publication details: *Convention on the rights of the child. Adopted by the General Assembly of the United Nations on 20 November 1989*, United Nations 1999 *Treaty Series* vol 1577 at 3.
[3] J Tobin 'Increasingly seen and heard: The constitutional recognition of children's rights' 2005 (25) *South African Journal on Human Rights* 86; Venice Commission (2014) *Report on the Protection of Children's Rights: International Standards and Domestic Constitutions* (online).
[4] See B Duncan (2008) *Global Perspectives on Consolidated Children's Rights Statutes* (UNICEF, Legislative Reform Initiative) at 35-36 (online). In relation to legal reform, see also L Lundy et al (2012) *The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries* (Queen's University Belfast and UNICEF UK) (online); L Lundy, U Kilkelly and B Byrne 'Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review' 2013 (21) *International Journal of Children's Rights* 442; K Nundy (2004) *The Legal Status of Legislative Reform Related to the Convention on the Rights of the Child (*UNICEF Legislative Reform Initiative) at 27 (online); and the UNICEF electronic resources on the *Legal Reform Initiative: Harmonizing National Legislation with International Human Rights Instruments*.

the CRC to national law' are rare,[5] and some states are still to draft consolidated children's rights statutes[6] or even accept that their laws are not fully compliant with the CRC.[7]

Despite some deficiencies, progress has been made toward giving domestic effect to the Convention. This has moved the CRC into a new phase, in which attention has shifted toward effective implementation, including by courts. This coincides with an increased interest in the application of international treaties by national courts more generally.[8] National courts are no longer simply 'a solution to a temporary deficiency of the international legal order',[9] but are instrumental in ensuring the effectiveness of international law.[10] As a result of litigants invoking international law, courts often engage with international treaties. The rise of supranational courts, such as the European Court of Justice ('the ECJ') or the European Court of Human Rights ('the ECtHR'), has emboldened the courts to be more assertive,[11] including in controlling how the legislature or the executive interpret and comply with the state's obligations under international law.[12]

This is not to say that courts are the prime implementation mechanism for the CRC and perhaps other treaties. The CRC creates a wide variety of obligations, and certain provisions or aspects thereof require legislative or executive intervention.[13] The Convention is a complex document, with many dimensions of which being 'an instrument for legal action'[14] is just one.[15] Courts have their own limitations. Peace and respect for the rule of law are important premises, and neither can be taken for granted. Further, courts seldom address systemic issues (except, perhaps, in constitutional litigation), and, in relation to individual protection, they are only

[5] For example, Belgium (W Vandenhole 'The Convention of the Rights of the Child in Belgian Case Law' in T Liefaard and J Doek (eds) *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 105-122); Brazil (M Maurás 'Public Policies and Child Rights: Entering the Third Decade of the Convention on the Rights of the Child' 2011 (633) *The ANNALS of the American Academy of Political and Social Science* 52 at 53); the Netherlands (C de Graaf 'The Application of the United Nations Convention on the Rights of the Child in Dutch Legal Practice' in A Diduck, N Peleg and H Reece (eds) *Law in Society: Reflections on Children, Family, Culture and Philosophy* (2015) 589; M Limbeek and M Bruning 'The Netherlands: Two Decades of the CRC in Dutch Case Law' in Liefaard and Doek (eds) *Litigating the Rights of the Child* (2015) 89); Norway (K Sandberg 'The Role of National Courts in Promoting Children's Rights: The Case of Norway' 2014 (22) *International Journal of Children's Rights* 1; Romania (M Couzens 'Romanian courts and the UN Convention on the Rights of the Child: A case study' 2016 (24) *International Journal of Children's Rights* 851).

[6] Duncan 2008 note 4 at 19.

[7] See, for example, Chapters 3 and 5 below.

[8] D Sloss (2011) *Domestic Application of Treaties* (Santa Clara Law Digital Commons; online). In this Introduction, the term 'application' is often used in the general sense of courts engaging or giving effect to the CRC, rather than to indicate the *direct* application (or the self-execution) of the Convention.

[9] A Nollkaemper *National Courts and the International Rule of Law* (2011) at 8.

[10] Ibid at 8. Also, M Waters 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' 2007 (107) *Columbia Law Review* 628 at 633.

[11] C Guarnieri 'Courts and marginalized groups: Perspectives from Continental Europe' 2007 (5) *International Journal of Constitutional Law* 187 at 193.

[12] Ibid.

[13] J Himes 'Monitoring Children's Rights: Cutting Through the Confusion and Planning for the Effective Action' in E Verhellen (ed) *Monitoring Children's Rights* (1996) 113 at 119; J Williams 'General legislative measures of implementation: individual claims, 'public officer's law' and a case study on the UNCRC in Wales' 2012 (20) *International Journal of Children's Rights* 224 at 228.

[14] Himes 1996 note 13 at 119.

[15] The others being 'a political, promotional or advocacy tool' and 'a tool for policy planning and programming' (ibid).

effective if they are 'willing and capable'[16] of sanctioning rights violations. Courts focus primarily on violations of legal norms. They represent a 'compliance model of human rights',[17] which although important, disregards the role of the CRC in shaping policies.[18] There are obstacles which affect the application of the CRC specifically: the absence of incorporation of the CRC in the national law; the low legal status of the CRC in the national legal order; 'the continuing controversy surrounding the concept of children's rights; the relatively open-ended nature of many of the norms; and the procedural impediments at the court level'.[19] Courts may act as gate-keepers by, for example, denying the CRC a self-executing character (in jurisdictions where this is relevant) and using loopholes in the CRC.[20] These are valid concerns, which show that the application of the law by courts cannot solve the full complexity of problems affecting children.[21]

Nonetheless, these concerns do not render judicial application obsolete. The role of the courts in giving effect to international human rights is accepted and valued. Many courts now engage with the CRC,[22] although the quality of such engagement varies.[23] The courts can contribute to advancing the rights of children by developing 'good case law and powerful precedents'[24] and by 'shaping the law on all issues that affect children'.[25] Further, there is a variety of obligations created by the CRC and while certain provisions or aspects thereof may require legislative or executive intervention, others can be secured through judicial application.[26] The courts' (presumed) receptiveness to the strength of legal argument rather than political judgement or popularity,[27] makes them an attractive safety net for the promoters of children's rights.

It can therefore be accepted that courts have a role to play in giving effect to the Convention.

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[16] E Powell and J Staton 'Domestic Judicial Institutions and Human Rights Treaty Violation' 2009 (53) *International Studies Quarterly* 149 at 154.

[17] Quotes from J Tobin 'Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations' in A Invernizzi and J Williams (eds) *The Human Rights of Children: From Vision to Implementation* (2011) 61 at 66.

[18] Ibid.

[19] J Tobin 'Judging the judges: Are they adopting the rights approach in matters involving children?' 2009 (33) *Melbourne University Law Review* 579 at 581.

[20] Such as the formulation of article 3(1) of the CRC, which makes the best interests of a child 'a' rather than 'the' primary consideration (J Todres 'Emerging limitations on the rights of the child: The U.N. Convention on the Rights of the Child and its early case law' 1998-1999 (30) *Columbia Human Rights Law Review* 159 at 194).

[21] For other authors who stress the complementarity between courts and other means of implementation, see J Himes 'Children's rights: Moralists, lawyers and the right to development' 1993 (1) *International Journal of Children's Rights* 81 at 83; Himes 1996 note 13 at 119; Williams 2012 note 13.

[22] Child Rights International Network (CRIN) *CRC in Court: The Case Law of the Convention on the Rights of the Child* (2012) (online). See generally, Liefaard and Doek 2015 note 5.

[23] Tobin remarks that engagement of the courts with the CRC, ranges from 'invisible' to 'substantive', with categories such as 'incidental', 'selective', 'rhetorical' or 'superficial' in between (Tobin 2009 note 19 at 582). According to CRIN (2012 note 22 at 15), judicial decisions seldom refer to children's civil and political rights and refer more frequently to economic, social and cultural rights. From a sample of 12 jurisdictions recently analysed, Lundy et al (2012 note 4) concluded that the key CRC principles were more frequently used in routine litigation than other articles.

[24] Himes 1993 note 21 at 89.

[25] Todres 1998-1999 note 20 at 160.

[26] Himes 1996 note 13 at 119; Williams 2012 note 13 at 228.

[27] On children's vulnerability to political oversight, see generally, A Nolan *Children's Socio-Economic Rights, Democracy and the Courts* (2011).

How this role should be conceived is a more difficult issue to disentangle.

1.2 Problem statement and the rationale of the study

In addition to the acknowledgment that courts have a role to play in giving effect to the CRC, there is an expectation that they will do so. Court are sometimes criticised for not applying the CRC or doing so inadequately.[28] For the Committee on the Rights of the Child ('the Committee' or 'the CRC Committee'), the treaty-body which monitors the progress with the implementation of the CRC,[29] there is an intrinsic link between the realisation of the rights of children and their protection by national courts.[30] These expectations confront the complex reality of domestic legal systems. Many recent studies investigate the role of courts in giving effect to international treaties,[31] but they cannot be fully relied on to understand the interaction between domestic law and the CRC because the latter's particularities raise distinct issues for courts.

Conceptualising the role of the courts in giving effect to the CRC is not an easy task. First, like other treaties,[32] the CRC is concomitantly an international treaty operating in the international sphere and a legal instrument with municipal relevance. Courts are institutions at the 'intersection of legal orders'[33] (national and international). They are 'claimed' as useful 'agents' both by international and domestic orders respectively. Internationally, it is expected that courts will contribute to the implementation of international treaties,[34] and, domestically, it is expected that they protect the integrity of the domestic legal order. Thus, the courts are concomitantly 'swords and shields'[35] at the crossroad between domestic and international law.

Second, there are other factors ranging from CRC-related (such as the contested enforceability and the programmatic nature of some articles, the absence of a reference to remedies in the CRC, or the formulation of provisions as obligations for the states rather than as rights for the child) to domestic realities (such as the legal framework for the reception of international law,

[28] See, generally, publications in Liefaard and Doek 2015 note 5; Tobin 2009 note 19; Todres 1998-1999 note 20.
[29] The Committee also receives individual or inter-state communications concerning the violation of CRC rights and may conduct inquiries (see articles 43 and 44 of the CRC and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, 2011 (in force 14 April 2014)).
[30] CRC Committee *General Comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6) ('*General Comment 5*') para 21.
[31] M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010); Nollkaemper 2011 note 9; D Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009); D Shelton (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (2011).
[32] B Curtis 'Self-execution and treaty duality' 2008 (1) *The Supreme Court Review* 131 at 133.
[33] A Nollkaemper 'The Duality of Direct Effect of International Law' 2014 (25) *The European Journal of International Law* 105 at 108-109.
[34] Knop argues that international lawyers are interested in domestic courts because they supply a coercive power which is not available internationally (K Knop 'Here and there: International law in domestic courts' 1999-2000 (32) *New York University Journal of International Law and Policy* 501 at 516). It was also argued that although courts cannot be claimed as 'organs of international community', their domestic functioning is affected by the interconnectedness of national and international law (R Provost 'Judging in Splendid Isolation' 2008 (56) *American Journal of Comparative Law* 125 at 168).
[35] Nollkaemper (2014 note 33 at 108) uses this metaphor in relation to the direct effect of international treaties, but the metaphor is appropriate here too.

the extent of legislative implementation of the CRC, the structure of the judicial system). For example, article 4 of the CRC is formulated differently from similar general implementation provisions of international treaties whose application by courts has been less contentious,[36] leaving the CRC vulnerable to claims that it was not intended to be applied by the courts. The Convention has special features, in which some of its strengths lie, such as its general principles[37] and a variety of rights which go well beyond the classic distinction between civil and political and socio-economic rights respectively.[38] Further, the Convention contains a wide variety of norms: some may be of limited relevance for the courts, while compliance with others may rest primarily on courts.[39]

Lastly, courts play complex roles in domestic jurisdictions. There is a tendency to use the term 'courts' monolithically, but this may be unhelpful. There are, for example, constitutional courts and ordinary courts; administrative and judicial courts; federal and state courts; and ordinary or specialised courts. In some cases, these distinctions have an impact on the ability of the courts to engage with the CRC.[40] Domestically, the CRC can be breached in a variety of ways, such as infringements upon individual rights, or by legislatures passing statutes which are inconsistent with the CRC, or by the executive organs acting contrary to the CRC. It may be that not *all* courts have the power to respond to *all* of these types of violations. Focusing on only one type of court runs the risk of painting an incomplete picture of what courts generally may be equipped to do in relation to the CRC in a particular legal system.

The above are some of the difficulties which have led to an insufficient conceptualisation of the role which the courts can or ought to play in the application of the Convention. As Tobin suggests, there is

> a strong onus on proponents of a more active judicial approach in this area to recognise the nature and extent of these potential obstacles and to articulate a coherent vision of how these might be overcome in order to facilitate more effective and systematic judicial involvement.[41]

This is, overall, what is sought in this study – to contribute to understanding the obstacles and the potential of courts in giving effect to the CRC.

There are multiple lines of enquiry which can be taken to investigate the role of the courts in this regard. They may pertain, for example, to the type of obligations created by the CRC or to

[36] See discussion in Chapter 2.
[37] These were identified by the Committee as articles 2 (non-discrimination), 3 (best interests of the child), 6 (survival and development) and 12 (the right to be heard) (*General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties under Article 44, Paragraph 1 (a), of the Convention* 1991 para 13).
[38] The Convention contains new rights for children (such as the right to play in article 31) and many protection-oriented rights. Article 5 (rights of caregivers to give guidance) was said to have a nature that is difficult to ascertain (M Rishmawi 'Article 4: The Nature of States Parties' Obligations' in *A Commentary on the United Nations Convention on the Rights of the Child* (2006) at 17).
[39] This issue is further discussed in Chapter 2 part 2.2.2. To give one example, arguably, the obligation placed on states to take measures to combat the illicit transfer and non-return of children abroad (article 11) is *prima facie* of limited relevance for the courts, while the injunction that a child shall be provided an opportunity to be heard in judicial proceedings (article 12(2)) is of direct relevance to them.
[40] See especially the Australian and the French case studies in this work.
[41] Tobin 2009 note 19 at 581.

subject matters (i.e., juvenile justice, family law) or to types of courts. This research focuses on the role of the courts in the light of the domestic legal framework concerning the relationship between international treaties and domestic law, for reasons explained in part 1.4 below.

1.3 The aim of the study and the research questions

1.3.1 The aim

The aim of the study is to assist in the conceptualisation of the role of the courts in giving effect to the CRC. This is done by studying the effect of the domestic legal rules pertaining to the relationship between the CRC and the domestic law on the application of the Convention by courts in selected jurisdictions.

1.3.2 The research questions

1. How do courts engage with the CRC in light of the domestic framework which informs the relationship between domestic law and international treaties?
2. What has been the impact of the engagement with the CRC on judicial reasoning?
3. What are the (facilitating or inhibiting) factors which have informed that engagement?

1.4 Theoretical perspective

This work is written from a cosmopolitan perspective. Cosmopolitanism[42] is centred on 'individualism, egalitarianism and universalism',[43] and has grown as a result of the current rise in global interconnectedness.[44] Three 'moral and normative commitments' are associated with cosmopolitanism: the individual (rather than the state) as a primary unit of moral concern at international level; equal moral worth of all individuals; and a universal scope.[45] Specific for cosmopolitanism are the ideas of 'global cohabitation' and duties toward those living beyond a state's borders.[46]

Cosmopolitanism is a vast field of theoretical enquiry in which there is no consensus 'about how the precise content of a cosmopolitan position is to be understood'.[47] Various strands have

[42] On its historical development, see G Wallace Brown and D Held 'Editor's Introduction' in G Wallace Brown and D Held (eds) *The Cosmopolitan Reader* (2010) 1 at 9.
[43] R Cryer et al *Research Methodologies in EU and International Law* (2011) at 46.
[44] Wallace Brown and Held 2010 note 42 at 1.
[45] Ibid at 1-2. See also R Pierik and W Werner 'Cosmopolitanism in context: an introduction' in W Werner and R Pierik (eds) *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (2010) 1 at 3.
[46] Wallace Brown and Held 2010 note 42 at 2.
[47] S Scheffler 'Conceptions of Cosmopolitanism' 1999 (11) *Utilitas* 255 at 255. Some describe cosmopolitanism as 'a way of being in the world' (J Waldron 'What is Cosmopolitan?' in Wallace Brown and Held (eds) *The Cosmopolitan Reader* (2010) 163 at 163) or as 'an intellectual disposition' (V Marotta 'The Cosmopolitan Stranger' in S van Hooft and W Vandekerckhove (eds) *Questioning Cosmopolitanism. Studies in Global Justice 6* (2010) 105 at 110).

been identified in cosmopolitan thinking,[48] but most useful for the purposes of this study is the preoccupation with how 'cosmopolitan morality'[49] can be applied along five themes: global justice, cultural cosmopolitanism, legal cosmopolitanism, political cosmopolitanism and civic cosmopolitanism.[50] These themes are often interconnected and overlap.[51] The first three are relevant for this study.

Cosmopolitan global justice is concerned with what is owed to human beings on account of their equal moral worth, which is recognised 'beyond the traditional nation-state paradigm'.[52] Cultural cosmopolitans argue in favour of global justice regardless of ethnic, cultural and national background.[53] This is based on the view that human identity is not anchored exclusively in one culture, and individuals have broader obligations toward their peers, including beyond domestic borders; and that there are universal human traits which should encourage a common culture.[54] Legal cosmopolitanism is preoccupied with the operationalisation of cosmopolitan ideals in international legal institutions,[55] and is therefore an institutional cosmopolitanism which seeks to give effect to cosmopolitan moral ideas.[56]

Cosmopolitan legal ideas serve as standards against which current international law is assessed with a view to establishing what needs to change in order for international law to conform with moral cosmopolitan ideas; and as advocacy tools in favour of creating a new layer of international law able to secure human dignity and 'legal obligation beyond the traditional state-centric model of international law'.[57] As remarked by Brown, '[c]ommon among legal cosmopolitans … is a basic rejection of international law that is predicated solely on the Westphalian model and therefore one that grants absolute overriding authority to the interests of state sovereignty'.[58]

There are several ways in which cosmopolitan thinking has influenced this work, as discussed further.

First, the diversity of cosmopolitan ideas can capture the complex reality of the operation of the CRC as a treaty with universal aspirations tempered by a demure domestic life. There are some internal tensions between cosmopolitan views, in that, for example, legal cosmopolitanism encourages legal uniformity while cultural cosmopolitanism would accept legal polyphony. This tension has enabled this researcher to identify two ways in which the

[48] A distinction has been made between cosmopolitanism about justice and cosmopolitanism about culture (Scheffler 1999 note 47 at 255); and between moral and institutional cosmopolitanism (Pierik and Werner 2010 note 45 at 1).
[49] Wallace Brown and Held 2010 note 42 at 9.
[50] Ibid.
[51] Ibid.
[52] Ibid at 10.
[53] Ibid.
[54] Ibid.
[55] See generally, G Wallace Brown 'Moving from Cosmopolitan Legal Theory to legal Practice Models of Cosmopolitan Law' in Wallace Brown and Held (eds) *The Cosmopolitan Reader* (2010) 248.
[56] Pierik and Werner point out to the codification of international criminal law, the creation of the International Criminal Court and human rights treaties as illustrations of cosmopolitan ideals being placed in an institutional framework (2010 note 45 at 6).
[57] Wallace Brown 2010 note 55 at 254.
[58] Ibid.

CRC seems to be approached: the legal cosmopolitan way, which corresponds to the international/ised discourse on the CRC and captures the aspirations of the Convention as a treaty with global reach; and the cultural cosmopolitan way, which largely focuses on the domestic operation of the CRC and its peculiarities. While some common aspects exist, the two perspectives are distinct. Yet, they are internally valid despite potential tensions between them, but none adequately explains the operation of the CRC in isolation, as discussed below.

The CRC reflects the aspirations of the cosmopolitan legal thinking, with its wide range of rights and extensive international endorsement.[59] Its ratification has created a large *espace juridique*[60] in which the sum of state commitments creates an expectation of quasi-universal domestic respect for its standards. A cosmopolitan image or meaning of the CRC is created in academic and civil society discourse, in the work of the CRC Committee and that of other international bodies.[61] This meaning results from a fusion of positive domestic experiences and international expectations, and creates a powerful CRC narrative, which is neither purely domestic nor purely international.[62] This anchors the CRC firmly in a 'cosmopolitan context'.[63]

The cosmopolitan context in which the Convention is placed does not erase the reality of domestic variations in its operation. These are approached in this work from a cultural cosmopolitan perspective applied to legal material. This perspective is useful because it enables this researcher to canvas the international/ised and domestic conceptualisations of the CRC without a need to establish a normative hierarchy between them. This researcher differs from authors who view cosmopolitanism as an 'avowedly normative, idealistic theory rather than one which purports to describe the world as it is'.[64] She takes the view that cultural cosmopolitanism, as used in this work, enables a description of 'the world as it is', meaning a world of great diversity, that functions without a need to place international and domestic approaches to the CRC in a hierarchical framework or have them perfectly aligned. Cultural cosmopolitanism enables a description of the operation of the CRC which approaches domestic peculiarities not as undermining it, but giving life to the Convention and contributing to its growth.

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[59] Contestations continue to exist in relation to the rights of children. For discussion, see R Dixon and M Nussbaum 'Children's Rights and a capabilities approach: The question of special priority?' 2011-2012 (97) *Cornell Law Review* 549; T Ezer 'A Positive Right to Protection for Children' 2004 (7) *Yale Human Rights and Development Law Journal* 1; M Guggenheim *What's wrong with children's rights* (2005).

[60] In *Banković and Others v Belgium and 16 Other Contracting States* (Application no. 52207/99) the European Court of Human Rights used this concept to stress that the European Convention on Human Rights and Fundamental Freedoms applies within the 'legal space (*espace juridique*) of the Contracting States' (para 80).

[61] For the use of the CRC by regional human rights bodies, see A Nolan and U Kilkelly 'Children's Rights under Regional Human Rights Law – A Tale of Harmonisation?' in C Buckley, A Donald and P Leach (eds) *Towards Convergence in International Human Rights Law Approaches of Regional and International Systems* (2016).

[62] The prominence of this composite narrative in the Convention context (perhaps more so than in relation to other human rights treaties) has several explanations. The CRC has introduced far-reaching changes in relation to children's position in law, and its implementation has been challenging for all states, regardless of their level of development, legal tradition or other domestic features. Civil society organisations in many states and a growing cohort of academics and researchers are determined to make the Convention work domestically, by drawing attention to international and foreign developments.

[63] Concept used by Z Skrbiš and I Woodward 'Cosmopolitan Openness' in M Rovisco and M Nowicka *The Ashgate Research Companion to Cosmopolitanism* (2011) 53 at 55.

[64] Cryer et al 2011 note 43 at 47.

A second cosmopolitan aspect of this work is that the domestic jurisdictions are used as instruments to assist in understanding the domestic operation of an international treaty. As suggested below, a cosmopolitan has 'greater allegiance'[65] to the international than to the national. This does not suggest a hierarchy of importance. Arguably, the substance or the meaning of the CRC is discovered primarily through its interaction with domestic realities, on which it is dependent.[66] The cosmopolitan construction of the CRC increases the demand for knowledge about the domestic relevance of the CRC. The more that it is understood about how the CRC operates domestically, the more complete its meaning becomes. This requires that the work of courts, as domestic actors which engage with the Convention, be considered.

Another aspect of this work in which a cosmopolitan influence is present is that the researcher employs the 'cosmopolitan way of seeing'[67] as a 'cosmopolitan stranger'.[68] The 'cosmopolitan stranger' is a 'cultural outsider'[69] 'who questions nearly everything that is taken for granted by the host'[70] and who cannot be sure that his/her interpretation of the things he/she sees overlaps with that of the host.[71] The absence of 'complete access to the cultural and language code of the host' 'causes anxiety and stress' while providing 'the ground for a different understanding of the host's world'.[72] A cosmopolitan stranger is reflexive and critical,[73] and 'can synthesize and have access to a "total perspective" not available to those immersed in their essentialist particular/local or global/universal frameworks'.[74]

What originally sparked this research was a concern about the disconnect between the ambitious cosmopolitan aspirations of the CRC and its more modest domestic achievements. It became apparent that the answers to this problem are found in the labyrinth of domestic laws, rather than in the esoteric field of international law. But a cosmopolitan stranger has limited equipment to relate to the new world he/she is trying to make sense of.[75] While 'estrangement is pedagogy',[76] an intimate knowledge of the *polis* might escape a cosmopolitan stranger. Thus, some subtleties in domestic legal reasoning may be lost to a cosmopolitan observer such as this researcher. The concept of the cosmopolitan stranger, however, enables the researcher to

[65] Marotta 2010 note 47 at 113.
[66] Objectively, the CRC does not *exist* at international level (i.e. it does not fulfil the essence of its existence in the international sphere). At international level, the CRC is a holographic image that develops *in reaction* to the domestic operation of the Convention. This international image is shaped by the CRC Committee and others with interest in the CRC (international organisations, NGOs, academia).
[67] Skrbiš and Woodward 2011 note 63 at 55.
[68] Marotta 2010 note 47 at 105. Nussbaum talks about cosmopolitanism as a 'lonely business', an exile 'from the comfort of local truths' (M Nussbaum 'Patriotism and Cosmopolitanism' in Wallace Brown and Held (eds) *The Cosmopolitan Reader* (2010) 155 at 161).
[69] Marotta 2010 note 47 at 107 discussing the work of Georg Simmel and Zygmunt Bauman.
[70] Ibid at 108.
[71] Ibid.
[72] All quotes from Marotta 2010 note 47 at 109.
[73] Ibid at 112 referring to Ulf Hannerz.
[74] Ibid at 118.
[75] In this case, the equipment includes the CRC and the formal domestic rules which inform the interaction between international treaties and domestic law.
[76] Expression used by S Gunew 'Estrangement as pedagogy: The cosmopolitan vernacular' in R Braidotti et al (eds) *After Cosmopolitanism* (2012) 132 at 136, building on the work of Paul Gilroy.

acknowledge limitations arising from the deficit of local knowledge, without deterring from an investigation which may uncover meaning. While a cosmopolitan observer's view may not be as complete as that of a local observer, it is complimentary and complementary to the local knowledge in that it stresses its international value which might not be noticeable to the local observer.

1.5 Methodology

This thesis aims to answer the research questions by conducting in-depth studies of the direct and indirect application of the CRC by courts in three jurisdictions, selected from amongst monist, dualist and hybrid legal systems[77] of both civil and common law tradition. Two reasons have informed this choice: that these issues have not been sufficiently canvassed in a CRC context; and that meaning can still be found by following this line of enquiry.

The distinction between monist and dualist systems remains an adequate, albeit basic, analytical tool to manage the diversity of the community of states parties to the CRC. The difficulties in dividing legal systems into 'monist' or 'dualist' have lead to some authors abandoning the term 'monist states' in favour of that of 'hybrid monist states'.[78] Without contesting the cogency of the mentioned position, this researcher prefers to approach monist and hybrid monist systems as distinct albeit similar. This is because in both systems, some international norms may be applied directly by courts without legislative incorporation or transformation. Nonetheless, distinguishing between them is useful for this work to illustrate that common legal concepts (i.e., direct application or self-execution) may operate very differently in different legal systems.

Although the variances between how courts engage with human rights treaties may be shrinking,[79] some basic distinctions remain. The two types of systems endorse *prima facie* different methods of giving effect to the CRC in domestic courts (direct versus indirect application); and there is an important distinction between the legal enquiries conducted, in that in monist and hybrid systems, some treaties or provisions thereof may be applied in the

[77] For the distinction between monist/dualist *views* to the relationship between national and international law and monist/dualist *legal systems*, see D Sloss 'Non-Self-Executing Treaties: Exposing a Constitutional Fallacy' 2002 (36) *University of California Davis Law Review* 1 at 9.

[78] This terminological preference was based on these writers' doubts that any states are purely monist, and allow all international norms to trump all domestic rules. Hybrid monist states include according to these writers Germany, the Netherlands, Poland, Russia, South Africa and the United States (D Sloss 'Treaty Enforcement in Domestic Courts: A Comparative Analysis' in D Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 1 at 7. Sloss credits Van Alstine with the creation of the term. See M van Alstine 'The Role of Domestic Courts in Treaty Enforcement: Summary and Conclusions' in D Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 555.

[79] See Sloss 2011 note 8 at 3. According to Shelton, it is difficult to find a state that is completely monist or completely dualist in its approach to international law (D Shelton 'Introduction' in Shelton (ed) *International Law and Domestic Legal Systems* (2011) 1 at 3). On the ongoing academic debate regarding the meaningfulness of this distinction see, for example, M Watters 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights treaties' 2007 (107) *Columbia Law Review* 628; Nollkaemper 2014 note 33; M Scheinin 'General introduction' in M Scheinin (ed) *International Human Rights Norms in the Nordic and Baltic Countries* (1996) 11 at 13.

absence of legislative measures to implement them.[80] A direct application of the CRC, following its automatic incorporation in monist jurisdictions[81] has significant advantages not available in dualist systems: immediate effect to the CRC regardless of political inaction, and potential access to remedies in cases of violation; and, in certain legal systems, the possibility of setting aside domestic norms which conflict with the Convention. The indirect approach in dualist states is centred on interpretive presumptions rather than direct application. Studying these different approaches provides rich information about the interaction between the Convention and the domestic law.

This study analyses the role of the courts through the perspective of the 'bindingness'[82] of international law. This has preoccupied the CRC Committee,[83] that, in its most general statement on the issue, said:

> States parties need to ensure, by all appropriate means, that the provisions of the Convention are given legal effect within their domestic legal systems. This remains a challenge in many States parties. Of particular importance is the need to clarify the extent of applicability of the Convention in States where the principle of 'self-execution' applies and others where it is claimed that the Convention 'has constitutional status"' or has been incorporated into domestic law.[84]

The Committee indirectly acknowledged that the engagement of the courts with the CRC depends on its domestic bindingness,[85] which may be unclear. As put by Provost, '[w]hile the issue of the binding nature of domestic norms rarely arises, it will often constitute an unavoidable first step in the application of international norms'.[86]

The initial interest in the status of the CRC[87] has faded in favour of a preoccupation with the substance of the CRC. From time to time this interest resurfaces showing that the issue remains unsettled.[88] Although formal rules regarding the interaction between the CRC and domestic legal systems cannot fully explain the dynamic of judicial engagement with the CRC,[89] they remain important for several reasons. First, the formal reception scaffold allows the courts 'to find ways to treat international law as law'.[90] Indeed, the courts continue to engage with the

[80] Van Alstine 2009 note 78 at 566.
[81] Monist states include, for example, Belgium, France, the Netherlands and Romania.
[82] Term coined by Knop (1999-2000 note 34).
[83] The Committee has been preoccupied with the direct and also the indirect application of the CRC (see, for example, M Couzens 'CRC Dialogues: Does the Committee on the Rights of the Child "Speak" to the National Courts?' in T Liefaard and J Sloth-Nielsen (eds) *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (2016) 103).
[84] CRC Committee *General Comment 5* note 30 para 19.
[85] Knop comments that this approach is facilitated by the traditional 'all-or-nothing' approach to international law: if international law is binding on the national judiciary, the judge has no discretion with regards to its application (1999-2000 note 34 at 503)
[86] Provost 2008 note 34 at 135.
[87] A Alen and W Pas 'The UN Convention on the Rights of the Child's Self-executing Character' in E Verhellen (ed) *Monitoring Children's Rights* (1996) 165; E Verhellen *Convention on the Rights of the Child* (1994).
[88] For example, it was only in 2009 that the Committee required the Netherlands to provide clarity on the status of the CRC in the national legal order (CRC Committee (2009) *List of Issues The Netherlands*), and Romania to indicate whether courts apply the Convention directly (CRC Committee (2009) *List of issues to be taken up in connection with the consideration of the third and fourth periodic reports of Romania*).
[89] Informal factors such as the level of knowledge of the CRC by judges and legal practitioners or the presence of litigators specialised in the rights of children are not addressed in this work.
[90] B Conforti *International Law and the Role of Domestic Legal Systems* (1993) at 13.

formal aspects of reception 'as an indispensable first step'.[91] Second, the formal rules governing the interaction between the CRC and domestic law reflect a domestic agreement regarding the means which courts can use to give effect to the CRC in a consistent and meaningful way. Within the limits of the agreement, the courts have uncontested powers to engage with the Convention. Third, by being public and accessible domestically and internationally, these norms shape expectations in relation to how the courts should engage with the CRC. Fourth, a focus on formal rules has the potential to show whether courts engage with the CRC in ways not captured by the mentioned formal structure. Knop is critical of approaching the role of the courts as being 'dependent on the conviction of bindingness',[92] because it prevents a full understanding of the judicial application of international law.[93] While this is true, it is submitted that it is the focus on bindingness that allows one to ascertain that courts give effect to the CRC in ways which transcend it.

Cosmopolitanism is preoccupied with achieving benefits for all, thus the attention paid in this work to the impact which the judicial engagement with the CRC has had on courts' reasoning. Assessing the impact of international treaties on domestic jurisprudence is difficult, and it is compounded in the case of the CRC by the overlap between its content and that of other norms (domestic or international), and their parallel application. Discerning *what* in the legal reasoning stems from the Convention and *what* stems from the domestic (or other international) norms is sometimes difficult.

Acknowledging these difficulties, this research has looked for a meaningful engagement with the CRC. The term 'meaningful' is approached as having procedural and substantive dimensions. Procedurally-meaningful engagement exists when international norms and their domestic implications are analysed, and a reasoned decision is made as to why international law is (*lato sensu*) followed or rejected.[94] The substantive dimension is present when engagement with the CRC has contributed to the development of the domestic law by adding *something* to the legal reasoning. This dimension is commensurate with the transformative aim of the CRC, which seeks to change how children are treated by the law and those who apply it. A contribution to the development of domestic law can take place in many ways, such as clarifying the domestic law; enabling and encouraging the development of domestic law in a certain direction; providing a lens through which domestic law is analysed and enabling the discovery therein of features which may have laid dormant otherwise; and by raising new aspects which may have otherwise been ignored in the judicial enquiry. In short, the search in

[91] H Keller and A Stone Sweet 'Assessing the Impact of the ECHR on National Legal Systems' in H Keller and A Stone Sweet (eds) *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008) 678 at 682, making the remark in the context of the European Convention on Human Rights and Fundamental Freedoms, 1950 (in force 1953) (ECHR), which applies, in this researcher's view, to the CRC.
[92] Knop 1999-2000 note 34 at 503.
[93] Ibid.
[94] This researcher draws from Tuovinen's critical work on the consideration of international law by the Constitutional Court of South Africa. See J Tuovinen 'The Role of International Law in Constitutional Adjudication: Glenister v. President of the Republic of South Africa' 2013 (130) *South African Law Journal* 661.

this project has been for cases where there is evidence that the CRC has enriched the legal reasoning, or has had some 'added value'.[95]

The selection of jurisdictions

This study focuses on three jurisdictions – Australia, France and South Africa – which broadly represent monist and dualist systems, including a hybrid system, South Africa, which combines the two approaches. The diversity of selected jurisdictions is appropriate for a cosmopolitan enquiry. Cosmopolitanism tolerates diversity[96] and derives meaning from 'heterogeneous cultural materials'.[97] In a cosmopolitan discourse, all voices are meaningful regardless of how disparate their tones may be. Meaning can be extracted from analysing experiences in widely differing legal systems, a meaning which might not have been discoverable by studying a homogenous sample.

The study does not purport to be universally valid nor representative of the types of jurisdictions analysed, but some findings have a sufficient degree of generality to be considered in relation to other jurisdictions. The jurisdictions have been purposefully selected to offer a range of insights into the research questions. Importantly, all countries are democracies, with a declared commitment to the CRC and support for the rule of law, separation of powers and the independence of the judiciary.

This is not a classic comparative study as its aim is not to compare the three jurisdictions in order to identify differences and similarities from which lessons can be learnt. It is also not a critical study of the courts' application of the CRC. In keeping with the cosmopolitan ethos of the work, the focus is on learning about the CRC: ascertaining what the courts have done with it, and what this says about the CRC and its interaction with domestic courts. If this research prompts self-reflection and stimulates cross-learning between the analysed jurisdictions, those are welcome by-products.

Thus, Australia is a dualist system and, *prima facie*, has the least-welcoming formal structure for the reception of the CRC: the Convention has not been domestically incorporated or fully transformed and cannot be applied directly; it can be used as an aid in statutory interpretation, but the rules governing that usage are limiting. The full impact of the Australian formal structure of reception can be seen in the jurisprudence of the High Court, wherein the CRC has

[95] The term 'added value of the Convention' is used in a similar way by De Graaf 2015 note 5 at 591. The term 'value-added' has a different meaning for Waters, who uses it to refer to cases where courts rely on international treaties simply to provide support for reasoning well-anchored in the domestic law (Waters 2007 note 10 at 654).
[96] Pierik and Werner 2010 note 45 at 2.
[97] Scheffler 1999 note 47 at 257. The value of the *local* in the relationship between international and domestic law is acknowledged by Knop (1999-2000 note 34), who argues in favour of courts utilising international law as comparative law (persuasive rather than authoritative norms) as a means better to understand how courts engage with international law. The present researcher agrees that this approach could be used as an analytical tool to unpack the judicial reasoning in some cases and in some legal systems. It remains, however, uncertain whether this approach is supposed to displace normative approaches or work alongside them; and whether this approach is intended as universally valid or applicable to only certain legal systems. If Knop's approach has universal aspirations, then it is likely to encounter major resistance from some courts. Indeed, it is not certain how utilising international law as comparative law would articulate with constitutional provisions in some countries, which proclaim that international law is a part of domestic law.

seldom found favour with the judges. However, the Australian case study illustrates the resourcefulness of domestic legal systems in giving effect to the Convention despite limitations in the formal reception rules. Some courts have created new ways to give effect to the CRC, showing that, depending on their jurisdiction, different courts may engage differently with the CRC.

France is a monist legal system, in which ratified international treaties form automatically part of the domestic legal order and enjoy supra-legislative status. Legislation has not transformed the Convention domestically in its totality, and legal reform has taken place on a sectoral basis. The CRC has been at the centre of important and controversial decisions in relation to the direct application of international treaties, and the subject has been much debated. Despite a very promising reception framework, the French jurisprudence shows that the direct application of the CRC and the assertion of its supra-legislative status are difficult to secure. It shows a complex interplay of factors which include special features of the CRC and domestic dynamics, such as concerns about the role of courts in giving effect to international treaties in the light of separation of powers and the interaction between multiple courts with jurisdiction in relation to the rights of children.

South Africa is a hybrid system that straddles the monist and dualist approaches.[98] Thus, although South Africa is essentially dualist in relation to international treaties, its Constitution permits the self-execution of a ratified international treaty. Theoretically, the courts have a choice: the direct application of the CRC, or an indirect application in the process of constitutional or statutory interpretation. The courts have never formally applied the CRC directly, and the Convention has had its most notable effect in the process of constitutional interpretation. The constitutional protection of the rights of children has been a gateway for the Convention, together with the generous constitutional provisions mandating consideration of international law. The South African case study demonstrates the importance of the reception system, both in terms of accommodating the values of the CRC and in allowing its usage by the courts.

Case law analysis

The case studies focus on judgments of the highest courts with jurisdiction to engage with the CRC. For Australia, three courts are considered: the High Court, the Full Court of the Family Court and the Victoria Supreme Court. Initially, only the High Court was selected, but it became apparent that this limited focus would provide an incomplete image of how the Australian judiciary engages with the Convention. The difference in approaches between courts is partially explained through their different jurisdictions, which in the case of the Family Court and that of the Victoria Supreme Court has had an enabling effect on their engagement with the CRC. For France, the case law of the Court of Cassation and that of the Council of State is analysed. For South Africa, the case law of the Supreme Court of Appeal and that of the Constitutional Court is discussed.

[98] It is a 'hybrid monist' system according to Sloss 2009 note 78 at 7.

The sampling and the case law analysis follow different patterns in the case studies, being guided by the specificity of the concerned legal systems. In the Australian and the South African case studies, all cases in which the CRC was mentioned by the respective courts were considered. This is because of the smaller number of cases discussing the CRC which have reached the highest courts by comparison with France. Further, for these two jurisdictions, closer attention is given to specific cases because the judgments are more comprehensive when compared with judgments in France, which are shorter and provide less detail on the courts' reasoning. This difference is accounted for by the different approaches to judgment writing taken in the common law and the civil law legal systems analysed here.

Only cases in which the CRC was explicitly mentioned have been considered. This excludes cases in which the CRC may have been given effect indirectly, through the application of domestic norms or other international rules which may reflect CRC values, but without mentioning it; and those cases in which the CRC was not engaged with although it may have been relevant.

1.6 The structure of the thesis

The rest of the thesis is structured as follows:

Chapter 2 contains a discussion of the role of the courts in giving effect to the CRC as envisaged by the Convention and the Committee, followed by a presentation of the role of the courts in the application of international law in monist and dualist legal systems.

Chapters 3, 4 and 5 contain the case studies pertaining to the three jurisdictions analysed in this work.

Chapter 6 is analytical in nature and evaluates the impact of the formal framework for the reception of the Convention on its application by the courts; the impact of the CRC on the judicial reasoning in the three systems and the factors which have influenced the courts' engagement with the CRC.

Chapter 7 contains the conclusions of the study. Several general observations will be made in relation to how the findings of this study may assist in conceptualising the role of the courts in applying the CRC. Suggestions are also made in relation to how the engagement of the courts with the Convention can be improved and about how the courts may assist in the international development of the CRC.

Chapter 2: The CRC, the courts, direct and indirect application

2.1 Introduction

In the first years of its application more visibility was given to the CRC as a guide for state action than as 'hard law' applicable by courts.[1] This was met with approval by some writers who saw the Convention as unfit for judicial application,[2] but it resulted in lost opportunities for more effective implementation.[3] It also gave rise to a limited understanding of the role of the courts in giving effect to the CRC.

With the courts being institutions exercising a 'border control' function between international and domestic legal orders, international and domestic perspectives have developed in relation to their role in giving effect to international treaties. The international perspective seeks to maximise the role of the courts in relation to the implementation or the enforcement of treaties, while the domestic perspective is understandably more cautious, in that the task of giving effect to international commitments has to be balanced against constitutional considerations, such as the status of international treaties in the domestic legal order and separation of powers. Some tension is therefore expected between the cosmopolitan aspirations embraced by the international perspective and the domestic perspective.

This chapter illustrates the tension between the two perspectives in relation to the CRC. The international perspective is grounded in the CRC provisions relevant for the role of domestic courts, and the views of the Committee on the Rights of the Child ('the Committee' or 'the

[1] J Himes 'Monitoring Children's Rights: Cutting Through the Confusion and Planning for the Effective Action' in E Verhellen (ed) *Monitoring Children's Rights* (1996) 113 at 119; J Todres 'Emerging limitations on the rights of the child: The U.N. Convention on the Rights of the Child and its early case law' 1998-1999 (30) *Columbia Human Rights Law Review* 159 at 193.

[2] E Engle 'The Convention on the Rights of the Child' 2011 (29) *Quinnipiac Law Review* 793; D Gomien 'Whose right (and whose duty) is it? An analysis of the substance and implementation of the convention on the rights of the child' 1989-1990 (7) *New York Law School Journal of Human Rights* 161; M King 'Children's Rights as Communication: reflections on Autopoietic Theory and the United Nations Convention' 1994 (57) *Modern Law Review* 385 at 395; D Smolin 'A tale of two treaties: Furthering social justice through the redemptive myths of childhood 2003 (17) *Emory International Law Review* 967 at 976; D Smolin 'Overcoming religious objections to the Convention on the Rights of the Child' 2006 (20) *Emory International Law Review* 81 at 101-102. It was held that '[t]he meaning of the Convention, however, is not in the first instance a judicial one … It is rather a political instrument than an ensemble of judicially enforceable elements' (J Vande Lanotte and G Goedertier 'Monitoring Human Rights: Formal and Procedural Aspects' in E Verhellen (ed) *Monitoring Children's Rights* (1996) 73 at 109-110).

[3] Himes 1996 note 1 at 119-120. The Committee on the Rights of the Child ('the CRC Committee' or 'the Committee') paid little attention to courts in its early activity. Todres notes that the guidelines for reporting to the Committee reflected little interest in the work of the courts (1998-1999 note 1 at 168).

CRC Committee'). The domestic perspective is informed by the dichotomy between dualist and monist legal systems and their dominant features: direct and indirect application of the CRC respectively.

2.2 The international perspective on the role of the courts in giving effect to the CRC

2.2.1 The CRC and the courts

Generally, international law does not prescribe the means of its domestic implementation,[4] but domestic implementation opted for by each state must enable that state to comply with its international obligations.[5] Article 4 of the CRC contains the general implementation measures which the states have undertaken to comply with under this treaty, and reads:

> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

The above text does not refer to the judiciary and to remedies in case of rights violations, although other international human rights treaties contain such references. Some treaties require that treaty bodies be provided with information in relation to judicial measures to give effect to the conventions.[6] Further, article 2(3) of the International Covenant on Civil and Political Rights, 1966 (in force 1976; 'the ICCPR') contains undertakings by states to ensure access to effective remedies for violations of ICCPR rights and that the rights be determined by, amongst others, 'competent judicial … authorities'.[7] The European Convention on Human Rights and Fundamental Freedoms, 1950 (in force 1953; 'the ECHR') provides that states '*shall secure* to everyone within their jurisdiction the rights and freedoms'[8] and that anyone whose rights therein have been violated 'shall have an effective remedy before a national authority'.[9] Provisions in relation to access to judicial remedies or domestic courts are also present in article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (in force 1969; 'the CERD'); article 2(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (in force 1987; 'the CAT'); article 2(c) of the Convention on the Elimination of All Forms of Discrimination

[4] T Buergenthal 'Modern Constitutions and Human Rights Treaties' 1998 (36) *Columbia Journal of Transnational Law* 211. Occasionally, international law may require a specific form of implementation, such as legislative measures. See S 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 D Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 61 at 111-112.

[5] Venice Commission (2014) *Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of the Courts* at 14 para 40 (online).

[6] Article 9 of the Convention on the Elimination of Racial Discrimination, 1965/1969, article 18 of the Convention on the Elimination of All forms of Discrimination against Women, 1979/1971 and article 73 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990/2003.

[7] Article 2(3)(b) of the ICCPR.

[8] Article 1 of the ECHR (my emphasis).

[9] Article 13 of the ECHR.

against Women, 1979 (in force 1981); and article 13(1) of the Convention on the Rights of Persons with Disabilities, 2006 (in force 2008).

A question arises therefore as to the significance of these omissions in article 4 of the CRC. International law scholars have asked the question as to whether there is an *international* obligation for states 'to open their national courts to persons for the invocation of treaty norms that protect or benefit persons'.[10] Currently,[11] there is no such general international law obligation.[12] General international law does not prescribe that a treaty be implemented by a certain organ of the state, as its focus is on compliance rather than on the means to achieve such.[13] Nonetheless, specific treaties may create such obligation, explicitly[14] or implicitly. A right to access to courts in order to obtain a remedy for a violation of rights protected under certain treaties may exist where the treaties refer to courts/tribunals[15] or to remedies,[16] or where such right can be implied in the treaty.[17] The right can be implied from the language of the treaty, its object and purpose, the subsequent practice of the states and, possibly, the negotiation history.[18] It has been argued, however, that such right cannot be implied when treaties similar in nature and scope provide victims with access to courts, while the treaty in discussion does not.[19] Thus,

> [u]nlike other UN human rights treaties, however, such as the treaties on civil and political rights, racial discrimination, and torture, the Convention on the Rights of the Child contains no express, general provisions calling for access to national organs, including national courts, for vindication of personal rights. The absence of such a provision, when it was included in earlier human rights treaties, weighs against implying such access to national courts on the basis of that convention.[20]

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[10] Murphy 2009 note 4 at 61.

[11] Murphy notes possible developments in this regard (ibid at 109).

[12] Ibid at 63. For some courts, the remedies envisaged by human rights treaties are primarily of a judicial nature because they meet the criteria of availability, effectiveness and sufficiency. See the African Court on Human and Peoples' Rights in *Tanganyika Law Society and The Legal and Human Rights Centre & Rev. Christopher Mtikila v The United Republic of Tanzania* (Applications No. 009/2011 and No. 011/2011) 14 June 2013 ('*Tanganyika Law Society'*) paras 82.1 and 82.3.

[13] Murphy 2009 note 4 at 70. There is, for example, no general obligation to give direct effect to international treaties in the domestic order. The state is bound by the obligations created by treaties, but the means to comply with such obligations, including the most appropriate national institutions to do so, is left to states (M Bossuyt 'The Direct applicability of international instruments on human rights' 1980 (2) *Revue Belge de Droit International* 317 at 318, 321-322).

[14] Murphy 2009 note 4 at 87-92 gives examples of such treaties in the area of commerce, navigation, intellectual property, trade, environment, nuclear energy.

[15] In the human rights field, an obligation to provide access to courts is less forcefully worded. Internationally, according to Murphy (ibid at 93-94), ICCPR (article 2(3)), CERD (article 6) and CAT (article 2(1)) refer to access to competent bodies, including judiciary, to secure redress for treaty violations. Other treaties are less direct and refer to access to competent authorities to obtain redress (see, for example, article 13 of the ECHR).

[16] Although human rights violations may be addressed through non-judicial remedies, the entitlement to a remedy may be taken as a confirmation of a judicial role in the domestic enforcement of a treaty. This may be so because of the specific institutional position of the courts (to establish violations of the law and provide remedies) and the perceived effectiveness of judicial remedies. See, for example, *Tanganyika Law Society* note 12 para 82.3.

[17] Murphy 2009 note 4 at 96-105.

[18] Ibid at 97.

[19] Ibid at 105-108. The reason is that the treaty designs its own implementation mechanism which includes other means than access to courts for giving effect to its rights.

[20] Ibid at 106 (fns omitted). He mentions nonetheless specific provisions referring to courts: articles 9(2), 12, 37(d), 40(2)(b)(iii) (n 152).

The CRC does not fit into the category of human rights treaties which create an obligation for the states to enable the courts to engage directly with the Convention. Judicial measures are not mentioned explicitly as general implementation measures, and a general access to remedies is not provided.

These aspects have preoccupied some courts. In 2012, a family of illegal immigrants removed from Norway requested the Supreme Court to issue a declaratory order that the state violated article 3(1) of the CRC,[21] which was incorporated verbatim in the national law in 2003, alongside the rest of the CRC.[22] Writing for the majority, Justice Matningsdal held that the absence of a reference in the CRC to an obligation for the state to secure access to effective national remedies meant that an order declaring the violation of a CRC provision could not be granted.[23] The Court contrasted the CRC with other treaties, reasoning that 'the justification for the right to request a separate declaratory judgment for breaches of the ECHR and the ICCPR is the right to an effective remedy'.[24]

Does the distinction between the envisaged role of the courts under the CRC and their role under other human rights treaties weaken the role of the courts in giving effect to the CRC? It is apposite to consider the drafting history of article 4 in as far as it relates to the role of the courts. No prominent role was anticipated for the courts,[25] and the discussions pertaining to this article revolved around the resource-dependency of some rights and the type of implementation obligations of the states. In 1981, the Working Group adopted a text which would have required the states to 'undertake all appropriate administrative and legislative measures'.[26] The UNICEF criticized this formulation as restrictive, in that it excluded an obligation to take other appropriate measures which were not administrative or legislative in nature.[27] It recommended an open ended formulation that would include 'other measures',[28] a position taken on board and currently reflected in article 4.

The references to courts during the drafting process are not numerous, and often concerned the courts' application of family law, judicial control over the state's interference with family life, and criminal law. However, some more general statements were also made. For example, the Ugandan representative is recorded to have said that the CRC 'provided a basis for Governments … to remedy violations through the judicial process';[29] and the USA proposed

[21] A, *B, C and the Norwegian Association for Asylum Seekers (NOAS) (third party intervener) v The State, represented by the Immigration Appeals Board*, Supreme Court of Norway (HR-2012-02399-P) ('the *A, B, C* case'). A compelling dissenting judgment was written by Justice Bårdsen.
[22] In Norway, the Human Rights Act of 1999 (as amended in 2003) declared the CRC, as well as other international instruments, as a part of the national law.
[23] *A, B, C* paras 96 and 101.
[24] *A, B, C* para 99. See also paras 94 and 95.
[25] See also Todres 1998-1999 note 1 at 178.
[26] P*aragraphs 57-61 of the 1981 report of the Working Group to the Commission on Human Rights (E/CN.4/L.1542), which is reproduced in paragraph 289 of the 1981 report of the Commission on Human Rights (E/CN.4/1475)* cited in Office of the United Nations High Commissioner for Human Rights *Legislative History of the Convention on the Rights of the Child Volume I* (United Nations, New York and Geneva 2007) at 351 ('the UNHCHR') (online).
[27] *E/CN.4/1989/WG.1/CRP.1, pages 17-20* in UNHCHR 2007 note 26 at 353.
[28] Ibid.
[29] *A/C.3/44/SR.41 (20 November 1989) para 27* as reflected in UNHCHR 2007 note 26 at 258.

an article, later withdrawn, which implied some application of the CRC by federal courts.[30] It was therefore envisaged, or even expected by some states, that courts would contribute to a certain extent to the implementation of the CRC.

While the absence of reference to courts in article 4 remains a 'significant oversight'[31], it is ultimately not fatal to the engagement of the courts with the Convention. The inclusion of a reference to 'other measures' suggests that access to courts may be required when appropriate,[32] and shows an intention by states to maximize the implementation mechanisms for the CRC. Certainly, the state parties did not *exclude* the involvement of the courts in giving effect to the CRC. Further, domestic law may compensate for the weak role of the courts under article 4, by either requiring or permitting the courts to give effect to the Convention, as is illustrated later in this work.

New developments add further dimensions to this discussion. The Optional Protocol on individual communications under the CRC entered into force recently,[33] and this may have significance for the role of the courts. The Protocol confirms that the CRC is not only aspirational, but that it is a legally enforceable instrument.[34] The Protocol rests on the assumption that some domestic remedies exist for the violation of CRC rights. Should they not exist or be ineffective, the Committee may declare a communication admissible, 'sanctioning' the state for the failure to provide an adequate remedial system for breaches of the CRC. Should the absence of a remedy, or its ineffectiveness, be linked with the inability or reluctance of the courts to apply the CRC, this should be an indication that something is amiss domestically. While in itself this does not create an international obligation for the states to ensure the CRC's application by courts, it may be considered by the courts or the political actors who may wish to avoid a potential embarrassment for the state resulting from an accumulation of adverse admissibility decisions.

The role of the domestic courts in giving effect to the CRC cannot be confined to what arises under article 4. Most of the discussion above gravitates around the remedial (or enforcement) role of the courts. In fulfilling that role, courts react to an alleged domestic violation of the CRC or its values. The CRC envisages, however, that the courts play more than a remedial role. In certain circumstances, they may be the main actors in giving effect to or implementing (rather than enforcing against potential trespassers) the provisions of the CRC. Arguably, a distinction can be made between the role of the courts as enforcement mechanisms and as implementation mechanisms respectively.[35]

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[30] From *E/CN.4/1988/WG.1/WP.17* as it appears in UNHCHR 2007 note 26 at 351.
[31] Todres 1998-1999 note 1 at 178. Todres contrasts this with the mentioning of the courts in article 3(1).
[32] Ibid.
[33] Optional Protocol to the Convention on the Rights of the Child on a communications procedure, 2011 (in force 2014).
[34] This contradicts earlier views that it is not 'accessible to the law's binary code of lawful/unlawful' (King 1994 note 2 at 390) or that it is a political instrument rather than a judicial one (Vande Lanotte and Goedertier 1996 note 2).
[35] This is a fluid distinction, and, occasionally, the involvement of the courts straddles the implementation – enforcement distinction, in cases such as article 12(2) or the provisions on juvenile justice.

Specific articles of the CRC refer explicitly to the courts and envisage their involvement in giving them effect, illustrating therefore the implementation role which the CRC contemplated for the courts, as opposed to their enforcement role as per the discussion above. Thus, article 3(1) requires that courts of law, amongst others, give a primary consideration to the best interests of the child. Article 9(1) requires the states to ensure that the removal of a child from the family takes place 'subject to judicial review'. Article 12(2) requires states to provide children with the 'opportunity to be heard in any judicial … proceedings affecting the child'. States shall also take protective measures against the ill-treatment of children, including, 'as appropriate, [procedures] for judicial involvement' (article 18(2)). Article 37(d) stipulates that a child deprived of his/her liberty shall have the right to challenge the deprivation of liberty before a court or another competent body. Article 40(2)(iii) declares that a child in conflict with the law has the right to have the matter determined 'without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law' and article 40(2)(v) provides for a right of review by a higher authority or judicial body.

There are also provisions which imply some judicial involvement. For example, in states where adoptions are authorised by courts, article 21 becomes relevant for the courts. Most parts of articles 37 and 40 fall into the same category, and provide the prohibition of cruel, inhuman or degrading punishment (article 37(a); prohibition of unlawful or arbitrary deprivation of liberty (article 37(b); presumption of innocence (article 40(2)(b)(i)); the right not to be compelled to give testimony or confess guilt (article 40(2)(b)(iv)).

Compliance by courts with some of these provisions depends on whether the courts are equipped to perform the function expected by the CRC, although other provisions can be complied with immediately even in the absence of legislative adjustment.[36] Breaches of the CRC by courts[37] may lead to the state incurring international responsibility.[38] This may not create an obligation for the state to ensure that all rights are given effect to by the courts, but courts or the states wishing to avoid state responsibility may reconsider the role of the courts, strengthening their capacity to apply the CRC.

Thus, while article 4 does not envisage an extensive role for the courts as a general mechanism for the implementation of the CRC and certainly does not mandate a judicial application of the CRC, specific provisions in the CRC imply that the courts can contribute to, or are even essential to giving effect to at least some of its provisions.

[36] For example, when courts enjoy a certain level of discretion in decision-making, they may be able to give a primary consideration to the best interests of the child, or to decide on a juvenile justice matter without delay, or to avoid the detention of a child.

[37] For example, a court may refuse to give effect to the best interests of the child, or it may not be able to give effect to article 9(1) of the CRC because it has no power to review a decision to separate a child from his/her parents.

[38] See articles 2 and 4(1) of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, 2001.

2.2.2 The Committee and the courts[39]

For the Committee, the judiciary is an important pillar of giving domestic effect to the CRC. The position of the Committee has evolved from not including the courts amongst general implementation measures,[40] to requiring the states to accompany their reports with, *inter alia*, copies of 'principal … judicial decisions' relevant to the CRC,[41] to provide information on the judicial application of some CRC provisions,[42] on remedies available and their accessibility to children,[43] or to inform the Committee about how jurisprudence impacts on children.[44] It has even taken to criticising or praising courts for how they engage with the Convention.[45]

In General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child Committee ('General Comment 5'),[46] the Committee addresses the role of the courts as part of the general mechanisms for the implementation of the CRC despite article 4 of the CRC not mentioning the courts.[47] The ability of children's rights to be invoked before the courts is the ultimate test of an effective implementation: '[t]he test must be whether the applicable rights are truly realized for children and can be directly invoked before the courts'.[48] Giving effect to the CRC rests on a children's rights perspective built on the four general principles of the CRC being developed, *inter alia*, throughout the judiciary.[49] The Committee refers to the courts also when it discusses the justiciability of rights,[50] asserting that

[39] Some of the aspects discussed in this part have also been analysed in M Couzens 'CRC Dialogues: Does the Committee on the Rights of the Child "Speak" to the National Courts?' in T Liefaard and J Sloth-Nielsen (eds) *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (2016) 103.

[40] *General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by State Parties under Article 44, Paragraph 1(a), of the Convention* (1991) para 9. Nonetheless, they required the states to report on, amongst others, judicial measures for the implementation of all categories of CRC provisions, from its general principles, to civil and political, socio-economic and protection rights (paras 13, 15, 16, 19, 21, 23).

[41] *General Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by State parties under Article 44, Paragraph 1(b), of the Convention* (2005) para 7 ('*Guidelines* 2005'). Also, *Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1(b), of the Convention on the Rights of the Child* (2010) para 15 ('*Guidelines* 2010').

[42] *Guidelines* 2005 paras 13, 15, 16, 19, 21, 23, 25 and 31.

[43] *Guidelines* 2005 para 14; *Guidelines* 2010 para 7.

[44] *Guidelines* 2010 para 13.

[45] The Committee has criticised French courts for not directly applying the entire Convention (*Concluding Observations of the Committee on the Rights of the Child: France* (2009) para 10). It has praised the South African courts for their progressive application of CRC provision (*Concluding observations on the second periodic report of South Africa* (2016) para 5), and the national courts in Fiji, Italy and South Africa for condemning corporal punishment and utilising the CRC to support their arguments (*General Comment No. 8 (2006) The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)* para 25 ('*General Comment 8'*).

[46] CRC Committee *General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)* ('*General Comment 5'*).

[47] In *General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, however, the Committee includes judicial measures as implementation measures under article 4 (part IV B 3) ('*General Comment 16'*).

[48] *General Comment 5* para 21.

[49] Ibid para 12.

[50] The Committee gives the term 'justiciability' a wide meaning which includes access to other 'independent complaint procedures' (ibid para 24). Generally, however, a matter is considered justiciable if it is amenable to *judicial* determination (C Scott and P Macklem 'Constitutional Ropes of Sand or justiciable guarantees? Social rights in a new South African Constitution' 1992-1993 (141) *University of Pennsylvania Law Review* 1 at 17); J Akandji-Kombé 'De l'invocabilité des sources européennes et internationales du droit social devant le juge interne

'[f]or rights to have meaning, effective remedies must be available to redress violations'.[51] The Committee recognises that the requirement for access to effective remedies is 'implicit' rather than explicit in the CRC, but it relies on the fact that this requirement is referred to in other human rights treaties.[52] It stresses that all rights in the CRC (economic, social, cultural, civil and political) 'must be regarded as justiciable',[53] and that the states should ensure access to remedies, including access to courts.

Lastly, the Committee mentions the courts when it discusses legislative measures for the implementation of the CRC. It expresses the need to clarify 'the extent of applicability of the Convention in States where the principle of "self-execution" applies and others where it is claimed that the Convention "has constitutional status" or has been incorporated into domestic law'.[54] The Committee does not acknowledge the courts as the custodians of this process, but this is implied in the Committee's view in relation to what 'incorporation' entails[55] and the meaning of the term 'self-execution'.

The more specific general comments add to this vision.[56] Two aspects dominate this approach: the courts as a remedial mechanism for violations of CRC rights and as primary audience for the expectations of the Committee. These are discussed below.

The remedial role of the courts is often mentioned by the Committee.[57] Access to courts is envisaged as a remedy for individual victims and as a corrective to inadequate implementation by the political branches of the state. The Committee often associates access to courts with access to effective individual remedies.[58] States are enjoined to provide access to judicial redress in a wide variety of contexts, such as breaches of adolescents' rights;[59] victims of violence,[60] including of corporal punishment outside of the home environment;[61] right to

après l'arrêt Gisti-FAPIL du Conseil d'État du 11 avril, n° 322326, au Lebon' 2012 *Droit social* 1014 part IA; A Mason 'The High Court as Gatekeeper' 2000 (24) *Melbourne University Law Review* 784 at 788).

[51] *General Comment 5* para 24.

[52] Ibid para 24.

[53] Ibid para 25.

[54] Ibid para 19.

[55] Ibid para 20. The Committee takes the same position in relation to the CRC prevailing over conflicting domestic laws in *General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside of their Country of Origin* para 14 ('*General Comment 6'*).

[56] There are, however, general comments in which the role of the courts is not prominent: *General Comment 6*; *General Comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31)*; *General Comment No. 19 (2016) on public budgeting for the realization of children's rights (art. 4).*

[57] Recently, the Committee has dealt with remedies in specific sections of some general comments (*General Comment No. 12 (2009) The right of the child to be heard* paras 46-47 ('*General Comment 12'*); *General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)* Part VI. F. *('General Comment 15')*; *General Comment 16* Part VI. B; *General Comment No. 21 (2017) on children in street situations* para 22 *('General Comment 21'*).

[58] The Committee refers also to non-judicial remedies. See, for example, *General Comment 5* para 24; *General Comment 15* part VI F; and *General Comment 16* part VI.A.2.

[59] CRC Committee *General Comment No. 4 (2003) Adolescent health and development in the context of the Convention on the Rights of the Child* para 9.

[60] CRC Committee *General Comment No. 13 (2011) The right of the child to freedom from all forms of violence* ('*General Comment 13'*) para 55(e).

[61] *General Comment 8* para 43.

health;[62] violation of rights by businesses;[63] protection against harmful practices;[64] children in street situations[65] or migrant children.[66]

To support the courts' role as a potentially corrective mechanism to inadequate implementation of the CRC by the political branches, the Committee relies on article 27 of the Vienna Convention on the Law of Treaties, 1969 (in force 1980; 'the VCLT') and supports the direct application of the CRC. It holds the view that the CRC should prevail over conflicting domestic legislation and practice:

> [i]ncorporation should mean that the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice. In case of any conflict in legislation, predominance should always be given to the Convention, in the light of article 27 of the Vienna Convention on the Law of Treaties.[67]

The Committee supports the direct application of the CRC, but does so inconsistently. It has not given equal attention, for example, to the direct application of the CRC in relation to all states where this is possible, and has been erratic in its explicit statements regarding the direct application of specific provisions.[68]

As suggested above, the Committee envisages the courts playing a primary implementation role for provisions explicitly or implicitly connected to judicial function. As discussed previously, some CRC provisions are directly relevant for the courts, while others may be less so. For example, it is not the primary duty of courts to register the child immediately after birth (article 7(1)) or to take measures to combat the illicit transfer and non-return of children abroad

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[62] *General Comment 15*: 'States should ensure and facilitate access to courts for individual children and their caregivers and take steps to remove any barriers to access remedies for violations of children's right to health' (part VI. F).

[63] *General Comment 16* parts IVB4, IV.C and VI.A.2.

[64] Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on harmful practices* para 55(o) and (q) ('*General Comment 18'*).

[65] *General Comment 21* para 22.

[66] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child *Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration* ('*General Comment 22'*) para 42. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return* paras 14-15.

[67] *General Comment 5* para 20. It has been argued that the exercise of judicial functions constitutes state action in terms of the VCLT, and thus the courts have an obligation not to apply the law in a manner which defeats the object and the purpose of the CRC (J Sloth-Nielsen 'Children's Rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child' 2002 (10) *International Journal of Children's Rights* 137 at 138)

[68] France has been often questioned by the Committee in relation to the direct application of the CRC, but states such as Belgium, the Netherlands or Romania have seldom or only recently been so questioned. Further, of all CRC provisions, it is only article 3(1) of the CRC which has been declared self-executing by the Committee, in a move that is arguably controversial. For a more extensive critical discussion of these aspects, see Couzens 2016 note 39.

(article 11), but it is a primary judicial function to use detention as a last resort and for the shortest period of time when children are concerned (article 37(b)). General comments contain numerous views and recommendations by the Committee in relation to how children ought to be treated by courts, as victims or offenders.[69]

In sum, the Committee envisages the justiciability of all CRC rights and access to domestic remedies in case of violation; child-friendly courts and procedures in all cases involving children; the development of a children's rights perspective throughout the judiciary; and the ability of courts in those legal systems where the CRC has been automatically incorporated to apply Convention norms directly and to give them priority over conflicting domestic norms and practices.

Some aspects of the Committee's position are open to criticism. First, reference to article 27 of the VCLT as a justification for courts to give domestic priority to the CRC is problematic without more. This is an *international* obligation incumbent on the states, rather than a domestic duty incumbent on courts.[70] Further, direct application and the supremacy of international law over domestic law are two different legal concepts, and the direct applicability of the CRC does not automatically mean that the Convention overrides domestic law in the absence of domestic legal provisions which recognise the primacy of international law.[71] Although in the general comments mentioned above, the Committee does not refer explicitly to the domestic courts as having to ensure the prevalence of the CRC over domestic norms, concluding observations suggest that this is the expectation of the Committee.[72]

Second, the Committee has not been helpful in assisting the courts to navigate the difficult question of direct application.[73] The Committee has criticised states for the courts' refusal to apply the CRC directly, but it did not constructively engage with the legal justifications presented by the concerned states.[74] Further, although the Committee expects that the entire Convention be directly applied by the courts,[75] it singled out article 3(1) to declare it directly applicable with no explanation.[76] The immediate question is whether the Committee accepts that some provisions may not be of direct application, contrary to the view it has previously expressed.

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[69] General comments such as 10 (*General Comment No. 10 (2007) Children's rights in juvenile justice* ('*General Comment 10'*)), *General Comment 12* (right to be heard) and *General Comment 14* (best interests) deal extensively with what the Committee sees as requirements arising from the CRC in relation to the courts' treatment of children. Others include *General Comment No. 11 (2009) Indigenous children and their rights under the Convention* para 33; *General Comment 22* para 30; *General Comment 13* para 54; *General Comment 18* para 87(d); *General Comment No. 9 (2006) The rights of children with disabilities* paras 73-74.

[70] A Nollkaemper 'The Netherlands' in D Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 326 (who argues in relation to article 27 VCLT that it 'applies only within the international legal order; by itself, it is not decisive in domestic law' (at 333; fn omitted)).

[71] This is discussed further in part 2.3.1.1.

[72] In relation to Australia, it expressed concerns that the CRC 'cannot be used by the judiciary to override inconsistent provisions of domestic law' (CRC Committee *Concluding observations: Australia* (2005) para 9).

[73] Couzens 2016 note 39 at 113-114.

[74] Ibid at 111-112.

[75] CRC Committee (2009) *Concluding observations: France* para11.

[76] CRC Committee *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)* ('*General Comment 14'*).

In conclusion, the extent to which the CRC mandates domestic judicial involvement is open to some doubt, but the Committee contemplates an extensive role for the courts. A few general features of the Committee's vision emerge from the discussion above: the justiciability of all CRC rights; no differentiation in terms of the role of the courts between types of legal systems; a role for the courts in ensuring the supremacy of the CRC over conflicting domestic law; and the direct application of the CRC in those legal systems allowing for this type of application. This is clearly a cosmopolitan vision which expects maximum benefits from the interaction between courts and the CRC.

In articulating its vision, and driven by the desire to facilitate the effectiveness of the Convention, the Committee pays little attention to what the courts are able to do in the light of the domestic framework which regulates the relationship between the CRC and the domestic law. It is not suggested that the Committee ought to go to great lengths to distinguish between different types of legal systems and tailor its output accordingly. For it, the relationship between the CRC and the domestic law is less important than for the domestic courts, for which it may be the first consideration in the legal enquiry. However, insufficient acknowledgment by the Committee of what domestic courts *can do* to give effect to the CRC may create a rift between international expectations and domestic judicial reality. The result is the emergence of two coexisting discourses (independently valid in their own spheres) – one international and one domestic – which may sometimes overlap while other times diverge, as illustrated in part 2.3.

2.3 The domestic perspective on the role of the courts in giving effect to the CRC

Domestically, courts have two important roles in relation to the CRC: the determination of its domestic legal status and relevance; and the engagement with the substance of its norms. Although arguably distinct, these roles are often inter-related. For example, decisions on direct application may call for an assessment of a norm's clarity and completeness; and a consistent interpretation of a statute with the CRC requires a comparative analysis of the substance of domestic and international law.

The ability of a court to engage with the CRC is determined by the domestic framework that governs its interaction with the domestic law, and is the first aspect that courts consider when required to give effect to the CRC. This framework differs between states, but, most commonly, a distinction is made between dualist and monist systems[77] and the accompanying distinction concerning the possibility of the CRC to be directly applied. The remainder of this part provides

[77] Sloss points out that the adjectives 'monist' and 'dualist' are used 'to describe different types of domestic legal systems' and not just 'two different theoretical perspectives on the relationship between domestic and international law' (D Sloss 'Treaty Enforcement in Domestic Courts: A Comparative Analysis' in D Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 1 at 5). It is in the former sense that the terms are used in this work. Acknowledging the merit of recognising the existence of hybrid systems (see discussion Chapter 1 part 1.5), these systems are not discussed separately in this chapter because they combine the essential features of monist and dualist systems.

an introduction to the direct and indirect application of international treaties by domestic courts, laying the ground for the more detailed analysis in the case studies.

2.3.1 The direct application or the self-execution[78] of the CRC

Some legal systems, primarily of monist tradition,[79] operate with the linguistically simple but conceptually complex proposition that duly ratified treaties are part of the domestic legal order or are automatically incorporated therein. Direct application is a powerful tool: it makes treaties immediately applicable by courts and direct sources of domestic rights; and it allows for gaps in domestic law to be filled by treaties.[80]

The direct application of the CRC by courts has been rather reserved, with the CRC being used primarily as an interpretive guide, and seldom applied directly.[81] Previous studies have documented the reluctance of the courts to apply the CRC directly and the inconsistencies in the case law.[82] This is not surprising considering the contentiousness of the topic: some completely reject the direct application of the Convention,[83] some question its usefulness,[84] while others advocate for it.[85]

[78] The term 'self-execution' is preferred in the USA and Japan, and 'direct application' in Europe (D Shelton (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (2011) 1 at 11). Agreeing that self-execution is the 'defining feature of direct effect' (A Nollkaemper *National Courts and the International Rule of Law* (2011) at 118), the terms 'direct application' and 'self-execution' are used interchangeably in this work. In relation to the jurisdictions discussed here, the term 'self-execution' is used in the South African law, 'direct application' in France.

[79] South Africa, for example, is primarily dualist in relation to international treaties but some treaty provisions may be applied directly if found to be self-executing. See Chapter 5.

[80] A Vandaele and W Pas 'International Human Rights Treaties and their Relation with National Law: Monism, Dualism and the Self-executing Character of Human Rights' in A Weyts (ed) *Understanding Children's Rights. Collected papers presented at the seventh International Interdisciplinary Course on Children's Rights, Ghent University, November-December 2004* (2004) 269 at 271.

[81] Child Rights International Network (CRIN) (2012) *CRC in Court: The Case Law of the Convention on the Rights of the Child* at 23-14 (online).

[82] L Lundy et al *The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries* (2012; online) at 37 (Belgium); J Rosenczveig 'The Self-executing Character of the Children's Rights Convention in France' in E Verhellen (ed) *Monitoring Children's Rights* (1996) 187; W Vandenhole 'The Convention of the Rights of the Child in Belgian Case Law' in T Liefaard and J Doek (eds) *Litigating the Rights of the Child*: *The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 105; C de Graaf 'The Application of the United Nations Convention on the Rights of the Child in Dutch Legal Practice' A Diduck, N Peleg and H Reece (eds) *Law in Society: Reflections on Children, Family, Culture and Philosophy* (Essays in honour of Michael Freeman) (2015) 589; M Limbeek and M Bruning 'The Netherlands: Two Decades of the CRC in Dutch Case Law' in T Liefaard and J Doek (eds) *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 89; M Couzens 'Romanian courts and the UN Convention on the Rights of the Child: A case study' 2016 (24) *International Journal of Children's Rights* 851.

[83] Engle 2011 note 2; Smolin 2006 note 2.

[84] E Verhellen *Convention on the Rights of the Child* (1994) at 79.

[85] CRC Committee (2009) *Concluding observations: France* para 11.

Even beyond the CRC, the direct application of international treaties is complex.[86] It raises questions in relation to 'the separation of powers, the principle of legality, and democracy'.[87] It has a *sui-generis* location being claimed as an international issue,[88] or as a domestic issue,[89] or as both.[90] Although often presented as a compact legal concept, direct application is a composite legal enquiry that combines international and national issues,[91] including constitutional doctrines,[92] and which is sometimes shaped by the interaction with supranational bodies. It is therefore difficult to articulate a coherent, common view of a concept shared by many legal systems. For a better understanding of how the international and domestic visions on the role of the courts compare, it is necessary nonetheless to make certain conceptual distinctions, to define direct application and to present the criteria which the courts apply to decide if a treaty or provision thereof can be applied directly. This task is undertaken below.

2.3.1.1 Conceptual distinctions

Terms such as 'direct effect', 'direct application', 'direct applicability', 'self-executing', 'justiciability' and 'invocation' are used in relation to various aspects of the direct application enquiry.[93] The terms are often not defined or definitions may not coincide.[94] Sometimes, the terms 'self-execution' or 'direct application' have been used as a substitute for 'reception', 'judicial enforceability', and 'individual treaty rights'.[95] A distinction is sometimes made between 'direct applicability' and 'direct effect'. The latter is a special type of direct

[86] See A Cassese *International Law* (2005) at 227; E Claes and A Vandaele 'L'effet direct des traités internationaux: Une analyse en droit positif et en théorie du droit axée sur les droits de l'homme' 2001 (34) *Revue Belge de Droit International* 411 at 423; A Vandaele and E Claes (2001) 'L'effet direct des traités internationaux. Une analyse en droit positif et en théorie du droit axée sur les droits de l'homme' (online); A Nollkaemper 'The Duality of Direct Effect of International Law' 2014 (25) *The European Journal of International Law* 105 at 106; T Wu 'Treaties' Domain' 2007 (93) *Virginia Law Review* 571 at 579.

[87] Venice Commission 2014 note 5 para 30.

[88] A matter of treaty interpretation (J Velu 'Les Effets Directs des Instruments Internationaux en Matiere de Droits de l'homme' 1980 *Revue Belge de Droit International* 293 at 294; J Verhoeven 'La notion d'"applicabilité directe" en droit international' 1980 (2) *Revue Belge de Droit International* 243) or dependent on the nature of the treaty (Wu 2007 note 86 at 573).

[89] It was argued that 'self-execution is not a matter of international law' and that the absence of self-execution is not per se a violation of international law (C Bradley 'Self-execution and treaty duality' 2008 (1) *The Supreme Court Review* 131 at 151). Also, Sloth-Nielsen 2002 note 67 (fn 8).

[90] D Sloss 'Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties' 2012 (53) *Harvard International Law Journal* 301 at 303; D Chauvaux and T Girardot 'Les clauses d'un traité international dépourvues d'effet direct ne peuvent être invoquées à l'encontre d'un acte réglementaire' 1997 *L'Actualité Juridique Droit Administratif* 435. The latter authors refer to it as an institution 'at the frontier between national law and international law'.

[91] D Sloss 'Non-Self-Executing Treaties: Exposing a Constitutional Fallacy' 2002 (36) *University of California Davis Law Review* 1.

[92] C Vázquez 'Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of treaties' 1995 (122) *Harvard Law Review* 599.

[93] See Akandji-Kombé 2012 note 50; C Sciotti-Lam *L'applicabilité des traités internationaux relatifs aux droits de l'homme en droit interne* (2004) at 335; M van Alstine 'The Role of Domestic Courts in Treaty Enforcement: Summary and Conclusions' in D Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 555.

[94] Akandji-Kombé 2012 note 50 at IA. Some authors distinguish between self-execution and direct application (see T Buergenthal 'Self-executing and non-self-executing treaties in national and international law' in *Collected Courses of the Hague Academy of International Law/Recueil des cours* (1992) 303 at 321). Others argue that 'self-execution' is the 'defining feature of direct effect' (Nollkaemper 2011 note 78 at 118), or direct effect is but one of the elements of direct applicability (Akandji-Kombé 2012 note 50 part B).

[95] Van Alstine 2009 note 93 at 600.

application[96] which confers on the international norm the 'highest degree of normativity',[97] consisting of the 'aptitude of a rule to confer upon individuals, by itself, without requiring any domestic measure of execution, rights which the individuals can avail themselves of before judicial authorities'.[98] This distinction has developed under the influence of EU law,[99] but its application to general international law is still debated.[100]

Another intersecting and complicating concept is that of 'justiciability'. Although they are both court-centred doctrines, they are conceptually distinct,[101] and equating them may restrict the direct application of international norms that meet the formal criteria for direct application. For example, concerns about the justiciability of socio-economic rights, or about the lack of an adequate domestic remedy in case of direct application[102] may discourage it.[103]

Other necessary conceptual distinctions concern automatic incorporation and the supremacy of international law. Being 'a part of the domestic law' does not mean that a treaty is to be applied directly by the courts. Rather, it indicates that the treaty has been the subject of 'reception'[104] in the domestic order *as is*[105] (i.e., with its wording), and it has *some* legal force. Incorporated or received treaties can be given domestic legal effect irrespective of whether they are directly applied by courts, by, for example, justifying legislative, executive or administrative measures.[106]

A further distinction is between international and domestic supremacy of international treaties. In the international sphere, a treaty is supreme in the sense that states cannot invoke their national law to justify lack of compliance with the treaty.[107] *Domestic* supremacy of international treaties depends on what is provided by the domestic law.[108] When such

[96] Akandji-Kombé 2012 note 50 Part B
[97] G Dumortier 'L'effet direct des conventions internationales' (Conclusions sur Conseil d'État, Assemblée, 11 avril 2012, *Groupe d'information et de soutien des immigrés (GISTI) et Fédération des associations pour la promotion et l'insertion par le logement (FAPIL)*, n° 322326, Lebon) 2012 *Revue Française de Droit Administratif* 547.
[98] Akandji-Kombé 2012 note 50 part C citing Verhoeven.
[99] For this, see P Craig and G de Burca *EU Law: Texts, cases and materials* (2008) at 271.
[100] Akandji-Kombé 2012 note 50 part C
[101] For example, a treaty norm may be self-executing but the matter may not be ripe, and thus not justiciable.
[102] A Woolhandler 'Judicial Enforcement of Treaties: Self-Execution and Related Doctrines: Remarks' 2006 (100) *Proceedings of the American Society of International Law* 439 at 448 mentioning the possibility that treaties that are 'too discordant with domestic regimes of judicially enforceable rights and remedies are less likely to be found enforceable'. See also Sloss 2002 note 91 at 11.
[103] On the relationship between the availability of judicial remedies and self-execution, see D Sloss 'Self-Executing Treaties and Domestic Judicial Remedies' 2004 (98) *Proceedings of the American Society of International Law* 346; D Sloss 'When Do Treaties Create Individually Enforceable Rights?: The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas' 2006 (45) *Columbia Journal of Transnational Law* 20; Sloss 2012 note 90 at 171.
[104] Van Alstine 2009 note 93 at 597-598; Verhoeven 1980 note 88 at 251.
[105] Nollkaemper 2011 note 78 at 118.
[106] Buergenthal 1992 note 94 at 318, 369; Nollkaemper 2009 note 70 at 339.
[107] Treaties (article 27 of the VCLT) and general international law (Article 3 of the Articles on the Responsibility of States for Internationally Wrongful Acts, 2001).
[108] Domestic supremacy was sometimes linked to article 27 of the VCLT (see examples in Sciotti-Lam 2004 note 93 at 247), although this article 'cannot force such supremacy at the domestic level', and applies only in the international order (Nollkaemper 2009 note 70 at 333).

supremacy exists and the courts can give it effect,[109] it manifests itself in the invalidation or the setting aside by courts of domestic norms which conflict with an international treaty.[110]

Domestic supremacy of international treaties and their direct effect are distinct concepts,[111] as reflected in the different legal texts which consecrate them domestically.[112] Nonetheless, domestic supremacy and direct effect are 'closely associated'[113] and are approached by some courts as interdependent.[114] The limited recognition of direct effect may then have a negative impact on the domestic supremacy of some treaties, and although arguments in favour of disaggregating direct application and supremacy have been made,[115] they have not persuaded all courts.[116]

2.3.1.2 Definition

The definitions of direct application mirror the terminological complexities above. In *Foster v Nielson*,[117] the case often associated with the debut of the self-execution doctrine, the US Supreme Court stated:

> [o]ur constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision … [118]

The '"classic" (and largely meaningless)'[119] definition of a self-executing or directly applicable treaty refers to a treaty that is 'capable of judicial application without additional implementing legislation';[120] or applies 'of itself without the need for any further legislative provision',[121] or

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[109] The domestic supremacy of incorporated treaties may not be enforceable by courts, being instead incumbent on the legislatures and the executive.

[110] For example, if the treaty has constitutional status, a competent court could invalidate domestic law, while if a treaty has supra-legislative status, a court can set a domestic norm aside (in the sense of not applying it in that specific dispute).

[111] For example, supremacy issues may not arise when a treaty norm fills gaps in domestic law (Verhoeven 1980 note 88 at 247). Also, direct effect may be immaterial to supremacy. The EU directives, for example, have no direct effect but 'can preclude reliance on a provision of national law' inconsistent therein (Craig and De Burca 2008 note 99 at 271).

[112] For example, article 93 of the Dutch Constitution deals with direct effect and article 94 deals with supremacy (Nollkaemper 2009 note 70 at 331-333); para 14 of the Preamble to the 1946 French Constitution deals with automatic incorporation and article 55 of the 1958 Constitution deals with supremacy (see A Pellet (2008) *Quelle place la Constitution de 1958 fait-elle au droit international?* (online).

[113] Verhoeven 1980 note 88 at 247.

[114] For example, France (see Chapter 3) and the Netherlands (Nollkaemper 2009 note 70 at 351).

[115] R Abraham 'Les effets juridiques, en droit interne, de la Convention de New York relative aux droits de l'enfant' (Conclusions sur Conseil d'Etat, Section, 23 avril 1997, Groupe d'information et de soutien des travailleurs immigrés (GISTI)) 1997 *Revue Française de Droit Administratif* 585; Nollakemper 2009 note 70 at 344; Akandji-Kombé 2012 note 50.

[116] See Chapter 3 below.

[117] *Foster v Nielson* 27 U.S. (2 Pet.) 253 (1829).

[118] *Foster v Nielson* 27 U.S. (2 Pet.) 253 (1829), 314.

[119] N Botha 'Rewriting the Constitution: The "strange alchemy" of Justice Sachs, indeed' (fn omitted) 2009 (34) *South African Yearbook of International Law* 253 at 266.

[120] Buergenthal 1998 note 4 at 213. The tendency has been to define non-self-execution in relation to the need to pass implementing legislation, although implementation measures can be of executive or administrative nature (Buergenthal 1992 note 94 at 368).

[121] Botha 2009 note 119 at 266. Similar definitions in Buergenthal 1998 note 4 at 213; Shelton 2011 note 78 at 11.

'without being translated into domestic law',[122] or 'as is, and not as potentially transformed by national legislation'.[123] For Dugard, 'a treaty [may be] self-executing in the sense that existing law is adequate to enable the [state] to carry out its international obligations without legislative incorporation of the treaty'.[124] Other authors argue that self-execution has multiple dimensions which require distinct definitions;[125] while others argue that there are degrees of direct application or legal effect.[126]

Some definitions of direct application include references to individual rights. According to Buergenthal, a self-executing treaty is 'directly enforceable in the courts' while a non-self-executing one does not 'without some further legislative or executive measure … give rise to legal rights or obligations enforceable in the domestic courts'.[127] In Europe, direct effect is defined by some as being the 'aptitude of a rule to confer upon individuals, by itself, without requiring any domestic measure of execution, rights which the individuals can avail themselves before the judicial authorities'.[128] Some authors argue that direct effect is engaged when international law is used 'to protect individual rights against the forum state',[129] or 'when a court acknowledges a rule of international law to be a decisive influence on the actual protection of the right involved'.[130] The inclusion of individual rights as a defining element of direct effect has been criticised as unduly restricting the direct application of international treaties,[131] prompting authors to distinguish between a wider and a narrower meaning of direct application.[132]

In this confusing field, there are two certainties: courts make 'a basic distinction'[133] between directly applicable treaties and other treaties; and a norm is directly applicable if the courts can apply it in the absence of other measures which complete or clarify it.[134] Relying on these premises, this work uses a wide meaning of the concept of direct application. Thus, direct application includes any application by courts of an international norm '*as is',*[135] as a source of domestic law,[136] without other execution measures (legislative, executive or administrative)

[122] Nollkaemper 2014 note 86 at 110.
[123] Nollkaemper 2011 note 78 at 118; Sloss referring to the international rule directly applied as being the 'rule of decision' (2009 note 77 at 11).
[124] J Dugard *International Law: A South African Perspective* (2005) at 62.
[125] Generally, Vázquez 1995 note 92.
[126] A Alen and W Pas 'The UN Convention on the Rights of the Child's Self-executing Character' in E Verhellen (ed) *Monitoring Children's Rights* (1996) 165; Sciotti-Lam 2004 note 93 at 340-341; Dumortier 2012 note 97.
[127] Buergenthal 1992 note 94 at 317.
[128] Akandji-Kombé 2012 note 50 part C, citing Verhoeven. See also Abraham 1997 note 115 at III.
[129] Nollkaemper 2014 note 86 at 109.
[130] Ibid.
[131] Sciotti-Lam 2004 note 93 at 336; Van Alstine 2009 note 93; Abraham 1997 note 115.
[132] A *lato sensu* directly applicable norm 'can be limited to creating obligations for state parties, to completing national law, to permitting the exclusion of an inconsistent domestic norm or to substitute itself to domestic law' (Sciotti-Lam 2004 note 93 at 439-440). The *stricto sensu* directly applicable norm must create individual rights (ibid at 337). This distinction mirrors the relationship between objective and subjective direct effect in the EU law (see generally Craig and De Burca 2008 note 99).
[133] Van Alstine 2009 note 93 at 600-601.
[134] Sciotti-Lam 2004 note 93 at 336.
[135] Nollkaemper 2011 note 78 at 118.
[136] Or the 'rule of decision' (Sloss 2009 note 77 at 11).

being necessary to complement or clarify the norm in order to produce a legal effect which could otherwise not be obtained by the application of domestic law only.[137]

2.3.1.3. Criteria for direct application

Direct application depends on certain criteria. Although 'seemingly objective' or 'seemingly technical',[138] they are 'fundamentally open to multiple interpretations'.[139] Courts do not always give them explicit attention nor do they apply them consistently,[140] leading to 'uncertainty and incoherence'.[141] Despite imperfections, these criteria play a legitimate function[142] and continue to be applied.

There is a variety of ways in which the criteria are presented, but, generally, the courts look at three aspects: the intent of the states, the creation of individual rights and the aptitude of a norm to be applied directly (usually presented as an assessment of the clarity, precision and completeness of the norm).[143] Each of these criteria is contested in terms of relevance or meaning, or both.

Courts look at the intent of the parties because treaties do not refer explicitly to direct application.[144] However, there is no uniformity in terms of whose intent matters, in relation to what and how to determine that intent.[145] Some courts look at the intention of the states to confer substantive rights on individuals;[146] others look for an intention in relation to self-execution itself.[147] Some look for the intention of their own government,[148] others for a collective intent[149] in relation to self-execution. It is not certain whether the intention of the state is that of the executive alone or also of other branches of the state.[150] In certain states,

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[137] This is a composite definition which builds on the general structure of the definition advocated by Sciotti-Lam (2004 note 93 at 349), but it was expanded through references to 'execution measures' and their role (as per Verhoeven 1980 note 88 at 245 and Sciotti-Lam 2004 note 93 at 336), and the outcome of direct application (a solution for 'the inertia of the state' according to Verhoven 1980 note 88 at 245 or a remedy 'where national law fails' according to Nollkaemper 2014 note 86 at 112).

[138] Nollkaemper 2014 note 86 at 124.

[139] Ibid.

[140] Nollkaemper 2011 note 78 at 132; Claes and Vandaele 2001 note 86 at 415; J Pieret 'L'influence du juge belge sur l'effectivite de la Convention: retour doctrinal et jurisprudential sur le concept d'effet direct' in J Pieret et A Schaus (eds) *Entre ombres et lumières: cinquante ans d'application de la Convention européenne des droits de l'homme en Belgique* (2008) 83.

[141] Pieret 2008 note 140 at 83.

[142] Vandaele and Claes 2001 note 86 at 11; Nollkaemper 2014 note 86.

[143] For different formulations, see Shelton 2011 note 78 at 11; Buergenthal 1992 note 94 at 328. Continental literature distinguishes between subjective (state intent-related) and objective (quality of norm-related) criteria. See discussion in Vandaele and Claes 2001 note 86 at 12; Sciotti-Lam 2004 note 93 at 357; C Laurent-Boutot *La Cour de cassation face aux traités internationaux protecteurs des droits de l'Homme* (Unpublished PhD thesis 2006, University of Limoges) (online).

[144] Sciotti-Lam 2004 note 93 at 359. This is normal considering that both monist and dualist states participate in the drafting of treaties (ibid at 362)

[145] Vázquez 1995 note 92 at 705; Buergenthal 1992 note 94 at 380.

[146] See, Chapter 3 below (France) and Nollkaemper 2009 note 70 at 347 (the Netherlands).

[147] Velu 1980 note 88 at 302. See also J Ancel 'La Cour de cassation et la Convention internationale relative aux droits de l'enfant' 2001 (205) *Journal de Droit des Jeunes* 20 at 21; Nollkaemper 2009 note 70 at 341 (the Dutch Supreme Court).

[148] Bradley 2008 note 89; Sciotti-Lam 2004 note 93 at 418.

[149] Sciotti-Lam 2004 note 93 at 357.

[150] Pieret 2008 note 140 at 24.

parliamentary debates contain discussions about the direct effect of treaties, which can be taken to reflect the will of the state.[151]

The intent criterion has been contested. It has been argued that intent may be relevant in establishing the substantive obligations and the *international* obligation to make a treaty directly applicable,[152] but 'should have no bearing on the question of whether the treaty is self-executing in character',[153] which is a constitutional issue that cannot be decided by looking at the intention of the drafters of a treaty.[154] Further, states rarely show concern for the direct application of international treaties during their drafting,[155] and courts should not draw inferences from the absence of statements regarding their direct effect during negotiations.[156] Thus, 'intent is not really a useful criterion'.[157]

Whether treaties create individual rights is also a contested criterion. It has been argued that a norm can be applied directly even if it does not create individual rights.[158] The focus on individual rights is explained through the role of the courts in the protection of the individual,[159] procedural requirements,[160] and the historical development of direct application.[161] It has thereafter been strengthened through the ECtHR and ECJ jurisprudence.[162]

The concept of individual rights itself is not straightforward. It is not always easy to establish when a treaty creates individual, domestically enforceable rights.[163] Some courts have relied on the general implementation provisions to decide that certain human rights treaties do not create individual rights but obligations for states.[164] An obligation for states does not always

[151] Velu 1980 note 88 at 301, 305.
[152] Undertaking an international obligation to make a treaty directly applicable is rare. According to Chauvaux and Girardot (1997 note 90), apart from *Jurisdiction of the Courts of Danzig, Advisory Opinion*, 1928 P.C.I.J. (ser. B) No. 15 (Mar. 3) ('*Danzig')* and the European community law, 'it is difficult to find cases where the direct effect arises from international law'. Not even the ECHR falls into this category (Buergenthal 1992 note 94 at 335; cf. Venice Commission 2014 note 5 at 14).
[153] Buergenthal 1992 note 94 at 395.
[154] Sloss 2004 note 103; Sloss 2012 note 90.
[155] Bradley 2008 note 89 at 150. Also, Nollkaemper 2011 note 78 at 135; Dumortier 2012 note 97; Wu 2007 note 86 at 578-579.
[156] Nollkaemper 2011 note 78 at 135. However, states may explicitly indicate upon ratification that a treaty is not self-executing, a practice used by the United States (Buergenthal 1998 note 4 at 220).
[157] Nollkaemper 2011 note 78 at 135; Pieret 2008 note 140 at 4.
[158] Generally, Van Alstine 2009 note 90; Verhoeven 1980 note 88 at 264; Sciotti-Lam 2004 note 93 at 336, 343; Vandaele and Claes 2001 note 86 at 15 (referring to the objective control of legality (i.e., the legality of administrative acts and assessing compatibility with treaties of domestic law)).
[159] Vázquez 1995 note 92 at 695 n 7.
[160] Sciotti-Lam 2004 note 93 at 354
[161] Sciotti-Lam (ibid at 346) links this requirement with the *Danzig* case, in which the PCIJ said that the 'very object of an inter-national agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts' (*Danzig* at 17-18). Verhoeven argues that the link between direct effect and individual rights is 'purely contingent and empirical' (1980 note 88 at 246).
[162] Verhoeven 1980 note 88 at 245. The ECJ stated that 'Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect' (*NV Algemene Transport - en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. - Reference for a preliminary ruling: Tariefcommissie - Pays-Bas.* Case 26-62 of 1963 ('*Van Gend and Loos'*) at 12).
[163] See generally, D Sloss 2006 note 103; S Kalantry 'The Intent-to-Benefit: Individually Enforceable Rights Under International Treaties' 2008 (44) *Stanford Journal of International Law* 63.
[164] Sciotti-Lam 2004 note 93 at 398-400.

imply the existence of an individual right,[165] and the courts may need to consider other factors.[166] Further, the existence of a right is not excluded by the treaty not using the word 'right'.[167] Conversely, the mere fact that an international treaty uses the term 'right' does not mean that domestic courts will accept it as such,[168] although the explicit wording of a treaty has on occasion assisted the courts to establish the existence of a right.[169]

Clarity, completeness, precision or sufficiency have been most influential in deciding direct application.[170] This criterion requires that a norm be 'clear enough to serve as objective law'.[171] Treaty norms may fall short of this criterion because they do not create legal obligations, or because they depend on the creation of procedures and institutions, or because they can only be given effect through legislation.[172] Establishing the completeness of human rights norms may be controversial[173] given the inevitably open character of these norms, akin to that of legal principles, which is meant to permit their adaptation to a wide range of scenarios.[174] According to Conforti, it would be 'unacceptable' to deny the direct application of norms considered 'vague' or 'indeterminate', 'especially when they contain declarations of principles rather than specific rules',[175] because legal principles are capable of judicial application.[176] Thus, the absence of clarity and precision should not be an autonomous criterion to refuse the direct application of human rights norms.[177]

Compounding difficulties is that completeness/clarity/precision do not concern only the linguistic qualities of the norm but also 'the vagueness of the normative implications of the various rights'.[178] If a court does not consider itself competent to adjudicate on socio-economic rights, for example, it might say that the norm is not clear or precise, despite the norm's intrinsic clarity. Further, courts with competence to apply open-ended norms might assess completeness

[165] Murphy 2009 note 4 at 101.
[166] Such as the 'spirit, the general scheme and the wording of those provisions' (*Van Gend and Loos* at 11); the clear obligations for other individuals, the states or the institutions of the Community (at 12); and the negative formulation of the provision at stake (ibid at 13).
[167] *Van Gend and Loos* at 11.
[168] See discussion in Buergenthal 1992 note 94 at 338-339 and 391; Vandaele and Claes 2001 note 86 at 12.
[169] *LaGrand (Germany v United States of America),* Judgement, I. C. J. Reports 2001, para 77. The rights terminology was not, however, the only factor (see Murphy 2009 note 4 at 101).
[170] Buergenthal 1992 note 94 at 343; Shelton 2011 note 78 at 12; E de Wet 'The Reception Process in the Netherlands and Belgium' in H Keller and A Stone Sweet (eds) *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008) 230 at 236.
[171] Nollkaemper 2009 note 70 at 342. Or 'self-sufficient' (Bossuyt 1980 note 13 at 318), or 'sufficiently precise and complete' (Sciotti-Lam 2004 note 93 at 439).
[172] See B Conforti *International Law and the Role of Domestic Legal Systems* (1993) at 27; Nollkaemper 2009 note 70 at 344; Nollkaemper 2011 note 78 at 137.
[173] Sometimes, precision is found in the concision of a norm, or, by contrast, in its comprehensiveness (C Fercot 'Précision et droits de l'Homme dans les ordre juridiques allemande and suisse' 2015 (5) *La Revue des Droits de l'Homme* paras 2 and 3 (online journal).
[174] Claes and Vandaele 2001 note 86 at 464.
[175] Conforti 1993 note 172 at 28-29 (all quotes).
[176] Ibid at 29.
[177] Claes and Vandaele 2001 note 86 at 431.
[178] P Alston 'Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights' 1987 (9) *Human Rights Quarterly* 332 at 351. These concerns can include the justiciability of socio-economic rights, the power to assert the domestic supremacy of international law and the potential remedies in that regard.

differently from courts which habitually apply more specific norms.[179] Courts with constitutional jurisdiction[180] or international bodies,[181] for example, do not raise the lack of precision of constitutional or treaty norms as an obstacle to their application. There is increasing acknowledgement that the 'structure d'accueil du droit interne' (or 'the structure of reception') plays an important role in the determination of direct application.[182] Therefore, a domestic legal framework convergent with a treaty may facilitate a finding of completeness of the latter's norms. It follows that a norm's clarity/completeness is not an abstract characteristic resting exclusively on its intrinsic features, but may depend on the features of a particular legal system,[183] and even on the matter presented to the court.[184]

The criteria discussed above are formal factors which influence direct application. However, the 'real reasons' behind decisions on direct application may be different,[185] and even extraneous to the treaty. Domestic legal institutions (such as standing and justiciability), political considerations or hostility to supra-national legal sources;[186] the attitude of judges toward 'international obligations in general or towards a specific treaty';[187] and local judicial traditions and doctrines also influence direct application.[188] These have 'very little to do with the wording of the disputed provision'.[189]

In Europe, the ECJ and ECtHR have influenced the direct application discourse. The centrality of the courts in the European Union law is not replicated in the general international law framework. This may unconsciously affect the courts' assessment of direct application. Findings of violation against state parties by the ECtHR have prompted national courts to consider its jurisprudence more closely and to recognise the direct effect/self-executing character of many of its provisions.[190] This shows that courts 'tend to view treaty obligations, whether incorporated or unincorporated, in a very different light when they know that they do not have the last word when it comes to determining the meaning or relevance of an

[179] Buergenthal 1992 note 94 at 395.
[180] Abraham 1997 note 115 para 2.
[181] C Nivard 'Précision et organes institués par des conventions internationales et européennes' 2015 (7) *La Revue des Droits de l'Homme* paras 5 and 20 (online journal). See also International Commission of Jurists *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability* (2008).
[182] Sciotti-Lam 2004 note 93 at 441 (term borrowed from Verhoeven 1980 note 88 at 260, who cites P Comte). Dugard also links self-execution with the ability of the domestic system to accommodate the application of the international norm (2005 note 124 at 62).
[183] Buergenthal 1992 note 94 at 395.
[184] The circumstance of a particular case, the status of the parties, the remedy sought and the jurisdiction of the court (Sciotti-Lam 2004 note 93 at 443), as well as the type of obligation (negative/positive; Velu 1980 note 88 at 314) may influence the decisions on direct application. Pieret argues that because direct application is influenced by the concrete circumstances of a case, *a priori* conclusions in terms of direct application of a particular norm may be problematic (2008 note 140 at 6).
[185] Buergenthal 1992 note 94 at 376.
[186] Ibid at 369. Justice Breyer, for example, finds relevant for the self-execution enquiry whether the application of a treaty norm causes 'constitutional controversy' or leads to a 'constitutionally undesirable conflict' with the other state branches (*Medellin v Texas*, 128 S. Ct. 1346, Separate opinion at 14).
[187] Buergenthal 1992 note 94 at 383. Similarly, Sciotti-Lam 2004 note 93 at 331.
[188] Buergenthal 1992 note 94 at 383.
[189] Ibid at 373.
[190] Ibid at 384.

international agreement'.[191] The jurisprudence of supranational courts may also facilitate direct application by 'reducing the hostility to and suspicion of international or "foreign" legal norms'.[192]

2.3.1.4 Direct application and the CRC

Direct application is therefore complex and controversial, and the current conceptualisation of direct application may not substantially advance the domestic effect of the CRC.

The CRC does not create an international obligation to be directly applied, and the *travaux preparatoires* do not indicate the intention for the Convention to be directly applicable.[193] Despite being familiar with the controversies surrounding direct application, the states were not preoccupied by them during CRC negotiations,[194] and, upon ratification, only Germany made a declaration that the CRC was not directly applicable by its courts. Germany withdrew the declaration in 2010.[195]

Some courts have sought to establish the direct applicability of the CRC in relation to the intention of the states, but locating that intention has been difficult. For example, the Austrian Parliament made a 'reservation of implementation', according to which courts and administrative authorities cannot rely directly on the CRC,[196] but the executive did not make such reservation at the time of ratification. During the parliamentary ratification in the Netherlands, it was concluded that certain CRC provisions can have direct effect and the direct effect of others 'cannot be ruled out'.[197] The Dutch courts, however, have recognised direct effect to articles not deemed of direct application by the Parliament.[198] Some courts have sought to deduce the intention of the states in relation to direct application from the wording of the CRC,[199] with future tense formulations or formulations geared toward achieving certain goals in the future,[200] or the obligation to take legislative measures[201] being taken as indications of the absence of direct applicability.

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[191] Ibid at 394.
[192] Ibid at 394. Similarly, Craig and De Burca 2008 note 99 at 277.
[193] Sciotti-Lam 2004 note 93 at 381.
[194] Sciotti-Lam 2004 note 93 at 380. The issue was raised during the drafting of the ICCPR and the International Covenant on Economic, Social and Cultural Rights ('the ICESCR') (A Seibert-Fohr 'Domestic Implementation of the International Covenant on Civil and Political Rights Pursuing to its article 2 para.2' in J Frowein and R Wolfrum (eds) 2001 (5) *Max Planck Yearbook of United Nations Law* 399 at 419, 424; Committee on Economic, Social and Cultural Rights ('the CESCR') *Draft General Comment No. 9: The domestic application of the Covenant* (1998) ('*General Comment 9*') para 11.
[195] See the website of the United Nations Treaty Collections *Status of ratification CRC*.
[196] S Neudorfer and C Wernig 'Implementation of International Treaties into National Legal Orders: The Protection of the Rights of the Child within the Austrian Legal System' in in A von Bogdandy and R Wolfrum (eds) 2010 (14) *Max Planck Yearbook of United Nations Law* 409 at 417.
[197] De Graaf 2015 note 82 at 590.
[198] Article 8 (ibid at 595 and 596) or article 3 (Limbeek and Bruning 2015 note 82 at 98).
[199] Sciotti-Lam 2004 note 93 at 383. This is referred to as 'critère rédactionnel'. See also Abraham 1997 note 115 at para A.2.c.
[200] Sciotti-Lam shows that formulations such as 'states undertake' or 'shall ensure' led to a denial of direct application (2004 note 93 at 384).
[201] Ibid at 387.

Occasionally, the mention of implementation measures in article 4 was approached as illustrative of the intention to create a non-self-executing treaty.[202] This resulted in a denial of direct application of the entire CRC by the French Court of Cassation, the Belgian Court of Cassation[203] and the Luxemburg Court of Appeal.[204] But, mention of implementation measures does not make a whole treaty non-self-executing.[205] While such measures are important for the non-self-executing norms, they do not erase the self-executing character of those which are directly applicable.[206] Reference to implementation measures cannot justify the presumption that a treaty is not self-executing[207] without questioning the long-accepted direct effect of equivalent provisions in other human rights treaties.[208] In any case, reference to legislative measures in article 4 is not unique, being also present in treaties whose self-execution is less controversial.[209]

The absence of references to effective remedies, including judicial remedies,[210] in article 4, and the absence of an individual complaints mechanism at the time of drafting[211] have been taken by courts as an indication of non-self-execution. International bodies do not support this reasoning. For example, the ECtHR rejected inferences in relation to the type of domestic implementation measures required of a state from reference to remedies in article 13 of the ECHR.[212] The Committee on Economic and Social Rights discourages presumptions of non-self-execution of ICESCR norms,[213] and the CRC Committee supports the direct application of the entire Convention.[214]

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[202] R Levesque 'The internationalisation of children's human rights: Too radical for American adolescents?' 1993-1994 (9) *Connecticut Journal of International Law* 237 at 279; Todres 1998-1999 note 1 at 185; Engle 2011 note 2 at 810.

[203] Court of Cassation, Case no P990276F (Justel No. F-19990331-5) of 31 March 1999. The Court did not formally reject the direct application of the entire CRC, but it raised article 4 *ex officio*. For a discussion of the case and its implications, see Vandaele and Claes 2001 note 86 at 16; Claes and Vandaele 2001 note 86 at 430.

[204] Sciotti-Lam 2004 note 83 at 400.

[205] Bossuyt 1980 note 13 at 327; Conforti 1993 note 172 at 30-31; Nollkaemper 2011 note 78 at 135.

[206] Abraham 1997 note 115; Conforti 1993 note 172 at 32.

[207] CESCR *General Comment 9* para 11.

[208] Many CRC rights are a replica of rights recognised direct effect in the ECHR and ICCPR (Alen and Pas 1996 note 126 at 180).

[209] Many courts accept the direct application of the ICCPR despite references to legislative measures in article 2(2) (C Harland 'The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey Through UN Human Rights Committee Documents' 2000 (22) *Human Rights Quarterly* 187 at 195-196).

[210] By contrast, some courts infer self-execution from the formulation of article 1 of the ECHR, which provides that states 'shall secure' the rights in the Convention (Pieret 2008 note 140 at 22).

[211] F Dekeuwer-Défossez 'La convention relative aux droits de l'enfant, qui ne crée des obligations qu'à la charge des Etats parties, n'est pas directement applicable en droit interne' 1994 *Recueil Dalloz* 34; J Massip 'L'application par la cour de cassation de conventions internationales recentes relatives a l'enfance' 1995 (53) *Les petites affiches* 41.

[212] See Seibert-Fohr 2001 note 194 at 422. In the *Swedish Engine Drivers' Union v Sweden* (Application No. 5614/72, 6 February 1976), the ECtHR indicated that article 13, or the ECHR in general, does not prescribe the manner in which states should give it effect within the domestic order (para 50). Also, *Popescu v Romania no 2* (Application No. 71 525/01, 26 April 2007) para 104.

[213] CESCR *General Comment 9* para 11.

[214] See part 2.2.2 above.

The Convention is vulnerable in relation to the completeness, clarity or the precision criterion, with many authors arguing that some of its provisions are vague.[215] Not all courts, however, have shared this concern or at least not explicitly.[216] Others counter-argue that this is immaterial if the text is 'normative, in that it states an identifiable right or obligation'.[217] Further, the vagueness criticism may be addressed by reading the problematic provisions together with other Convention articles.[218] The generality of the wording of CRC articles is not unusual,[219] nor always problematic considering the diverse jurisdiction and experience of the courts,[220] and judges' increasing exposure to legal texts with a more general formulation.[221]

Judicial assessment of clarity and completeness may be influenced by the jurisprudence which treaty norms may have generated. The clarity of norms improves their readiness 'for domestic consumption',[222] but such clarity is often obtained through legal interpretation and consistent judicial engagement.[223] It is judicial rulings that have persuaded national audiences that 'human rights law is really law, by all international and domestic standards'.[224] This suggests that, in the 'legal conscience',[225] an instrument which has been judicially applied is more likely to be perceived as clear than a legal instrument which has not. This is sometimes reflected in the

[215] U Kilkelly 'The Convention on the Rights of the Child after Twenty-five Years: Challenges of Content and Implementation' in M Ruck, M Peterson-Badali and M Freeman (eds) *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (2017) 80 at 85; J Tobin 'Judging the judges: Are they adopting the rights approach in matters involving children?' 2009 (33) *Melbourne University Law Review* 579 at 581; King 1994 note 2 at 395; Vande Lanotte and Goedertier 1996 note 2 at 109-110.

[216] For example, Romanian and Bulgarian courts do not discuss these aspects (M Couzens 'Romanian courts and the UN Convention on the Rights of the Child: A case study' 2016 (24) *International Journal of Children's Rights* 851; for Bulgarian Supreme Court examples, see *Kerezov v Minister of Justice* ILDC 606 (BG 2002) (with comment by T Lozanova, 2008) and *Council of Ministers v TSD and ors* ILDC 972 (BG 2007) (comment by T Lozanova, 2010)). Other courts consider the completeness and clarity of CRC norms, and some have found article 3(1), for example, not to satisfy these criteria (Case No. C990048N of 4 November 1999 Court of Cassation Belgium (Justel No. F-19991104-5); Decision No. 196388 of 25 September 2009 Belgian Council of State; *D v Family Allowance Fund of Zug Canton*, Swiss Federal Tribunal *Arrêts du Tribunal fédéral* 136 I 297, 2010); the Dutch Council of State in *Minister for Immigration and Integration v A and B* ILDC 543 (NL 2006) (comment by J Handmaker and M van Eik J, 2008). In 2012, the Dutch Council of State accepted the direct application of article 3(1) to a certain extent (Limbeek and Bruning 2015 note 82 at 98).

[217] Dumortier 2012 note 97. Also, Conforti 1993 note 172.

[218] U Killkelly and L Lundy 'Children's rights in action: Using the Convention on the Rights of the Child as an auditing tool' in A Alen et al (eds) *The UN Children's Rights Convention: theory meets practice* (2007) 57 at 66.

[219] C Price-Cohen and S Kilbourne 'Jurisprudence of the Committee on the Rights of the Child: A Guide for Research and Analysis' (1997-1998 (19) *Michigan Journal of International Law* 633 at 642.

[220] L Garlicki 'Constitutional courts versus supreme courts' 2007 (5) *International Journal of Constitutional Law* 44 at 47.

[221] V Ciobanu 'Independenţa judecătorului şi principiul legalităţii în procesul civil' 2010 (2) *Revista Română de Drept Privat* 43 at 47 and 49; Claes and Vandaele 2001 note 86 at 430; Garlicki 2007 note 220 at 49.

[222] M Buquicchio-de Boer 'The Direct Effect of the European Convention of Human Rights and the Rights of Children' in E Verhellen (ed) *Monitoring Children's Rights* (1996) 199 at 207.

[223] For example, Scott and Macklem argue that 'precision is a function of the repeated invocation and application of social rights by the judiciary' and that engagement with social rights requires 'experience and effort' (1992-1993 note 50 at 84).

[224] M Scheinin 'General introduction' in M Scheinin (ed) *International Human Rights Norms in the Nordic and Baltic Countries* (1996) 11 at 17.

[225] Sometimes, when the CRC is criticised, its wording is not contrasted with that of the ECHR, but rather with the ECtHR jurisprudence that offers clarity on its standards (A Bainham 'International Adoption from Romania – why the moratorium should not be ended' 2003 (15) *Child & Family Law Quarterly* 223 at 229).

preference of some European courts for the ECHR in cases concerning children, and the sidelining of the CRC.[226]

The CRC is also at a disadvantage in relation to whether or not its norms create individual rights. Some of its provisions do not utilise a rights language, referring instead to the obligations or commitments of the states. Some courts such as the Belgian Council of State,[227] the French Court of Cassation and the Council of State,[228] and the Swiss Federal Tribunal[229] have denied direct effect to CRC norms for the above reason. This overlooked that some norms may have both inter-state and individual rights dimensions:[230]

> [t]he fact that treaty provisions are worded in such a way that address States parties is in itself not sufficient for it to be not self-executing. The content and nature of the obligation are decisive.[231]

Articles 32-36 of the CRC illustrate the risk of a literal reading. Such reading would lead to the absurd conclusion that there is a 'right of the child to be protected from economic exploitation', as per article 32, but no protection rights are created by articles 33-36 because they do not use the term 'right'. This literal approach is not embraced by the Committee, which identified individual rights in CRC provisions not drafted in a rights language.[232] While there may be some reservations regarding the cogency of the Committee's position, there is merit in the view that treaties are a legitimate constraint on the power of the state even when they do not create individual rights,[233] and they can be applied directly at least to a certain extent.[234]

To conclude, the CRC is *prima facie* vulnerable in relation to the criteria for direct application, but cogent arguments have weakened these concerns. How direct application has contributed to giving domestic effect to the CRC is explored in more detail in the France and South Africa case studies in Chapters 3 and 5.

2.3.2 The indirect effect of the CRC

Indirect application is the only means by which domestic courts can give effect to treaties in dualist systems.[235] The departing premise is that treaties bind a state internationally, and become domestically binding only if given the force of law through an act of the legislature.[236]

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[226] Vandenhole 2015 note 82 at 121; Limbeek and Bruning 2015 note 82 at 101; Couzens 2016 note 82.
[227] The Belgian Council of State Decision No. 69715 of 21 November 1997 (in relation to article 20).
[228] See discussion in Chapter 3.
[229] It considered that articles 3(1) and 26 are declaratory provisions which do not create rights (*D v Family Allowance Fund* note 216).
[230] Abraham 1997 note 115.
[231] Alen and Pas 1996 note 126 at 171 (fn omitted).
[232] For example, *General Comment 14* declared that article 3(1) of the CRC contains a right of the child to have his/her interests taken as a primary consideration. In *General Comment No. 13 (2011) The right of the child to freedom from all forms of violence*, the Committee declared that article 5 contains a right for the child to be directed and guided in the exercise of rights by caregivers (para 59), and that article 19 contains 'a right to protection from all forms of violence' (para 65).
[233] Nollkaemper 2009 note 70 at 351. Also, Alen and Pas 1996 note 126; Claes and Vandaele 2001 note 86; Van Alstine 2009 note 93.
[234] Alen and Pas 1996 note 126 at 173-174.
[235] Dualist countries include the UK, Ireland, Australia, Canada, but also countries of civil law tradition (Finland, Hungary, Israel and Sweden; in Venice Commission 2014 note 5 para 22).
[236] Through, for example, scheduling of a treaty to a statute, partial incorporation, amending of legislation or the transformation of the treaty into domestic law. In this process, treaty norms become domestic statutory norms

This requirement arises from the doctrine of the separation of powers, as in these states the executive enters international agreements with little or no involvement of the legislature.[237] A tension may therefore exist between international commitments and their domestic effects in the absence of legislative action. Although dualist states generally reject the doctrine of automatic incorporation, they differ in many other respects which can have an impact on giving effect to treaties, such as legal traditions (civil or common law) and human rights protection (constitutional[238] or statutory[239]).

Courts have developed techniques to give 'a variable and mitigated normativity'[240] to treaty norms, with the courts adopting 'an increasingly flexible approach'[241] in this regard. Some of these techniques are constitutionally endorsed while others have been developed by courts.[242] Such judicial techniques include the interpretation of legislation in a manner consistent with international law,[243] legitimate expectation/use of international treaties to control administrative discretion; declarations of incompatibility of national law with international law;[244] or reliance on international treaties to develop the common law.[245] Reliance on international treaties to interpret a state's constitution has been controversial in some states,[246] but not in others.[247] Literature also draws attention to the use of international law as a persuasive rather than as a binding tool.[248]

A wide spread technique common between states with common-law tradition is the use of international treaties to interpret domestic law. However, this has been conceptualised differently in different states. Thus, different approaches exist in relation to the requirement of ambiguity in domestic law. Use of international law is justified when there is ambiguity in legislation in states such as Australia, New Zealand and the UK,[249] but ambiguity is not

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either with their own wording or as rephrased by legislatures. On techniques of legislative incorporation, see M Shaw *International Law* (2017) at 115.

[237] C Heyns and F Viljoen *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (2002) at 8; Shaw 2017 note 236; M Waters 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' 2007 (107) *Columbia Law Review* 628 at 637. Some changes have, however, occurred over time (see Shaw 2017 note 236 at 115-116; R Provost 'Judging in Splendid Isolation' 2008 (56) *American Journal of Comparative Law* 125 at 142).

[238] Compare Australia and South Africa, for example.

[239] Like in New Zealand (Bill of Rights Act, 1990; Human Rights Act, 1993) or the UK (Human Rights Act, 1998).

[240] Provost 2008 note 237 at 153.

[241] Shaw 2017 note 236 at 129.

[242] In South Africa, they are provided for in the Constitution, while in Australia they are governed by the common law (see discussion in Chapters 4 and 5). In Canada, the presumption of conformity is a 'rule of judicial policy' (G van Ert 'Canada' in D Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 166 at 189).

[243] In countries such as Australia, Canada, South Africa or the UK.

[244] Provost 2008 note 237 at 153. For example, British courts can issue declarations of incompatibility of domestic legislation with the ECHR, under section 4 of the Human Rights Act, 1998 (Shaw 2017 note 236 at 119).

[245] See discussion in Chapter 4.

[246] See Shaw 2017 note 236 at 129 and Chapter 4 below.

[247] See Canada and the US (Waters 2007 note 237), and South Africa (Chapter 5).

[248] K Knop 'Here and There: International Law in Domestic Courts' 1999-2000 (32) *New York University Journal of International Law and Politics* 501.

[249] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 274 ('*Teoh'*) para 26; M Poole 'International Instruments in Administrative Decisions: Mainstreaming International Law' 1999 (30) *Victoria University of Wellington Law Review* 91; Shaw 2017 note 236 at 116.

necessary in Canada[250] or for the purposes of the interpretation of the Bill of Rights in South Africa.[251] The concept of 'ambiguity' itself has a narrow as well as a wide meaning, the latter being more accommodating of a reliance on international law.[252]

The usage of international law is mandated in some states but only recommended in others. In South Africa, the courts *must* consider international law when interpreting the Bill of Rights and '*must prefer* any reasonable interpretation'[253] consistent with international law when interpreting legislation. In Australia the courts '*may* use international law as a source of developing the common law'[254] and 'the courts *should* favour'[255] an interpretation of legislation which accords with Australia's international obligations, and that meaning '*should* prevail' if the wording of legislation is susceptible to a consistent construction.[256] In Canada, the Supreme Court 'encourages a voluntary engagement with human rights treaty law, [but] it does not require – or support – obligatory convergence with that law'.[257] In New Zealand, there is a 'duty of the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in the light of the universality of human rights'.[258]

The impact of interpretive techniques may vary in intensity.[259] It can range from simply 'gilding the domestic lily'[260] or confirming the legal reasoning embedded in domestic rules; to developing the common law; to 'contextual interpretation of domestic bills of rights'[261] and giving meaning to domestic provisions; or to constitutional interpretation in conformity with human rights treaties.[262] In many states, however, the legislatures retain the right to legislate contrary to international obligations despite the operation of statutory presumptions of conformity with international law.[263] The close engagement of some judges with international law has prompted the use of concepts such as 'interpretive incorporation'[264] or 'creeping monism'.[265] They suggest a departure from rigid dualism possibly caused by belonging to

[250] Van Ert 2009 note 242 at 173.
[251] Sections 39(1)(b) and 233 of the Constitution of the Republic of South Africa, 1996 ('the South African Constitution').
[252] See the position of Mason CJ and Deane J in *Teoh*. Waters rightly notes that '[a]mbiguity … is sometimes in the eye of the beholder' (2007 note 237 at 683).
[253] Section 233 of the Constitution of the Republic of South Africa, 1996.
[254] A Devereux and S McCosker 'International Law and Australian Law' in D Rothwell and E Crawford (eds) *International law in Australia* (2017) 23 at 36 (my emphasis).
[255] *Teoh* per Mason CJ and Deane J Teoh para 26 (my emphasis)
[256] *Teoh* per Mason CJ and Deane J para 27 (my emphasis). See Devereux and McCosker 2017 note 254 at 39 for other cases supporting this position.
[257] Waters 2007 note 237 at 695. See *Baker v Canada* [1999] 2 S.C.R. 817 para 70; *Suresh v Canada* [2002] 1 S.C.R. 3 para 59.
[258] *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266.
[259] Waters 2007 note 237 at 687.
[260] Ibid at 654.
[261] Ibid at 673.
[262] Ibid at 679.
[263] Australia (see Chapter 5); Canada (Provost 2008 note 237 at 132-133).
[264] 'Interpretive incorporation' is a term coined by Justice Michael Kirby of the High Court of Australia (Waters 2007 note 237 at 652 fn 92).
[265] Ibid at 654.

regional human rights bodies,[266] globalisation and changes to judiciary's deference to the executive in treaty matters.[267]

2.3.2.1 The indirect application of the CRC in dualist states

With many dualist states not having incorporated the CRC,[268] domestic courts have relied on indirect application to give effect to the CRC, sometimes in significant cases concerning children.[269] A selection of cases illustrates this point, with more extensive analysis being conducted in Chapters 4 and 5.

A triad of immigration cases in the mid-1990s, involving the application of the CRC, re-shaped the law in relation to the effect of unincorporated treaties. In *Tavita v Minister of Immigration* ('*Tavita'*),[270] the New Zealand Court of Appeal had to decide whether in removing from New Zealand the Samoan father of a New Zealand child, immigration authorities should consider the international obligations arising from the ICCPR and CRC (article 9(1) and (4)).[271] The Court found the Minister's argument to the contrary, based on the fact that the treaties were not incorporated,[272] to be 'unattractive', cautioning that 'there must at least be hesitation about accepting it'[273] because it implied that the taking of international commitments 'has been at least partly window-dressing'.[274] The Court gave immigration authorities an opportunity to reconsider their decision, including the two international instruments concerned.[275] In the case of *Minister for Immigration and Ethnic Affairs v Teoh*[276] ('*Teoh'*), discussed extensively in Chapter 4, the Australian High Court decided that unincorporated treaties gave rise to a legitimate expectation that administrative authorities would act according to the CRC.

Baker v Canada (Minister of Citizenship and Immigration)[277] ('*Baker'*) concerned the relevance of the CRC for the review of a decision to remove from Canada the Jamaican mother of four Canadian-born children.[278] She criticised the decision, *inter alia*, because insufficient attention was paid to the rights and interests of her children. The relevance of the CRC for assessing the reasonableness of a discretionary administrative decision had to be decided, including whether the decision-maker had to give a primary consideration to the best interests of the children affected by the decision.[279] The majority decided that 'the failure to give serious

[266] *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* [2011] UKSC 4 (per Lady Hale paras 23-24).
[267] Waters 2007 note 237 at 651.
[268] For an exception, see Norway (note 22 above).
[269] For more, see Tobin 2009 note 215; Todres 1998-1999 note 1; J Williams 'England and Wales' in T Liefaard and J Doek (eds) *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 53.
[270] *Tavita v Minister of Immigration* [1994] 2 NZLR 257. For comment, see Poole 1999 note 249.
[271] *Tavita* at 262.
[272] *Tavita* at 261, 265.
[273] *Tavita* at 266.
[274] *Tavita* at 266.
[275] *Tavita* at 266.
[276] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 274.
[277] *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 ('*Baker*').
[278] For the innovative aspects of the judgment, see Knop 2000 note 248 at 510; Provost 2008 note 237 at 198; Van Ert 2009 note 242 at 196.
[279] *Baker* per L'Heureux-Dubé J para 63.

weight and consideration to the interests of the children' was unreasonable.[280] While the CRC was not incorporated and not directly applicable,[281] it may 'help inform the contextual approach to statutory interpretation and judicial review',[282] and 'help show the values that are central' to the reasonableness of the decision.[283] In the majority's view, a reasonable decision-maker 'should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them'.[284] Judges Iacobucci and Cory (both dissenting) held that the primacy of children's rights as per the CRC 'is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament'.[285]

The legal techniques and motivations of courts differ in these cases,[286] but common is the courts' departure from traditional doctrine which previously denied effect to unincorporated treaties. These cases brought children's rights into the spotlight in the contentious field of immigration, and broke new ground by considering the children's best interests in matters affecting them but not involving them directly. The legitimacy of the techniques used in these cases has been criticised for being tantamount to judicial incorporation[287] but it was soon understood that the cases had a process-oriented effect, mandating consideration rather than compliance with the Convention.[288] Despite this limitation, these cases remain significant for reasons further explored in Chapter 6.

Two other cases illustrate the potential of indirect methods of application as means of giving effect to the CRC. In the case of *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*[289] ('*Canadian Foundation')*[290] the Supreme Court of Canada engaged in some depth with the substance of the Convention. This was a challenge to the constitutional validity of section 43 of the Criminal Code which provided with a defence against prosecution the teachers and carers who used force which did not exceed what was reasonable under the circumstances, for corrective purposes.[291] The majority (per McLachlin CJ) upheld the constitutionality of this section. The judgments of McLachlin CJ and Arbour J (dissenting) made extensive use of the Convention, albeit with different results. McLachlin CJ found support in article 3(1) of the CRC (the best interests being 'a' rather than 'the' primary consideration) for her view that the best interests of the child was not a principle of *fundamental*

[280] *Baker* per L'Heureux-Dubé para 65.
[281] *Baker* per L'Heureux-Dubé para 69.
[282] *Baker* per L'Heureux-Dubé para 70.
[283] *Baker* per L'Heureux-Dubé para 71.
[284] *Baker* per L'Heureux-Dubé J para 75. For a critique of the reasoning, see Provost 2008 note 237 at 140, 141.
[285] *Baker* per Iacobucci J para 81.
[286] For example, *Baker* rejected the existence of a legitimate expectation arising from the CRC (per L'Heureux-Dubé para 29). *Tavita* and *Teoh* share a concern about the domestic accountability of the executive in relation to the obligations it assumed internationally; this is not present in *Baker.*
[287] Van Ert 2009 note 242 at 193-194. For criticism to *Teoh*, see Chapter 5 (part 4.4).
[288] M Bastarache 'La révision judiciaire des decisions ministérielles à la lumière de l'arrêt Baker c. Canada' 2003-2004 (5) *Revue de la Common Law en Français* 399 at 415; M Allars 'One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: Teoh's Case and the Internationalisation of Administrative Law' 1995 (17) *Sydney Law Review* 204 at 231-232.
[289] *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 S.C.R. 76.
[290] Comment in G van Ert 'Canadian Cases in Public International Law in 2003-4' 2004 (42) *Canadian Yearbook of International Law* 583 at 601.
[291] For the text, see *Canadian Foundation* per McLachlin CJ para 1.

justice, contrariety with which would result in constitutional invalidity.[292] The majority noted that the CRC did not explicitly require the banning of all corporal punishment of children,[293] but that, *inter alia*, articles 5, 19(1) and 37(a) of the CRC were to be used to interpret the term 'reasonable' in order to give it a constitutional meaning.[294] Arbour J was of the view that section 43 was unconstitutional, and that international obligations 'must also inform the degree of protection' that children qualify for under the country's Constitution.[295] Arbour J referred extensively to CRC Committee's concluding observations, in which the Committee found the defence of reasonable chastisement to be imprecise and inconsistent with the CRC.[296]

In *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)*[297] ('*ZH'*) the UK Supreme Court engaged extensively with the CRC. The case concerned the circumstances in which a non-citizen parent may be removed from the UK when his/her removal will also result in the departure of his/her UK citizen children.[298] Lady Hale, for the Court, stressed that article 8 of the ECHR case law provides increasing recognition of the importance of best interests of children where the child is in a difficult position because of parental conduct, such as in this case.[299] The Court engaged with article 3(1) of the CRC,[300] which it considered 'the most relevant national and international obligation',[301] and whose application was expected by the ECtHR.[302] The Court sought to give effect to the best interests in the context of its proportionality inquiry under article 8(2) of the ECHR. It pointed out that a child's nationality is not a 'trump card' but is of importance, as recognised by articles 7 and 8 of the CRC.[303] The Court stressed the strong connection between the children and the UK, and referred to article 12 of the CRC and the importance of knowing children's own views in discovering their best interests,[304] especially where there may be conflict with those of the parents.[305]

To conclude, the indirect application of the CRC has had a positive impact on some significant cases. The versatility of the CRC is illustrated by its invocation in difficult and often politicised legal issues, such as immigration and corporal punishment. Reliance on the CRC enabled courts to consider the interests of children in matters concerning them indirectly;[306] it prompted the courts to consider the children's position independently of that of their parents; and it prompted the courts toward a more child-friendly interpretation of domestic law. Further, despite the carefully-guarded division between international obligations and domestic law, some courts

[292] *Canadian Foundation* per McLachlin CJ para 10.
[293] *Canadian Foundation* per McLachlin CJ para 33.
[294] *Canadian Foundation* per McLachlin CJ paras 31-33. Thus, 'physical correction that either harms or degrades a child is unreasonable' (para 31).
[295] *Canadian Foundation* per Arbour J para 186.
[296] *Canadian Foundation per* Arbour J paras 186-188.
[297] *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department Respondent* [2011] UKSC 4.
[298] *ZH* per Lady Hale para 1.
[299] *ZH* per Lady Hale para 20.
[300] *ZH* per Lady Hale para 21.
[301] *ZH* per Lady Hale para 23.
[302] *ZH* per Lady Hale para 23.
[303] *ZH* per Lady Hale para 30.
[304] *ZH* per Lady Hale para 34.
[305] *ZH* per Lady Hale para 37. The Court refers in this paragraph to *General Comment 12*.
[306] But see Strayer JA in *Baker* para 10 or McHugh J in *Teoh* para 43.

strove to avoid applying domestic law in ways that would breach international obligations.[307] This is not universally embraced[308] and does not make the CRC directly applicable. It shows, however, that the courts are alert to the Convention and find it relevant for the act of judging.

2.4 Conclusions

The discussion in this chapter shows a complicated picture of judicial involvement in applying the CRC. The Convention does not create a general obligation for the states to ensure that the CRC can be applied by the courts, but certain provisions rest on them being given effect by courts. The wide discretion left to states in deciding the involvement of courts in applying the CRC sits ill with the need for an effective implementation of the Convention. No doubt aware of this tension, the Committee approaches domestic courts as important contributors to domestic implementation in various ways, ranging from direct application, to providing remedies for violations and ensuring the supremacy of the CRC over conflicting domestic law. However, as shown in this chapter, many complexities surround giving judicial effect to the CRC in both monist and dualist systems, which create obstacles to safeguarding Convention rights.

A tension is therefore apparent between the aspirations of the Committee and the domestic reality. This arises from their defining the role of the courts 'each with its own internal logic'.[309] The approach to judicial implementation developed by the Committee is clear-cut, albeit somewhat simplified. When using concepts such as 'direct application', 'supremacy of the CRC' or 'justiciability,' the Committee overlooks their multi-layered nature and the domestic institutional interactions which may determine them. On the other side, domestic courts are acutely aware of these complexities. A few examples illustrate this tension. Thus, the Committee expects the courts to give priority to the CRC over conflicting domestic law, but this is not possible if not permitted by the domestic law. The Committee advocates the direct application of the CRC as a whole, but many courts do not embrace this approach.[310] The Committee and domestic courts may also differ on their interpretation of the CRC, as illustrated by the *Canadian Foundation* case above.[311]

These tensions should not, however, obscure the successful engagement of the courts with the CRC, achieved by navigating both the vulnerabilities of the CRC and the complexities of domestic systems, as further illustrated in the three case studies which follow.

[307] *Tavita* at 266; *ZH* per Lady Hale para 25.
[308] See, for example, McHugh J in *Teoh* para 37.
[309] Provost 2008 note 237 at 126.
[310] Most courts follow an article-by-article approach to direct application.
[311] According to the Committee, the CRC prohibits corporal punishment of children in all contexts (*General Comment 8* paras 31 and 43), a position disagreed with by the majority of the Canadian Supreme Court in the *Canadian Foundation.*

Chapter 3: France[1]

3.1 Introduction

As discussed in Chapter 2, the direct application of international treaties is controversial but opens significant opportunities for their application by domestic courts. The study of French jurisprudence undertaken in this chapter is illustrative in this regard.[2]

Several reasons make France a good case study of the potential and the difficulties raised by the direct application of the CRC. First, a decision as to whether the Convention or its norms are directly applicable determines whether the CRC is given effect or not, considering that the courts rarely engage with it in other ways. Second, the vacillations of the French case law are useful for understanding the opportunities and problems raised by the direct application of the Convention. Moreover, with France having consistently come under scrutiny from the Committee on the Rights of the Child ('the Committee' or 'the CRC Committee') for its allegedly poor record of direct application of the CRC,[3] French jurisprudence draws attention to a tension between domestic and international visions of direct application. Lastly, in the absence of a consolidated children's rights statute, the Convention was the main reference point for the courts in relation to the rights of children.

The focus in this study is on the jurisprudence of the highest courts:[4] the Court of Cassation (the highest judicial court; hereafter 'the CC' or 'the Court')[5] and the Council of State (or Conseil d'État, hereafter 'the CE' or 'the Council'; the highest administrative court).[6] Although these courts do not issue binding precedents, they exercise judicial control over the application

[1] An initial version of this chapter has appeared as M Couzens 'France' in T Liefaard and J Doek (eds) *Litigating the Rights of the Child*: *The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 123.

[2] The CRC was ratified by France on 7 August 1990 (United Nations Treaty Collection *Status of Treaties: Convention on the Rights of the Child* (online)) and it came into force for France in October 1990 (Décret no 90-917 du 8 octobre 1990 portant publication de la convention relative aux droits de l'enfant, signée à New York le 26 janvier 1990 (1)). France made declarations to articles 6 and 40(2)(b)(v); and a reservation to article 30.

[3] CRC Committee *Concluding observations of the Committee on the Rights of the Child: France* (1994) para 12; *Concluding observations of the Committee on the Rights of the Child: France* (2009) paras 10-11; *Concluding observations on the fifth periodic report of France* (2016) para 7.

[4] The cases were accessed on *Legifrance* (https://www.legifrance.gouv.fr/), an official database of French law, which includes reported and unreported judgments. The cases will therefore be identified according to the identifications provided by *Legifrance* (the court, number of appeal, date). All translations from French into English belong to this researcher, except where indicated otherwise. The study covers reported and unreported cases to 1 November 2018.

[5] Many cases involving the CRC come from the First Civil Division (Civ 1), and occasionally from the Second Civil Division (Civ 2), Criminal Division (Crim) and the Social/Labour Division (Soc). Important cases are dealt with by a full court (the Assembly). For the structure and the functions of the Court, see the Court's website https://www.courdecassation.fr/cour_cassation_1/presentation_2845/).

[6] For the structure and the functions of the Council, see its website http://english.conseil-etat.fr/ ; J Rivero and J Waline *Droit Administrative* (2002) at 185.

of the law by lower courts. They also play a unifying role in terms of court practice, are the last judicial resort for the protection of human rights, and their judgments are scrutinised by supranational bodies.[7] Their jurisprudence is therefore emblematic for the judicial protection of human rights, including the rights of children.

The chapter is structured as follows: Part 3.2 provides an introduction to the direct application of human rights treaties in France, which is followed in parts 3.3 and 3.4 by presentations of the jurisprudence of the Court and Council respectively. Part 3.5 analyses the impact of the direct application of the CRC, followed in part 3.6 by a presentation of the factors that have influenced the direct application of the CRC. General conclusions are drawn in part 3.7.

3.2 The direct application of international human rights treaties in France and the CRC

France is a monist state,[8] where international treaties can be directly applied by courts. According to its 1958 Constitution,[9] international treaties have a supra-legislative but under-constitutional status.[10] This means that they prevail over acts of Parliament, including posterior acts,[11] but not over the Constitution. Direct effect of international treaties (arising from the monist approach) and their supremacy over statutes (arising from article 55 of the 1958 Constitution) are technically distinct, but the courts approach them as intrinsically linked.[12] As a consequence, a court can only give effect to the supremacy of treaty provisions that are of direct application.[13]

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[7] C Laurent-Boutot *La Cour de Cassation face aux traités internationaux protecteurs des droits de l'Homme* (Université de Limoges, Unpublished thesis 2006) at 34.

[8] A Pellet (2008) *Quelle place la Constitution de 1958 fait-elle au droit international?* (online); E Decaux 'Le régime du droit international en droit interne' 2010 (62) *Revue Internationale de Droit Comparé* 467 at 469; D Chauvaux and T Girardot 'Les clauses d'un traité international dépourvues d'effet direct ne peuvent être invoquées à l'encontre d'un acte réglementaire' 1997 *L'Actualité Juridique Droit Administratif* 435.

[9] The Constitution is a composite text, consisting of the Constitution of 1958 (of the Vth Republic), and the texts to which this refers, such as the Declaration of the Rights of Man and the Citizen of 1789, the Preamble of the 1946 Constitution and the 2004 Environment Charter (B Mathieu *Qu'est-ce que la Constitution?* (online).

[10] Decaux 2010 note 8 at 469; Rivero and Waline 2002 note 6 at 68-69. The reciprocity requirement in article 55 does not apply to human rights treaties (J Lachaume 'Droit international et juridiction judiciaire' 2009 (October) *Répertoire International Dalloz* para 126; F Latty 'Observations CE ass., 11 avr. 2012, n 322 326, GISTI et FAPIL' in A Pellet and A Miron *Les Grandes Decisions de la Jurisprudence Francaise de Droit International Public* (2015) 674 at 679).

[11] Decaux 2010 note 8 at 470 and 489; L Dubouis 'Droit international et juridiction administrative' 2006 (January) *Répertoire International Dalloz* para 3; Lachaume 2009 note 10 para 107.

[12] P Lagarde 'La convention de New York du 26 janvier 1990 sur les droits de l'enfant n'est pas directement applicable en droit interne' 1993 *Revue Critique de Droit International Privé* 449 para 1; Laurent-Boutot 2006 note 7 at 42 in relation to the practice of the CC.

[13] J Lachaume 'Jurisprudence française relative au droit international (année 1997)' 1998 (44) *Annuaire Français de Droit Internationa*l 663 paras 17, 95 and 127. Treaties not applied by courts remain supreme, in that they bind the Parliament (J Ancel 'La Cour de cassation et la Convention internationale relative aux droits de l'enfant' 2001 (205) *Jurnal du Droit des Jeunes* 20 at 21 (hereafter 'Ancel 2001a'); Decaux 2010 note 8 at 487; Laurent-Boutot 2006 note 7 at 35).

The direct application of international treaties and the enforcement of their supremacy over national laws fall within the jurisdiction of the courts. The Constitutional Council does not assess the compatibility of domestic statutes with international conventions.[14] Instead, it exercises a control of constitutionality[15] against a 'constitutional bloc' or *bloc de constitutionnalité*,[16] which contains domestic norms with constitutional value but not international treaties. French statutes are therefore subject to a constitutionality control exercised by the Constitutional Council, and a control of consistency with international treaties exercised by courts. The consequences of the two types of control differ. An unconstitutional provision cannot come into force or is invalidated, while a statutory norm inconsistent with an international treaty is set aside (i.e., not applied) in a specific dispute, sometimes in favour of the court applying the international norm.[17] In addition to being used for the control of statutes, international norms with direct effect[18] are also directly relied on to assess the lawfulness of administrative action/acts (individual or normative),[19] with the offending administrative action being deemed unlawful and invalidated.

The recognition of direct effect determines the domestic effectiveness of international treaties in that courts rarely use general international law for the purposes of interpreting national law.[20] French writers have stressed the nuanced domestic normativity of incorporated norms in an attempt to change the courts' intransigent position according to which the absence of direct effect of some norms meant no judicial effect for those norms.[21] Under the influence of EU

[14] Decaux 2010 note 8 at 469; Rivero and Waline 2002 note 6.

[15] *A priori* (raised by certain political office-bearers before the law comes into force; article 61 of the 1958 Constitution) or *a posteriori* (*question prioritaire de constitutionalité* ('QPC') raised by individuals in concrete disputes; article 61-1 of the 1958 Constitution, introduced in 23 July 2008 and effective March 2010). See V Constantinesco and S Pierré-Caps *Droit Constitutionnel Français* (2010) at 221 – 222, and, on the website of the Constitutional Council, *La question prioritaire de constitutionnalité*.

[16] These are 'norms of constitutional nature arising from a variety of sources' (Decaux 2010 note 8 at 478). In addition to the norms in note 9 above, these include fundamental principles of French law recognised by the Council. See Constantinesco and Pierré-Caps 2010 note 15 at 224; Decaux 2010 note 8 at 478.

[17] Decaux 2010 note 8 at 470; Lachaume 2009 note 10 para 111.

[18] CE, No. 163043, 23 April 1997 (known as *Groupe d'information et de soutien des travaielleurs immigré;* hereafter '*GISTI* 1997'). This is a contentious issue, and arguments have been made that to control the legality of normative acts, direct effect is not necessary (R Abraham 'Les effets juridiques, en droit interne, de la Convention de New York relative aux droits de l'enfant (Conclusions sur Conseil d'Etat, Section, 23 avril 1997, Groupe d'information et de soutien des travailleurs immigrés (GISTI))' 1997 *Revue Française de Droit Administratif* 585; G Dumortier 'L'effet direct des conventions internationales (Conclusions sur Conseil d'État, Assemblée, 11 avril 2012, Groupe d'information et de soutien des immigrés (GISTI) et Fédération des associations pour la promotion et l'insertion par le logement (FAPIL), n° 322326, Lebon) 2012 *Revue Française de Droit Administratif* 547; S Slama (2012) *Adoption de nouveaux critères de détermination de l'effet direct des normes internationales sans consacrer leur invocabilité systématique* para 4 (CREDOF; online).

[19] Rivero and Waline 2002 note 6 at 67.

[20] Interpretation in line with general international law is exceptional, 'ambiguous, even underground' (J Akandji-Kombé 'De l'invocabilité des sources européennes et internationales du droit social devant le juge interne après l'arrêt Gisti-FAPIL du Conseil d'État du 11 avril, n° 322326, au Lebon' 2012 *Droit Social* 1014). This is because, *inter alia*, unlike the EU law, general international law does not specifically require the use of conventions for the interpretation of national law (ibid); and that the Constitution endorses direct application of international treaties but not their use for interpretation purposes (ibid; E Lambert Abdelgawad and A Weber 'The Reception Process in France and Germany' in H Keller and A Stone Sweet (eds) *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008) 108 at 117). However, the courts seem to slowly develop this possibility (Laurent-Boutot 2006 note 7 at 42 and 44; Lambert Abdelgawad and Weber 2008 above; Latty 2015 note 10).

[21] The outcome of *GISTI* 1997 was that 'the provisions lacking direct effect are radically un-invocable before an administrative court' (Chauvaux and Girardot 1997 note 8).

law,[22] the concept of 'invocability' was developed as an umbrella-term for the normative capacity of international norms,[23] which may range from the 'maximum normativity'[24] of norms with direct effect to a more limited normativity recognised to norms lacking such.[25] Arguments for the recognition of a nuanced normativity for general international treaty provisions have, however, failed,[26] the courts continuing to give effect only to those international law provisions of direct application.

Despite its importance, the courts have largely lacked a systematic approach to the direct application of international treaties.[27] Nonetheless, a few general rules can be identified. Generally, the courts assess direct applicability on an article-by-article basis.[28] Further, in order to be applied directly, in addition to the formal requirements of ratification and publication of the treaty in an official gazette, two other criteria need to be satisfied.[29] The subjective criterion requires that the object of the norm is to create individual rights, and not to regulate exclusively the relationship between states. For this, courts consider the state intention, which they search in the wording of the relevant provisions,[30] and in other elements such as the object of the treaty or provision.[31] Courts have placed significant weight on the literal meaning of norms in establishing the intention of the states. Formulations requiring the state to take implementation measures have led to a denial of direct effect by judicial courts; while a precise norm which does not refer to an act of application has generally been recognised as having direct effect.[32] Up until 2012, and despite cogent criticism,[33] the Council placed significant reliance on the literal meaning of a provision (*élément rédactionnel*) to establish the states' intention: norms which are addressed to the states have been considered as creating obligations only between states and not as creating individual rights capable of direct domestic application.[34] The

[22] This technique is used in relation to European directives, which although not of direct application, produce certain legal effects, such as consistent interpretation, reparation, exclusion and substitution of domestic norms (Slama 2012 note 18 para 4).
[23] Abraham 1997 note 18; Akandji-Kombé 2012 note 20; Dumortier 2012 note 18.
[24] Dumortier 2012 note 18.
[25] Such limited normativity may consist of use for interpretation purposes or engagement of state responsibility for legislative activity (ibid); or to set aside national norms ('invocability of substitution') or to interpret them ('invocability of interpretation') (Akandji-Kombé 2012 note 20).
[26] See arguments by Abraham (1997 note 18) and Dumortier (2012 note 18).
[27] Latty 2015 note 10 at 676 (in 2012, the Council jurisprudence changed, as discussed below). The Court continues to lack a systematic approach (Cour de Cassation *Rapport Annuel 2013 'L'ordre public'* at 111 (online)).
[28] Laurent-Boutot 2006 note 7 at 45 (for exceptions see at 49).
[29] Some differences exist in how the courts conceptualise direct application, but the essence coincides. See Cour de Cassation (2009) 'Contributions de la première chamber civile de la Cour de cassation: L'application direct de la Convention de New York relative aux droits de l'enfant' in *Rapport Annuel 2009: Les personnes vulnérables dans la jurisprudence de la Cour de cassation* 81 at 83 and 84 (online)).
[30] See, for example, Ancel 2001a note 13 at 20; Cour de Cassation *Rapport Annuel 2009* note 29 at 83; Lachaume 2009 note 10 para 93.
[31] Ibid para 94; Cour de Cassation *Rapport Annuel 2009* note 29 at 84.
[32] Lachaume 2009 note 10 para 93.
[33] Abraham (1997 note 18) argued that the wording may be an indication of the absence of direct effect but not the determinant factor.
[34] According to Abraham (ibid), formulations associated with direct effect are 'states recognise' or 'states guarantee', as opposed to 'the states undertake to guarantee' or 'undertake to recognise'. See also Lagarde 1993 note 12 para 3.

unrestrained reign of this literal approach ended with *GISTI and FAPIL* 2012,[35] where it was decided that a norm addressed to the state is not automatically excluded from direct application, and that the normative value of a norm can only be established by analysing the wording and the possibility of its immediate application.[36]

The second criterion is the objective criterion which refers to the degree of normativity of the treaty or provision,[37] or the 'quality of the norm'.[38] It requires that a norm be sufficiently clear and precise or complete in order to regulate immediately a concrete dispute, without a need to take any further domestic measures.[39] This criterion leaves judges a significant level of discretion.[40]

The manner in which the courts engage with the two criteria and the reasons for them rejecting the direct application of certain international provisions are not always clear.[41] For example, the CE formally rejected the direct application of certain treaty provisions because they 'create obligations only between states', when in fact the direct effect was denied because the norm was considered incomplete.[42] Generally, there is a limited analysis of direct effect in judgments and the courts use stereotypical formulations to reject direct application.[43] Further, there is some 'circularity'[44] in the judicial reasoning concerning the application of the two criteria, and absence of legal predictability which results from the case-by-case and article-by-article approach to direct application.[45] The difficulties of navigating the jurisprudence on direct effect are augmented by the brevity of the two courts, especially of the CC. Historical, legal and

[35] CE, No. 323326, 12 April 2012 ('*GISTI and FAPIL')*. The two organisations challenged the lawfulness of a decree, which, in the implementation of a statute recognising the right to access state housing, introduced discriminatory requirements regarding the duration of residence in France and the type of residence permit. The decree was challenged for being contrary to article 6(1) of the International Labour Organisation (ILO) Convention 97 of 1 July 1949 concerning migrant workers, under which the state parties (including France) undertook not to discriminate between nationals and migrant workers residing legally in France.

[36] The Council applied this reasoning to decide that article 6(1) of the ILO Convention no 97 does not create obligations exclusively between states and does not require complementary measures to produce domestic effects.

[37] B Taxil 'Les critères de l'applicabilité directe des traités internationaux aux États-Unis et en France' 2007 (59) *Revue Internationale de Droit Comparé* 157 at 159.

[38] Laurent-Boutot 2006 note 7 at 40.

[39] Dumortier 2012 note 18. See also Decaux 2010 note 8; Taxil 2007 note 37.

[40] Ibid at 166.

[41] Dubouis 2006 note 11 para 40 criticizing the Council for failing to distinguish between how it employs the two criteria. Chauvaux and Girardot (1997 note 8) observed the Council's failure in *GISTI* 1997 to state its reasons for finding that articles 24, 26 and 27 of the CRC lack direct effect.

[42] Latty 2015 note 10 at 684. Abraham 1997 note 18 para III.A.2 argues that the Council of State rejected the direct application of articles 9, 12 and 14 of the CRC because of their lack of precision, although its judgment refers to these provisions as creating obligations only between states.

[43] Latty 2015 note 10 at 684.

[44] Dumortier 2012 note 18 (rather than being approached independently, the objective criterion is taken as proof of the subjective criterion, and *vice versa*).

[45] Latty 2015 note 10 at 684.

political reasons inform this approach to judgment writing,[46] which should not, however, be mistaken for simplistic reasoning or poorly informed courts.[47]

The effects of recognising direct effect to an international norm are potentially far-reaching. Such a norm can play various roles: it may cover a gap in the domestic law; it may set aside and substitute, in a concrete dispute, domestic norms found to be inconsistent with it; or it may be used to assess the lawfulness of administrative acts (individual or normative).[48]

These effects are of importance for the CRC. First, France gives limited recognition to child-specific rights in its Constitution, and a limited number of child-specific norms exist within the constitutional bloc. Paragraph 11 of the 1946 Preamble contains a commitment by the state to guarantee health services, material security, rest and leisure to children amongst others, while Paragraph 13 contains a commitment to guarantee equal access to education, professional training and culture to children and adults. In addition, the Constitutional Council has recognised constitutional status to the principle of a specialised system of juvenile justice,[49] and has interpreted Paragraph 10 of the 1946 Preamble to include the interest of the child in adoption.[50] Therefore, children's rights do not feature highly in the control of the constitutionality of statutes. The conventionality control of statutes against the CRC by courts may, however, compensate for this. Further, France lacks a consolidated children's rights statute, preferring sectoral legal reform in response to its CRC obligations. This creates potential for gaps in the law, which can be covered by giving direct effect to the CRC. Lastly, direct application has heightened importance in France, since the courts are slow to use general (as opposed to European) international treaties for interpretation purposes, as discussed above.

3.3 The direct application of the CRC by the Court of Cassation

The Court has had a troubled history of applying the CRC, moving from quiet acceptance to firm rejection, and then to selective direct application. The year 2005 was a turning point for the Court's jurisprudence, and it is used as a landmark for discussing the case law.

[46] M de S-O-l'E Lasser 'Judicial (Self-) Portraits: Judicial Discourse in the French Legal System' 1994-1995 (104) *Yale Law Journal* 1325; B Louvel (2015) *Discours prononcé en ouverture des travaux de la commission de réflexion dédiés à la motivation* at 1 (online); Conseil d'État *Groupe de Travail sur la Redaction des Decisions de la Juridiction Administrative*: *Rapport 2012* at 10 (online).

[47] The published arguments of the *commissaire du government/commissaire public* or *conseilleurs*, who are members of the Council and the Court respectively, contain comprehensive legal arguments, with extensive references to international law, supranational (mainly ECtHR) case law, occasionally foreign law and judgments, and academic literature. It is exceptional, however, for the judgments to contain references to the courts' own case law or that of supranational courts.

[48] Rivero and Waline 2002 note 6 at 67.

[49] Decision 2002-461 DC, 29 August 2002 para 26. For more, see D Darsonville 'QPC du 21 septembre 2012: la poursuite de la désagrégation du droit pénal de mineurs' 2012 (4) *Constitutions: Droit Constitutionnel Appliqué* 609; C Lazerges 'Les limites de la constitutionnalisation du droit pénal des mineurs' 2008 (1) *Archives de Politique Criminelle* 5.

[50] Decision 2013-669 DC, 17 May 2013 para 53.

3.3.1 The pre-2005 position

After the entry into force of the CRC, the Court did not reject the Convention.[51] Lower courts embraced the CRC, and some set national norms aside and substituted them with the relevant CRC provisions.[52] However, several judgments in 1993 and 1994 firmly established the Court's pre-2005 approach. In *Lejeune*, the appellant argued that a lower court disregarded articles 1, 3, 9 and 12 of the CRC, by deciding what was in the best interests of the child without listening to the child directly, although the appellant raised concerns that the view expressed by the child during interviews with the psychologist has been influenced by the mother.[53] The First Civil Division decided that *the entire* CRC was not directly applicable because it created obligations only for the states and thus could not be invoked directly before national courts by individuals. Subsequently, the same division pointed out that 'it results from the text [of the CRC] itself that according to its article 4, its provisions create obligations only for the states, so that it cannot be invoked before the courts'.[54] In 1994, the Labour Division adopted this approach when quashing the decision of a court which set aside provisions of a national statute in favour of article 26 of the CRC.[55] The Criminal Division did not initially share this intransigence, continuing to use formulations indicative of a certain openness to an article-by-article approach to direct application.[56] As its decisions were less explicit, they were also less influential than those of the civil and social divisions.[57] In 1997, the Criminal Division rallied to the reasoning of the other divisions, dismissing an appeal in which a convicted minor argued that the relevant national statute was inconsistent with article 37 of the CRC because it allowed for his indefinite detention.[58] Therefore, by 1997, all the divisions of the Court rejected the direct application of the entire Convention, this being saluted by some as a display of a 'beautiful unanimity'.[59]

Some lower courts continued to apply the CRC but their lapses were sanctioned by the Court.[60] The Court itself did not use its article-4 based reasoning consistently, with both the First Civil

[51] Civ 1, No. 90-05026, 1991 (article 29(1) (a) not infringed upon); Crim, No. 90-87713, 1991 (dismissed because the CRC was only raised in appeal).
[52] Soc, No. 93-10891, 1994.
[53] Civ 1, No. 91-11310, 10 March 1993. Same reasoning in Civ 1, No. 91-17487, 1993; Civ 1, No. 91-18735, 1993.
[54] Civ 1, No. 91-18735, 1993 (in a residence dispute, the appellant argued that the court considered only the 'interest of the children' and not the '*best interests* of the child' as required by the CRC, breaching therefore articles 3, 9 and 12). Also, Civ 1, No. 94-05075, 1995.
[55] Soc, No. 93-10891, 1994. The statutory provisions established an age limit below 18 up to which children benefited from medical insurance paid for by the state, as dependents of their parents.
[56] Laurent-Boutot 2006 note 7 at 64 and 65.
[57] Ibid at 65. It was argued that legislation which criminalised persons who sought to prevent medical facilities from conducting terminations of pregnancy was contrary to articles 6, 8 and 9 of the CRC. The Criminal Section did not reject the reliance on the CRC because the treaty was not directly applicable; instead, it relied on France's interpretive declaration to the CRC, according to which ratification cannot constitute an obstacle to the application of termination of pregnancy laws (Crim, No. 95-85118, 1996; Crim, No. 96-80223, 1996; Crim, No. 96-80318, 1996; Crim, No. 96-82024, 1997; Crim, No. 97-83877, 1998).
[58] Crim, No. 97-82008, 1997.
[59] J Massip 'La cour de cassation et le caractere directement executoire en France de la Convention sur les droits de l'enfant (Cass. crim., 18 juin 1997)' 1998 (39) *Les Petites Affiches* 25.
[60] J Massip 'La Convention relative aux droits de l'enfant, qui ne crée des obligations qu'à la charge des Etats parties, n'est pas directement applicable en droit interne' 1993 *Recueil Dalloz* 361 fn 2; J Hauser 'Droits de l'enfant : il y a CIDE et CIDE !' 1994 *Revue Trimestrielle de Droit Civil* 581; J Rongé 'La Convention internationale relative aux droits de l'enfant: On avance ou on recule?' 2004 (10) *Journal du Droit des Jeunes* 9

Division[61] and the Criminal Division[62] occasionally departing from it, and raising hopes for change.[63] Some Court members supported a more permissive approach to direct application,[64] arguing that several aspects of the CRC indicate that it was intended to create individual rights;[65] and that article 4 suggests that domestic implementation measures are required only when 'necessary' and not when the CRC provisions can be given effect immediately.[66] Despite its formal rejection, the CRC influenced the CC as reflected in its use of the phrase 'the best interest of the child', which was not reflected at the time in the positive law.[67] Although the issue of the direct application was clearly controversial, the Assembly of the Court never clarified the issue,[68] maintaining the uncertainty about the role of the CRC in litigation.[69]

The Court was criticised for its departure from the customary, article-by-article approach to direct application,[70] and for ousting the direct application of the CRC for reasons not used in relation to other human rights conventions.[71] The Court rejected, however, criticism that it deprived the CRC of domestic effect, by drawing attention to legislative initiatives to give effect to the CRC domestically,[72] and to the Council of State's jurisdiction to ensure that the organs of the state complied with the CRC.[73] Some defended the simplicity and the certainty

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at 15 note 60; J Rosenczveig 'The Self-executing Character of the Children's Rights Convention in France' in E Verhellen (ed) *Monitoring Children's Rights* (1996) 187; Lagarde 1993 note 12 para 7.

[61] For example, the application of article 2 was rejected because it was not relevant (Civ 1, No. 94-14858, 1996). See J Marguénaud 'De l'indifférence des juridictions judiciaires à l'égard de la Convention internationale relative aux droits de l'enfant' 1999 *Revue Trimestrielle de Droit Civil* 509; C Neirinck 'L'application de la Convention internationale de l'enfant à la découpe: à propos d'un revirement de jurisprudence' 2005 *Revue de Droit Sanitaire et Social* 814. Also, Civ 1, No. 98-22784, 2000.

[62] It decided that in applying the national law, the courts did not disregard articles 2 and 16 of the CRC (Crim, No. 98-84538, 1999) or article 3(1) (Crim, No. 00-84429, 2001) when they prohibited the foreign parents of children residing in France to remain in the country after completing their custodial sentence.

[63] With hindsight (and perhaps insight), these decisions are presented by the Court itself as a move toward accepting the direct application of the CRC (Cour de Cassation *Rapport Annuel 2009* note 29 at 85-86).

[64] Decaux 2010 note 8 at 498.

[65] Ancel 2001a note 13 at 21 (referring to the Preamble of the CRC). He also argued that although the majority of the CRC norms create obligations for the states, some recognize individual rights which can be applied directly (J Ancel (2001) 'La protection des droits de la personne dans la jurisprudence récente de la Cour de cassation' in Cour de Cassation *Rapport de la Cour de cassation 2000* ('Ancel 2001b') (online).

[66] Ancel 2001a note 13 at 21.

[67] Ancel 2001b note 65; J Ancel 'La Convention de New York relative aux droits de l'enfant devant la Cour de cassation' 2011 *Justice & Cassation* 13 at 19; Cour de Cassation *Rapport Annuel 2009* note 29 at 85-86; G Lebreton 'Le droit de l'enfant au respect de son "intérêt supérieur". Critique républicaine de la derive individualitste de droit civil français' 2003 (2) *Cahiers de la Recherche sur les Droits Fondamentaux* 77.

[68] Laurent-Boutot 2006 note 7 at 66, 132.

[69] Ibid at 132.

[70] B Bonnet 'Le Conseil d'Etat et la Convention internationale des droits de l'enfant à l'heure du bilan: De l'art du pragmatism' 2010 (17) *Dalloz* 1031; D Bureau 'De l'application directe en France de la Convention de New York du 26 janvier 1990 sur les droits de l'enfant' 2005 *Revue Critique de Droit International Privé* 679. More generally, F Dekeuwer-Défossez 'La convention relative aux droits de l'enfant, qui ne crée des obligations qu'à la charge des Etats parties, n'est pas directement applicable en droit interne' 1994 *Recueil Dalloz* 34; Rosenczveig 1996 note 60 at 190; Marguénaud 1999 note 61; Lagarde 1993 note 12.

[71] Dekeuwer-Défossez 1994 note 70; Lagarde 1993 note 12 para 6 and 7 (noting that the formulation of the Preamble to the European Convention on Human Rights and Fundamnental Freedoms, 1950/1953 ('the ECHR') and article 2(2) of the International Covenant on Civil and Political Rights, 1966/1976 ('the ICCPR') respectively did not prevent the Court of Cassation from giving direct effect to these treaties); Rongé 2004 note 60.

[72] At the time of *Lejeune*, the government announced legislative measures to implement the CRC (Laurent-Boutot 2006 note 7 at 58).

[73] Cour de Cassation *Rapport Annuel 2009* note 29 at 84; Ancel 2011 note 67 at 15.

of the position of the Court;[74] while others argued that the denial of direct application would not have a major impact considering that the French law largely complied with the CRC and that alternative legal means existed to achieve its objectives.[75]

The reasons for the Court's position blended legal and judicial policy reasons.[76] Article 4 constituted the main *legal* reason. The reference to implementation measures in this article was seen to reflect the intention of the parties to create obligations solely for the states, rather than individual rights enforceable domestically.[77] Massip, the presiding judge in *Lejeune*, went so far as to argue that the CRC is not drafted in normative terms.[78] Further support for this view was found in the formulation of other provisions,[79] many of them addressed to the states,[80] and enjoining them to 'guarantee', 'ensure', 'recognise' or 'respect' certain rights, or to take legislative measures.[81]

Another legal reason relied on to deny the direct applicability of the CRC was its monitoring mechanism.[82] The fact that the Committee on the Rights of the Child was only empowered to receive state reports documenting state *progress*, rather than individual communications to establish *violations* of the Convention, was taken as an implication that the CRC was not intended to have direct effect.[83] It was argued that a right to approach an international body is a clear indication of direct applicability,[84] and in its absence, 'it would be a paradox'[85] to apply the Convention directly in France if the Committee itself was not able to do something similar.

Although primary reliance in explaining the position of the Court was placed on the subjective criterion,[86] commentators noted that the CRC also fell short of the objective criterion. It was argued that the CRC norms are 'so general or even so vague that it cannot be seen how their violation can be invoked by individuals'[87] since a court 'cannot … make a decision referring

[74] Benhamou (cited by F Monéger 'La Convention des droits de l'enfant devant les juridictions administratives' 1996 *Revue de Droit Sanitaire et Social* 137).
[75] Dekeuwer-Défossez (1994 note 70), suggesting the optimum use of the existing national law, legal reform and the use of the ECHR to give effect to the CRC.
[76] The term *politique judiciaire* is used by Rongé 2004 note 60 at 15.
[77] Massip 1993 note 60; J Massip 'Lapplication par la cour de cassation de conventions internationales recentes relatives a l'enfance' 1995 (53) *Les Petites Affiches* 41.
[78] Ibid.
[79] It was argued that formulations such as states 'shall ensure', 'take all necessary measures', 'respect', 'recognise', 'assure', 'shall use their best efforts' were seen by the Court as reflecting state undertakings and not creating individual rights (B Vassallo 'La Convention des droits de l'enfant à la cour de cassation' 2010 (296) *Journal du Droits des Jeunes* 25 at 25. Also, Ancel 2011 note 67 at 14; Cour de Cassation *Rapport Annuel 2009* note 29 at 84.
[80] On this literal approach to the provisions of the CRC, see Dekewer-Défossez 1994 note 70.
[81] Massip 1995 note 77 part B. Partial support for this view in Ancel 2001a note 13 at 20.
[82] Massip 1995 note 77; Ancel 2001a note 13 at 20; Cour de Cassation *Rapport Annuel 2009* note 29 at 84.
[83] Massip 1993 note 60; Massip 1995 note 77.
[84] Dekeuwer-Défossez 1994 note 70.
[85] Ibid. It was argued that the absence (at the time) of an individual communication mechanism deprived the CRC of an important pressure tool for its direct application (C Sciotti-Lam *L'applicabilité des traités internationaux relatifs aux droits de l'homme en droit interne* (2004) at 411.
[86] Sciotti-Lam noted that the *en bloc* denial of direct application excluded the application of the objective criterion (ibid at 444).
[87] Massip 1993 note 60. For concerns about the vagueness and lack of precision of many CRC norms, see also Ancel 2001a note 13 at 20; Ancel 2011 note 67 at 14.

exclusively to the New York Convention as its justification'.[88] Even supporters of the CRC argued that its wording is 'too imprecise', and is riddled with gaps which make it difficult for it to act as an 'operational norm'.[89] Also, 'because of the imprecision and generality of its wording, [the CRC] may inspire a reading' which discourages direct application.[90]

Judicial policy reasons were important, and may have tipped the balance in favour of denying the CRC direct application. Thus, the pronouncements on direct application made in *Lejeune* were not necessary on the facts, because the child was listened to by both social workers and doctors, which *prima facie* satisfied the requirements of article 12 of the CRC.[91] Although the Court could have decided that the CRC was not breached,[92] it opted for a 'decision in principle'[93] rejecting the direct application of the entire CRC. The Court used this opportunity to curtail the multiplication of judicial views regarding the direct application of the CRC,[94] and to address concerns related to the potentially destabilising effect of the CRC[95] when used by courts too eager to set aside national law in favour of a direct application of the CRC.[96] It also intended to deter 'artificial litigation encouraged by the terms often vague and less precise of the Convention,'[97] and to prevent the development of a case-by-case approach to direct application, which would threaten legal certainty.[98] Reluctance to engage with socio-economic rights may have been a contributing factor,[99] as were the concerns about the potential tensions between the rights of the child and public order issues such as illegal immigration, fake marriages and other fraudulent means to gain residence in France.[100] In the face of such concerns, the formulation of article 4 provided a convenient *legal* cover. The denial of direct effect was seen as 'a deliberate strategic choice in relation to article 4 of the CRC',[101] a taking of 'refuge in a form of ostracism tainted by legal nationalism'[102] and a distortion of the application of established legal principles which governed the application of international

[88] Massip 1993 note 60.
[89] Dekeuwer-Défossez 1994 note 70.
[90] Neirinck 2005 note 61. Also, F Boulanger 'Applicabilité directe de la Convention de New York et intérêt supérieur de l'enfant' 2006 *Recueil Dalloz* 554.
[91] Massip 1993 note 60; Massip 1995 note 77.
[92] Dekeuwer-Défossez 1994 note 70.
[93] Massip 1995 note 77; Dekeuwer-Défossez 1994 note 70.
[94] Ibid.
[95] Concerns were raised, for example, about the potential of the CRC to 'complicate' the relationship between parents and children and the role of judges (Laurent-Boutot 2006 note 7 at 58; also, P Bonfils and A Gouttenoire *Droit des Mineurs* (2008)); the possibility that the Convention would be manipulated in the interest of adults, and the multiplication of appeals (Sciotti-Lam 2004 note 85 at 411-412).
[96] For example, during 1991-1992, relying directly on the CRC, some courts allowed children to intervene in the divorce of their parents; and judges admitted applications by children who refused to join their parents to religious shrines (Rosenczveig 1996 note 60 at 194).
[97] Massip 1995 note 77 part B.
[98] Ibid part B.
[99] Laurent-Boutot 2006 note 7 at 59-60.
[100] Hauser 1994 note 60.
[101] E Claes and A Vandaele 'L'effet direct des traités internationaux: Une analyse en droit positif et en théorie du droit axée sur les droits de l'homme' 2001 (34) *Revue Belge de Droit International* 411 at 449. Similarly, Sciotti-Lam 2004 note 85 at 411.
[102] Bonnet 2010 note 70.

conventions in the national legal order.[103] The Court clearly left it to the legislature to bring the law in line with the Convention.[104]

3.3.2 The 2005 decisions

In May 2005, the Court changed its approach. In two decisions rendered on the same day, the Court *de facto* applied the 'two stars'[105] of the CRC, articles 3 and 12, without, however, explicitly declaring that they have direct effect. In a first case, the CC decided that by not considering the request of a child to be listened to in an appeal against a residence decision, the court breached articles 3(1) and 12(2) of the CRC, read together with the relevant provisions of the Civil code and the Code of civil procedure.[106] A second case concerned a child born to a lesbian couple through artificial insemination. After the separation of the couple, one of the partners changed her sex, and recognised (the paternity of) the child, but this was challenged by the biological mother for being contrary to the biological reality. The court of appeal agreed, but recognised visitation rights to the transsexual parent. The Court decided that in granting visitation rights, the court of appeal considered the best interests of the child in article 3(1) of the CRC and thus 'has justified its decision in law'.[107]

In June 2005, the Court explicitly declared that article 3(1) was of direct application. It was argued that by ordering the immediate return of a child to the country of habitual residence, the lower court violated, *inter alia*, article 3(1) of the CRC. This was so because the severe impact of her uprooting from the environment in which she was already integrated constituted the exception to immediate return in article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction, 1980. The Court decided that in assessing the risk of danger to the child, article 3(1) of the CRC, which was of direct application, required that the best interests of the child be given a primary importance; the lower court did so when it decided on the return of the child.[108]

The Court abandoned therefore its position in *Lejeune* and embarked on an article-by-article approach to direct application. The decisions inspired mixed reactions. They were described as a 'spectacular U-turn'[109] or a result of a gradual change;[110] or a 'balanced evolution' unlikely to revolutionise the law considering the limited number of provisions recognised as being of

[103] Ibid; Bureau 2005 note 70; F Monéger 'Enfant (droits de l')' 2006 (January) *Répertoire International Dalloz* 1.
[104] Bonnet 2010 note 70. Some judges argued that it is the duty of the state to harmonise its laws with the CRC, and not of the courts to inquire into the consistency between the two (Massip 1993 note 60). Refusal to apply the CRC directly may have been a deliberate move to expose France to international responsibility for its failure to adapt its laws (Sciotti-Lam 2004 note 85 at 412). The 'technique' had been used before by the Court in the context of the ECHR (Laurent-Boutot 2006 note 7 at 215).
[105] A Gouttenoire 'L'application de la Convention internationale des droits de l'enfant' 2012 (50) *Les Petites Affiches* 17.
[106] Civ 1, No. 02-20613, 18 May 2005.
[107] Civ 1, No. 02-16336, 18 May 2005.
[108] Civ 1, No. 04-16942, 14 June 2005. Similarly, Civ 1, No. 08-18126, 2009.
[109] P Courbé 'L'application directe de la Convention des Nations unies sur les droits de l'enfants' 2006 *Recueil Dalloz* 1487.
[110] Reflected in decisions in which the Court did not use an article-4 based reasoning. See Laurent-Boutot 2006 note 7 at 66-67.

direct application.[111] There were also reservations about the direct effect of article 3(1) of the CRC and its use to challenge norms of general application.[112] But the Court was rather cautious. It applied article 12(2), for example, when the reformed legislation largely implemented this provision.[113] This prompted some commentators to argue that direct application had little more than a symbolic value since it did not lead to additional protection,[114] or that it was a 'sacrifice to the fashion of international norm'[115] since the CRC simply reinforced existing statutory obligations. [116]

Although the application of the CRC did not provide additional protection to that provided under the national law, these decisions were significant. In May 2005, the Court invoked the CRC *ex officio*,[117] showing its determination to break with its previous position.[118] These decisions legitimised the judicial use of the concept of the 'best interests of the child', as opposed to the 'interest of the child' recognised in French statutes.[119] Further, they paved the way for the CRC to be given effect as a supra-legislative norm, and for further development of the direct application of the Convention.

The change in the Court's position was brought about by a combination of legal, social and political factors.[120] The Court changed its view in relation to the meaning of article 4 of the CRC, accepting that this article did not characterise the legal nature of *all* CRC provisions,[121] and that while some provisions create obligations just between states, others create individual rights, which are not dependent on legislative intervention.[122] The monitoring mechanism of the CRC, unchanged at the time,[123] ceased to be mentioned as an obstacle to the direct application, illustrating the vulnerability of the argument in the first place. Despite the unanimous judgments, not all judges supported the *Lejeune* reasoning. This can be seen in

[111] Neirinck 2005 note 61.
[112] Bureau 2005 note 70; Bonfils and Gouttenoire 2008 note 95.
[113] Law 93-22 of 8 January 1993 introduced into the Civil code article 388-1, which read with articles 338-1 and 338-2 of the Code of civil procedure provided that a competent child may request to be listened to at any stage during the procedures (including for the first time in appeal), and that a decision not to listen to the child must be specifically motivated by the court. These domestic provisions were relied on by the Court in one of its 18 May 2005 judgments, along articles 3 and 12 of the CRC.
[114] F Dekeuwer-Défossez 'La Convention internationale des droits de l'enfant: quelles répercussions en droit français?' 2006 (5) *Cahiers de la Recherche sur les Droits Fondamentaux* 39 at 42.
[115] J Hauser 'La référence à la Convention internationale des droits de l'enfant (CIDE) fait recette à la Cour de cassation mais est-elle nécessaire?' 2006 *Revue Trimestrielle de Droit Civil* 101.
[116] Ibid.
[117] Ancel 2011 note 67 at 19; Bureau 2005 note 70; Vassallo 2010 note 79.
[118] The Court refers to the May 2005 decisions as 'decisions of principle' (*Rapport Annuel* note 29 at 86).
[119] Ancel 2011 note 67; Dekeuwer-Défossez 2006 note 114 at 42; Lebreton 2003 note 67 at 80. French legislation post-CRC generally uses the phrase 'interest of the child' rather than the 'best interests of the child' (for exceptions, see article L752-2 of the Code de l'entrée et du séjour des étrangers et du droit d'asile and article L 221-1.6 of the Code de l'action sociale et des familles). Nonetheless, judicial courts continue to oscillate between the two phrases (Cour de Cassation *Rapport Annuel 2009* note 29 at 87 and 91; Vassallo 2010 note 79 at 29).
[120] Courbé 2006 note 109.
[121] Bureau 2005 note 70.
[122] Ibid; Ancel 2001a note 13 and 2001b note 65.
[123] In 2016, France ratified the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (2011). To date (March 2019), the Committee dealt with one communication against France, which it rejected as inadmissible because the violations complained of occurred prior to the Protocol coming into force for France (7 April 2016) (*S.C.S v France*, 25 January 2018).

judgments where the CC did not rely on article 4 arguments or in extra-judicial writing of some judges.[124] The absence of dissenting opinions in French judgments[125] prevented the ventilation of viewpoints more supportive of the direct application, which in the end prevailed once the presidency of the First Civil Division had changed.[126]

The Court may have also been receptive to the robust academic criticism and an increasingly rights-oriented society.[127] The experience of the Council of State might have allayed fears that the French law will be thrown into disarray if the CRC is directly applied,[128] encouraging the Court to end the major divergence between their approaches:[129]

> the First Civil Division has adopted this [the Council's] analysis, harmonising therefore its jurisprudence with that of the Council of State, so as to give the treaty its full value: that of an international text, with a value superior to internal law, which imposes on the judicial judges – the same as on the administration – to give priority to the best interests of the child.[130]

The evolution of human rights jurisprudence, generally, made it difficult for the Court to continue denying the direct application of the CRC. The Court applied other treaties directly;[131] the best interests of the child had penetrated the ECtHR jurisprudence,[132] and the ECtHR gave judgments against France, in which the CRC played a role.[133] Finally, the lower courts occasionally 'rebelled' against the view of the Court[134] signalling the time for change.

3.3.3 After 2005

After the 2005 decisions, the Court of Cassation engaged more freely with the CRC although the number of provisions applied directly has remained low. The quasi-totality of its jurisprudence concerns article 3(1),[135] and it only rarely deals with other provisions.[136] For example, legal provisions allowing children born out of wedlock to take the surname of one of the parents, but not their united surnames, were found not to be contrary to article 8 of the CRC as long as the child possesses a civil status consistent with the law and reflecting the

[124] Especially, Ancel.
[125] Dissenting opinions are a 'quasi-taboo' and a 'profoundly foreign' tool for the French judiciary (J Ancel (2005) *Les opinions dissidents Cycle de conférences annuelles sur les méthodes de jugement* (online)).
[126] Laurent-Boutot talks about the influence of Jean-Pierre Ancel, the presiding judge of the First Civil Division, on the May 2005 decisions (2006 note 7 at 68-69).
[127] Courbé 2006 note 109.
[128] Ibid.
[129] Bureau 2005 note 70. However, the two courts continue to differ on some issues relating to the application of the CRC (Courbé 2006 note 109).
[130] Cour de Cassation (2006) *Rapport Annuel 2005: L'innovation technologique* at 416 (online).
[131] Courbé 2006 note 109. Lachaume notes that most ECHR and ICCPR norms have been recognised direct effect, despite 'not all being of great precision' (2009 note 10 para 96).
[132] Boulanger 2006 note 90. For example, the advocate general supported the direct application of article 3(1) of the CRC by relying on the use of this article by the ECtHR (Laurent-Boutot 2006 note 7 at 71-72). It was also argued that the use of the best interests of the child by the ECtHR has enhanced the influence of the CRC on the French law (Dekeuwer-Défossez 2006 note 114 at 40).
[133] Rongé 2004 note 60 at 15.
[134] Ancel 2001a note 13 at 21; Rongé 2004 note 60 at 15.
[135] Vassallo 2010 note 79 at 27. The dominance of article 3(1) is acknowledged by the Court itself (*Rapport Annuel 2009* note 29 at 85).
[136] See, for example, the table referred to in Le Defenseur des Droits *Effet Direct de la Convention Internationale relative aux Droits de l'Enfant dans l'Ordre Juridique Français* (cases up to 2015) (online).

relationship with the parent whose surname he/she carries.[137] In 2007, the Court refused to order the return of a child to Morocco, despite the unlawful removal of the child by the mother. It decided that the interest of the child is better served by maintaining the child in France because the return to Morocco would expose the child to a total and abrupt separation from the mother at the instance of the father (who had exercised his parental rights in bad faith), which would be contrary to article 9(3) of the CRC.[138]

In a 2006 case the Court invoked the CRC *ex officio*[139] and applied article 7(1) directly.[140] By recognising the child born prior to his birth *sous X*,[141] the father established the filiation with his son from the moment of the child's birth. Article 7(1) of the CRC gave the child the right to know the parent who recognised him and to be raised by him, although this right was not provided in the French law.[142]

Socio-economic rights are generally avoided by the Court. In several cases it was argued that contrary to articles 3(1), 24(1) and 26 of the CRC, child grants were denied to legal migrants whose children joined them without following the family reunification procedures set by the French law, because the legality of children's entry into France could not be proved by producing the special medical certificate issued by the relevant authorities.[143] The Assembly of the Court decided that making the grant conditional upon the presentation of the special medical certificate had an

> objective character justified by the necessity within a democratic state to control the influx of children, [and] did not constitute a disproportionate interference with the right to family life guaranteed by articles 8 and 14 of the ECHR, and did not disregard the dispositions of article 3-1 of the Convention on the Rights of the Child.[144]

Notably, the Court carefully avoided declaring the compatibility of the law with the socio-economic rights provisions, limiting itself to an assessment against article 3(1).

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[137] Civ 1, No. 08-18871, 2010. In another decision, the CC stated that the right to preserve one's identity does not prevent all name changes (Civ 1, Nos 07-16067 and 07-18811, 2008).
[138] Civ 1, No. 06-12687, 2007.
[139] Vassallo 2010 note 79 at 33
[140] Bonfils and Gouttenoire 2008 note 95.
[141] The mother decided to give birth anonymously.
[142] Civ 1, No. 05-11285, 7 April 2006 (known as the *Benjamin* case). The Court also engaged with article 7(1) in Civ 1, No. 10-19028, 2011, where a mother entrusted her new-born baby for adoption, with the child not having the filiation established in relation to any of the parents. During the adoption process, the biological parents recognised the child. The recognition was set aside by the courts, and then appealed by the father who argued that the adoption would create an insurmountable obstacle for the child to know her father and build a relationship with him, which was contrary to article 7(1) of the CRC. The Court found that article 7(1) was not breached and that by the time the adoption process started, sufficient time has passed for the parents to have recognised the child prior to that point. It added that it would be contrary to the best interests of the child to deprive her of a stable family, while waiting for the hypothetical recognition of the child by the biological parents.
[143] See Rapport de Mmes Coutou et Vassallo Conseillers référendaires, Avis de la Cour de cassation 8 October 2007, *Bulletin d'information* 2008 No. 674, 12; Rapport de Mme Monéger Conseiller rapporteur (Pourvoi no 09-69.052 *Bulletin d'information* 2011 No. 747, 20) (online).
[144] Ass, No. 09-69052, 3 June 2011; Ass, No. 09-71.352, 3 June 2011 (the latter decision rendered exclusively on articles 8 and 14 of the ECHR); Ass, No. 11-17520, 5 April 2013. The position of the Court was later endorsed by the ECtHR in *Okitaloshima Okonda Osungu c France* and *Selpa Lokongo c France*, 1 October 2015, Applications Nos 76860/11 et 51354/1.

To conclude, after more than a decade of rejecting the direct application of the CRC, the Court of Cassation is cautiously engaging with the Convention. Although the number of provisions directly applied is limited, the jurisprudence is clearly developing.

3.4 The direct application of the CRC by the Council of State

The Council of State applied the CRC directly on an article-by-article basis from the outset. However, its case law is peppered with inconsistencies and uncertainties,[145] as illustrated by its jurisprudence on articles 7, 9, 10, 12 and 16. All of these articles were at some point denied direct effect for a reason which became the hallmark of the CE's engagement with many CRC norms:[146] that they create obligations between states rather than individual rights which can be applied directly.[147] Sometimes, these articles are now applied directly by the CE (as shown below) without an explanation being provided for the change in perspective.

Some examples illustrate how the CE has applied the above articles when it eventually decided to give them direct effect. A decision to deport a foreign national, married with a French resident with whom he had four children, and whose family reunification application was rejected, did not violate article 7(1) because there were no obstacles to the applicant taking his family overseas, where children could be brought up by both parents.[148] However, a violation of article 7(1) (read with article 3(1)) would occur if the deportation of a parent resulted in the interruption of affective ties between the child and the other parent, who was unable to leave France because he was imprisoned.[149] A refusal of a short-term visa to a child did not constitute a violation of articles 9 and 3(1) since the child's French resident father could visit his son overseas.[150] Together with article 3(1) (and the Preamble of the 1946 Constitution and article 8 of the ECHR), article 9 could justify granting a permission to reside in France to the parents

[145] Some refer to the 'confusion, even incoherence' of the Council's jurisprudence (R Errera (2005) *L'application de la Convention Internationale relative aux Droits de l'Enfant et l'Incidence de la Convention Europeenne des Droits de l'Homme sur les Droits de l'Enfant* at 7 (online).
[146] For further discussion, Sciotti-Lam 2004 note 85 at 401.
[147] Articles 7 and 9 'create obligations only between states and do not create rights for their subjects' (CE, No. 181137, 1997; CE, No. 238724, 2003), or article 9 created obligations only between states (CE, No. 143866, 1994; No. 265003, 2004). In a challenge to the deportation of a family with two children born in France, the Council decided that articles 2, 4, 8, 9, 10 and 28 create obligations only between states, and cannot be applied directly (CE, No. 173470, 1997). However, article 9 was tacitly applied when the Council rejected as unfounded the allegations that it (and article 19) would be violated by the deportation of the applicant's family to Mali, where the children would be allegedly exposed to various risks (FGM, poor nutrition and sanitation) (CE, No. 136601, 1993). In 1995, the Council implicitly applied article 16 (CE, No. 141083, 10 March 1995 (known as *Demirpence*), and in 1999, it assessed the consistency between certain provisions of the Civil code regarding the exercise of parental authority over children born outside marriage, and articles 3(1) and 16 (CE, No. 191232, 1999). In 2002, however, in an appeal against a decision to deport a foreign national whose spouse was residing regularly in France with the couple's child, the Council, decided that article 16, together with articles 7 and 9, creates obligations only between states, and cannot be applied directly (CE, No. 214664, 2002).
[148] CE, No. 247587, 2004.
[149] CE, No. 300721, 2009. Interestingly, when not applied with article 3(1), article 7 was subsequently denied direct application because together with article 8 of the CRC, they create obligations exclusively between states. (CE, No. 364895, 2013). Notably, this is the last case in which the Council relied on this reasoning in relation to the CRC.
[150] CE, No. 326046, 2010.

of girls granted refugee status because of their risk of FGM in their country of origin, although the parents themselves could not be recognised as refugees.[151]

While initially it refused to apply article 10 directly,[152] the Council applied it implicitly when it decided that it could not be invoked by a French resident whose siblings were not authorised to join her in France, because this article applies only between ascendants and descendants, and in relation to leaving and returning to one's country of origin.[153] Article 12(2) was explicitly declared of direct application in an immigration appeal in which it was objected that a child herself had not been listened to by authorities. The appeal was rejected because the view of the child was conveyed to the authorities by the child's grandmother.[154] In 2004, the Council decided that the deportation of an illegal migrant and his separation from his children residing regularly in France did not constitute a violation of article 16, because it was not an *arbitrary* interference with the children's private and family life.[155]

Other articles have generated a more consistent jurisprudence. In *Cinar*,[156] the Council recognised the direct effect of article 3(1), an article which now dominates its jurisprudence. The case concerned a Turkish mother residing lawfully in France who brought with her, illegally, her 4-year-old son. She applied for the child to be granted a residence permit, but the application was rejected because the law required that applications for family reunification be made from abroad.[157] The mother appealed relying exclusively on the ECHR and CRC. The *commissaire du government* Rony Abraham supported the direct application of article 3(1), which he considered the only well-founded reason for the appeal.[158] Abraham argued that article 3(1) was of direct application because no additional measure was needed for its application. Also, its general nature and propensity to multiple interpretations did not prevent its application by administrative judges, who were accustomed to dealing with the application of general norms, such as general legal principles.[159] Thus, despite the illegal entry of the child into France, a separation from the mother, even temporarily, in the circumstances of the case (unknown father and no family members able to care for the child in Turkey), was contrary to article 3(1) of the CRC.[160] The administrative decision was invalidated and national law set aside in favour of a direct application of article 3(1).[161]

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[151] CE, No. 368676, 2013.
[152] CE, No. 254401, 2004; CE, No. 274139, 2005.
[153] CE, No. 155096, 1998; similarly, CE, No. 238724, 2003. On the vacillations of the jurisprudence on article 10, see also Errera 2005 note 145 at 7.
[154] CE, No. 291561, 2008.
[155] CE No. 265003, 2004. Article 16, in conjunction with article 3(1), was also used to assess the lawfulness of a decree regarding the creation of a database with personal data (including of children below the age of 13) aimed at preventing threats to the public security (CE, No. 332886, 2013; CE, No. 389815, 2015).
[156] CE, No. 161364, 22 September 1997 (known as *Cinar*).
[157] M Reydellet 'La convention des droits de l'enfant n'est pas un traité "hors-jeu" (Conseil d'Etat, 22 septembre 1997) Mlle Cinar (req. no 161364; Conclusions Abraham)' 1998 (11) *Les Petites Affiches* 17.
[158] Ibid. As explained by Abraham, the French law allowed the administration to reject the application if the applicant was already in France.
[159] Reydellet 1998 note 157.
[160] The applicable law at the time did not contain a provision entitling the administration to give primary consideration to the best interests of the child in deciding reunification applications, an effect achieved through the application of article 3(1).
[161] Reydellet 1998 note 157.

Challenges to extradition and detention conditions saw the Council apply article 37. It decided that articles 37(b) and (c) do not prohibit the extradition of a minor, as long as it takes place, as required by the French law, to a country that has special legal provisions concerning child offenders.[162] A decree which provided that detention centres for immigrant families in process of being deported need to be specially equipped and contain child-specific materials was not contrary to articles 3(1) and 37 CRC because it was not intended to encourage the use of detention of minors other than as a last resort, but rather to establish the standards for such detention.[163] In 2008, the Council invalidated a ministerial decree which permitted the use of solitary confinement for children, noting that articles 3(1) and 37 require

> the adaptation of a detention regime of minors in all its aspects in order to respond to their age and impose on the administrative authority an obligation to give a primary consideration to the best interest of children in all the decisions which concern them.[164]

As the decree did not offer sufficient guarantees of a special treatment for children, the Council invalidated its provisions to the extent of their applicability to children.

More recently, the Council applied articles seldom engaged with by courts. In 2011, it decided that there was no violation of article 13 by a media regulator which prohibited a television station from broadcasting an anonymous interview with a child offender whose mother explicitly opposed the broadcasting.[165] Article 32 was raised in a challenge to two decrees which permitted derogations from the existing prohibition of employment of young workers in dangerous environments, and the authorisation of children aged 15-18 to work in asbestos-contaminated environments during their professional training.[166] The government justified the derogations through the absence of skilled work in relevant industries (i.e., repairs and restoration of old buildings). Although it found the decrees partly unlawful on domestic law grounds,[167] the Council pronounced that they were not inconsistent with articles 32(1) and (2)(b) of the CRC, because these articles permitted the authorisation of employers to train workers aged 15-18 in environments where the asbestos concentration was below a dangerous level.[168]

[162] CE, No. 220271, 2001 (known as *Nezdulkins*).
[163] CE, No. 282275, 2006. But see the vulnerability of the Council's position under articles 3 and 5 of the ECHR in *Popov v France* (Application No. 39472/07 and 39474/07; 19 January 2012) and *A.B and others v France* (Application No. 11593/12; 12 July 2016).
[164] CE, No. 293785, 31 October 2008 (known as the *Section Francaise de l'Observatoire International des Prisons*).
[165] CE, No. 334289, 2011. The Council also found that there was no disproportionate interference with article 10 of the ECHR.
[166] CE, No. 373968, 2015.
[167] CE, No. 373968, 2015 para 11.
[168] CE, No. 373968, 2015 para 13.

A significant number of provisions were, however, declared as not having direct effect. These provisions include article 2;[169] article 3(2);[170] article 3(3);[171] article 4;[172] article 5;[173] article 6;[174] article 8;[175] article 11;[176] and articles 24(1), 26(1) and 27(1).[177] A few examples illustrate the approach of the Council. The Council rejected the application of articles 12(1) and (2) and 14(1) as creating only obligations between states in a challenge to the refusal of a minister to abrogate a decree concerning the delivery of medical care to a child against the wishes of the parents.[178] In a challenge against a decision to deport the married mother of two children born in France, it held that article 18(1) creates only obligations between states without creating individual rights.[179] In 2011, an appellant disputed his obligation to pay additional tax, arguing that no consideration was given to the fact that he contributed to the upbringing of three children living in Pakistan. As the Pakistani law prohibited adoption, he was unable to adopt the children and thus establish the legal filiation on which the fiscal law conditioned the tax rebate. The Council stated that articles 2, 3(2), 3(3), 5, 19, 20 and 27 do not have direct effect and cannot be invoked directly before the courts.[180] The Council went on to find that article 3(1) was not disregarded by the provisions of the fiscal code which established the category of children considered to be under the charge of a person demanding a tax rebate. In 2007, the Council decided that the exclusion of a child from a French language school in Morocco for the non-payment of fees could not be challenged against article 28 which proclaims free primary education, because the article creates only obligations between states.[181] In 2001, in relation to the refusal of residence permit to a child's aunt, the Council decided that articles 2, 9, 20 and 29 did not produce effects in relation to individuals, and that article 3(1) was not disregarded when the authorities established that the presence of the applicant was not a necessity for the child and his family.[182]

[169] CE, No. 262670, 2004 (articles 2 and 9 create only obligations between states). In other decisions, the direct application was rejected for other reasons: CE, No. 320321, 2011 (it has no direct effect, together with 3(2), 3(3), 5, 19, 20 and 27); CE, No. 323758, 2010 (insufficient information to establish whether the claim was well-founded); CE, No. 359223, 2014, para 7 (article 2(2) not 'useful' in that it does not have direct effect).
[170] CE, No. 291561, 2008; CE, No. 293785, 2008.
[171] CE, No. 293785, 2008; CE, No. 320321, 2011 (below).
[172] CE, No. 176205, 1997.
[173] CE, No. 320321, 2011.
[174] CE, No. 170098, 1997; CE, No. 220588, 2002 (articles 4, 6 and 9 create only obligations between states). However, in 2001 the Council found that a decision to authorise the commercialisation of an oral contraceptive was not contrary to article 6 CRC (and article 2 of the ECHR and article 6 of the ICCPR) (CE, No. 216521, 2001).
[175] CE, No. 173470, 1997 (articles 2, 4, 8, 9, 10 and 28 create obligations between states); CE, No. 155096, 1998; CE, No. 364895, 2013.
[176] The CE decided that articles 7, 10 and 11 did not apply to the deportation of an applicant married to a French resident and the mother of his child (CE, No. 150167, 1996).
[177] CE, No. 163043, 23 April 1997 (*GISTI* 1997). Also CE, No. 204784, 2000 (articles 26 and 27; found that article 3(1) was not disregarded when considering the whole legal framework); CE, No. 253365, 2004 (article 24); CE, No. 320321, 2011 (article 27).
[178] CE, No. 140872, 1996. Later, the CE decided that article 12(2) can be applied directly.
[179] CE, No. 240001, 2002.
[180] CE, No. 320321, 2011. In an earlier decision, the Council found the allegations in relation to article 19 unfounded (CE, No. 136601, 1993).
[181] CE, No. 297871, 2007.
[182] CE, No. 213745, 2001.

Many of the decisions in which the direct application of CRC was rejected relied on the CE's pre-2012 view that articles addressed to the states do not create individual rights but obligations between states. This reasoning has been used by the Council overwhelmingly in relation to the CRC,[183] and especially in relation to article 9, but also in relation to articles 2, 4, 6, 7, 8, 10, 12, 14, 16, 18, 28 and 29. It is clear that this reasoning was stretched beyond articles addressed primarily to states,[184] suggesting that the reason for the denial of direct effect may rather be the perceived lack of completeness of some CRC norms. Clarity is difficult to obtain considering that the Council's formal reasons do not always match its substantive reasoning.[185] Thus, some of the provisions not recognised as having direct effect because of lack of completeness have also been denied direct application because they allegedly created obligations only between states.[186]

The literal approach that enabled a simplistic discarding of some CRC provisions has lost its grip on the administrative jurisprudence. Following *GISTI and FAPIL* 2012 the Council can no longer dismiss the direct application of CRC norms based solely on a criterion to which many of its norms were vulnerable. This ought to make the Council engage more carefully with the content of the norms, and assess their precision and clarity. The dominance of article 3(1) may permit the Council to avoid doing so, but some changes in its reasoning can be noticed. Post-*GISTI and FAPIL*, it used the mentioned literal approach in only one decision.[187] Further, it assessed the lawfulness of two decrees against article 32, which is overtly addressed to the states,[188] and then, in a challenge to the implementation norms of the statute which recognised same-sex marriages, it pointed out that articles 21 and 22 of the CRC (also addressed to states) do not require that marriage and adoption be reserved for heterosexual couples.[189]

The Council relies on the CRC to assess the lawfulness of normative administrative acts and the consistency of legislation with the Convention (the *conventionalité*). Cases in which inconsistency with the CRC is established do not abound, and they concern primarily article 3(1). However, they are significant because they assert the legal status of the CRC as a supra-legislative instrument. As seen above, in *Cinar*, the Council set aside national legal provisions in favour of a direct application of article 3(1). In the 2006 *L'Association Aides*,[190] it declared incompatible with the CRC a statute and its implementing decrees that made access to state medical care by illegal immigrants dependent on a period of three months uninterrupted residence in France. Thus, before fulfilling the residence requirement, children residing in France illegally could only access emergency medical care. The Council decided that this

[183] Of the 96 cases which used the formula 'créent seulement des obligations entre Etats' ('exact phrase' search on *Legifrance*; 1 August 2016) between 7 September 1990 and 1 August 2016, only seven (7) relate to other international treaties, and of those only one refers to another human rights treaty (the Convention on the Elimination of All Forms of Discrimination Against Women).
[184] Articles 7, 14 and 16, for example.
[185] Abraham 1997 note 18.
[186] Articles 2 and 8, for example.
[187] CE, No. 364895, 2013 (in relation to articles 7 and 8). By comparison, this reasoning was used by the Council prior to *GISTI and FAPIL* 2012 in 107 judgments (*Legifrance* search 14 November 2018).
[188] CE, No. 373968, 2015.
[189] CE, No. 370459, 2015 para 14.
[190] CE, No. 285576, 2006.

limitation of access to health care disregarded articles 1 and 3(1) of the CRC, which require the state not to limit children's access to medical services necessary to protect their health.[191] More recently, the Council articulated its expectation that lower courts do not automatically apply a national statute, and instead enquire first into its compatibility with article 3(1) of the CRC. Thus, the Council criticised an appeal court for concluding that article 3(1) was not breached by the administrative authority that simply gave effect to a statutory rule,[192] and decided that by 'not assessing if the *law itself* [my emphasis] was compatible with these stipulations [article 3(1)], the court committed an error in law'.[193]

Although in many decisions the Council disposed of the CRC-related issues by simply finding the compatibility of national norms with the Convention, its recent jurisprudence shows that it expects more. In 2014, the *Observatoire* invoked articles 3(1) and 37(c) to challenge the legality of a decree which abrogated statutory provisions requiring that the family of an incarcerated child and child offender protection services be immediately informed of the detention, and that a timely visit be paid to the child by the probation services.[194] The Council decided that the abrogation decree did not disregard the mentioned articles, but that these directly applicable CRC provisions must be applied in the individual decisions made by the prison authorities.[195] Consequently, the direct application of the above provisions may lead, in individual cases, to the immediate notification of the family and protection services of the taking into detention of a child, and timely visits of the child by the above.

A drawback of the Council's position is that the lawfulness of administrative acts and the consistency of laws with the CRC are only assessed in relation to those articles recognised as having direct effect. This position was established in *GISTI* 1997.[196] The applicants requested the invalidation of a decree that made access to social security conditional on proof of legal residence. The applicants invoked, amongst others, articles 24(1), 26(1) and 27(1) of the CRC. The Council refused to apply these articles, indicating that they do not produce effects regarding individuals and therefore cannot be invoked for the invalidation of a decision concerning individuals or of a decision of general application.[197] The Council disagreed with the *commissaire du government* Abraham, who sought to make a distinction between challenges to individual decisions, in which norms ought to be of direct application, and challenges against norms of general application, where the control norm need not be of direct

[191] This was significant considering that the Constitutional Council declared the statute consistent with paragraph 11 of the Preamble to the 1946 Constitution and the equality principle (paras 14-20 of Décision No. 2003-488 DC du 29 décembre 2003 Loi de finances rectificative pour 2003).
[192] The issue concerned access to certain welfare payments by migrants residing legally in France but not meeting certain length-of-stay criteria.
[193] CE, No. 375887, 2015.
[194] CE, No. 369766, 2014.
[195] CE, No. 369766, 2014 para 10.
[196] See also Gouttenoire 2012 note 105. According to Slama (2012 note 18), *GISTI* 1997 and *Cinar* have established the view of the Council with regard to the direct application and that since then the CE has constantly blocked the invocation of norms without direct effect before the courts.
[197] Abraham (1997 note 18) argued that they are not of direct application because they require implementation measures. Chauvaux and Girardot (1997 note 8) pointed out, however, that although articles 24 and 26 might not be sufficient by themselves as they rest on the state organizing a medical and social security system, such system already existed in France.

application.[198] The Abraham position received substantial support.[199] It was argued that in the control of domestic norms what is necessary is for the treaty norm to have a sufficient degree of normativity to allow it to serve as a 'reference norm'.[200] Nonetheless, in *GISTI and FAPIL* 2012 the Council reiterated its earlier view and its determination to exclude norms not recognised as having direct effect from the Council's adjudicatory function.[201] This is significant considering that its jurisprudence, like that of the Court of Cassation, focuses on the direct application of the CRC, which is only exceptionally used as an interpretation aid.[202] For example, the Council refused to invalidate a ministerial decree for reasons of its inconsistency with the CRC, but interpreted it in the light of article 3(1) to imply an obligation for prison authorities who take disciplinary measures against juvenile offenders to inform the children's guardians and allow them to arrange representation for the child.[203]

To conclude, the Council has been 'extremely cautious'[204] in its direct application of the CRC, but its jurisprudence is increasingly diverse, and recent developments raise hopes for a positive evolution.

3.5 An assessment of the impact of the direct application of the CRC in France

3.5.1 Introduction

As seen above, both courts engage with the CRC primarily from the perspective of direct effect. In the cases consulted for this study, the Convention is rarely used for interpretation purposes,[205] and lacks therefore an alternative outlet to produce domestic effects.[206] While both courts apply the CRC directly, their jurisprudence contains inconsistencies and sharp turns which are hardly explained. The direct application reasoning is cryptic (especially for a foreign researcher) and lacks detail, making the jurisprudence difficult to navigate. It is not always clear how the courts engage with the direct effect criteria. While reference to the subjective criterion is made by the courts, a transparent engagement with the objective criterion is lacking.

[198] Abraham 1997 note 18.
[199] Chauvaux and Girardot 1997 note 8; Gouttenoire 2012 note 105; Dumortier 2012 note 18.
[200] For instance, Dumortier (ibid) points out that in the control of norms the judge only verifies the compliance of a decree or law with a treaty, and if necessary, invalidates or discards the offending norm.
[201] Latty 2015 note 10 at 681.
[202] CE, No. 349624, 2011.
[203] CE, No. 253973, 30 July 2003 **(***Section française de l'Observatoire international des prisons)*.
[204] Rongé 2004 note 60 at 14. Errera (2005 note 145 at 4) talks about a 'restrictive' approach.
[205] Examples are Civ 1, No. 11-28424, 2013; CE, No. 253973, 2003.
[206] The CRC norms not recognised direct effect are sometimes used for interpretation purposes in other jurisdictions (M Limbeek and M Bruning 'The Netherlands: Two Decades of the CRC in Dutch Case Law' in T Liefaard and J Doek (eds) *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 89 at 95).

There is an underlining concern about the lack of clarity and precision or completeness of the CRC,[207] but what justifies this concern is not explained.

To assess the impact of the direct application of the CRC, the paragraphs below evaluate the extent of recognition of direct effect and its legal consequences. Inevitably given its dominance, much of the assessment is made in relation to the article 3(1) case law.

3.5.2 Scope

Overall, only a few CRC provisions have been recognised as having direct effect (article 1, 3, 7, 8, 9, 10, 12(2), 13, 16, 20 and 21, 32) and there is no perfect overlap between provisions applied directly by the two courts. The domination of article 3(1)[208] has created a 'comfort zone' for the courts and litigants but has removed the incentive to wrestle with the direct application of other articles. Although protection-oriented provisions are most popular, autonomy-oriented rights (articles 13, 16) have started to be applied. The limited number of directly applied articles is partially compensated for by the increasing diversity of legal issues in relation to which the CRC is raised such as abduction;[209] taxation;[210] parenthood and homosexuality;[211] use of sport performance-enhancing drugs;[212] departure of children to Syria to join Islamic State militants;[213] legal aid fees;[214] the choice of name;[215] termination of employment for privately-hired child minders;[216] extradition of child offenders[217] or of primary caregivers;[218] and the regulation of hazardous work.[219]

At a first glance, the ascendancy of article 3(1) is surprising considering that it is the 'most explosive'[220] CRC provision, is not formulated as a typical directly applicable norm,[221] and is not exemplary in its precision. Despite possible concerns, this article has become so influential that it lends its legal clout to other norms, with positive effects for their application. Thus, at times, article 3(1) has absorbed the substance of norms denied direct effect,[222] including socio-

[207] Abraham 1997 note 18; Ancel 2001a note 13 at 21; Massip 1993 note 60; Vassallo 2010 note 79. In its *Rapport* 2009 at 84, the Court of Cassation comments that many CRC provisions do not recognise 'precise and determined rights' because they are 'very general, even vague'.
[208] A search on the *Legifrance* website (on 12 June 2016), using the exact phrases employed by the Court of Cassation and Council of State to refer to the CRC indicates the following: the Council referred to the CRC in 403 decisions, of which only 62 did not concern article 3(1); the Court referred to the CRC in 167 cases, and only 58 did not refer to article 3(1). While this is not an infallible quantitative account, it is indicative of the dominance of article 3(1) in the two courts' case law.
[209] Civ 1, No. 16-20858, 2016.
[210] CE, No. 320321, 2011 (see discussion accompanying note 180 above).
[211] CE, No. 370459, 2015.
[212] CE, No. 363376, 2013.
[213] CE, No. 386817, 2015 (article 3(1) did not create an obligation for the state to impose a general rule requiring that French minors have the written authorization of their parents in order to be allowed to leave France).
[214] CE, No. 370989, 2016 (article 3 invoked).
[215] Civ 1, No. 10-27512 11-19963, 2012 (naming a child after a cartoon character – 'Titeuf', which is close in pronunciation with 'Little Egg' – was not in the child's interests).
[216] Soc, No. 13-17603, 2015.
[217] *Nezdulkins* discussed in text accompanying note 162.
[218] CE, No. 385927, 2015 para 6 (discussed below in text accompanying note 282).
[219] See discussion accompanying note 166 above.
[220] Courbé 2006 note 109.
[221] Bureau 2005 note 70.
[222] Prior to accepting the direct application of articles 9 and 10, the Council applied article 3(1) to protect the relationship between children and parents in immigration matters (F Monéger 'Le Conseil d'Etat met en avant

economic rights;[223] and at other times, when considered together with some CRC norms, it resulted in their direct application despite such articles not being recognised as having direct effect on their own.[224] That the norm is not addressed to the states but rather to its institutions, including the courts,[225] may have suited the literal approach taken by the courts, and, in turn, facilitated the recognition of its direct effect. Other contributing factors may have been the generality and flexibility of the provision;[226] the fact that it did not require implementation measures;[227] and the familiarity of the courts with the concept of the 'interest of the child'.[228] While controversy remains in terms of the role and value of article 3(1),[229] these concerns have not deterred the development of a comprehensive and increasingly diverse jurisprudence.

3.5.3 The legal consequences of the direct application of the CRC in France

Despite some scepticism regarding the impact of direct application of the CRC in France,[230] the CRC has left its mark on the jurisprudence.

3.5.3.1 The 'high-end' impact of direct application

Far-reaching consequences of a norm being recognised as having direct effect include providing the legal reasons for the decision, covering gaps in the national law, and dislocating (with or without substitution) conflicting domestic norms (statutes or normative administrative acts).

Although not very frequently, there have been cases where the CRC was the sole reason for a decision, and resulted in children benefiting from legal protection beyond that recognised in the national law. In *Benjamin*, the right to know one's parents (article 7(1)) was recognised for children despite not being explicitly provided for in the French law. Article 9(3) served as the sole justification for the refusal to order the return of a child unlawfully removed from the

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l'intérêt supérieur de l'enfant contenu dans la Convention des Nations Unies sur les droits de l'enfant' 1998 (3) *Revue de Droit Sanitaire et Social* 174).

[223] In *L'Association Aides*, the Council formally applied article 3(1) but gave effect to the substance of article 24, which it previously declared as not having direct effect (L Gay 'L'affirmation d'un droit aux soins du mineur étranger ou l'inconventionnalité partielle d'une loi jugée conforme à la Constitution' 2006 (11) *Revue de Droit Sanitaire et Social* 1047). Recently, the Court of Cassation assessed the conformity with article 3(1) of the CRC of certain statutory provisions, although the values sought to be protected related to articles 26 and 27 of the CRC (see discussion in part 3.3.3 above).

[224] Articles to which the Council denied recognition of direct effect when applied independently (articles 7, 9 and 16) were so applied when invoked together with article 3(1) (see part 3.4 above).

[225] Rongé 2004 note 60 at 14; P Bordry 'Le Conseil d'État français et la Convention internationale relative aux droits de l'enfant' 2001 (205) *Journal du Droit des Jeunes* 16 at 19.

[226] Neirinck 2005 note 61; Schwartz refers to article 3 as formulating a principle and 'not an obligation for the State. It is therefore this principle which is of direct application' (R Schwartz 'La jurisprudence du Conseil d'État et les droits de l'enfant' 2010 (296) *Journal du Droit des Jeunes* 37 at 38 fn omitted).

[227] Abraham 1997 note 18; Reydellet 1998 note 157.

[228] See, M Gobert (2006) *Le droit de la famille dans la jurisprudence de la Court de cassation* (online); Lebreton 2003 note 67; Hauser 2006 note 115.

[229] F Dekeuwer-Défossez 'L'effectivité de la CIDE: rapport de synthèse' 2010 (200) *Les Petites Affiches* 35; P Verdier 'Pour on finir avec l'interest de l'enfant' 2008 (280) *Journal du Droit des Jeunes* 34; Bonfils and Gouttenoire 2008 note 95; Gobert 2006 note 228; Lebreton 2003 note 67; Vassallo 2010 note 79. The Court of Cassation itself questioned the reliance on article 3(1) when the interest of the child is mentioned in relevant domestic texts, but it concludes that its usage emphasises the centrality of the concept for the decision-maker (*Rapport Annuel 2009* note 29 at 90).

[230] Cour de Cassation *Rapport Annuel 2009* note 29 at 92; Hauser 2006 note 115; Schwartz 2010 note 226 at 39; Vassallo 2010 note 70 at 33.

country of habitual residence.[231] Article 3(1) was used to justify individual exceptions from the application of laws which may otherwise disproportionately affect some children. For example, children born overseas through surrogacy to French parents, could be issued with French travel documents, because, although surrogacy is contrary to French public order, the administration has an obligation to give a primary consideration to the best interests of children.[232] Children placed in kafala (called '*makfoul*') can benefit from the family reunification procedure, despite not falling within the category of children allowed by statute to apply for it,[233] if the denial of reunification would constitute an excessive interference with private and family life of the *kafil* (kafala carers) and a violation of article 3(1).[234] The *makfouls* living with their *kafils* in France can be issued with French travel documents, despite the law not explicitly providing for this possibility, if it is established that denying such documents would breach article 3(1) of the CRC.[235]

The Court of Cassation is less inclined to go beyond the letter of the law. Unlike the Council it has not extended to the *makfoul*s benefits not explicitly bestowed upon them by the law. Thus, it set aside a decision which, based on articles 3(1) CRC and articles 8 and 14 of the ECHR, ordered the state to pay a *kafil* the child benefit reserved by statutes for adoptive parents or persons who received a child for the purposes of adoption.[236] Also, the Court has been unwilling to recognise the filiation between French commissioning parents and children born thorough surrogacy overseas, as discussed below.

The supra-legislative status of the CRC often materialises in the legality control of individual administrative decisions. For example, a deportation decision consistent with article 8 of the ECHR was not implemented, in the light of article 3(1) of the CRC, because the applicant gave birth after the deportation was decided, and the new-born was under the care of a French resident.[237] Further, because it is presumed to be in the best interests of the child to live with the person who has parental authority, French administration cannot generally refuse to grant residence to a child, without breaching article 3(1), by claiming that it is in the child's interest to remain with his biological parents in the country of origin.[238] Nonetheless, it is not always in the best interests of children placed in notarial *kafala*[239] to live with the *kafil* in France, and the courts have to decide whether a refusal to grant a long term visa breaches article 3(1).[240]

[231] Civ 1, No. 06-12687, 2007.
[232] CE, No. 348778, 2011; CE, No. 401924, 2016 (issues of nationality and filiation are acknowledged to be under the jurisdiction of judicial courts).
[233] For exceptions, see Rapport de Mme Guyon-Renard Conseiller rapporteur Avis 17 December 2012 *Bulletin d'information* No. 777 of 1 March 2013, 7.
[234] CE, No. 249369, 2004; CE, No. 220434, 2004. Also, Monéger 2006 note 103.
[235] CE, No. 351906, 2012.
[236] Civ 2, No. 08-15571, 2009. Also, Vassallo 2010 note 79 at 27.
[237] CE, No. 274713, 2006.
[238] CE, No. 305031, 2009. However, the visa can be refused if it is not in the interest of the child to join the *kafil* for other reasons, such as his/her resources or living conditions (CE, No. 337091, 2010). For more, see Rapport de Mme Guyon-Renard 2012 note 233.
[239] This is different from judicial *kafala.* Children placed in notarial *kafala* in Morocco are not orphans nor are their biological parents unable to care for them.
[240] CE, No. 330211, 2013 para 4.

In rare cases, the direct application of the CRC has led to the setting aside (non-application) of national law and the invalidation of normative administrative acts. The courts are reluctant to declare statutes incompatible with the CRC;[241] and although, in principle, they are willing to evaluate national law against the CRC, cases in which incompatibility is found are rare. They all involved article 3(1) and come from the Council; the Court has never made a finding of inconsistency with the CRC.[242] Thus, in *Cinar*, national law was set aside in favour of the direct application of article 3(1). In *L'Association Aides,* domestic law was declared inconsistent with article 3(1), resulting in the partial invalidation of the implementation decrees. This partial invalidation of a decree also occurred in *L'Observatoire* 2008, in relation to articles 3(1) and 37 applied together. Recently, however, the CE indicated its expectation that, when relevant, administrative courts assess the compatibility of the applicable statute with article 3(1).[243] The Court of Cassation formally assesses statutes against the CRC, including article 3(1),[244] but it prefers its application when this article is complementary to the national law rather than in conflict with it.[245]

The limited number of incompatibility findings raises concerns about the courts' readiness to assume that national law complies with the CRC, and/or their potentially problematic interpretation of the CRC. For example, when it decided that article 12(2) was not breached, the Council noted that the child had conveyed her views through her grandmother and that listening to the child directly would not have changed the outcome because the child's views were not determinant.[246] But the Council did not enquire into the effectiveness of listening to the child through a representative; and showed a misunderstanding of article 12, which does not make the views of a child determinant of the outcome. Further, when the Council applied article 13, it gave no attention to what appears to have been a tension between a teenager's consent to the broadcasting of an interview and his mother's opposition to it.[247] The Court endorsed the refusal of a lower court to listen to the child because the request for a hearing was not made by the child herself, but gave no consideration to difficulties in accessing the court for a child caught in an acrimonious family dispute.[248]

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[241] Judges have generally struggled with the novel institutions of direct effect and the supremacy of international law, the power to 'apply and give priority to international law' having provoked a 'considerable upheaval' for the courts (G Canivet (2006) *Vision prospective de la Cour de cassation*, Paper presented at the *Conference a L'Academie des sciences morales et politique* at 6. Also, Decaux 2010 note 8 at 468.

[242] Ancel 2011 note 67; Gouttenoire 2012 note 105 at 18; Monéger *Report 2011* note 143. Nonetheless, the Court may draw attention to the need for legal reform (Cour de Cassation (2015) *Rapport Annuel 2014 Le temps dans la jurisprudence de la Cour de cassation* at 79-80, where it suggested that the legislature ensures the consistency of legislation concerning child benefits for legal migrants with international and European law).

[243] CE, No. 375887, 2015 para 10.

[244] For example, according to the Court, the provision of the Civil code which prevents the adoption of *kafala* children by their *kafils* does not disregard the best interests of the child (despite the negative consequences of not being adoptable) because, *inter alia*, article 20 CRC mentions *kafala* as a measure which operates in the child's best interests (Civ 1, No. 09-10439, 2010; Civ 1, No. 08-11033, 2009; Guyon-Renard *Report* 2012 note 233). The possibility of norm control against article 3(1) of the CRC was indirectly accepted when the Court found that such control needs to be exercised in contentious cases and not in its advisory jurisdiction (Civ 1, No. 17-70039, 2018).

[245] Article 3(1) is often applied, for example, in association with national norms that refer to the interest of the child (Vassallo 2010 note 79 at 33).

[246] CE, No. 291561, 2008.

[247] CE, No. 334289, 2011.

[248] Civ 1, No. 16-18379, 2007.

Another concern is that, with the dominance of article 3(1), the limited number of inconsistency findings may reflect an anxiety about the suitability of this article to serve as a standard to evaluate legal norms.[249] It is not clear, for example, when the application of article 3(1) could lead to a dislocation of statutory provisions that are clear and precise.[250] With the Constitution not entrenching the best interests, the anxiety is perhaps compounded by the absence of expertise in the abstract application of this article. Nonetheless, these difficulties do not alleviate judges' legal obligation to assess the quality of domestic norms against article 3(1).[251]

Domestic political and legal complexities may be at stake in some cases, rather than CRC-related difficulties. For example, challenges to the regressive social assistance legislation of 2005/2006 required the Court to reverse the effects of legislation enacted specifically to overturn the previous jurisprudence of the Court, which maximised access to family benefits for legal migrants.[252] Further, setting aside the conflict norm which prevented the adoption of *makfouls* by *kafils* raised concerns about diplomatic relations with the children's country of origin, which may see such rulings as defying their judicial system, or may even raise concerns about the interests of children themselves.[253]

However, not all cases place the national law and the CRC on an antagonistic footing, and there is often complementarity between them, which may secure additional legal benefits for children.[254]

3.5.3.2 The jurisprudential added value[255] of the direct application of the CRC

In a context of legal reform and potentially overlapping legal instruments, the value of the direct application of the CRC has been questioned.[256] Despite some scepticism, the application of the CRC has had a positive impact. For example, the direct application of the CRC enabled the courts to diverge from the jurisprudence of the Constitutional Council, which does not engage with the CRC,[257] and secure better outcomes for children. Thus, while the legal

[249] Concerns were raised about using a tool designed for application to individual cases in the abstract control of legislation (Bonfils and Gouttenoire 2008 note 95; L Khaïat 'La défense des droits de l'enfant, un combat inachevé' 2010 (296) *Journal du Droit des Jeunes* 20 at 23); or about placing the interest of the child above the law (A Gouttenoire 'Le domaine de l'article 3-1 de la CIDE: la mise en oeuvre du principe de primauté de l'intérêt supérieur de l'enfant' 2010 (200) *Les Petites Affiches* 24) and creating a lack of legal security (Bonfils and Gouttenoire 2008 note 95).

[250] Cour de Cassation *Rapport Annuel 2009* note 29 at 92. Defending its strict adherence to domestic law, the Court stated that 'it respects the texts voted by the legislator' (ibid at 93). See also Gouttenoire 2010 note 249; Monéger *Report 2011* note 143.

[251] Gouttenoire 2010 note 249.

[252] The position of the Court was that access to benefits was not conditional on the child going through the reunification procedure, and was sufficient for the *parents* to prove their legal residence in France. See Coutou and Vassallo *Report 2007* note 143; Observations de M Maynial Premier avocat general, *Bulletin d'information*, No. 674 of 15 Jan 2008, 33.

[253] Observations de M Jean Avocat general (Avis CC 17 December 2012) *Bulletin d'information* No. 777 of 1 March 2013, 31.

[254] For example, in *Nezdulkins*, the standards of protection in article 37(b) and (c) were enriched by the application of the national law.

[255] See Chapter 1 (text accompanying fn 98) where the term added value is discussed.

[256] Cour de Cassation *Rapport Annuel 2009* note 29 at 92; Schwartz 2010 note 226; Vassallo 2010 note 79.

[257] Recently, the CRC was invoked in a challenge to the constitutionality of changes to the divorce legislation, but the Council decided that the CRC had no effect before the Council (Décision No. 2016-739 DC Loi de modernisation de la justice du XXIe siècle para 53).

framework for *accouchement sous X*[258] has been endorsed by the Constitutional Council in as far as preserving the anonymity of the mother, the Court of Cassation relied on article 7 of the CRC to give the child the possibility to know his/her father.[259] Also, while the Constitutional Council found the provisions of the law concerning access to medical care by illegal migrants consistent with the Constitution, the Council of State found them incompatible with article 3(1) of the CRC.[260] Occasionally, the direct application led to the protection of rights not recognised by national statutes[261] and the CRC has served as an independent standard to assess official conduct, including legal norms.[262] Reliance on article 3(1) of the CRC, applied independently of article 8 of the ECHR, allowed the CC to prioritise the interests of children when they collided with those of their parents;[263] and the application of articles 3(1) and 12(2) led to the appointment of a legal representative for a child when the statutory conditions required for such appointment were not met.[264]

The direct application of the CRC may achieve what the Constitution and statutes have failed to do: mainstream the rights of children in *all* decisions in matters concerning them. This is most visible in the article 3(1) jurisprudence, which is now applied across jurisdictions and a wide variety of legal issues. Illustrative of this process is the penetration of the best interests of the child in the administrative jurisprudence, which hardly operated with the concept of the 'interest of the child' prior to the recognition of direct application to article 3(1) CRC.[265]

Two features of the best interests jurisprudence further reflect the added value by the direct application of article 3(1): the centrality and independence of children's interests and the application of the best interests of the child to matters affecting children indirectly.

A. Asserting children's independent and special legal position

Article 3(1) asserts the centrality of children's interests and the special nature of such interests, the courts having to enquire into the children's best interests and justify their solution in relation to these. Thus, the choice of language of instruction cannot be based solely on the interest of the father to preserve his relationship with the children, and without considering what is in the best interests of the children themselves;[266] a residence decision based on grounds without link

[258] A practice according to which the mother can require that her giving birth and identity be kept secret, and that her child be put up for adoption. The mother has two possibilities: not to disclose her name (anonymous birth); or to disclose her name to the institution provided by the law, requesting that her name be kept secret and be disclosed only to the child upon reaching the age of 18 (secret birth). For more, see F Vasseur-Lambry 'Les message troublants du juge de la filiation: L'accouchement sous X en question' 2012 (137) *Les Pettites Affiches* 13; *Odièvre v France* (Application No. 42326/98, 13 February 2003) ('*Odièvre')* paras 15- 18.
[259] *Benjamin*.
[260] *L'Association Aides.*
[261] *Benjamin*.
[262] *L'Association Aides; L'Observatoire* 2008.
[263] Civ 1, No. 16-20858, 2016; Civ 1 No. 17-11840, 2017 (in cases of child abduction, the Court used article 3(1) to assess whether the requirements of an exception from the Hague Convention rule of immediate return to the country of residence may be met).
[264] Civ 1, No. 03-17912, 2005. See Boulanger 2006 note 90 at 4.
[265] A brief quantitative account is illustrative. An 'exact phrase' search on *Legifrance* for the period 1 January 1960-22 September 1997 on 'l'intérêt de l'enfant' produced 5 results (no result was obtained for 'l'intérêt supérieur de l'enfant'); for the period 22 September 1997 (the date of the *Cinar* decision) -16 July 2016, 443 results were obtained for 'l'intérêt supérieur de l'enfant' and 78 for 'l'intérêt de l'enfant'
[266] Civ 1, No. 02-18360, 2005.

to the best interests of the child and without investigating the latter cannot be upheld;[267] and a court cannot refuse to order the return of the child unlawfully removed from the country of habitual residence by relying on the difficulties potentially faced by the mother.[268] Similarly, the Court decided that a lower court wrongly found that the child abducted from the country of residence was not integrated in France by relying on aspects concerning the child's mother rather than the child (the mother not working, not speaking French and being an asylum seeker); by ordering the immediate return of the child in these circumstances, the lower court breached article 3(1) of the CRC (and the Hague Convention).[269] A refusal to issue French travel documents to a *makfoul*, which rested on the automatic presumption that it is in the child's interest to reside in France with the person exercising parental authority, could not be upheld in the absence of an enquiry into the interest of the child to visit his biological family.[270]

Asserting the independence of children's legal position in the name of article 3(1), the Council avoided visiting on children the negative consequences of the illicit behaviour of their parents in cases concerning family reunification,[271] deportation,[272] issuing of travel documents to children born through surrogacy,[273] and the case of parents subjected to anti-terrorism measures. Thus, an order severely restricting the freedom of movement of a mother, the sole primary caregiver of three young children (aged 6, 4 and 2), suspected of having supported persons involved in terrorist activities, was found to violate articles 3(1) of the CRC and 8 of the ECHR, because it excessively affected the functioning of the family unit and was a serious interference with children's best interests.[274] The Court has been less inclined to make best interests 'concessions' in the face of the illegality of parental conduct. It refused, for example, to recognise the filiation of children resulting from surrogacy in relation to the commissioning parents, even when one of the parents was the biological parent,[275] or to recognise filiation established through fraud.[276]

Legal norms (statutes or implementing norms) must consider and make provision for the special needs of children. In *L'Association Aides* and *L'Observatoire* 2008 the CE invalidated decrees *only* to the extent of their application to children, because of the failure to take into consideration their special needs. Conversely, decrees regarding the collection and storage of personal data for public security purposes that differentiated between children and adults, did not breach articles 3(1) and 16.[277] Children's special legal position is also asserted in those

[267] Such as the late recognition of paternity, the father's permission that the child be taken abroad for longer periods of time and the mother not preventing the development of a relationship between the father and the child (Civ 1, No. 06-17869, 2007). See also Cour de Cassation *Rapport Annuel 2009* note 29 at 90.
[268] Civ 1, No. 11-28424, 2013.
[269] Civ 1, No. 17-11927, 2017.
[270] CE, No. 351906, 2012.
[271] *Cinar*.
[272] CE, No. 274713, 2006.
[273] CE, No. 348778, 2011.
[274] CE, No. 395622, 2016. The order required the mother to report three times a day to a police station in a different town. She did not have a car and relied on public transport. The order had to be amended by the minister.
[275] Civ 1, No. 09-66486, 2011; Civ 1 No. 09-17130, 2011; Civ 1 No. 12-18315, 2013 discussed in part 3.6.2.
[276] I.e., a birth certificate obtained fraudulently (Civ 1, No. 09-68399, 2010).
[277] The type of data, its collection and the duration of preservation differed for children (CE, No. 332886, 2013 paras 21 and 26).

cases where the CE applied article 3(1) in order to introduce some flexibility into the application of laws which may disproportionately affect some children.[278]

B. The application of the best interests of the child to matters which concern children indirectly

This is a recent phenomenon which stretches the application of article 3(1) beyond matters which *involve* children directly, to those which *affect* them. After initially maintaining that the scope of article 3(1) does not extend to the extradition of a parent, because 'the extradition is not, in itself, a measure which concerns the children',[279] the Council admitted that the refusal to grant a residence permit followed by a deportation order against the parent of an ill child, constituted a decision concerning the child, which required the authorities to give a primary consideration to his best interests.[280] Article 3(1) therefore 'is not applicable only to decisions whose object is to address the personal situation of minor children but also to those decisions which can affect them in a manner sufficiently direct and certain'.[281] Thus, an extradition decree against the father of a severely disabled child, who relied on the father for his daily care, was a decision which called for the consideration of article 3(1).[282] The best interests of the child could not, however, prevent the extradition if this was justified by reasons of public order.[283]

The Court of Cassation has been more reluctant to apply article 3(1) in matters concerning children indirectly. Article 3(1) was unsuccessfully invoked in the sentencing of parents[284] or against the confiscation of family home from accused convicted of drug trafficking.[285] Reliance on article 8 of the ECHR (rather than article 3(1) of the CRC) led to the Court's refusal to execute a European arrest mandate issued for a sentence of 4 months imprisonment for offences committed 10 years earlier by the father and the sole carer of a 5 year old child.[286] Nonetheless, the Court considered article 3(1) in an appeal against the prohibition to remain in France lodged by a father who argued that this would prevent him from developing a relationship with his child; however, it endorsed the balance struck by the appeal court between the interests of the child, public safety and the interests of the victim.[287]

The outcomes favourable to children obtained in some cases where article 3(1) was applied would have been difficult to obtain otherwise. It was argued that article 8(1) of the ECHR has

[278] *Kafala* and family reunification (CE, No. 249369, 2004; CE, No. 220434, 2004; see text corresponding to note 234 above) and issuing of travel documents respectively (CE, No. 351906, 2012; see note 235 and corresponding text); issuing of travel documents to children born through surrogacy abroad (CE, No. 348778, 2011; note 232 and corresponding text); and family and social services visits to arrested children (CE, No. 369766, 2014; note 194 and corresponding text).
[279] CE, No. 317125, 2009.
[280] CE, No. 359359, 2014.
[281] CE, No. 359359**,** 2014 para 1.
[282] CE, No. 385927, 2015 para 6.
[283] CE, No. 385927, 2015 paras 6 and 7.
[284] Crim, No. 09-83032, 2010 (a plastic surgeon argued that articles 8 of the ECHR and 3(1) of the CRC were breached by the sentencing court which sentenced him to a custodial sentence for causing bodily harm to his patients).
[285] Crim, No. 10-87811, 2011. Similar wording in Crim, No. 09-81239, 2009 (4 minor children); Crim, No. 09-81710, 2009 (appellants caring for a severely disabled child).
[286] Crim, No. 10-86237, 2010.
[287] Crim, No. 09-83351, 2009.

an absorbent effect on article 3(1) of the CRC, and that decisions are rendered on article 3(1) when the parties 'forget' to invoke article 8 of the ECHR.[288] While some overlap may exist, it should not be automatically assumed. For instance, in *L'Association Aides* or *L'Observatoire* 2008 article 8 of the ECHR would have been irrelevant as the matters did not concern family or private life. In matters concerning the issuing of French travel documents to *makfouls*, article 8 of the ECHR has little relevance considering that children's actual family life is with the *kafil*, rather than with their biological family overseas whose visitation they wanted facilitated by obtaining French travel documents. In cases of child abduction, articles 3(1) and 9(3) of the CRC were useful to establish whether the Court had to apply an exception from the immediate return of a child to the country of residence.

One of the difficulties in discerning the impact of the direct application of the CRC is the complex legal context in which it takes place. Widespread legal reform and the multitude of relevant (national and international) legal sources have sometimes relegated the Convention to a secondary or 'complementary role'[289] often in relation to article 8 of the ECHR. Two observations are necessary. First, there may be an expectation that for a norm to be considered as being directly applied, it has to generate by itself a specific legal outcome. Unlike cases in other jurisdictions,[290] the French jurisprudence contains cases in which CRC provisions applied independently delivered legal outcomes.[291] Further, directly applicable norms rarely operate independently as they need some supporting national law;[292] and a norm may be applied directly and determine the outcome even when it is not the sole legal provision applied by the court.[293] Consider the decisions on travel documents and family reunification of *kafala* children. It is clear that article 3(1) was the legal reason relied on by the Council to extend the benefits of the existing law to these children. Nonetheless, technically, article 3(1) did not operate independently, in that the benefits so recognised to *kafala* children were pre-established by the legislation. To deny that in these cases article 3(1) was applied directly simply because its application does not satisfy a purist view of direct application is unrealistic and obscures the full impact of the CRC.

Second, and in terms of the CRC being marginalised in favour of other legal instruments, the principle of subsidiarity provides a legitimate justification for applying the national law first. Article 41 of the CRC also provides that national or international standards offering superior protection should be applied with priority. But an abstract evaluation of legal standards is not

[288] Schwartz 2010 note 226 at 40.
[289] Schwartz (ibid at 39), in relation to articles 3(1) of the CRC and 8 of the ECHR; Vassallo (2010 note 79 at 33) notes the pairing of article 3(1), 7(1) and 12(2) with statutes that refer to the interest of the child, filiation and the child's right to be heard.
[290] M Couzens 'Romanian courts and the UN Convention on the Rights of the Child: A case study' 2016 (24) *International Journal of Children's Rights* 851.
[291] See part 3.5.3.1 above.
[292] A Nollkaemper 'The Duality of Direct Effect of International Law' 2014 (25) *The European Journal of International Law* 105.
[293] It may therefore be difficult to find cases in which the CRC provides *stricto senso* the 'rule of decision' – the criterion used by Sloss to assess whether a treaty has been directly applied (D Sloss 'Treaty Enforcement in Domestic Courts: A Comparative Analysis' in D Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 1 at 11). It may be more realistic therefore to assess direct effect in relation to the degree of influence a treaty has had on the decision.

the only factor influencing the choice of norms. Possibly, treaties that are 'if not more radical, at least easier to use'[294] may be preferred by courts to the detriment of the CRC. This suggests that it is not necessarily the alleged legal inferiority of the CRC, caused by its flaws, that might have generated the Convention's judicial misfortune – it may rather be its jurisprudential under-development. It suffices to say here that safeguarding the role of the CRC in adjudication in a context characterised by norm inflation, rests on courts distancing themselves from automatic assumptions in relation to the compatibility or overlap between the CRC, national law and international law respectively.

A final observation needs to be made. The impact of direct application was evaluated primarily from the perspective of concrete legal outcomes (individual remedies, invalidation of administrative action, setting aside of legislation). There is, however, a more subtle effect which may be overlooked or too easily dismissed as paying lip-service to the CRC simply because it does not deliver concrete legal outcomes. By consistently referring to the CRC, even without generating far-reaching legal consequences, the courts acknowledge the importance of conceptualising child-related issues within the framework of the Convention and have increased the visibility of children's interests and rights in adjudication. This is not to be neglected when children's rights are underdeveloped by comparison with other rights. Arguably, in this context, successful and unsuccessful applications, good judgments and bad judgments, direct application or its rejection, all contribute to negotiating the meaning of the CRC in France.

3.6 Factors with impact on the direct application of the CRC

3.6.1 CRC-related factors

Two CRC-related factors are explicitly acknowledged in judgments: article 4 (by the Court of Cassation) and some norms being addressed to the states (by the Council of State). They constituted formal obstacles to the direct application of the CRC by courts, but were abandoned in 2005 and 2012 respectively. This did not lead to a significant increase in the number of norms recognised as having direct effect or a complete distancing from the initial views held by the courts.[295] Although the CRC has been criticised for want of clarity and precision, this criticism remains itself opaque. After 2005, the Court has not explicitly denied direct application to specific CRC provisions,[296] and it is unclear what norms it considers not to have direct effect and the reasons therefore.[297] The over-reliance on article 3(1) may have kept the

[294] Schwartz (2010 note 226 at 39-40) mentions that as an administrative judge, he applies more frequently and with more ease article 8 of the ECHR than article 3(1) of the CRC.
[295] The Court stated that although some articles have been recognised direct effect, most create obligations only between states (Cour de Cassation *Rapport Annuel 2005* note 130 at 416). Also, Schwartz 2010 note 226 at 37-38; Vassallo 2010 note 79 at 25.
[296] Monéger *Report* 2011 note 143.
[297] The Court may even ignore the CRC arguments raised, as done in Crim, No. 05-86947, 2006 (article 6 invoked to extend the definition of 'homicide' to include the unborn child) and Ass, No.13-28369, 25 June 2014 (argued that article 14(1) was not of direct application and did not impose an obligation of laicity on the crèche where the applicant, a Muslim woman wishing to wear a veil, worked). The Court may have been reluctant to engage with the CRC because it was raised to support adult rather than children's interests.

courts in a comfort zone, and thus reluctant to explore more seriously the direct application of other norms.

3.6.2 CRC-independent factors

Despite views that the CRC 'contains the seeds of its own non-application',[298] the direct application does not depend exclusively on the Convention strengths and weaknesses,[299] as shown below.

3.6.2.1 The factual and legal context

Many cases, especially those decided by the Council, deal with immigration issues, which may explain its reserved attitude toward the CRC.[300] The marginal relevance and the 'bulk' invocation of the CRC have discouraged the application of the Convention in some cases,[301] while seeking 'a reasonable application to a concrete situation' has resulted in a norm being considered 'sufficiently complete'[302] to be applied.

In 1994 it was feared that the direct application of article 7 of the CRC would result in an 'absence of legal security'[303] by automatically creating joint parental authority for the exercise of which no domestic rules existed to guide its application. Nonetheless, in 2006 this article was directly applied by the Court with no hesitation in a different legal context in the *Benjamin* case. Some judges also estimated *in abstracto* that article 9 lacked direct effect because it created obligations for the states,[304] but this article was then applied directly or recognised as potentially having direct effect in concrete disputes.[305]

The remedy sought may also influence the decision to apply the CRC directly. Thus, the control of conformity with the Convention and legality control involves a more abstract application of the CRC, for which the standard of completeness may be less stringent, while settling a dispute concerning individual rights requires a norm with a higher precision. For example, while articles 21 and 22 were used by the Council to assess the lawfulness of the implementation norms of a statute recognising homosexual marriages,[306] it is unlikely that the Court would have relied on these articles to approve adoptions by homosexual couples if this had not yet been recognised by domestic law. Further, in an abstract challenge to the decree allowing for the administrative detention of children with their parents for the purposes of deportation, launched by two NGOs, the Council found that the decree was not contrary to articles 3(1) and 37 of the CRC.[307] Nonetheless, when the concrete conditions of detention of children were exposed in *Popov v France*, the ECtHR found a violation of international standards in relation

[298] Khaïat 2010 note 249 at 22.
[299] The reluctance to apply the ECHR directly was abandoned only in response to ECtHR jurisprudence (Lambert Abdelgawad and Weber 2008 note 20 at 139-140).
[300] Rongé 2004 note 60 at 10
[301] For example, in *GISTI and FAPIL* 2012, article 3(1) was raised amongst others to challenge the legality of a decree. Dumortier (2012 note 18) dismissed its relevance, arguing that it was just a part of a 'litany' of norms invoked by the applicants.
[302] Taxil 2007 note 37 at 166.
[303] Dekeuwer-Défossez 1994 note 70.
[304] Ancel 2001a note 13 at 20; Schwartz 2010 note 226 at 38.
[305] Civ 1, No. 06-12687, 2007 (see part 3.3.3); CE, No. 368676, 2013 (see part 3.4).
[306] CE, No. 370459, 2015.
[307] CE, No. 282275, 2006.

to the detention of minors, which was not adapted to their needs as children.[308] Although the last example refers to different courts and legal standards, it illustrates that direct application may depend on what is sought by litigants in concrete cases.

International norms which do not frontally conflict with national law,[309] and 'principles … [that] are sufficiently general and flexible so that they do not challenge profoundly the domestic law (as it is the case with article 3(1))'[310] have been recognised as having direct effect. Norms to which national law has already given effect to;[311] or those that 'converge' with national law,[312] even when they do not perfectly satisfy the direct application criteria, are also easier to recognise as having direct effect. For example, although article 12(2) is indirectly addressed to the state,[313] the CC recognised its direct effect once legal reform gave it domestic effect.[314] Further, article 3 is not formulated as a right, and it is addressed to state institutions,[315] but the concept of the 'interest of the child' was already present in the French law and judges were familiar with it. It was also a flexible concept which could be applied in a flexible manner, avoiding direct conflict with national law.[316]

3.6.2.2 Opportunity considerations

Judicial policy rather than legal reasons has at times determined the courts' decisions on direct application. Thus, the CC rejected the direct application of the CRC *en bloc* influenced by the 'political-legal controversy'[317] concerning its direct effect. When it reversed that position in 2005, the relevant cases did not strictly require it, and other factors were at play, such as the desire to harmonise its approach with that of the Council of State. The Council accepted the direct application of article 12(2) in a case where this made no difference to the outcome.[318] The differential treatment applied to CRC norms whose substance was already protected in treaties recognised as having direct effect suggests that the caution of the Council was of a 'judicial policy' rather than of a strictly legal nature.[319] The decision in *GISTI* 1997 was influenced by 'considerations of opportunity' indicative of a 'choice of judicial policy',[320] which, despite cogent arguments to the contrary, remained strong in 2012.[321]

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[308] The ECtHR even referred to articles 2, 3 and 37(b) and (c) of the CRC, articles which the Council decided were not breached by the domestic decree (*Popov v France* paras 52, 90, 91).
[309] Boulanger 2006 note 90 at 7. *Benjamin*, for example, article 7 of the CRC did not explicitly come into conflict with a specific domestic norm, because the French law did not recognise the rights in the above article.
[310] Neirinck 2005 note 61.
[311] Ibid referring to article 12(2) decision in May 2005.
[312] Latty 2015 note 10 at 694.
[313] Courbé 2006 note 109; see also view expressed by Ancel (2001a note 13 at 20) that article 12 is amongst those not directly applicable.
[314] Rongé 2004 note 60.
[315] Courbé 2006 note 109; the converse argument was also made (Bordry 2001 note 225).
[316] See especially the jurisprudence of the Council in cases such as *Cinar*, the *kafala* and surrogacy decisions.
[317] Bonnet 2010 note 70.
[318] CE, No. 291561, 2008.
[319] Rongé 2004 note 60 at 15
[320] Amongst such considerations, Chauvaux and Girardot (1997 note 8) mention keeping the use of international law simple, by avoiding a distinction between direct effect and invocability, a dramatic increase in international documents invocable before courts, a potential overlap with the jurisdiction of the Constitutional Council; and the simplistic assimilation of international instruments with national laws.
[321] Dumortier 2012 note 18; Slama 2012 note 18 para 4; Latty 2015 note 10 at 682.

3.6.2.3 Multiple jurisdictions and the interaction with supra-national courts

The lack of uniformity between the positions of the Court and the Council is one of the puzzling aspects of the French jurisprudence. It created confusion amongst litigants,[322] legal insecurity, and an abandonment of the CRC in favour of more successful legal instruments.[323] But even after May 2005 differences continue to exist. For example, after 2005, the Court has not excluded, as a matter of principle, the direct effect of any article,[324] while up to *GISTI and FAPIL* 2012 the Council did deny, in principle, the direct application of norms addressed to the states. In terms of specific provisions, the Council rejected for some time the direct application of articles 7, 8, 9 and 12(2), all being at the time applied by the Court.

The courts' different jurisdiction explains to a certain extent their divergence.[325] The Court resolves disputes between individuals or concerning individual rights.[326] It relies on norms which are able to clarify the rights of parties and provide solutions to unfolding disputes.[327] Setting aside provisions of national statutes is only viable if the international norm (or other existing norms) can be substituted for them and thus provide a solution to the dispute. By contrast, the Council controls, amongst other things, the legality of various types of norms against international conventions (an 'objective control of legality'[328]), for which it is sufficient for the norm to have *some* constraining power,[329] which need not be the maximum normative power conferred by the direct effect.[330] Thus, while the administrative norm may be invalidated by the Council, it is the task of the issuing body to decide how to bring its conduct in line with the CRC.[331] Separation of powers implications raised by the control of norms exercised by the two courts are different: the Court assesses the conformity with treaties only of statutes, potentially opposing the CRC to the will of the democratically elected legislature; while the Council also controls the legality of norms emanating from the administration or the executive. Nonetheless, while some explanations exist for the different approaches, there can be no justification for the incoherence which has dominated the courts' reasons: at different points, the Court or the Council reasoned that the Convention or certain articles thereof created exclusively international obligations, while the other Court gave them domestic effect.

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[322] Monéger 1996 note 74; Laurent-Boutot 2006 note 7.
[323] Ibid.
[324] Monéger *Report* 2011 note 143.
[325] As put by Bordry, the Court of Cassation 'has to choose between two norms and apply the chosen one to the case at hand, while the Council of State decides the legality of a law or of a decision' (2001 note 225 at 17). The terminology may be telling. When rejecting direct effect, the Court of Cassation reasoned that the CRC created 'obligations *for* the state' while the Council of State reasoned that certain articles create 'only obligations *between* states' (my emphasis). It is possible that to avoid the application of the CRC, it was sufficient for the Court to say that the Convention creates state obligations (international or national), which were outside its jurisdiction. The Council, however, deals with the lawfulness of state conduct; so, to avoid the direct application of the CRC, it was not sufficient for it to say that the Convention creates obligations for the state (and its organs). The obligations created by the CRC had therefore to be 'pushed' into the international sphere, and the reasoning adapted.
[326] Laurent-Boutot 2006 note 7 at 122.
[327] Akandji-Kombé 2012 note 20 part III.B.2.
[328] Dumortier 2012 note 18; Laurent-Boutot (2006 note 7 at 121) referring to administrative courts exercising a legality control of norms with opposability *erga omnes* (*contentieux objectif*), in which the main objective is not the protection of individual interest (although this may be a by-product), but rather of the general interest.
[329] Akandji-Kombé 2012 note 20 part III.B.2; Dumortier 2012 note 18.
[330] Dumortier 2012 note 18.
[331] Bordry 2001 note 225 at 17. Also, Akandji-Kombé 2012 note 20 part III.B.2.

The shifts in the jurisprudence of both supreme courts raise the question of the mutual influence of their jurisprudence. There are examples which suggest that this may occur, but also examples in which the courts do not pursue a harmonisation of their jurisprudence. Thus, the significant shift in the Court's jurisprudence in May 2005 was influenced by the Council, as acknowledged by the Court.[332] The Council eventually accepted the direct application of articles 12(2), 7(1) and 9(3), which were already applied directly by the Court. On the other side, the Council continued its reliance on the literal criterion even if this was not explicitly embraced by the Court. In relation to specific articles, the Council still refuses to apply article 8 directly although the Court does so; and the two courts take different approaches to the application of article 3(1) in surrogacy cases or in matters affecting children indirectly. What is certain, however, is that the courts are aware of each other's jurisprudence, and in the light of *GISTI and FAPIL* 2012, which is said to reflect the common position of the courts,[333] some harmonization may occur in the future.

The jurisprudential context with impact on the direct application of the Convention is wider. Although some institutions dealing with child-related issues engage with the CRC while others do not, their jurisprudence creates a legal context in which the CRC inevitably operates. The Constitutional Council, the ECtHR and the ECJ may therefore shape the direct application of the CRC.

The Constitutional Council does not apply the CRC, which is not a part of the 'constitutionality bloc', but makes binding[334] or persuasive[335] decisions, with relevance for courts' engagement with the Convention. It was criticised for its deferent attitude to the Parliament in certain child-related matters,[336] and for its less cogent reasons in family matters when compared to other legal issues.[337] In other child-related matters, the Council has endorsed the constitutionality of legislation potentially problematic from a CRC perspective, such as regressive changes to the juvenile justice legislation;[338] legislation making it impossible for same-sex partners to adopt each other's children prior to the legalisation of same-sex marriages;[339] legal framework

[332] Cour de Cassation *Rapport Annuel 2005* note 130 at 416.
[333] Akandji-Kombé 2012 note 20. On a potential dialogue between the two courts, see Cour de Cassation (2015) *Conseil d'Etat: rencontre à la Cour de cassation* and (2014) *Lancement des travaux de groupes de reflexion visant à développer les relations institutionnelles de la Cour* (both online).
[334] For general info, see A Gouttenoire 'Cohérence des contrôles de conventionnalité et de constitutionnalité en matière de droit des personnes et de la famille' 2013 (2) *Les Nouveaux Cahiers du Conseil Constitutionnel* 63.
[335] R de Gouttes *Le dialogue des juges,* Paper presented at the Colloque du Cinquantenaire du Conseil Constitutionnel, 3 November 2008 (online).
[336] For example, it considered *accouchement sous X* and adoption by homosexual couples to be 'questions of society' best left to the legislature (F Chénedé and P Deumier 'L'oeuvre du Parlement, la part du Conseil constitutionnel en droit des personnes et de la famille' 2013 (39) *Nouveaux Cahiers du Conseil Constitutionnel* (online journal)).
[337] J Hauser 'Le Conseil constitutionnel et le droit de la famille' 2004 *Cahiers du Conseil Constitutionnel* 16.
[338] For example, the introduction of minimum sentencing for child offenders and adult sentences for juveniles in certain situations (Decision 2007-554 DC, 9 August 2007); the creation of correctional tribunals for children, whose panels include only one judge specialised in juvenile matters (Decision 2011-635 DC, 4 August 2011). Decision 2011-147 QPC, 8 July 2011 (cumulating the instruction and adjudication by judges dealing with juvenile offenders was considered to breach the impartiality principle) and Decision 2012-272 QPC, 21 September 2012 (fast-track procedure for the prosecution of juvenile offenders considered constitutional despite the risk that insufficient information about the child could be collected).
[339] Decision 2010-39 QPC, 6 October 2010.

applicable to accouchement *sous X*;[340] or stricter requirements for accessing child benefits for the children of legal migrants.[341] These decisions removed certain incentives for the administrative and judicial courts to question the conformity of domestic law with the Convention, considering that the latter has a lower domestic status than that of the Constitution.

The approaches of the Constitutional Council and the courts to common matters may differ, potentially creating tensions between the constitutional and ordinary jurisprudence. For the time being, relying on the CRC, courts have sometimes distanced themselves from the views of the Constitutional Council and delivered child-focused decisions by using gaps in the constitutional jurisprudence,[342] and by appropriating the application of article 3(1) of the CRC,[343] which, in the view of this researcher, remains the domain of the courts. The view that a 2013 decision by the Constitutional Council 'has raised the notion of the best interests of the child to constitutional level'[344] is not subscribed to here. First, in its decision, the Council refers to the domestic formulation of the concept – the 'interest of the child' – and not to the 'best interests of the child'.[345] Second, paragraph 10 of the Preamble to the 1946 Constitution, which in the interpretation of the Council includes that adoption must be in the interest of the child, is limited to the protection of the individual in a family context. It reads: '[t]he Nation shall provide the individual and the family with the conditions necessary to their development'. Combined with the limited ambit of the decision, this seems to confine the recognition of a constitutional value to the interest of the child to the adoption context (or at most in family-related issues). A constitutional status for the best interests of the child in *all* matters concerning or affecting children is still to be recognised.

The jurisprudence of the ECJ and the ECtHR together with the indirect pressure of their more effective implementation mechanisms,[346] have had an impact[347] on the direct application of international treaties, including the CRC. In 2011, for example, the full Court of Cassation

[340] Decision 2012-248 QPC, 16 May 2012.
[341] Decision 2005-528 DC, 15 December 2005, asserts the entitlement of the legislature to impose restrictions on the access to child benefits based on the method of entry of the child into France (especially paras 16-18). The Committee, however, recommended that '[a]llocations to families should not be subject to the modalities of entry of the child onto the territory of France' (*Concluding Observations: France* 2004 para 47).
[342] The Constitutional Council jurisprudence covered only the legal position in relation to the mother of the children born *sous X*. This permitted the Court in *Benjamin* to rely on the CRC and address the legal position in relation to the fathers of these children.
[343] Gay (2006 note 223) remarked that when assessing the constitutionality of legislation which was found to be inconsistent with the CRC by the Council in *L'Association Aides*, at no time did the Constitutional Council give independent attention to children as a distinct group affected by the law. It is reminded here that the recognition of a special treatment to children was the essence of the reasoning of the Council in that case.
[344] Decision 2013-669 DC, 17 May 2013. Position expressed by the Défenceur des Droits (2015) *Report by the Defender of Rights to the United Nations Committee on the Rights of Children* at 7 (online), and commended by the Committee on the Rights of the Child (*Concluding observations on the fifth periodic report of France* 2016 para 25).
[345] Decision 2013-669 DC, 17 May 2013 para 53.
[346] C Nivard 'L'effet direct de la Charte sociale européenne devant les juridictions suprêmes françaises' 2012 (28) *Revue des Droits et Libertés Fondamentaux* (online); Dubouis 2006 note 11 para 5.
[347] It is rare to find references to case law (national or international) in the judgments of the two courts (see, nonetheless, reference to ECJ judgments in Ass., No. 11-17520, 2013; Ass., No. 11-18947, 2013). The influence of the reasoning of the ECtHR and ECJ is deduced from a corroboration of the reasoning of the courts, outcome of the decisions and reports presented by reporting judges, *commissaires public* and general advocates (and sometimes the published arguments of the parties).

declared that state members are bound by the decisions of the ECtHR, regardless of whether the state has amended its legislation or not.[348] There is concern about adverse decisions from the European courts,[349] and an 'interest' by the courts and the state to avoid decisions against France.[350] There are in-built political, legal and administrative mechanisms that assess the compatibility of proposed legislation with the ECHR and its jurisprudence.[351] These strong institutional safeguards are not replicated in the CRC context.[352] As mentioned in part 3.2, concerns about ECtHR judgments against France have contributed to the jurisprudential shift of the Court of Cassation in 2005, and continue to shape the jurisprudence of the Court.[353] The Court eventually applied article 3(1) influenced by the ECtHR jurisprudence which integrated this standard.[354] The Council is equally astute to the European jurisprudence. The reasoning in *GISTI and FAPIL* 2012 is 'manifestly' influenced by the practice of the ECJ,[355] which 'nourishes and is a useful reference point regarding this common notion [direct application]'.[356] Notably, the Committee is absent from this 'influential block',[357] despite its repeated recommendations for a more extensive direct application of the CRC in France.

The operation of the CRC at the intersection of multiple jurisdictions and legal standards can be illustrated with the jurisprudence on *accouchement sous X* and surrogacy.

Children born *sous X* have no filiation established with their mother and her family. This raises concerns under article 7 of the CRC (the child's right to know one's parents), and the Committee found it to be contrary to the rights of children.[358] The ECtHR, however, decided that the practice falls within the state's margin of appreciation and that the law provided sufficient guarantees that upon reaching majority, a child can access information regarding his/her filiation.[359] In a challenge to the constitutionality of the legislative framework for births *soux X*, the Constitutional Council decided that

[348] Ass., No. 10-17049, 2011.
[349] Dubouis 2006 note 11 para 5.
[350] Lambert Abdelgawad and Weber 2008 note 20 at 129-130. See, for example, the extensive references to the jurisprudence of the ECtHR in a recent report of the Court, dedicated to the role of judges in a globalised world (Cour de Cassation (2018) *Étude Annuelle 2017: Le juge et la mondialisation dans la jurisprudence de la Cour de cassation* (online)).
[351] Article 8 of the Loi organique no 2009-403 du 15 avril 2009 relative à l'application des articles 34-1, 39 et 44 de la Constitution requires an impact assessment of bills, amongst others, in relation to European law, but not in relation to the CRC. Further, Lambert Abdelgawad and Weber (2008 note 20 at 154-155) mentioning dissemination of information about the ECtHR jurisprudence, teaching, and scholarship.
[352] On the absence of mechanisms to assess legislative initiatives against the CRC, see Defender of Rights 2015 note 344 at 7.
[353] Advocate general Maynial (2008 note 252 at 38) was explicit that the Court had to anticipate the position of the ECtHR, if it was to avoid later censure.
[354] Laurent-Boutot 2006 note 7 at 71-72.
[355] Slama 2012 note 18. Also, Latty 2015 note 10 at 685.
[356] Dumortier 2012 note 18; Taxil 2007 note 37 at 165.
[357] Occasionally, however, reports presented to the courts by judges may refer to its work (Coutou and Vassallo *Reports* 2007 note 143). The Committee and its output are not mentioned in the Court's *Étude Annuelle 2017*. A search on *Legifrance* (13 November 2018) shows that the Court and the Council have never considered the Committee's views in its judgments. Both courts have, however, considered the views of the Human Rights Committee against France, deciding that they are not binding on the state (CE, No. 239559, 2003; CC, No. 14REV017, 2015).
[358] *Concluding observations: France* 2009 para 43.
[359] *Odièvre* para 49.

> the legislator intended to avoid pregnancies and births susceptible of creating a danger for the health of both the mother and the child, and to prevent infanticide or child abandonment; [the legislator] also pursued the constitutional objective to protect [their] health[360]

and struck therefore a correct balance between the interests of the mother and those of the child.[361] However, using a gap in the law (which did not address the situation of the fathers whose children were born *sous X*) and applying article 7(1) of the CRC, the Court gave recognition to the filiation of a child with the father who recognised his child before the child's birth, while maintaining the maternal filiation unknown.

Children born through surrogacy to French (commissioning) parents overseas have faced difficulties (in terms of obtaining travel documents, registration of birth in France, recognition of filiation with the French commissioning parents, and nationality) as a result of surrogacy agreements being considered void under the French law.[362] Until 2015, the Court refused to allow the registration of birth documents issued in countries where surrogacy is permitted and to recognise the filiation of children with the commissioning parents.[363] The Court reasoned in a first phase that the refusal to transcribe the foreign birth documents did not violate article 3(1) because the children had the filiation established according to the foreign law and were not prevented from living with the commissioning parents in France;[364] in the second phase it decided that article 3(1) of the CRC (and article 8 of the ECHR) cannot be usefully invoked to recognise legal effects of surrogacy agreements which were fraudulently concluded against the French law.[365] By referring to the *l'etat du droit positif*[366] (or, 'the existing positive law') to justify its position, the Court deferred to the legislature, and refused to assess the law against article 3(1) or to engage in an *in concreto* application of article 3(1), as done by the Council of State.[367] A full Court changed its position but only as a result of the ECtHR judgments in *Menesson v France*[368] and *Labassée v France*.[369] It then decided (narrowly following the above judgments) that the birth certificate of a child born through surrogacy overseas and connected biologically to a French national and recognised by him is to be transcribed in the French civil registers, if there is no suspicion that the act is irregular. A refusal to register regular foreign documents would constitute a violation of article 8 of the ECHR.[370] In 2017, the Court decided that denying the adoption of a child born through surrogacy by the spouses of the commissioning parent, despite the legal conditions for adoption being met, amounted to a

[360] Decision 2012-248 QPC, 16 May 2012 para 6.
[361] Decision 2012-248 QPC, 16 May 2012 para 8.
[362] According to article 16-7 read with article 16-9 Civil code, all surrogacy agreements are void for being contrary to the public order.
[363] For further discussion, see A Gouttenoire 'Surrogacy agreements: at last, the primacy of the child's interests' 2015 (1) *Montesquieu Law Review* 103 at 106.
[364] Civ 1, No. 09-66486, 2011; Civ 1 No. 09-17130, 2011. See B Weiss-Gout 'Trois décisions, une même deception' 2011 (146) *Gazette du Palais* 7.
[365] Civ 1 No. 12-18315, 2013.
[366] Civ 1 No. 09-66486, 2011; Civ 1, No. 10-19053, 2011; Civ 1, No. 12-18315, 2013.
[367] Gouttenoire 2012 note 105.
[368] Application no. 65192/11, 26 June 2014.
[369] Application no. 65941/11, 26 June 2014. See comments by Gouttenoire 2015 note 363 and F Chénedé 'Les arrêts Mennesson et Labassée ou l'instrumentalisation des droits de l'homme' 2014 *Recueil Dalloz* 1797.
[370] Ass., No. 14-21.323, 2015 and No. 15-50002, 2015.

violation of article 3 of the CRC and article 8 of the ECHR.[371] In 2018, the Full Court sent a request for an advisory opinion to the ECtHR, in which it asked whether the refusal to register the foreign birth document, which indicated as the mother of the child the commissioning mother went beyond France's margin of appreciation in relation to article 8 of the ECHR; and whether the possibility of adoption by the commissioning mother satisfied the requirements of the same article.[372]

The operation of the CRC at the intersection of different court jurisdictions and legal orders has consequences for the CRC. The Constitutional Council and the ECtHR do not apply the CRC directly and do not assess the compatibility of national laws with the CRC. The monopoly over the direct application of the CRC therefore allows the Court of Cassation and the Council of State to have a distinctive jurisprudential voice regarding the rights of children, and to extract maximum normative returns from the application of the Convention. At times, the courts defended their privileged position in relation to the application of the CRC. They made clear that the interpretation and application of the CRC is under their jurisdiction, and not that of the Constitutional Council,[373] a position readily agreed with by the latter.[374] In 2015, when it changed its jurisprudence on surrogacy, the Court did so by applying article 8 of the ECHR only, although in the past it utilised article 3(1) in its reasoning in surrogacy cases. While this may be just an oversight, it may also be a careful defence of one's turf: while it deferred to the view of the ECtHR in terms of article 8 of the ECHR, it held on to its view on article 3(1) of the CRC.

A second positive aspect is that the interaction with multiple jurisdictions reveals the multiple normative facets of the CRC. In the light of their distinct jurisdiction, different courts have different opportunities to give effect to the CRC. For example, the application of the CRC by the Court did not give *makfouls* the opportunity to be adopted by *kafils*, but the Council application of article 3(1) resulted in them being entitled to access social grants and French travel documents.[375] Further, while the Court resisted recognising the filiation between French commissioning parents and children born through surrogacy overseas, the Council applied article 3(1) so as to allow children to obtain the documents necessary to join the commissioning parents in France.[376]

There is, however, a negative side to this interaction – the jurisprudence of other relevant institutions may circumscribe the potential benefits of the CRC. This is reflected especially in the position on births *sous X*, where the convergence of jurisprudence from the Court of Cassation, the Constitutional Council and the ECtHR maintained a practice problematic from a children's rights perspective. Similar effects have arisen from the convergence of the CC and ECtHR practice in relation to denial of access to social grants to children who joined their

[371] Civ 1, No. 16-16455, 2017.
[372] Ass., No. 10-19053, 2018.
[373] In 2012, the Court refused to send to the Constitutional Council a QPC in which it was argued that certain statutory provisions were contrary to article 3(1), reasoning that the mentioned article 'was not part of the rights and freedoms guaranteed by the Constitution' (Soc, No. 11-40090, 2012).
[374] Decision 2013-669, 17 May 2013 para 57.
[375] See discussion in part 3.4.
[376] Ibid.

parents to France without following the procedure of family reunification.[377] In both matters, the Committee found the domestic law and practice inconsistent with the CRC, but its position has not been considered.

3.7 Conclusion

Direct application has been central for the judicial effect of the CRC in France and has led to much controversy. The courts justified their reluctance through various features of the Convention – its reference to further implementation measures, its creating only obligations between states rather than individual rights, and the absence of precision of its norms. With the courts accumulating a better understanding of the Convention and its articulation with domestic law, these reasons have either been abandoned or given less importance. Although the number of provisions directly applied remains limited, courts now apply the CRC frequently to a great variety of legal issues in both private and public law.

The impact of the application of the CRC is mixed. In the absence of an extensive constitutional protection for children's rights and a consolidated children's rights statute, the supra-legislative status of the CRC and its vocation to be applied directly have raised hopes about the impact of the Convention. 'High-end' returns of direct application – providing benefits beyond those provided by domestic law and sanctioning inconsistent domestic norms – are seldom obtained. The impact of direct application is marked by the dominance of article 3(1). Its general wording has allowed the courts to consider under its umbrella the substance of rights unlikely to be otherwise directly applied by the courts. At the same time, it created a 'comfort zone' for the courts, allowing them to avoid deciding on the direct application of other CRC provisions.

Despite potential concerns, the CRC has added value to the judicial protection of children's rights by enabling the courts to make child-focused decisions not justifiable under other legal instruments. The Convention has made the rights and interests of children more visible in judicial decisions, and it prompted courts and parties to conceptualise legal issues in a manner that considers them. This may explain perhaps the focus on article 3(1), which the courts have come to approach as *the* provision which legally justifies considering the rights of children and giving them a special legal treatment. Not all judgments reflect a meaningful engagement with the CRC. Symbolic, or superficial (if one is to use a negative term), application shows a desire to integrate the CRC in judicial reasoning, preserving therefore the judicial habit of relying on the Convention.

The factors that influence the direct application of the CRC are not easy to identify because of the brevity of judgments.[378] The narrow approach to direct application and the absence of another normative outlet for the CRC (such as its use for statutory interpretation purposes) have

[377] See note 144 and accompanying text.
[378] Some judges expressed concern about the transparency and accessibility of their judgments (P Deumier (2015) *Repenser la motivation des arrêts de la Cour de cassation? Raisons, identification, réalisation* (online); Ancel 2005 note 125; Canivet 2006 note 241 at 10; Louvel 2015 note 46), the preservation of their relevance as human rights protectors (Louvel 2015 note 46) and as participants in the global legal discourse (Deumier 2015 above).

limited the impact of the Convention. Questions have been raised about the CRC containing 'the seeds of its own non-application',[379] such as its reference to implementation measures in article 4, the alleged lack of precision and clarity of its provisions, or many of its provisions being addressed to the states. However, these CRC-related factors have either been abandoned or have decreased in importance, or are insufficiently explained by the courts to constitute a persuasive explanation for the limited direct application. One should therefore be cautious to burden the CRC with full responsibility for its non-application. This study shows that factors outside the CRC have a bearing on its direct application. Context (legal and factual), judicial policy/opportunity considerations and the interaction with the jurisprudence of other institutions are functionally ambivalent factors that can either facilitate or hinder the direct application of the CRC.

The French jurisprudence has been dynamic and its trajectory has been influenced by courts gradually acquiring a better understanding of the Convention and factors outside the CRC. So far, the evolution of the case law has been in a positive direction. The ratification by France of the Optional Protocol on individual communications in 2016[380] may assist this positive trend. France may have to confront the international consequences of its courts denying direct effect to many CRC provisions. Findings of violation of Convention rights by the Committee may stimulate legal reform or may encourage the courts to be more receptive to the CRC standards and the position of the Committee. The courts may need to be aware of the Committee's views and anticipate its position, should they wish to avoid a finding of violation against France. Exposure to the Committee's views may present the courts with an alternative (persuasive)[381] discourse to that currently tapped into (i.e. the jurisprudence of the ECtHR, ECJ, Constitutional Council), and open opportunities for further development in the courts' application of the CRC.

[379] Khaïat 2010 note 249 at 22.
[380] Note 123.
[381] Both courts discussed here have indicated that they do not consider the views of the Human Rights Committee binding, and it will likely have the same position in relation to the CRC Committee (note 357).

Chapter 4: Australia

4. 1 Introduction

Australia is a jurisdiction with a complex interaction between the CRC and domestic law. This complexity arises from the unincorporated status of the CRC, the federal structure of the state and the variety of courts that apply the Convention. Australian cases reveal aspects not encountered in the other jurisdictions discussed in this work, and thus help conceptualise the role of the courts in giving domestic effect to the CRC.

The jurisprudence of three superior courts – the High Court of Australia ('the HCA'), the Full Court of the Family Court ('the FCFC') and the Victoria Supreme Court ('the VSC') – is analysed. The jurisprudence of the High Court is of interest considering that this is the highest Australian court[1] and the ultimate decision-maker concerning the relationship between treaties and domestic law. The FCFC and the VSC have distinct jurisdictions informed by special statutes (family law legislation and a human rights statute, respectively), which permit them to engage with the Convention differently from the HCA, and warranting therefore separate consideration.

The study proceeds with a general presentation of the relationship between international and Australian domestic law, followed by a discussion of the relationship between the domestic law and the CRC. Part 4.4 is dedicated to the case law, and it is followed by an analytical part and the conclusions.

4.2 The relationship between international treaties and Australian law[2]

Australia is a common law system of Anglo-American tradition, with a federal structure consisting of States and Territories. The legislative power is divided between State and federal legislatures, with the Commonwealth ('Cth') Parliament having the power to legislate only in

[1] Australian Law Reform Commission (2002) *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation ('ALRC Report 92')* at 98 (online).
[2] See generally, A Devereux and S McCosker 'International Law and Australian Law' in D Rothwell and E Crawford (eds) *International law in Australia* (2017) 23.

the domains explicitly provided in the Constitution.[3] States have residual legislative power but federal law prevails over inconsistent state law.[4]

Treaties are negotiated and entered into by the Commonwealth executive,[5] with limited involvement of the Commonwealth Parliament and the States/Territories.[6] The Commonwealth Parliament has the power to make laws in relation to 'external affairs',[7] including laws to give effect to treaties ratified by the Commonwealth executive. Legislating under the external affairs power allows the Commonwealth to make laws in matters which are otherwise under the jurisdiction of the States. The Commonwealth Parliament has not enacted special laws to give effect to human rights treaties[8] (save anti-discrimination treaties on grounds of race, sex and disability),[9] allegedly to avoid an interference into the legislative powers of the States.[10]

The government has been often criticised for its failure to enact a consolidated federal Bill of Rights.[11] The official view is that the existing law (legislation and common law) provides adequate human rights protection,[12] and that the passing of a Bill of Rights is not necessary.[13] However, the human rights protection system is 'hard to pin down'.[14] Very few rights are explicitly or implicitly protected in the Constitution,[15] and those which are, embody freedoms developed at common law, rather than 'general principles of broad statement'[16] like those found in human rights instruments. Federal statutes[17] and common law[18] provide some human

[3] Section 51 of the Commonwealth of Australia Constitution Act 1900/1901 ('the Constitution').
[4] Section 109 of the Constitution.
[5] Section 61 of the Constitution.
[6] The Constitution does not require their participation, but a policy has developed to allow for their input prior to the taking of binding treaty action. See Devereux and McCosker 2017 note 2 at 26.
[7] Section 51(xxix) of the Constitution.
[8] H Charlesworth and G Triggs 'Australia and the International Protection of Human Rights' in D Rothwell and E Crawford (eds) *International Law in Australia* (2017) 11 at 129.
[9] Ibid at 128.
[10] Ibid at 129; H Charlesworth 'The UN and Mandatory Sentencing' 2000 (25) *Australian Children's Rights News* 1 at 4. But see *Commonwealth v Tasmania* (1983) 158 CLR 1.
[11] For unsuccessful efforts to introduce a federal human rights statute, see Charlesworth and Triggs 2017 note 8 at 125-127; A Pert 'The Good International Citizenship of the Rudd Government' 2012 (30) *Australian Year Book of International Law* 93 at 112-113. Two States (Australian Capital Territory and Victoria) have passed human rights statutes: Human Rights Act 2004 (ACT) and the Charter of Human Rights and Responsibilities Act 2006 (Vic).
[12] This view is criticised by, for example, G Triggs (2016) *Human rights across the Tasman: a widening gulf*, The Hotung Fellowship Public Lecture, 6 April 2016 (online) and D Otto 'From "reluctance" to "exceptionalism": The Australian approach to domestic implementation of human rights' 2001 (26) *Alternative Law Journal* 219 at 221.
[13] Commonwealth of Australia (2007) *Common Core Document forming part of the reports of States Parties – Australia – incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights June 2006* para 83 (online). Similarly, Heydon J in *Momcilovic v The Queen* [2011] HCA 34.
[14] Otto 2001 note 12 at 221.
[15] P Bailey *The Human Rights Enterprise in Australia and Internationally* (2009) at 239.
[16] Ibid at 269-271.
[17] For example, the Family Law Act 1975 (Cth) protects some children's rights in the context of the relationship between parents and children.
[18] Charlesworth and Triggs 2017 note 8 at 121. See Australian Human Rights Commission ('the AHRC') (not dated) *Common law rights, human rights scrutiny and the rule of law* (online). For divergent views in relation to the effectiveness of human rights protection at common law, see R French (2009) *The Common Law and the Protection of Human Rights*, Paper presented at the Anglo Australasian Lawyers Society ('French 2009a'); J Southalan (2011) *Common Law v Human Rights: Which Better Protects Freedoms?* (online) cf A Nicholson 'The

rights protection that overlaps with human rights treaties, but there are differences in the scope and the nature of protection,[19] and the common law is vulnerable to statutory override.[20] None of the rights recognised at common law are socio-economic rights or are child-specific.[21]

Australia follows a dualist tradition to the relationship between national law and international treaties.[22] The Constitution has limited provisions concerning the relationship between international and domestic law, the issue being determined primarily by common law.[23] A transformation approach is taken in relation to treaty obligations,[24] under which ratified treaties do not become domestically binding unless incorporated by legislation.[25] Certain human rights instruments, including the CRC,[26] have been attached in schedules to the Australian Human Rights Commission Act 1986 ('the HRCA'; formerly known as the Human Rights and Equal Opportunity Commission Act 1986).[27] This process does not amount to incorporation,[28] but the Commission can inquire into acts and practices contrary to the human rights provided in the attached instruments.[29] This is a 'curious position'[30] that allows the Commission to draw attention to breaches of international human rights which are not of direct application domestically.[31] Some courts have stressed that the scheduling enhances the status of declared instruments,[32] but its concrete benefits remain uncertain.[33]

The lack of incorporation or transformation of a treaty does not deny its relevance for Australian law. Its effect is indirect, and includes influencing the development of the common law, informing statutory and, more controversially, constitutional interpretation, and influencing the exercise of administrative power and executive discretion.[34] Reliance on

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United Nations Convention on the Rights of the Child and the Need for Its Incorporation into a Bill of Rights' 2006 (44) *Family Court Review* 5 at 10.

[19] Human Rights (Parliamentary Scrutiny) Act 2011 (Cth); Australian Law Reform Commission ('the ALRC') (2016) *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Final Report 129) paras 2.45 – 2.46 (online).

[20] Charlesworth and Triggs 2017 note 8 at 121.

[21] For the rights recognised at common law, see, for example, R French (2010) *Protecting Human Rights Without a Bill of Rights,* Paper presented at the John Marshal Law School, Chicago at 26-27 (e.g. right of access to courts; privilege against self-incrimination; no deprivation of liberty except by law, etc) (online).

[22] A 'clear cut dualism', according to R French (2009) *Oil and Water? – International Law and Domestic Law in Australia*, The Brennan Lecture, Bond University (online) ('French 2009b') at 30.

[23] Devereux and McCosker 2017 note 2 at 26.

[24] Ibid at 25.

[25] Ibid at 27. See Mason CJ and McHugh J in *Dietrich v R* [1992] HCA 57 ('*Dietrich'*) para 17.

[26] The CRC became a declared instrument on 22 December 1992 (A Twomey 'Minister for Immigration and Ethnic Affairs v Teoh' 1995 (23) *Federal Law Review* 348 at 360).

[27] See the Commission's website at https://www.humanrights.gov.au/our-work/legal/legislation.

[28] K Walker and P Mathew 'Minister for Immigration v Ah Hin Teoh'1995 (20) *Melbourne University Law Review* 236 at 249; I Shearer et al 'International Law Association Committee on International Law in National Courts: Report of the Australian Branch' 1994 *Australian Year Book of International Law* 231 n 37.

[29] On the nature and the extent of these powers, see Charlesworth and Triggs 2017 note 8 at 130.

[30] Ibid at 129. Some authors have called this 'quasi-incorporation' (Shearer et al 1994 note 28 at 240).

[31] Charlesworth and Triggs 2017 note 8 at 129.

[32] *B and B and the Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FamCA 451 (see part 4.2.3 below) endorsing the position of Einfeld J in *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 ('*Magno*') that scheduled international instruments 'should have significant application in Australia' (para 48).

[33] J Single 'The Status of the UN Convention on the Rights of the Child in Australian Law' 1999 (9) *Polemic* 36 at 37.

[34] Devereux and McCosker 2017 note 2 at 36-44.

international law to interpret the Constitution is limited and controversial,[35] with only isolated judicial voices supporting it.[36] The impact of international human rights treaties on the common law has not been far-reaching,[37] and there are divergent judicial opinions especially in relation to the legitimacy of the influence exercised by unincorporated treaties.[38]

Various intersecting[39] presumptions of statutory interpretation allow for the influence of international treaties on domestic law. The presumption of consistent interpretation had its 'precise parameters ... stated differently in different cases',[40] with some judges expressing hostility toward it.[41] The presumption that legislation is to be interpreted as far as its language permits in conformity to an international treaty applies in relation to legislation which seeks to give effect to such treaty.[42] It also extends to other legislation, if the treaty precedes the legislation.[43] In *Teoh* it was said that the presumption applies 'because Parliament, *prima facie*, intends to give effect to Australia's obligations under international law'.[44] The presumption may be fortified by the Parliament having expressed some domestic commitment to the treaty,[45] even when such commitment falls short of incorporating or transforming a treaty into domestic law.

For this presumption to apply, ambiguity in a statute is required.[46] While some authors have challenged this requirement,[47] others have defended its application as reflecting the parliamentary supremacy and the institutional role of the courts.[48] Some judges support a wider construction of the notion of 'ambiguity'[49] which is said to exist '[i]f the language of the

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[35] Ibid at 42.

[36] Kirby J in *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 657-658; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 417-418; *Al-Kateb v Godwin* [2004] HCA 37 ('*Al-Kateb*')). The position has been resisted by other High Court judges (*AMS v AIF* (1999) CLR 160, 180; see *Al-Kateb* per McHugh J).

[37] Devereux and McCosker 2017 note 2 at 38.

[38] It was supported by Brennan J in *Mabo and others v Queensland* (No. 2) [1992] HCA 23 ('*Mabo'*) para 42; Brennan J in *Dietrich* para 9. Mason CJ and Deane J in *Teoh* (para 28) were cautious in relation to unincorporated treaties, and Calinnan J in *Western Australia v Ward* [2002] HCA 28 ('*Ward'*) was averse to developing the common law in accordance to international law (para 958).

[39] B Horrigan 'Reforming Rights-Based Scrutiny and Interpretation of Legislation' 2012 (37) *Alternative Law Journal* 228 at 230.

[40] Devereux and McCosker 2017 note 2 at 39.

[41] McHugh J, according to D Meagher 'The Common Law Presumption of Consistency with International Law: Some Observations from Australia (and Comparisons with New Zealand)' 2012 *New Zealand Law Review* 465 at 472-473. See McHugh J in *Al-Kateb* para 65.

[42] P Herzfeld and T Prince *Statutory Interpretation Principles: The Laws of Australia* (2014) at 179. Same presumption applies in relation to customary international law (*Polites v Commonwealth* (1945) 70 CLR 60, 68-69 (Latham CJ) ('*Polites'*)).

[43] Herzfeld and Prince 2014 note 42 at 180.

[44] *Teoh* per Mason CJ and Deane J para 26 fn omitted.

[45] See, generally, Meagher 2012 note 41.

[46] For a view that ambiguity is not required, see Meagher 2012 note 41 at 485. On the meaning of ambiguity, see J Spigelman 'Statutory Interpretation: Identifying the Linguistic Register' 1999 (4) *Newcastle Law Review* 1 at 2-3.

[47] D Dyzenhaus, M Hunt and M Taggart 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' 2001 (1) *Oxford University Commonwealth Journal* 5 at 25.

[48] W Lacey 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere' 2004 (5) *Melbourne Journal of International Law* 108 at 123-124 ('Lacey 2004a').

[49] This approach was pioneered in *Teoh* (Walker and Mathew 1995 note 28 at 243). Other cases in which it was followed include *De L v Director-General Department of Community Services (NSW)* [1996] HCA 5 (per Kirby J); *AMS v AIS* (per Gleeson CJ, McHugh and Gummow JJ para 50); *Minister for Immigration and Multicultural*

legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia'.[50] In such case, 'that construction should prevail'.[51] The wider meaning of 'ambiguity', which is predicated not on the linguistic clarity *per se* but on the existence of a choice of meanings, is more conducive to the use of international law. However, a wide view of 'ambiguity' is not endorsed by all judges, some rejecting the argument that a statute should be construed in line with international law 'wherever possible', and in the absence of 'genuine ambiguity'.[52]

A further presumption of statutory interpretation is that the Parliament is presumed not to intend to limit fundamental human rights, unless that intention is clearly and unequivocally expressed.[53] This presumption applies in relation to fundamental rights recognised at common law,[54] although the list of rights is not 'settled'.[55] The application of the presumption to unincorporated human rights is uncertain and controversial,[56] and ultimately unlikely in the absence of some statutory commitment to international human rights treaties.[57]

The caveat to both interpretive presumptions is that they do not operate when the will of the Parliament is clearly contrary to international law.[58]

Although not establishing presumptions of interpretation, the Acts Interpretation Act 1901 (Cth) creates opportunities to rely on international law as extrinsic statutory interpretation material.[59] Sections 15AB(1) and (2)(d) of the Act authorise reliance on an international treaty 'referred to' (section 15AB(2)(d)) in that statute, in order to confirm the ordinary meaning of the text or resolve an ambiguity.[60] When there is no ambiguity, a treaty 'referred to' in a statute may be relied on for interpretation purposes if the meaning of the statute is manifestly absurd or unreasonable.[61] Thus, when a treaty is mentioned in a statute, the courts can refer to it to interpret that statute even in the absence of ambiguity, if the treaty 'is capable of assisting in

and Indigenous Affairs v B [2004] HCA 20 (per Kirby J para 143); *Al-Kateb* per Kirby J para 168, but disapproved of by McHugh J para 65); *Kartinyeri v The Commonwealth* [1998] HCA 22 (per Gummow and Hayne JJ para 97).

[50] *Teoh* per Mason CJ and Deane J para 27 fn omitted. To paraphrase French CJ in *Momcilovic*, the *Teoh* ambiguity does not have 'negative connotations' (para 50).

[51] *Teoh* per Mason CJ and Deane J para 27 fn omitted.

[52] *Ward* per Callinan J para 955 (both quotes).

[53] AHRC (not dated) note 18; M Sanson *Statutory Interpretation* (2012) at 207. This is known as the 'principle of legality' (French CJ *in Momcilovic* para 43; Meagher 2012 note 41; Horrigan 2012 note 39 at 229).

[54] There may be some support from judges writing extrajudicially for extending the presumption beyond common law rights: M Kirby 'Chief Justice Nicholson, Australian Family Law and International Human Rights' 2004 (5) *Melbourne Journal of International Law* 221 at 230; French 2010 note 21 at 30; Spigelman 1999 note 46 at 15-16.

[55] ALRC 2016 note 19 para 2.29.

[56] Dyzenhaus, Hunt and Taggart 2001 note 47 at 6; French 2009b note 22 at 37; Meagher 2012 note 41; French CJ in *Momcilovic* para 43.

[57] Meagher 2012 note 41 at 483, 485.

[58] *Al-Kateb* at 581; *Momcilovic* per French CJ para 43. French 2010 note 21 at 27.

[59] Devereux and McCosker 2017 note 2 at 39.

[60] Section 15AB(1)(a) and (b)(i) read with section 15AB(2)(d).

[61] Section 15AB(1)(b)(ii) read with section 15AB(2)(d). See also Shearer et al 1994 note 28 at 239.

the ascertainment of the meaning of the provision'.[62] In order to make use of the interpretive opportunities provided in the Act, it is sufficient for the treaty to have been mentioned in the second reading speech in the Parliament,[63] even if it was not referred to in the final form of the Act.

Unincorporated treaties may also affect the exercise of administrative and executive discretion.[64] In *Teoh*, the HCA crafted a new method to give effect to an unincorporated treaty by extending the scope of the administrative law doctrine of legitimate expectation,[65] as discussed further in part 4.4.4 below.

According to some authors, a new form of engagement with unincorporated international treaties is emerging, namely the reliance on international treaties in the exercise of *judicial* discretion.[66] The substantial protection of rights continues to depend on their recognition at common law, and the exercise of discretion must comply with existing authorities.[67] The judicial officer has the option to take an incorporated treaty into account as a relevant factor, but has no legal obligation to ensure that the decision conforms with the treaty[68] or that the treaty is taken into account.[69]

Judges' attitude to international law is also relevant. The dominant judicial view is that legislation or official conduct is assessed against domestic standards, and potential breaches of international law are to be sanctioned in the international sphere.[70] Thus, for some judges, international law '"either binds fully or it does not bind"' or '"it is either relevant or irrelevant"'.[71] More nuanced views have also been expressed. The result is a kaleidoscope of judicial views that ranges from enthusiasm[72] to caution[73] and to strong opposition to what some call the 'often ambiguous'[74] or 'often vague and conflicting'[75] international norms.

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[62] *Magno* per Gummow para 20. See also M Allars 'One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: Teoh's Case and the Internationalisation of Administrative Law' 1995 (17) *Sydney Law Review* 204 at 205.
[63] *Magno* per Gummow paras 19-20; Devereux and McCosker 2017 note 2 at 41.
[64] Ibid at 44.
[65] M Groves 'Treaties and Legitimate Expectations – The Rise and Fall of *Teoh* in Australia' 2010 *Monash University Law Research Series* 8; W Lacey 'In the Wake of *Teoh*: Finding an Appropriate Government Response' 2001 (29) *Federal Law Review* 219 at 232; M Taggart '"Australian Exceptionalism" in Judicial Review' 2008 (36) *Federal Law Review* 1 at 17.
[66] Discretion is 'the space between laws' in which judges and administrators can chose 'between several different, but equally valid, courses of action' in order to make just decisions in response to individual situations (Lacey 2004a note 48 at 110).
[67] Ibid at 116.
[68] *Kioa v West* (1985) 159 CLR 550 ('*Kioa'*) per Gibbs CJ para 21.
[69] *Kioa* per Brennan J para 40.
[70] Criticised by Charlesworth 2000 note 10 at 1.
[71] H Charlesworth 'The High Court and Human Rights' in P Cane (ed) *Centenary Essays for the High Court of Australia* (2004) 356 at 368. See Callinan J in *Ward* [2002] HCA 28 para 956
[72] Kirby J (former justice of the High Court 1996-2009); Nicholson CJ (former CJ of the Family Court 1988-2004).
[73] French (2009b note 22) raising concerns about international law being an 'elusive' concept, which still faces 'taxonomical challenges'.
[74] *Ward* per Callinan para 956.
[75] *Ward* per Callinan J para 958.

The effectiveness of human rights protection in Australia has often been criticised. Thus, common law or treaty rights may be superseded by statutes made by the Parliament,[76] which has also undone or pre-empted progressive human rights jurisprudence.[77] The very detailed legislation passed by the federal Parliament has prevented the application of rights-protective interpretive presumptions[78] and has curtailed administrative and judicial discretion by leaving no flexibility to dispense individualised justice or consider international human rights.[79] Superior courts 'have tended to respect the words of the statute, even where the consequence is an egregious breach of the most fundamental of human rights'.[80] In doing so, they show a concern about the legitimacy of judicial protection of unincorporated rights, which contrasts with their willingness to protect common law rights.[81] The context in which the human rights discourse operates is politicised,[82] and the absence of a legislative 'scaffolding on which to build a human rights culture'[83] leads to a weak general public support for human rights. Further, many human rights cases, including concerning children, relate to immigration matters, which are politically sensitive.[84]

The 'partial and porous'[85] protection of human rights creates a 'legacy of exceptionalism and isolation from global human rights jurisprudence'.[86] The relevance of international law 'is questioned and a sense of self-sufficiency is promoted within domestic legal discourse'.[87] Indeed the legal context is that 'such [international] instruments can safely be ignored in the determination of most legal issues under Australian law'.[88] There is habitual rejection of the views of international human rights bodies,[89] and a disappointing 'failure to face a reasoned

[76] Triggs 2016 note 12.
[77] See Bailey 2009 note 15 at 268, 343-344; Charlesworth and Triggs 2017 note 8 at 130-131. For changes to the immigration legislation following successful litigation against the government, see P Mathew 'Nationality, Asylum and Refugee Law in Australia' in D Rothwell and E Crawford (eds) *International Law in Australia* (2017) 165 at 195-197; G Triggs 'An Interview with Professor Gillian Triggs on the Impact of International Human Rights on Domestic Law' 2013 (20) *Pandora's Box* 54 at 60.
[78] Charlesworth and Triggs 2017 note 8 at 137.
[79] Bailey 2009 note 15 at 218.
[80] Triggs 2016 note 12. It has been argued, however, that the courts have narrowed the meaning of non-justiciability under the influence, amongst others, of international standards (see, generally, R Thwaites 'The Changing Landscape of Non-Justiciability' 2016 *New Zealand Law Review* 31).
[81] Meagher 2012 note 41 at 478.
[82] For insights, see H Charlesworth (2006) *Human rights: Australia versus the UN* (Democratic Audit of Australia, Australian National University) at 5 (online); S Joseph 'The Howard Government's Record of Engagement with the International Human Rights System' 2008 *Australian Year Book of International Law* 45 at 48; A Pert and H Nasu 'Australia and International Organisations' in D Rothwell and E Crawford (eds) *International Law in Australia* (2017) 95.
[83] Triggs 2016 note 12. Also, Charlesworth and Triggs 2017 note 8 at 118.
[84] Taggart 2008 note 65 at 6; Triggs 2016 note 12.
[85] Charlesworth and Triggs 2017 note 8 at 129.
[86] Triggs 2016 note 12. Also, Otto 2001 note 12; Taggart 2008 note 65.
[87] J Tobin 'Finding rights in the "wrongs" of our law: Bringing international law home' 2005 (30) *Alternative Law Journal* 164 at 164.
[88] A Nicholson (2002) 'Australian Judicial Approaches to International Human Rights Conventions and "Family Law"', Paper presented at The Miller Du Toit Conference, Cape Town ('Nicholson 2002a') at 15 (online).
[89] Joseph 2008 note 82 at 52-53. Also, Pert 2012 note 11 at 122; Charlesworth and Triggs 2017 note 8 at 133.

challenge'[90] from international bodies. This 'ultimately renders the Australian legal landscape increasingly barren and detached from evolving international developments'.[91]

It is in this legal and political context that the interaction between the CRC and judicial reasoning in Australia needs to be understood.

4.3 Australia and the CRC

Australia ratified the CRC in 1990,[92] but its position in relation to the CRC 'is more than a little uncertain'.[93] The country remains 'obstinate in its refusal to implement the CRC'[94] despite domestic and international calls for federal protection of Convention rights.[95] The official position is that the enactment of the CRC was not necessary because prior to ratification, the government ensured that domestic law complied with it.[96] Concerns have been expressed, however, including by the CRC Committee, over the conformity with the Convention of legislation and practices on issues such as immigration detention; mandatory sentencing in some States; alternative care; lack of prohibition of corporal punishment; right to privacy and protection of family life; the absence of a right to approach courts with claims of violation of CRC rights; the reservation to article 37(c); and the treatment of indigenous children.[97] The status of the CRC in the domestic law and opportunities for the courts to apply it have been also been queried by the Committee,[98] which expressed concern that the Convention 'cannot be used by the judiciary to override inconsistent provisions of domestic law'.[99]

[90] Bailey 2009 note 15 at 337.
[91] Tobin 2005 note 87 at 164.
[92] It ratified the CRC on 17 December 1990 (United Nations Treaty Collection *Status of Treaties: Convention on the Rights of the Child* (online). It made a reservation to article 37(c) (second sentence) (ibid note 92).
[93] F Bates 'Australia: The Certain Uncertainty' in E Sutherland (ed) *The Future of Child and Family Law: International Predictions* (2012) 47 at 48.
[94] J Tobin 'The Development of Children's Rights' in L Young, M Kenny and G Monahan (eds) *Children and the Law in Australia* (2016) 25 at 26.
[95] Commonwealth of Australia (2009) *National Human Rights Consultation Report* at 347 (online); Charlesworth and Triggs 2017 note 8 at 127; CRC Committee (1997) *Concluding observations of the Committee on the Rights of the Child: Australia* para 9; CRC Committee (2012) *Concluding observations: Australia* paras 11, 12.
[96] Australia (1995) *Australia's Report under the Convention on the Rights of the Child* para 6; CRC Committee (2005) *Summary record of the 1054th meeting* para 30).
[97] Australian Human Rights Commission (2014) *The Forgotten Children: National Inquiry into Children in Immigration Detention* at 25-37 (online); CRC Committee (2005) *Concluding observations: Australia*. CRC Committee (2012) *Summary record of the 1708th meeting* para 22; CRC Committee (2012) *Concluding observations: Australia* para 80 (c); CRC Committee (1997) *Concluding observations: Australia* paras 7-9, 15, 20 and 22. The Australian delegation that presented the Australian country report to the Committee disagreed with the critical remarks of the latter in relation to corporal punishment and mandatory sentencing (CRC Committee (1997) *Summary record of the 404th meeting* para 19; (1997) *Summary record of the 405th meeting* para 78; (2005) *Summary record of the 1055th meeting* para 55).
[98] CRC Committee *Concluding Observations* 2005 paras 18, 19 and 58.
[99] Ibid para 9.

Issues covered by the CRC fall under the legislative powers of the State and the federal parliaments.[100] The Commonwealth has legislative powers in relation to marriage and parental rights ((sections 51(xxi) and 51(xxii) of the Constitution), while public law issues (child protection, juvenile justice and adoption, for example) belong to the States.[101] The Commonwealth may legislate on CRC-relevant issues that are normally under the States' competence by relying on its external affairs powers. However, it has been reluctant to do so,[102] even when State legislation was in conflict with the CRC.[103]

Although it remains un-incorporated, the CRC has influenced federal developments in law and policy.[104] It has had, for example, a significant impact on the reform of the Family Law Act in 1995,[105] including the import into the Act of the notion of the best interests of the child[106] and the formulation of some provisions in a rights language.[107] This reform has been 'extremely complex',[108] bringing up the concern that 'the erosion of judicial discretion by a continuing process of legislative specificity'[109] might undermine the rights of children. No explicit reference was made to the CRC in the Family Law Act until its amendment in 2011 (effective June 2012),[110] when section 60B(4) was introduced.[111] It reads:

> An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.

The Parliament indicated that the amendment does not incorporate the Convention,[112] which is to be used as an interpretation aid for Part VII in case of ambiguity, with the Act prevailing in case of inconsistency.[113] Considering the government's insistence that its laws complied with the CRC at the time of ratification,[114] one may ask why was it necessary to amend the Act in

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[100] R Shackel 'The UN Convention on the Rights of the Child: Tracing Australia's Implementation of the Provisions Relating to Family Relations' in O Cvejić Jančić (ed) *The Rights of the Child in a Changing World, Ius Comparatum – Global Studies in Comparative Law* 13 (2016) 37 at 41.
[101] Nicholson 2002a note 88 at 1-2.
[102] M Rayner 'The state of children's rights in Australia' in B Franklin (ed) *The New Handbook of Children's Rights: Comparative policy and practice* (2002) 345 at 350; Single 1999 note 33 at 38.
[103] Nicholson 2006 note 18 at 23.
[104] Single 1999 note 33 at 37; Tobin 2016 note 94 at 31.
[105] J Behrens and P Tahmindjis 'Family Law and Human Rights' in D Kinley (ed) *Human Rights in Australian Law* (The Federation Press, Sydney 1998) 169.
[106] Single 1999 note 33 at 37. Also, A Dickey *Family Law* (2014) at 305.
[107] F Bates '"Out of Everywhere into Here" – The Disparate Bases of Childrens' (sic) Rights in Australia' 2007 (15) *Asia Pacific Law Review* 235 at 250; A Sifris 'Children in Immigration Detention: The Bakhtiyari family in the Family Court' 2004 (29) *Alternative Law Journal* 212 at 216. See sections 60(2)(b) and (c); 60B(2)(a) of the Family Law Act.
[108] Bates 2012 note 93 at 60.
[109] Ibid at 73.
[110] Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011. Also, M Fernando 'Express Recognition of the UN Convention on the Rights of the Child in the *Family Law Act*: What Impact for Children's Participation?' 2013 (36) *UNSW Law Journal* 88 at 88 and 91.
[111] It was introduced in Part VII of the Act, titled 'Children', and dealing with the relationship between children and parents, or between parents.
[112] See the Parliament of the Commonwealth of Australia (2010-2011) *Replacement Family Law Legislation Amendment (Family Violence and other Measures) Bill, 2011 Replacement Explanatory Memorandum* para 24 (online) ('the *Replacement Memorandum'*). Also, Fernando 2013 note 110 at 91.
[113] *Replacement Memorandum* note 118 para 24.
[114] The last such statement was made in the 2018 report submitted to the Committee (Australia (2018) *Australia's joint fifth and sixth report under the Convention on the Rights of the Child* (online).

1995, and then again in 2011, the latter time even stating that the object of amended Part VII was 'to give effect' to the CRC?

In addition to the Family Law Act, other federal statutes have been influenced by and mention the CRC.[115] Further statutory protection exists in child protection, consumer protection, education, and anti-discrimination,[116] but it is 'limited and piecemeal'.[117] The status of the CRC as a declared instrument under the Human Rights Commission Act has prompted some judicial attention, as discussed in part 4.4.1 below.

In general, the CRC is not widely embraced, with misconceptions in relation to its effects on sovereignty, federal balance, and impact on child-parent relationships.[118] There is apprehension about its 'vague and general terms' and lack of 'sufficient detail to provide any real guidance'; the 'conditional language and qualified terms which are contained in many of the articles [and which] undermine any rights which may have been created …'.[119] The gulf between the likes and dislikes inspired by the CRC makes it 'highly unlikely that any genuine intellectual currency is likely to be transacted'[120] between its supporters and detractors. These difficulties are compounded by a lack of solid and uncontested domestic children's rights foundation.[121] Consequently, the rights of children 'play little part in the mundane operation of the law' and 'no coherent picture has emerged, is emerging, or is likely so to do'.[122] This is illustrated in the case law presented below.

4.4 The case law

This consideration of the relevant case law is structured according to the categories of engagement presented in part 4.2 above. Part 4.4.7 presents separately the case law of the VSC after the coming into force of the 2006 Victoria Charter to illustrate the impact of this statute on the engagement of domestic courts with the CRC. As discussed in Chapter 1, only cases in which there is some meaningful engagement with the Convention have been closely analysed.

[115] Sex Discrimination Act 1984 (section 4); Australian Human Rights Commission Act 1986 (sections 46C and 46MB); Privacy Act 1988 (amended; section 12B); Age Discrimination Act 2004 (section 10); Human Rights (Parliamentary Scrutiny) Act 2011 (section 3); Workplace and Gender Equality Act 2012 (section 5); National Disability Insurance Scheme Act 2013 (section 3); Enhancing Online Safety for Children Act 2015 (sections 4, 12).
[116] Shackel 2016 note 100 at 42.
[117] Tobin 2016 note 94 at 26. Similarly, Nicholson 2002a note 88 at 5.
[118] 51% of the submissions to the Joint Standing Committee on Treaties opposed the CRC on the grounds indicated above (Joint Standing Committee on Treaties, The Parliament of the Commonwealth of Australia (1998) *United Nations Convention on the Rights of the Child* at ix (online)). See also M Jones 'Myths and facts concerning the Convention on the Rights of the Child in Australia' 1999 (5) *Australian Journal of Human Rights* 126 at 128.
[119] Bates 2007 note 107 at 245.
[120] Ibid at 244.
[121] Bates argues that one of the problems with children's rights protection in Australia is their disparate sources such as the Constitution, the CRC, foreign case law or legislation, historical principles and even uncertain sources (ibid at 255).
[122] Ibid at 258.

A brief quantitative account of cases mentioning the CRC may be useful. On 26 October 2018 (last date of search on Australasian Legal Information Institute (*Austlii*) database), 26 HCA cases mentioned the CRC, of which six did not involve children or their rights and one was on appeal from the Supreme Court of Nauru.[123] There were 131 cases in the Family Court, 22 in the FCFC and 25 in the VSC that mentioned the CRC.[124]

4.4.1 Judicial consideration of the legal status of the CRC in Australian law

The HCA treats the CRC as an unincorporated treaty which cannot create domestic rights directly[125] and inconsistency with which does not affect the validity and the application of domestic law. In *Minister for Immigration and Multicultural and Indigenous Affairs v B,*[126] Kirby J was ready to accept that the Australian law breached the country's international obligations,[127] but decided that while the courts 'can note and call attention to the issue'[128] they are bound to act according to a valid statute and the Constitution.[129] When the language of a statute is clear, even 'intractable',[130] the courts must give it effect.[131] The Migration Act 1958 (in that case) was clear and reflected a 'deliberate decision'[132] to detain children who were illegal immigrants,[133] to which the courts were bound to give effect.

The importance of the Convention has been acknowledged by some judges. In *Teoh,* the existence of a legitimate expectation arising from the ratification of the Convention was linked with the fact that the 'instrument evidences internationally accepted standards'.[134] Gaudron J found the Convention significant because it 'gives expression to a fundamental human right which is taken for granted by Australian society'.[135] In *Re Woolley*, the CRC was thought to be 'unquestionably an important consideration of legislative policy',[136] albeit one that cannot prevail over a domestic statute. Bell J in the VSC found that '[o]f cardinal importance, it [the CRC] is now the primary source of international law on the human rights of children'.[137] By contrast, for other judges, its ratification 'is, by its very nature, a statement to the international community … How, when or where those undertakings will be given force in Australia is a matter for the federal Parliament'.[138] Similarly, '[t]he non-enactment of the Convention into Australian law could well indicate parliamentary resistance to it'.[139] The endorsements of the

[123] *DWN027 v The Republic of Nauru* [2018] HCA 2. The case is not discussed because in appeals from Nauru, the HCA applies Nauru laws. The *Austlii* database is available at http://www.austlii.edu.au/ .
[124] Date of search: 24 May 2017 (the reporting by *Austlii* in relation to the VSC only started in 1998).
[125] *Teoh* per Mason CJ and Deane J para 25; per McHugh para 35.
[126] [2004] HCA 20 ('*MIMIA v B'*) (discussed below).
[127] *MIMIA v B* per Kirby J paras 147, and 151-153.
[128] Kirby J para 171.
[129] Kirby J para 155.
[130] Kirby J para 159.
[131] Kirby J para 155 and 171.
[132] Kirby J para 188.
[133] Kirby J paras 157-158 and paras 160-169.
[134] *Teoh* per Mason CJ and Deane J para 34.
[135] *Teoh* per Gaudron J para 6. However, the same significance might not be attached to 'a treaty or convention that is not in harmony with community values and expectations' (ibid).
[136] *Re Woolley* per Gleeson CJ para 31.
[137] *ZZ v Secretary, Department of Justice* [2013] VSC 267 para 62.
[138] *Teoh* per McHugh J para 37.
[139] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6 per Callinan J para 147.

domestic importance of the CRC by HCA judges have remained of only symbolic value, as positive outcomes have seldom arisen from its consideration by this Court.

The Family Court was keener to address the domestic status of the CRC even when this was not strictly necessary for the case at hand.[140] Except when incorporation views were expressed, the Court endorsed the classic position that the CRC cannot prevail over inconsistent domestic norms. In *Murray v Director, Family Services, ACT*[141] it was held that the CRC could not prevail over a treaty which was given some statutory recognition.[142] In *H v W,*[143] Fogarty and Kay JJ said that despite its importance, the CRC does not entitle a court to 'disregard or overrule' specific provisions of the Family Law Act (the paramountcy of a child's best interests) to give effect to article 12 of the CRC.[144] In *KN & SD & Secretary, Department of Immigration and Multicultural and Indigenous Affairs,*[145] a majority decided that the rights in the CRC (as incorporated domestically by the Family Law Act) could not be given effect because of their inconsistency with the Migration Act.[146]

A majority of the Full Court in *B and B and the Minister for Immigration & Multicultural & Indigenous Affairs*[147] advanced the view that the CRC was incorporated into the domestic law through amendments to the Family Law Act. The decision was set aside unanimously by the High Court in *MIMIA v B*.

The case raised questions in relation to the scope of the welfare jurisdiction of the Family Court in section 67ZC(1) of the Family Law Act 1975 (Cth) following the amendments made by the Family Law Reform Act 1995.[148] The case was unusual because the applicants approached the Family Court under its welfare jurisdiction[149] rather than the Federal Court or the High Court that customarily decide immigration matters.[150] It was hoped that the Family Court would be

[140] In *Murray v Director, Family Services, ACT* [1993] FamCA 103, the CRC did not have 'a significant role to play' (Nicholson CJ and Fogarty J paras 153, 160). In *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676 the extensive discussion on the CRC and its relationship with the Family Law Reform Act 1995 was *obiter*, and in *B and B v MIMIA*, the Court relied on the CRC in the alternative.
[141] [1993] FamCA 103 ('*Murray*').
[142] *Murray* per Nicholson CJ and Fogarty J paras 153, 160. It was argued that a conflict existed between article 3 of the CRC and the mandatory return provisions in the Hague Convention on the Civil Aspects of International Child Abduction, 1980 ('the Hague Convention'), the latter being a Convention partially incorporated domestically. The majority found that no conflict existed, because both treaties sought the protection of children's best interests.
[143] *H v W* [1995] FamCA 30 ('*H v W'*).
[144] *H v W* Fogarty and Kay JJ para 64. The judges remarked that when a court is called on to make welfare decisions, the 'self-determination' of a mature child does not arise, and the wishes of the child can be rejected (para 57). In time, however, the position in relation to the best interests and the voice of the child has become more nuanced (see *Re Jamie* [2013] FamCAFC 110).
[145] [2003] FamCA 610 ('*KN & SD*').
[146] *KN & SD* per Nicholson CJ and O'Ryan J paras 75-76.
[147] [2003] FamCA 451 ('*B and B v MIMIA'*).
[148] Section 67ZC(1) reads: 'In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children'.
[149] Dickey 2014 note 106 at 301. Examples of matters in which the Family Court has exercised its welfare powers are the sterilisation of a child for non-therapeutic purposes; authorisation of treatment for a transgender child; disclosure of parentage; relocation; obtaining a child's passport; and child abduction (ibid at 301-302).
[150] Sifris 2004 note 107 at 213; *MIMIA v B* per Kirby J para 119.

able to use its wide discretion under the Family Law Act to exempt illegal immigrants children from detention under the Migration Act.[151]

The case concerned a family of illegal immigrants (two adults and five children) held in mandatory immigration detention, who sought the release of the children on grounds that detention was harmful to them. A majority of the FCFC (Nicholson CJ and O'Ryan J) found that its welfare jurisdiction was distinct from and extended beyond the Court's jurisdiction in parental responsibility matters,[152] to include immigration detention which was harmful to children.[153] The view of the Family Court was that its welfare jurisdiction was a general jurisdiction that enabled it to make orders for the welfare of children beyond the matters in which this jurisdiction was normally exercised and, implicitly, in relation to third parties such as the Minister for Immigration. A unanimous High Court disagreed, holding that the welfare jurisdiction of the Family Court did not extend to the immigration detention of children, and the Court had no power to order the release of the children or make orders against the Minister.[154] While the majority in the FCFC engaged extensively with the CRC, only Kirby J and Callinan J gave it attention in the High Court.

The primary reasoning of the majority of the Family Court did not concern the CRC.[155] The Court relied on the CRC only in the alternative and not as 'an essential aspect'[156] of the decision. The Court set out to demonstrate that the Commonwealth Parliament exercised its external affairs powers when it introduced section 67ZC in the Family Law Act, because the Family Reform Act 1995 sought to give effect to the CRC.[157] If successful, this would justify giving an expansive meaning to the welfare jurisdiction of the Court, beyond its traditional ambit,[158] to include making orders against third parties such as the Minister of Immigration. To decide that the Parliament has indeed exercised its external affairs powers, the Court relied on various aspects, such as the close relationship between the CRC and the changes introduced by the Family Reform Act;[159] the statement made in the country's report to the CRC

[151] Ibid note 112 at 213.
[152] Which encompassed '"traditional" areas of family law, namely [those] related to residence and contact and like matters' (Nicholson CJ and O'Ryan J paras 128, 174). For comments, see L Ruddle and S Nicholes 'B & B and Minister for Immigration and Multicultural and Indigenous Affairs: Can International Treaties Release Children from Immigration Detention Centres?' 2004 (5) *Melbourne Journal of International Law* 256.
[153] See extrajudicial views by Nicholson CJ (2002a note 88 (at 8 fn omitted)), later adopted by him in *B and B v MIMIA.*
[154] Nicholson 2006 note 18 at 11.
[155] See para 106 onwards Nicholson CJ and O'Ryan J. For more on the relevant domestic issues, see Dickey 2014 note 106 at 300; Ruddle and Nicholes 2004 note 152 at 259.
[156] Nicholson CJ and O'Ryan J para 249.
[157] Demonstrating this nexus was necessary because the validity of a law passed in the exercise of the external affairs powers 'depends on whether its purpose or object is to implement the treaty' (*Victoria v The Commonwealth* (1996) 187 CLR 416 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ para 34). It is worth mentioning that the Family Law Act 1975 was passed by the Cth Parliament under the constitutional heads of marriage, divorce and matrimonial causes (sections 51(xxi) and (xxii) of the Constitution; see Dickey 2014 note 106 at 13-15); Sifris 2004 note 107 at 214-215.
[158] Nicholson CJ and O'Ryan J para 249.
[159] Judges noted the references to the CRC in earlier Bills, the influence of the CRC on the wording of the Act, that certain articles reflected CRC standards, the use of the term 'best interests'; and the reference to the 'rights of children' in section 43(c) of the Act (per Nicholson CJ and O'Ryan J paras 272-273 endorsing the views expressed by the Full Family Court in *B and B: Family Law Reform Act 1995*).

Committee, where 'it was claimed that the Government had implemented the Convention in the area of (*inter alia*) family law';[160] and the references to the CRC in parliamentary documents preceding the Reform Act.[161] It also noted the close relationship between the object of Part VII of the Act (section 60B) and the CRC, which pleaded in favour of section 67ZC not being approached as 'simply a re-enactment of the original welfare jurisdiction'.[162] The Court referred to articles 3(2) and 19 of the CRC to support its view that the purpose of section 67ZC was to expand the protection which the Court can secure to children through an extension of its welfare jurisdiction.[163] These aspects were 'strongly supportive of the proposition that the 1995 amendments to Part VII did intentionally incorporate certain articles of UNCROC into municipal law',[164] and that the introducing of section 67ZC in the Family Law Act 'has implemented the relevant parts of UNCROC'.[165] In dissent, Ellis J disagreed that the Family Law Reform Act 1995 incorporated the CRC because the Act did not indicate so, did not mention the CRC and did not attach it as a schedule.[166]

As the CRC was used as an alternative reasoning by the FCFC, the High Court was not bound to consider it in appeal. Thus, only Callinan J addressed the incorporation reasons. He held that the CRC may have influenced the drafting of some FLA provisions[167] and that the FLA may not be inconsistent with the CRC[168] but argued that these do not prove incorporation. Part VII of the FLA reflected no intention of the Parliament to incorporate the Convention,[169] or to implement it 'by, in some way enlarging or creating an all-embracing welfare jurisdiction'.[170] Callinan J stated that the CRC does not require the protection of children 'by a conferral of jurisdiction upon the Family Court',[171] with article 4 of the Convention leaving state parties the freedom to choose domestic means of compliance.[172]

The majority of the FCFC (Nicholson CJ and O'Ryan J) reiterated their incorporation reasons in *KN & SD & Secretary, Department of Immigration and Multicultural and Indigenous Affairs,*[173] a case decided immediately after *B and B v MIMIA*. The decision was not appealed to the HCA. The mother (of an Australian child born in 2001 and living with the father since the mother's arrest), who entered Australia illegally, was placed in mandatory immigration detention and was awaiting deportation. The majority raised the issue of incorporation in interpreting section 60B of the Family Law Act. The section provided that the object of Part VII of the Act was to ensure that children receive appropriate parenting and that the parents are able to provide it. Section 60B(2) contained principles underlining these objects and provided

[160] Nicholson CJ and O'Ryan J para 281.
[161] Nicholson CJ and O'Ryan J paras 276-278.
[162] Nicholson CJ and O'Ryan J para 283.
[163] Nicholson CJ and O'Ryan J para 287.
[164] Nicholson CJ and O'Ryan J para 275.
[165] Nicholson CJ and O'Ryan J para 288.
[166] Ellis J para 423.
[167] *MIMIA v B* Callinan J paras 221-222.
[168] Callinan J para 220.
[169] Callinan J para 220.
[170] Callinan J para 222.
[171] Callinan J para 222.
[172] Callinan J para 222.
[173] [2003] FamCA 610 ('*KN & SD*'). The case differs from *B and B v MIMIA*, because it did not involve the welfare jurisdiction of the Court and the applicant was a parent rather than the children.

that children have the right to know and be cared for by their parents, and to have regular contact with them. One of the questions was whether the rights in section 60B(2) were fundamental rights that are protected by the principle of legality.[174] To decide the point, the majority reiterated its *B and B v MIMIA* view that the CRC was 'sufficiently incorporated' into the domestic law by the Family Law Reform Act.[175] To this, the majority added two supporting arguments: the almost universal ratification of the Convention and its recognition in the HRCA.[176] It concluded that 'UNCROC has been incorporated into Australian law by (*inter alia*) s. 60B of the Act'.[177] This finding then contributed to the majority view that the CRC rights are protected by the principle of legality.[178]

The incorporation views of the FCFC are not beyond criticism, and they were considered 'controversial and less capable of immediate justification'[179] at the time. The Court's conclusion was problematic considering that Australia declared before the CRC Committee that it had no intention of enacting the CRC as domestic law, a position known to the Court.[180] The Court made far-reaching statements about the incorporation of the CRC but did not spell out what CRC rights were incorporated by which Family Law Act provisions. In *B and B v MIMIA*, section 67ZC (the welfare jurisdiction) assumed the incorporating role,[181] while in *KN & SD* section 60B seems to have performed that role.[182] While one may guess the rights being given effect to,[183] having to do so weakens the incorporation argument in that it is unlikely that the Parliament would have been so vague when taking such a significant step. It is not surprising, therefore, that the HCA judges gave little attention to the incorporation arguments.

The introduction of section 60B(4)[184] in the Family Law Act in 2011 revives the incorporation discussion. Incorporation arguments based on section 60B(4) of the FLA have been made in *Langmeil & Grange.*[185] The Court conceptualised, without deciding, two possible approaches to this section:

> Whether ... s 60B(4) requires the Court to give effect to the Convention on the Rights of the Child in an application for parenting orders or does no more than confirm, in cases of ambiguity, the obligation to

[174] See discussion in part 5.2.
[175] Para 67.
[176] Para 68.
[177] Para 68.
[178] See further discussion in part 4.4.6.
[179] Bates 2007 note 107 at 239 in relation to *B and B v MIMIA.*
[180] *B and B: Family Reform Act* 1995 para 10.12.
[181] *B and B v MIMIA* per Nicholson CJ and O'Ryan J para 288.
[182] *KN & SD* para 68.
[183] The majority in *B and B v MIMIA* refers to the implementation of 'the relevant parts of UNCROC so far as this case is concerned' (para 288). Ruddle and Nicholes argue that in the light of various constitutional constraints, only CRC provisions concerned with parental responsibilities could be said to have been incorporated (2004 note 152 at 270-271). In relation to *KN & SD*, it can be argued that given the formulation of section 60B(2) of the Act, articles 7(1) and 9(3) may have been incorporated.
[184] Cited above.
[185] *Langmeil & Grange* [2013] FamCAFC 31. In *Ralton & Ralton* [2017] FamCAFC 182 it was argued that the trial judge breached section 60B(4) and thus the CRC. The Full Court answered that although the section refers to the CRC, 'the contents of the Convention are not enshrined as operative principles of law. Ratification itself has no direct legal effect upon domestic law and the Convention is applicable only to the extent that it has been incorporated by specific provisions of the Family Law Act. Accordingly, the Court applies the Family Law Act and not the Convention' (para 18).

> interpret Part VII of the Act to the extent its language permits, consistently with the Convention, does not require determination by us. We observe that in the Explanatory Memorandum the Attorney General explained that the provision is not the equivalent to incorporation of the Convention into domestic law.[186]

The Court distinguished therefore between 'giving effect' to the CRC and using the CRC for interpretation purposes in cases of ambiguity. The immediate questions are whether 'giving effect' to the CRC would mean that the Family Court may now be authorised by statute to apply the CRC directly; and whether 'giving effect' to and relying on the CRC to clarify ambiguities in the FLA are fundamentally different and/or mutually exclusive. In *Barret & Barrett*[187] one of the appeal reasons was that the decision of the lower court breached, *inter alia*, the human rights of the children under the CRC.[188] The Full Court answered tersely that '[t]he Act sets out how a court … determines the parenting dispute, not the United Nations Convention on the Rights of the Child'[189] which is 'not yet part of the domestic law of Australia'.[190] Thus, the CRC is given effect 'through the application of the Act itself' and unincorporated 'international treaty obligations can only give assistance in the interpretation of existing domestic law and in determining its proper application so as to avoid where possible conflict with treaty and international obligations'.[191] The latter case suggests that the 'incorporation' argument has lost currency even with its original promoter, despite a more supportive formulation of the Family Law Act after the 2011 amendments.[192] The subject is not, however, free of uncertainty. There are cases where the Court does not raise the absence of incorporation to reject parties' arguments that lower courts have disregarded the CRC, and even engages somewhat with the substance of Convention norms.[193]

The case of *AS by her litigation guardian Marie Theresa Arthur v Minister for Immigration and Border Protection and Commonwealth of Australia*[194] offers insights into the limitations of giving statutory recognition to the CRC in a system of parliamentary supremacy. At stake was the meaning of section 4AA(1) of the Migration Act 1958 (Cth) which states that '[t]he Parliament affirms as a principle that a minor shall only be detained as a measure of last resort', and especially whether this gave rise to an independent and actionable statutory duty (or it created justiciable rights). It was argued that the language of the section corresponded to that of article 37(b) of the CRC, which together with other materials supported the justiciability of the mentioned section.[195] The Court accepted that the section adopted the language of article 37(b) of the CRC,[196] and that in doing so, the Parliament 'enacted, as part of Australian domestic law, the proposition that the Parliament affirmed as a principle "that a minor shall

[186] *Langmeil & Grange* para 25.
[187] [2017] FamCAFC 4 ('*Barret*').
[188] *Barret* para 112.
[189] *Barret* para 112.
[190] *Barret* para 113.
[191] *Barret* para 113.
[192] The absence of support for the incorporation argument was acknowledged by its mastermind, the former CJ of the Family Court (Nicholson 2006 note 18 at 6.)
[193] *Langmeil & Grange* [2012] FamCAFC 39 paras 136 and 137 (where the Full Court decided that articles 34 and 19 of the CRC were not breached by the trial court); *Zlotnik & Gerasimov* [2015] FamCAFC 174; *Rilak & Tsokas* [2017] FamCAFC 26.
[194] [2016] VSCA 206 ('*AS v MIBP*').
[195] *AS v MIBP* para 18.
[196] *AS v MIBP* para 28.

only be detained as a measure of last resort"'.[197] However, the provision was not independently justiciable, and it could only inform the decision of relevant authorities from the position of a legal principle.[198] Thus, even when the standards of the CRC are enacted in domestic statutes, their normative significance is controlled by the Parliament.

The status of the CRC as a declared instrument under the HRCA has received some attention.[199] High Court judges saw it as having limited judicial significance.[200] As put by Callinan J, whatever the relevance of the declaration, it did not incorporate the CRC.[201] McHugh J in *Teoh* suggested that the declaration implied a lesser role for the courts because the state decided to give effect to the Convention through such declaration rather than through judicial application.[202] The Family Court, however, relied on the declaration to stress the importance of the CRC. A majority of the Full Court supported judicial statements that a declaration under the HRCA makes the CRC 'a source of Australian domestic law by reason of this legislation'.[203] The declaration also contributed to a majority finding that certain CRC articles have been domestically incorporated by the Family Law Act.[204] Other cases, however, see the Court retracting to the view that the declaration 'may give it [the CRC] a special significance in Australian law',[205] which nonetheless remains unclear.[206]

To conclude, in most judgements analysed in this study judges approach the CRC as an unincorporated treaty which bows to clear domestic standards. However, the Family Court under the leadership of the former Chief Justice Nicholson sought to demonstrate that the CRC had an enhanced domestic status by putting forward incorporation views or by noting the status of the CRC as a declared treaty under the HRCA. Its arguments were not unanimously supported by fellow judges of the Family Court, and have not been addressed by most HCA judges, leaving many issues without a definitive judicial answer.

4.4.2 The CRC as a source of external affairs power

As discussed in part 4.2, the ratification of an international treaty enables the Commonwealth Parliament to make laws to give effect to a treaty in domains which are otherwise the jurisdiction of the States. A valid exercise of the external affairs power requires that the treaty be sufficiently specific rather than aspirational;[207] that the law is 'reasonably capable of being

[197] *AS v MIBP* para 29.
[198] *AS v MIBP* para 29.
[199] *B v MIMIA* per Nicholson CJ and O'Ryan J para 252; *Teoh* per Mason CJ and Deane J (para 28) and Toohey J (para 28).
[200] The argument of the father that the lower court should have referred (*inter alia*) to the CRC as a declared instrument under the HRCA was not addressed by judges in *AMS v AIF*.
[201] *MIMIA v B* para 220
[202] *Teoh* McHugh paras 40-41.
[203] *Murray* per Nicholson CJ and Fogarty J para 140.
[204] *KN & SD* per Nicholson CJ and O'Ryan J para 68.
[205] *B and B: Family Reform Act 1995* para 10.20.
[206] *Murray* per Nicholson CJ and Fogarty J para 141; *B and B: Family Reform Act 1995* para 10.6; *B and B v MIMIA* per Nicholson CJ and O'Ryan J para 263.
[207] Devereux and McCosker 2017 note 2 at 29. See *Victoria v The Commonwealth* (1996) 187 CLR 416 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ para 33. In the *Commonwealth v Tasmania*, it was remarked that international agreements may create international obligations despite not being drafted with the precision of domestic norms (Deane J para 23). In *Pape v Commissioner of Taxation* [2009] HCA 23 Heydon J

considered appropriate and adapted to implementing the treaty'[208] and that 'its purpose or object is to implement the treaty'.[209]

Compliance by the CRC with the specificity requirement has not been decided by the courts, and the isolated judicial views expressed so far have been inconsistent. In *AMS v AIF* and *AIF v AMS,*[210] Gleeson CJ, McHugh and Gummow JJ referred to the international instruments, including the CRC, invoked by the parties 'as to some of their provisions [being] aspirational rather than normative'.[211] In *MIMIA v B,* Callinan J argued that there is a 'strong possibility … that the Convention may be aspirational only'.[212] On the other side, in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*,[213] McHugh J and Gummow J pointed out that 'it was not suggested that *Teoh* concerned a treaty of this limited nature',[214] meaning a treaty of an aspirational nature,[215] while in *B and B v MIMIA*, a majority of the FCFC held that the CRC was sufficiently specific, especially its article 3(1), to enliven the external affairs power.[216] In *Hwang v The Commonwealth; Fu v The Commonwealth*[217] it was contended that when the Commonwealth Parliament made citizenship laws it exercised its external affairs power, and thus it had to comply with article 3(1) of the CRC.[218] McHugh J rejected the argument that citizenship laws are made in the exercise of external affairs power[219] but expressed no concern in relation to the potentially aspirational nature of the CRC in general, or of article 3(1) in particular.

Whether child-relevant matters can fall under the external affairs power is another potentially contentious issue. In *MIMIA v B,* Callinan J queried whether 'the welfare of children in this country can truly be an external affair',[220] and disagreed with the FCFC that changes to the Family Law Act were made in the exercise of external affairs power and in order to give effect to the CRC.[221]

Judicial pronouncements have therefore been sparse and inconclusive,[222] but recent legislative developments may strengthen the case for the CRC as a valid source of external affairs power. Section 60B(4) of the Family Law Act, introduced in 2011,[223] may serve as a counterargument

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explained that 'sufficient specificity' does not mean a specificity equivalent with the common law but that the treaty 'must avoid excessive generality' (para 475).

[208] *Victoria v The Commonwealth* per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ para 34. Also, *Commonwealth v Tasmania*, Mason J para 48; Murphy J para 44; Deane J para 20.

[209] *Victoria v The Commonwealth* per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ para 34.

[210] [1999] HCA 26 ('*AMS v AIF*').

[211] *AMS v AIF* Gleeson CJ, McHugh and Gummow JJ para 50.

[212] *MIMIA v B* and B per Callinan J para 222.

[213] [2003] HCA 6 ('*Lam*').

[214] *Lam* per McHugh and Gummow JJ para 99.

[215] *Lam* per McHugh and Gummow JJ para 98. In *B and B v MIMIA*, Nicholson CJ and O'Ryan J took the statement to mean that the CRC was clearly not aspirational (para 267).

[216] *B and B v MIMIA* 2003 per Nicholson CJ and O'Ryan J para 267.

[217] [2005] HCA 66 ('*Hwang*').

[218] *Hwang* para 6.

[219] *Hwang* para 8.

[220] *MIMIA v B* per Callinan J para 220.

[221] *MIMIA v B* per Callinan J paras 220-221.

[222] Compare the views in *AMS v AIF; Lam* and *MIMIA v B and B* with those in *B and B v MIMIA.*

[223] See the text quoted above.

to Callinan J's view in *MIMIA v B*, that the purpose of the Act was not to implement the CRC. Further, the Commonwealth Parliament relied on its external affairs power (amongst others) to reform the child care support legislation to give effect to unspecified Convention provisions.[224] It seems therefore that, contrary to Callinan J's concerns in *MIMIA v B*, the welfare of Australian children can be a matter of external affairs in the view of the Parliament.

Acceptance of the CRC as a source of external affairs power could be significant, at least theoretically. First, it would counter concerns that this treaty is aspirational only. Second, it would give the CRC constitutional relevance, being the only situation whereby a domestic statute or provisions thereof may be invalidated for reasons of inconsistency with the CRC. In *Victoria v The Commonwealth*, it was decided that a statute is invalid if the deficiency in implementing the treaty that enlivens external powers is so substantial that the law loses the character of a law implementing the treaty,[225] or if the law is 'substantially inconsistent with the Convention'.[226] These potential gains are curtailed by the rare reliance by the Parliament on its external affairs powers to give effect to the CRC. Further, inconsistency with some provisions of the CRC might not deny the law the character of an implementing measure of the Convention, as per the *Victoria v The Commonwealth*. Lastly, the open-ended nature of some CRC provisions, while not denying their binding nature, might make it difficult to establish a substantial inconsistency therewith. Despite these potential limitations, a confirmation that the CRC is a treaty able to enliven legislative powers under section 51 (xxix) of the Constitution should not be discounted in a legal context where the formal means to give judicial effect to the CRC are limited.

4.4.3 The CRC and statutory interpretation

4.4.3.1 High Court cases

De L v Director-General Department of Community Services (NSW) [227]

The case concerned the meaning of the phrase 'child objects to being returned'[228] which would enable a court to refuse to order a child abducted by a parent to the child's country of habitual residence. The phrase the 'child objects', as found in the Regulation which gave effect to the Hague Convention, was argued to require a strong opposition to return, while article 12 of the CRC required that the views of the child (however strongly expressed) be given weight according to the age and maturity of the child.

Only Kirby J (dissenting) engaged with the CRC in relation to the argument that the Hague Convention and the CRC took conflicting approaches to the relevance of the views of the child. He held that, in the context of child abduction, the views of children should be given weight

[224] Section 40 of the Schedule 1 to the Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017 introduces Part IV (titled 'Child care subsidy'). Section 85AB of Part IV indicates the exercise of external power to give effect to the CRC.
[225] *Victoria v The Commonwealth* para 38.
[226] *Victoria v The Commonwealth* para 38.
[227] [1996] HCA 5 ('*De L*').
[228] The phrase appeared in regulation 16(3) of the Family Law (Child Abduction Convention) Regulations 1986 (that made the Hague Convention a part of the domestic law) and had a formulation identical with that in article 13(2) of the Hague Convention.

only when they amount to a strong opposition, while the majority (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ) embraced the opposite view.[229] Kirby J accepted the statement in *Teoh* that Australian legislation is to be construed 'so far as possible, to conform with Australia's obligations under treaties which Australia has ratified', and proceeded to consider article 12 of the CRC on that basis. He opted for the narrower meaning of the term 'objects' as it arose from standards of the Hague Convention which were part of the Australian law and thus binding on the Court.

Kirby J did not engage extensively with the CRC, but in considering the wider meaning of the term 'objects' he acknowledged various factors which may prevent children from expressing feelings 'in terms of the adult notion of objection', such as differences in capacity, culture; loyalty conflict; lack of familiarity with those eliciting the child's objection. Article 12 of the CRC has been a trigger for this considerate discussion, and in rejecting the interpretation of the term 'objects' in line with this article, Kirby J did so only after considering the implications of such approach and after explaining why other serious competing objectives were to prevail.

Re Woolley; Ex parte Applicants M276/2003 by their next friend GS[230]

In *Re Woolley*, the constitutional validity of the Migration Act 1958 was challenged in as far as it authorised the prolonged detention of children who were illegal immigrants. The case concerned four children, aged 15, 13, 11 and seven, who entered Australia illegally with their parents in 2001. They were detained under the mandatory detention provisions of the Migration Act. It was argued on behalf of the children that the provisions of the Act were invalid if and to the extent that they authorised the prolonged detention of children.[231]

Two issues were raised: first, whether the Migration Act authorised the mandatory detention of children; and, second, whether, such detention was constitutionally valid if it was so authorised. The application was dismissed unanimously. The CRC played a limited role in the judgments written. It was mentioned generically by some judges,[232] and only Kirby J identified relevant provisions (articles 37, 2(1), 3(1), 3(2), 7(1), 9(1) and 18(1)).[233] Judges decided that the CRC could not be relied on to exclude children from a detention clearly mandated by the Migration Act. The Act did not distinguish between adults and children in terms of mandatory detention,[234] and it was 'impossible' to read down the statutory provisions so as to allow for an 'individual assessment of particular unlawful non-citizens'.[235] Further, the constitutional validity of the Migration Act was not affected by its inconsistency with the CRC,[236] which

[229] Kirby J's view is now endorsed in the revised formulation of the Regulations, which require that 'the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes' (regulation 16(3)(c)(ii)).
[230] [2004] HCA 49 ('*Re Woolley*').
[231] Gleeson CJ para 3. The provisions at stake were sections 189 (mandatory detention), 196 (duration of mandatory detention: until visa is granted or until the immigrant requests removal), 198 (removal as soon as reasonably possible after the visa was denied or upon the immigrant's request).
[232] Gleeson CJ paras 7, 11, 31; McHugh J paras 107, 114; Hayne J para 221 (Callinan J and Haydon J do not refer to the CRC).
[233] Kirby J para 200.
[234] Gleeson CJ para 7; McHugh J para 46 and Gummow J para 129.
[235] Gleeson CJ para 10.
[236] McHugh J para 115.

'would not justify a refusal by the Court to give effect to the legislation'.[237] As put by Kirby J, '[i]f the law is clear and constitutionally valid, it is the duty of Australian courts to apply its terms. This is so whatever judges or others may think about the content and effect of such law'[238] and 'whatever views might be urged about the wisdom, humanity and justice of that policy'.[239]

Re Woolley was an attempt to make the Court responsive to children's vulnerability in the interpretation of the Migration Act and the constitutional validity enquiry, relying on the CRC and the *parens patriae* jurisdiction.[240] The applicants sought to persuade the Court that although immigration detention was constitutionally valid for adults,[241] it was not so for children. Children's detention under the Act was indefinite (and thus unconstitutional) because, unlike adults, they lacked the capacity to request the removal from Australia and voluntarily end their detention.[242] A second argument was that the prolonged detention had severe consequences because of the children's inherent vulnerability. This made the detention punitive and thus unconstitutional, because punishment can only be applied by courts.[243]

Both arguments failed. In relation to children's capacity to end their detention, it was noted that not all children lack capacity to act in their own name,[244] and that children's capacity varies with the matter requiring decision, the maturity and the level of understanding of the child.[245] Further, when children lack competence to make decisions, their guardians have the power to decide for them.[246] On the punitive nature of immigration detention, it was said that children are a 'rather diverse class' and while for some purposes they 'might be treated conveniently as a single group', it was not so for the purposes of deciding whether immigration detention was punitive or not.[247] Children's vulnerability did not determine the constitutionality of the Act,[248] which depended on the purpose of the Act.[249] The Act was not punitive but sought to make individuals available for deportation and to prevent their insertion into the Australian community.[250] Thus, the argument in relation to children's '"special status"' and '"distinctive

[237] Gleeson CJ para 11. Other judges shared the view that the task of the Court is to assess the validity of legislation against the Constitution and not international treaties (McHugh J para 115; Hayne J para 122; Kirby J para 201).
[238] Kirby J para 173.
[239] Kirby J para 198 fn omitted.
[240] Gleeson CJ para 31. *Parens patriae* jurisdiction is a protective common law jurisdiction which entitles Supreme Courts of States and Territories to make decisions for the care, protection and welfare of children (Dickey 2014 note 106 at 299). The welfare jurisdiction of the Family Court is a statutory protective jurisdiction, currently reflected in section 67ZC(1) of the Family Law Act (ibid at 301; *B and B v MIMIA* para 128). This section gives the Family Court 'a power that is virtually equivalent to the traditional *parens patriae* power' (Dickey 2014 note 106 at 299; *AMS v AIF* per Gaudron J para 85). The *parens patriae* jurisdiction is wide, and its limits have not and cannot be established (*AMS v AIF* per Gaudron J paras 85-89; per Hayne J para 213).
[241] As decided in *Chu Kheng Lim and Others v The Minister for Immigration, Local Government and Ethnic Affairs and Another* (1992) 176 CLR 1.
[242] See section 198 of the Migration Act 1958.
[243] Gleeson CJ para 13.
[244] Gleeson CJ para 30.
[245] McHugh J para 102.
[246] McHugh J para 103; Gummow J paras 153, 157; Callinan J para 266.
[247] Gleeson CJ para 13.
[248] Gleeson CJ para 29.
[249] McHugh J para 60; Callinan J para 257.
[250] McHugh J para 71; Gummow J para 164.

interests and vulnerabilities"',[251] 'wrongly fixes upon the nature of the person detained, absent a consideration of the purpose for which detention is authorised'.[252] The nature of detention does not change because the applicants are children,[253] and thus vulnerable, or because of the protection duties owed to them by the state.[254]

The arguments that *parens patriae* jurisdiction made it possible for the Court to distinguish between children and adults in relation to immigration detention also failed. Kirby J and Callinan J shared the view that *parens patriae* jurisdiction (as a common law institution) was overridden by the clear and precise provisions of the Migration Act.[255] Kirby J suggested, however, that the *parens patriae* jurisdiction may have an impact on the validity of the Act if 'rooted in the Constitution itself'.[256] Gummow J commented that it was not argued that the *parens patriae* jurisdiction could limit the power of the Commonwealth to make laws,[257] and McHugh J accepted that the *parens patriae* jurisdiction may be used to avoid the detention of children if the purpose of the Act were to use such detention to punish the children or their parents,[258] which was not the case here. The statements made by Kirby, Gummow and McHugh JJ we made *obiter*.

Re Woolley reads like a 'terminus point' for the CRC in relation to immigration detention, making it clear that the Convention bows to legislative intransigence, independently or in association with domestic 'carrier' concepts such as *parens patriae*.

4.4.3.2 Family Court cases appealed to the High Court

Northern Territory of Australia v GPAO[259]

Central to the case was whether several best interests provisions of the Family Law Act 1975[260] informed an enquiry into the validity of territory legislation and the interpretation of other federal statutes. These legal issues arose because, as discussed in part 4.3 above, legislative competence in relation to child-related matters is split between States/Territories and the Commonwealth, and in case of inconsistency between statutes, the federal statute (i.e., the Family Law Act) prevails. Despite this legislative fragmentation in relation to children,

[251] Gummow J para 162.
[252] Gummow J para 163. For Kirby J, however, the conditions of detention could also render the detention punitive (paras 184-186 and 189).
[253] McHugh J para 99.
[254] McHugh J para 100.
[255] Kirby J para 193; Callinan J para 259, 267.
[256] Kirby J para 193.
[257] Gummow J para 168.
[258] McHugh J para 101.
[259] [1999] HCA 8 ('*GPAO*'). For comments, see D Sandor 'Disclosure of Child Protection Information' 1996 (45) *Family Matters* 31; G Watts 'Is the Family Court bound by the Rules of Evidence in Children's Matters?' 1999 (13) *Australian Family Lawyer* 8.
[260] Section 43 which provided that the Family Court exercised jurisdiction under that Act by having regard to the need to protect the rights of children and their welfare; and section 64 which provided that in custody, guardianship, welfare and access applications, the welfare of the child must be regarded as the paramount consideration. The Family Law Reform Act 1995 came into force after the Court heard the case but before judgment was given. The change did not materially affect the judgments because section 43 remained unchanged and section 64 was repealed and replaced with, amongst others, sections 65E and 67ZC(2) which had the same effect as the repealed section in that they made the best interests of the child the paramount consideration in certain matters (*GPAO* per McHugh and Callinan JJ para 156).

legislatures share a basic concern for the welfare of the child albeit they may pursue it in different, and potentially conflicting, ways.

The case came before the FCFC as *Re Z*[261] – a dispute concerning parental rights, during which Northern Territory authorities refused to share information with the Court because a Territory child protection statute prevented them from doing so. This was so although allegations of abuse were made against one of the parents. It was argued, amongst other things, that this prevented the Court to give paramount importance to the interests of children, and was therefore inconsistent with the Family Law Act.

Fogarty J (dissenting) held, *inter alia*, that the Territory legislation was not inconsistent with the Family Law Act because the two statutes regulated different aspects in relation to the welfare of children.[262] Nicholson CJ and Frederico J differed. They opted for the view that Territory legislation was in conflict with those Family Law Act provisions which required the Court to consider giving paramountcy to the best interests of the child. The CRC reasoning was *obiter* but provided support for the argument that the relevant best interests of the child provisions had a wider scope than the traditional concept of 'welfare'. First, the majority noted the change in terminology, which 'reflects the wording' of the CRC,[263] from 'welfare' to the 'best interests' of the child, and it approved of academic suggestions that the term 'welfare' was narrower than the 'best interests'.[264] Second, the external affairs power enlivened by the CRC 'would provide' another source for the Commonwealth's power to make laws for the overall welfare of the children,[265] meaning matters covered both by state and federal competence. Thus, section 67ZC of the FLA provided for the welfare jurisdiction of the Family Court as a 'separate jurisdiction', which extended not only to traditional matters covered by this type of jurisdiction (i.e., parent-child relationship) but also to child protection issues.[266] As a provision in a federal statute, section 67ZC informed the validity of State/Territory child protection legislation[267] and the interpretation of rules of evidence in other federal statutes.[268] For these judges, the welfare of children cannot be compartmentalised,[269] and the welfare jurisdiction of the Family Court provided a unifying tool to ensure a holistic consideration of the best interests of the child. Notably, all judges were in favour of 'more satisfactory'[270] legislative effect to be given to the CRC as a way to address the fragmentation of domestic law in relation to children and to ensure a holistic consideration of the best interests of the child.[271]

[261] *Re Z* [1996] FamCA 89.
[262] Territory/State legislation aimed at securing the best interests of children collectively, while the Family Law Act sought to ensure the best interests of the child subject of concrete proceedings. See Fogarty J para 66-67; 83-91.
[263] Para 307, where the majority refers to articles 9(1), 3, 18(1) and (2) but without further discussion.
[264] Paras 308-309.
[265] Para 317.
[266] Paras 323-324. Fogarty J expressed concern with the potential intrusion of this jurisdiction 'into such areas as ASIO secrecy, taxation or social security confidential information, or Cabinet discussions – the consequences of such a finding would be significant …'. (para 29).
[267] Paras 323-324.
[268] Para 375.
[269] Para 325. I.e., in family law and child protection matters respectively.
[270] Nicholson CJ and Frederico J para 357.
[271] Fogarty J para 58; Nicholson CJ and Frederico J para 357.

On appeal, in *Northern Territory of Australia v GPAO,*[272] the majority of the High Court opted for a narrow application of the paramountcy principle limited to the final/merits decisions on parenting orders and not to the preliminary orders relating to producing evidence.[273] The reasoning of the majority focused on the relationship between federal and territory laws and the jurisdiction of the Family Court as a federal court. Kirby J, in dissent, identified a further legal issue:

> the extent to which ambiguities in the meaning of that federal law, concerning its ambit and operation, should be resolved in a way compatible with international law and so as to ensure that Australian law conforms, as far as it properly can, to international law.[274]

Kirby J supported the view in *Teoh*, that ambiguity is not to be construed narrowly,[275] which meant that the CRC could be utilised to clarify the *ambit* of the federal statute[276] rather than the meaning of its substantial terms. The ambiguities in this case concerned the scope of the best interests of the child in section 65E of the Family Law Act. Kirby J identified the CRC (and specifically article 9)[277] as one of 'those considerations which have most influenced'[278] him in reaching his decision, but it constituted 'an additional reason' for employing an approach that was already grounded in domestic law.[279] Kirby J stressed that Part VII of the Family Law Act was enacted to give effect to the CRC and thus ambiguities in relation to the scope of application of the best interests should be interpreted in a way that upholds international law.[280] The Convention makes no distinction between interlocutory and final decisions, requiring instead that the best interests of the child be considered throughout the judicial process.[281] Kirby J endorsed the view of the majority of the FCFC that the change from 'welfare' to 'best interests' in the FLA under the influence of the CRC gives the latter 'probably … a wider connotation'.[282]

B and B v Minister for Immigration and Multicultural and Indigenous Affairs[283]

Finding that it had jurisdiction in relation to immigration detention of children under this Act,[284] the FCFC considered the lawfulness of the detention. The Migration Act provided no limit for the detention of illegal immigrants (adults or children), although it was possible for a detained person to end the detention by requesting the return to the country of origin. The Court was of the view that on the face of it, the Act authorised the indefinite detention of children because it was unrealistic to expect that children have the capacity validly to request the Minister to end

[272] [1999] HCA 8 ('*GPAO*').
[273] The reasoning was based on a literal interpretation of section 65E of the Family Law Act.
[274] *GPAO* per Kirby J para 203 fn omitted.
[275] Kirby J para 232.
[276] Section 65E at the time.
[277] Kirby J para 231.
[278] Kirby J para 223.
[279] Kirby J para 232.
[280] Kirby J para 232.
[281] Kirby J para 231.
[282] Kirby J para 230 (fn omitted).
[283] This case also raised issues about the potential incorporation of the CRC by the Family Law Act. These issues were addressed in part 4.4.1.
[284] As discussed in part 4.4.1.

their detention.[285] The contention that parents could make the relevant request in their children's name was rejected because it 'effectively involve[s] treating the children as the chattels of their parents'.[286] According to the majority, an indefinite detention would be incompatible with article 37 of the CRC and 'serious breach' of Australia's obligations under the Convention.[287] Thus, considering the presumption that a statute should not be interpreted so as to curtail fundamental freedoms[288] and that statutes are to be construed as far as possible in conformity with international treaties,[289] the majority said that the Act could not be interpreted as authorising the indefinite detention of children.[290] Such detention would be unlawful,[291] and would justify the Court's exercise of welfare jurisdiction and an order for the release of the children.[292] In the alternative, the Court said that should the detention be considered lawful but harmful,[293] the court could give directions in relation to the nature and type of detention, medical care and education.[294] The case was remitted for a decision on the best interest of the children, and the children were eventually released.[295]

The HCA judges did not address the interpretation reasoning above, preferring to decide the case on constitutional grounds.

4.4.3.3 Family Court cases not appealed to the High Court

B and B: Family Law Reform Act 1995[296]

In *B and B: Family Law Reform Act 1995*,[297] the Family Court extensively discusses (*obiter*[298]) the significance of the CRC for family law cases. The Court's position centred on the impact which the CRC has had on the Family Law Reform Act 1995.[299] Two of the principles in the newly introduced section 60B (the object clause) of Part VII of the Act, titled 'Children',

[285] Nicholson CJ and O'Ryan J para 380. For discussion on capacity, see paras 370-377.
[286] Nicholson CJ and O'Ryan J para 382.
[287] Nicholson CJ and O'Ryan J para 388.
[288] Nicholson CJ and O'Ryan J para 357.
[289] Nicholson CJ and O'Ryan J para 363.
[290] If the Act could be interpreted to authorise indefinite detention, then it may be unconstitutional (Nicholson CJ and O'Ryan para 384).
[291] Nicholson CJ and O'Ryan J para 381.
[292] Nicholson CJ and O'Ryan J para 389.
[293] Nicholson CJ and O'Ryan J para 391.
[294] Per Nicholson CJ and O'Ryan J para 400.
[295] On the litigation following the decision of the FCFC, see Ruddle and Nicholes 2004 note 152 at 261-262. See also *Mr. Ali Aqsar Bakhtiyari and Mrs. Roqaiha Bakhtiyari v Australia* Communication No. 1069/2002 (2003) (after the FCFC but before the HCA judgments) in which the Human Rights Committee found Australia in breach of several provisions of the International Covenant on Civil and Political Rights, 1966 ('the ICCPR').
[296] *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676 ('*B and B: Family Law Reform Act 1995'*).
[297] The ex-wife wished to relocate to another Australian state with the children of the marriage. The relocation would have limited the time the children spent with their father. The father argued that legal reform under the influence of the CRC has recognised to children the right to know and have regular contact with him, in section 60B(2) FLA, and that such rights could only be interfered with/limited if exercising those rights was not in the best interests of the child (paras 6.2-6.3). The Court decided, however, that the above section did not create enforceable rights for children, a position which the Court retracted in *KN & SD* discussed below. For a comment, see L Young 'B and B: Family Law Reform Act 1995 (Cth) – Relocating the Rights Debate 1997 (21) *Melbourne University Law Review* 722.
[298] Para 10.1.
[299] Para 3.3.

reflected CRC articles,[300] with the 'more directly relevant' being articles 2.1; 3.1; 3.2; 7.1; 9.3; 18.1,[301] and articles 5, 9 and 12.[302] The change in terminology from 'welfare' to 'best interests' appeared to have been justified *inter alia* by the use of the later term in the CRC.[303]

In terms of the judicial relevance of the CRC, the Court supported the view that the Convention did not create domestic rights,[304] but embraced an earlier view that courts should not be 'too restrictive' in their use of the Convention, and they could rely on it even to fill *lacunae* in legislation.[305] It stated that the CRC can be used to interpret the Family Law Act even if the Act made no explicit reference to it.[306] The Convention 'is likely to be … relevant in the absence of any inconsistent statutory provision' and it may be considered 'in the exercise of a discretion, which the Family Court clearly exercises in determining matters of parenting responsibility and the best interests of children'.[307] In the area of family law, it 'may gain further strength from s. 43(c) of the Family Law Act'[308] which contains a mandatory direction that when a court exercises jurisdiction under the Act, it shall have regard to the need to protect the rights and welfare of children.[309] While this section pre-dated the ratification of the CRC, in its first report to the CRC Committee Australia indicated that it does not plan to incorporate the Convention domestically because it ensured that legislation, policies and practice complied with it prior to ratification.[310] Section 43 was taken therefore to indicate the government's recognition of the rights of children, and a gateway for the use of the CRC by the Family Court.

Against this background, the Court rejected arguments that the CRC cannot be relied on for the interpretation of Part VII of the Act because, allegedly, the Act was 'comprehensive, stands alone and does not need the assistance by anything that was only of general origin',[311] was not ambiguous or obscure, and was '"effectively" a code'.[312] On the contrary, the relevant provisions of the Act were 'statements of broad general principle, consistent with UNCROC but lacking the sort of precision that would be expected if they were intended to constitute part of a code'.[313] For the Court, it was 'hard to see how the Convention can be considered not to be relevant,'[314] and '[i]t is difficult … to imagine a better starting point' than the CRC in defining the rights to which section 43 refers, since the Convention has acquired almost

[300] Para 3.28.
[301] Para 3.30.
[302] Para 3.32.
[303] Para 9.34.
[304] Para 10.2.
[305] Para 10.5.
[306] It was argued, *inter alia*, that the CRC was irrelevant because the statute did not refer to it (para 6.35). The Court analysed the content of the Act, relevant parliamentary documents, Bills that preceded the Family Law Reform Act, the Explanatory Memorandum and parliamentary speeches. It pointed out that although the explicit references to the CRC in earlier drafts of the Bill were dropped, the CRC was referred to in second reading speeches in the Parliament (see paras 3.4-3.8), which made it a relevant extrinsic material for the interpretation of the Family Law Act (per section 15AB(2)(f) of the Acts Interpretation Act).
[307] Para 10.18.
[308] Para 10.7.
[309] Para 10.7.
[310] Para 10.12.
[311] Para 6.35.
[312] Para 6.35.
[313] Para 10.16.
[314] Para 10.13.

universal ratification and appears in a schedule to the HRCA.[315] The CRC 'must be given special significance because it is an almost universally accepted human rights instrument and thus has much greater significance for the purposes of domestic law than does an ordinary bilateral or multilateral treaty not directed at such ends'.[316] Nonetheless, the interpretation of the relevant statutory provision could not be informed by the CRC *as a whole* because it did 'not represent anything like the full quotient of rights of children provided by UNCROC' which extends well beyond issues dealt with in that section.[317]

These comprehensive statements regarding the role of the CRC were only made in the abstract by the Court, as they were not directly relevant to the case. They contribute, however, to an accumulation of *dicta* supporting the relevance of the CRC for domestic adjudication.

A similarly generous view in relation to the role of the CRC in relation to the Family Law Act was taken in *Re Jamie*.[318] Embracing the *Teoh* view of ambiguity,[319] Bryant CJ noted that as the CRC and the FLA 'share an underlying common purpose or object, namely a concern that decisions are made in a child's best interests, in an application under s 67ZC [welfare jurisdiction], it is appropriate for the court to have regard to the relevant provisions of the Convention on the Rights of the Child'.[320] The Act did not prescribe the issues to be taken into account by the Court when exercising the welfare jurisdiction and thus, the Court found it useful to turn to the CRC for guidance. The CRC 'makes it clear that it is important that children have input into decisions that affect them and that parents have special responsibility for assisting their children in making these decisions …'.[321] Thus, in the case of a competent child who considers stage 2 treatment for gender dysphoria, the authorisation of the Family Court is not required. The views of the child should be given weight according to the age and maturity of the child, and the state should respect the guidance given by the parents, as required by articles 12 and 5 CRC.[322]

Earlier, in *Murray*[323] a majority of the Full Court (Nicholson CJ and Fogarty J) went even further. They rejected the 'too restrictive'[324] position that unincorporated treaties can only be used to resolve ambiguities in legislation, and stated that the CRC

[315] Para 10.14.
[316] Para 10.19.
[317] Para 10.25.
[318] [2013] FamCAFC 110. This judgment is now superseded by *Re: Kelvin* [2017] FamCAFC 258 (which made no reference to the CRC).
[319] *Re Jamie* para 120.
[320] *Re Jamie* para 120.
[321] *Re Jamie* para 122.
[322] *Re Jamie* paras 129, 134.
[323] It was argued that by ordering the immediate return under the 1980 Hague Convention on the Civil Aspects of Child Abduction, the trial judge erred by not considering and applying article 3 of the CRC (*Murray* para 80). To the argument that there was a conflict between the Hague Convention and the CRC, the Court responded in the negative (para 156).
[324] *Murray* para 147.

> can also be used to fill lacunae in such legislation and to resolve ambiguities and lacunae in the common law. As such it may well have a significant role to play in the interpretation of the Family Law Act 1975 and in the common law relating to children.[325]

This was a 'more controversial'[326] position, which has received only limited support[327] possibly because it conflicts with the dualist stance taken by Australia.

To conclude, the CRC has been relied on to interpret relevant statutes. Its impact in the interpretive process has been prevented by its conflict with some statutes and enhanced by its convergence with others.

4.4.4 The CRC and the exercise of administrative discretion

The case of *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*[328] remains the highest point of the High Court's engagement with the CRC, although its domestic relevance has been diminished by subsequent developments.[329] It is the only case in which all High Court judges engaged with the Convention and a positive outcome for children was unequivocally connected to the CRC.[330]

Mr Teoh, a Malaysian citizen, came to Australia and was granted a temporary entry permit. He married an Australian citizen with whom he had three children. He applied for permanent residence, and while his application was pending, he was convicted of drug trafficking and sentenced to a custodial sentence. As a result, Mr Teoh was denied permanent residence and was liable to deportation. He sought the reassessment of this decision because his deportation would severely affect his family. The relevant authorities considered the family hardship argument,[331] but in the light of the seriousness of the crime, the visa was denied.[332] The majority of the Full Federal Court ordered that the denial of visa be set aside; the judgment was appealed to the High Court.

Amongst other things, the High Court had to decide on the role of the CRC as an unincorporated treaty in the making of discretionary administrative decisions, and establish whether the ratification of the Convention created a legitimate expectation that the interests of children were to be given a primary consideration in the deportation of a parent. The intricacies of the doctrine of legitimate expectation are primarily of domestic relevance and are not addressed here. Instead, the focus is on how judges engaged with the CRC in the four written judgments.

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[325] *Murray* per Nicholson CJ and Fogarty J para 149.
[326] Kirby 2004 note 54 at 232.
[327] Kirby J supported this approach, but the Hight Court was 'cautious' (Shearer et al 1994 note 28 at 263).
[328] (1995) 183 CLR 273 ('*Teoh*').
[329] Subsequent migration guidelines which formally required administrative decision-makers to consider the best interests of children have made the substance of *Teoh* moot (Groves 2010 note 65 at 15). See also N Sharp 'Procedural fairness: The age of legitimate expectation is over' 2016 (90) *Australian Law Journal* 797; Taggart 2008 note 65.
[330] For comments, see Allars 1995 note 62; Groves 2010 note 65 at 8; Lacey 2001 note 65; Twomey 1995 note 26; Walker and Mathew 1995 note 28. For some critical views, see Dyzenhaus, Hunt and Taggart 2001 note 47 at 11. On the influence of *Teoh* abroad, see L Katz 'A *Teoh* FAQ' 1998 (16) *AIAL Forum* 1 at 11; Taggart 2008 note 65 at 16; Groves 2010 note 65 at 1.
[331] *Teoh* per Mason CJ and Deane J para 7.
[332] Mason CJ and Deane J para 7.

The leading judgment was written by Mason CJ and Deane J, with whom Toohey J in a separate judgment largely agreed. Being unincorporated, the CRC was not a direct source of domestic rights and obligations;[333] the case was not concerned with an ambiguity in a statute or with the development of the common law. Thus, Mason CJ and Deane J explored new ways to give effect to the CRC. Mason CJ and Deane J found the Convention to be relevant for the discharge of statutory discretion.[334] The administrative decision-makers were therefore entitled, although not obliged, to consider it.[335] The 'crucial question' for the relevance of the CRC to the case was whether the decision not to grant Mr Teoh a visa was an action 'concerning children' in the sense of article 3(1).[336] The two justices embraced the ordinary meaning of 'concerning' as meaning 'regarding, touching, in reference or relation to; about'[337] and rejected a narrower construction, according to which although the decision affected children, it did 'not touch or relate to them'.[338] In relation to the weight attached to the interests of the child, Mason CJ and Deane J stressed that they need not be automatically prioritised:

> The article is careful to avoid putting the best interests of the child as the primary consideration; it does no more than give those interests first importance along with such other considerations as may, in the circumstances of a given case, require equal, but not paramount, weight.[339]

Mason CJ and Deane J indicated that the ratification of the CRC gives rise to a legitimate expectation that 'absent statutory or executive indications to the contrary, administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as "a primary consideration"'.[340] A legitimate expectation does not compel a decision-maker to act according to a treaty.[341] Instead, if a decision contrary to the treaty is envisaged, those affected should be given the opportunity to be heard.[342] Mason CJ and Deane J found that the decision-maker took the interests of the children into account, but she did not treat them as a primary consideration. For this, it was necessary for the decision-maker to ask 'whether the force of any other consideration outweighed it'.[343] Instead, the decision-maker treated

> the policy requirement as paramount unless it can be displaced by other considerations…A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it.[344]

Gaudron J, concurring, took the view that the CRC was only of 'subsidiary significance in this case' and instead '[w]hat is significant is the status of the children as Australian citizens' and

[333] Mason CJ and Deane J para 25.
[334] Mason CJ and Deane J para 22.
[335] Mason CJ and Deane J para 22. McHugh J para 36 agreed.
[336] Mason CJ and Deane J para 30.
[337] Mason CJ and Deane J para 30 fn omitted. This approach was also shared by Toohey J (para 31).
[338] Mason CJ and Deane J para 30.
[339] Mason CJ and Deane J para 31.
[340] Mason CJ and Deane J Mason CJ and Deane J para 34 fn omitted. Also, Toohey J para 29.
[341] Mason CJ and Deane J para 36.
[342] Mason CJ and Deane J para 37. Also, Toohey J para 32.
[343] Mason CJ and Deane J para 39.
[344] Mason CJ and Deane J para 39.

the 'obligations [of the state] to the child citizen in need of protection'.[345] *Obiter*, Gaudron J said that

> it is arguable that citizenship carries with it a common law right on the part of children and their parents to have a child's best interests taken into account, at least as a primary consideration, in all discretionary decisions by governments and government agencies which directly affect that child's individual welfare.[346]

This was a 'novel'[347] independent right whose possible source was the *parens patriae* jurisdiction of the courts to protect a citizen child.[348] The CRC simply 'gives expression to a fundamental human right which is taken for granted by Australian society'[349] and which arises from the 'special vulnerability of children'.[350] Should there be any doubts about the existence of such domestic right, 'ratification would tend to confirm the significance of the right within our society'.[351] As the CRC gives expression to 'an important right valued by the Australian community, it is reasonable to speak of an expectation that the Convention would be given effect'.[352] Put differently, the CRC *gives effect* to an Australian expectation, rather than *creates* one.

McHugh J, in dissent, disagreed with the application of the legitimate expectation doctrine to international treaties.[353] For this judge, international treaties are 'agreements between States',[354] whose breach is sanctioned in the international sphere;[355] and, in this case, upon reporting to the CRC Committee.[356] Giving force to international commitments are matters for the federal Parliament,[357] which chose to do so through the Human Rights and Equal Opportunity Commission Act 1986 (Cth), and the remedial mechanisms provided therein.[358] McHugh J further questioned the application of article 3 to immigration decisions, and more generally, to measures 'concerning' children rather than directed at them. In his view, extending the net of article 3 so wide 'will have enormous consequences for decision-making in this country if it applies to actions that are not directed at but merely have consequences for children'.[359]

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[345] *Teoh* per Gaudron J para 3.
[346] Gaudron J para 4.
[347] Allars 1995 note 62 at 225.
[348] Ibid.
[349] *Teoh* per Gaudron J para 6.
[350] Gaudron J para 5.
[351] Gaudron J para 6.
[352] Gaudron J para 6.
[353] A concern for this justice was the 'enormous' impact on the administrative decision-makers of a legitimate expectation arising from the significant number of treaties ratified by Australia (*Teoh* per McHugh J para 38).
[354] *Teoh* per McHugh J para 37.
[355] This view is later supported by McHugh and Gummow JJ in *Lam* para 98.
[356] *Teoh* per McHugh J para 37.
[357] McHugh J para 37.
[358] McHugh J para 40, 41.
[359] McHugh J para 43. This Justice questioned whether article 3 ought to be a primary consideration when sentencing a parent, repossessing the property of a parent, or taxation issues. Similar concerns were also raised by Callinan J in *Lam* para 147.

Teoh was controversial because of its unusual approach to the doctrine of legitimate expectation.[360] It did not recognise a right to an outcome guaranteed by the CRC,[361] and decisions contrary to it could still be made provided certain procedural guarantees were ensured.[362] *Teoh* only applied to executive federal decision-makers[363] who enjoyed some statutory discretion; and that legislation and/or explicit statements of policy contrary to the CRC could displace the *Teoh* legitimate expectation.[364] Although the case still captures the attention of international lawyers, it now has a limited domestic scope.[365] Ministerial directions require that the best interests of the children affected be considered when decisions are made in relation to denial or cancelation of parents/carers' visa on character ground,[366] displacing therefore the application of the judicially-created legitimate expectations doctrine.[367]

Nonetheless, the judgments in *Teoh* remain significant repositories of judicial opinion on the interaction between Australian law and the CRC, and on the interpretation of the CRC more generally, as discussed in part 4.5 below.

The decision in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*[368] retreated from the *Teoh* approach to legitimate expectation without, however, overruling *Teoh*.[369] The engagement by the Court with the CRC is limited, and only Callinan J gives it some independent consideration. This judge noted the unincorporated status of the CRC, suggesting that '[t]he non-enactment of the Convention into Australian law could well indicate parliamentary resistance to it'.[370] This resistance may have been generated by a concern that the enactment of the CRC might 'distort the fine balance in criminal sentencing generally between deterrence of recidivism by adult criminals many of whom have children' and might be a 'disincentive … in relation to abstention from crime by those non-citizens who are minded to commit it'.[371]

[360] For attempts to displace *Teoh* see, Lacey 2001 note 65 especially at 224 and Katz 1998 note 330 at 9.
[361] Allars 1995 note 62 at 231-232.
[362] W Lacey 'A Prelude to the Demise of Teoh: The High Court Decision in Re Minister for Immigration and Multicultural Affairs, Ex parte Lam' 2004 (26) *Sydney Law Review* 130 ('Lacey 2004b') at 135.
[363] Katz 1998 note 330 at 8-9; Walker and Mathew 1995 note 28 at 248.
[364] Allars 1995 note 62 at 233. *Teoh* per Mason CJ and Deane J para 34 ('statutory or executive indications to the contrary').
[365] A Edgar and R Thwaites 'Implementing treaties in domestic law: Translation, enforcement and administrative law' 2018 (19) *Melbourne Journal of International Law* 24.
[366] The latest direction is *Minister for Immigration and Border Protection Direction no. 65 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501 CA, 22 December 2014* (see para 9.2). This was preceded by several other directions (Edgar and Thwaites 2018 note 365 at 38 fn 68).
[367] Ibid at 35, 37. The authors argue that article 3 was incorporated 'by reference' in these ministerial directions (at 39), giving it an enhanced protection by being now transformed into a mandatory (rather than discretionary) consideration for decision-makers
[368] [2003] HCA 6 ('*Lam*'). For an extensive commentary, see Lacey 2004b note 362. The case concerned a Vietnamese permanent resident (father of two Australian children) whose permanent residence visa was cancelled because of his criminal activity.
[369] Groves 2010 note 65 (see fn 40); Lacey 2004b note 362 at 156.
[370] *Lam* per Callinan J para 147.
[371] Callinan J para 147 (both quotes).

4.4.5 The CRC and the principle of legality

This principle has so far found endorsement in relation to the CRC only in the Family Court. In *B and B v MIMIA*, the Full Court stated that indefinite immigration detention of children would be incompatible with article 37 of the CRC.[372] Thus, considering the presumptions that the Parliament does not intend to limit rights[373] and that statutes are to be construed as far as possible in conformity with international treaties,[374] the Court supported an interpretation of the Migration Act that would not authorise the indefinite detention of children. The consideration of the principle of legality seems justified here by the fact that at stake was a CRC right which had a common law correspondent.[375]

In *KN & SD*[376] the application of the principle was extended beyond the rights with common law correspondent. Relevant was the relationship between the Migration Act (which permitted the deportation of the mother) and section 60B(2) of the Family Law Act, which provided that children have the right to know and be cared for by their parents, and to have regular contact with them. The question was whether the mentioned rights were *fundamental* rights and thus protected by the presumption that the Parliament does not intend to limit fundamental rights unless it clearly indicates its intention to do so. As mentioned in part 4.4.1, the majority decided that the CRC was incorporated by section 60B.[377] Although the rights in section 60B(2)[378] and the CRC can be limited by the application of the best interests of the child, they remain fundamental and thus protected by the principle of legality:

> We reject the proposition that fundamental rights are limited to those conferred by the common law. We are of the view that the terms of s.60B itself confers fundamental rights on a child. We also think that fundamental rights and freedoms are also grounded in international law and in Instruments such as … UNCROC …[379]

The extension of the principle of legality to rights other than common law rights to include unincorporated rights in international instruments with or without domestic correspondence, was disagreed with by Ellis J.[380] Nonetheless, the majority decided that because the Migration Act was clear and precise, it negated the fundamental rights arising from the Family Law Act and the CRC.[381]

While the position in *KN & SD* is favourable to CRC rights, it runs counter to precedents that applied the presumption only in relation to rights recognised at common law. The judgment

[372] Nicholson CJ and O'Ryan J para 388.
[373] *B and B v MIMIA* per Nicholson CJ and O'Ryan J para 357.
[374] Nicholson CJ and O'Ryan J para 363.
[375] Rights in relation to personal liberty. See discussion of the principle of legality in part 4.2 above.
[376] The facts are briefly presented in part 4.4.1 above.
[377] Para 68.
[378] Nicholson CJ and O'Ryan J swiftly reversed the *obiter* position in *B and B: Family Law Reform Act 1995*, that section 60B contains broad general principles but does not confer enforceable rights, and declared it 'incorrect' (*KN & SD* para 70).
[379] Para 69.
[380] Ellis J disagreed as to the meaning of 'fundamental right', holding that a right is 'fundamental' if it has some 'common law recognition' and not simply because the right is 'important' (para 133).
[381] Para 76.

was not appealed to the High Court, and the application of the principle of legality to unincorporated treaty rights remains controversial.

4.4.6 The CRC and the exercise of judicial discretion

As mentioned in part 4.2, the consideration of the CRC in the exercise of judicial discretion has not yet been endorsed by the HCA. Other courts have, however, expressed some support for giving effect to the Convention in this way. In *B and B: Family Law Reform Act 1995*, for example, the FCFC said that 'regard may be had to a convention or treaty in the exercise of a discretion, which the Family Court clearly exercises in determining matters of parenting responsibility and the best interests of children'.[382] In *Re K*,[383] the Court issued discretionary guidelines for the appointment of separate legal representatives for children, having regard to articles 9 and 12 of the CRC.

Clearer is the use of the CRC to guide judicial discretion in the case law of the VSC. Relying on the CRC for these purposes was appropriate

> if the subject matter of the case before the court comes within its scope, which is a test of relevance; if taking the human right into account is not inconsistent with any applicable legislation, the operation of which such a convention obviously does not impair; and if doing so is not inconsistent with the common law (broadly defined), the content of which, equally obviously, such a convention does not alter.[384]

In *DPP v TY*, in sentencing proceedings concerning a juvenile offender, Bell J noted the relevance of article 40(1) of the CRC,[385] and that 'the Convention runs with the grain of the Court's sentencing discretion, not against it'.[386] Accordingly, 'the exercise of the sentencing discretion will be the better for it'.[387] As put by Bell J:

> In practical terms, the main significance of considering this matter will be to supply a further basis for, and to reinforce the existing principle of, giving primary emphasis to youth and rehabilitation as a mitigating factor when sentencing children. Article 40(1) also brings home that, by the way the courts deal with children in the sentencing process, they can promote both their positive development and the growth of their understanding of, and respect for, the human rights of others.[388]

In Re TLB,[389] the father of a seven month old baby, a mentally impaired man who had committed a violent crime, applied for an extension of his leave to remain in the community and not to be separated from his child.[390] The statutory framework allowed the Court to consider, alongside prescribed factors concerning community safety, any other matters that it found relevant.[391] In extending the leave, Bell J considered that the best interests of the child not to be separated from his father was relevant.[392] The Court stressed that although the CRC

[382] Para 10.18.
[383] [1994] FamCA 21 para 11.
[384] *DPP v TY* (No 3) [2007] VSC 489 ('*DPP v TY*') para 49.
[385] *DPP v TY* para 50.
[386] *DPP v TY* para 50.
[387] *DPP v TY* para 51.
[388] *DPP v TY* para 51.
[389] [2007] VSC 439.
[390] *In Re TLB* paras 5-6.
[391] *In Re TLB* para 14, 18.
[392] *In Re TLB* para 18.

was not incorporated in the Australian law, it was a relevant consideration for the exercise of judicial powers,[393] because article 9(1) dealt with the separation of children from their parents.[394] The Court referred to the CRC as an 'an additional basis on which the best interests of the applicant's son should be taken into account'.[395] Although Bell J refers to the CRC as an add-on reasoning, the Convention was essential for the identification of the best interests of the child as a relevant consideration not explicitly mentioned in the relevant legislation.[396]

4.4.7 The CRC and human rights statutes: A Victoria case-study

4.4.7.1 Introduction

The state of Victoria passed a human rights act[397] in the form of the Charter of Human Rights and Responsibilities Act 2006 ('the Charter').[398] The Charter only applies in relation to state legislation or exercise of official power under the State law, but it is relevant for the rights of children because States, as opposed to the Commonwealth, have the power to regulate important matters such as juvenile justice, child protection or education, to name just a few.

The Charter binds the courts to the extent that they have functions under the substantive part of the Charter (in relation to the right to a fair hearing and other rights in criminal proceedings, etc)[399] and in relation to the interpretation of laws.[400] The Charter makes it unlawful for public authorities to act contrary to the Charter or to make decisions without considering relevant human rights.[401] For the purposes of the Charter, human rights are 'the civil and political rights set out in Part 2 [of the Charter]'.[402]

A feature of the human rights acts inspired by the British Human Rights Act 1998 is their interpretation clauses, which allow the courts to interpret legislation, where possible, in a way compatible with human rights, without, however, giving them the power to invalidate incompatible legislation.[403] In cases of incompatibility, courts may be empowered to issue declarations of incompatibility,[404] which the political branches can act upon.[405] Section 32(1) of the Victorian Charter mandates therefore that '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'. Section 32(2) enables the courts to consider ('may be considered') in the interpretation of statutes, international law as well as domestic, foreign and international

[393] *In Re TLB* para 20.
[394] *In Re TLB* para 20.
[395] *In Re TLB* para 20.
[396] *In Re TLB* para 14.
[397] For an overview of human rights acts as a 'new genre of rights protection', see Bailey 2009 note 15 at 173 onwards.
[398] Most Charter provisions concerning the role of the courts and the obligations of the public authorities under the Charter came into force in January 2008, with the balance of provisions coming into force in January 2007 (section 2 of the Charter).
[399] Section 6(2)(b) of the Charter
[400] Section 32 of the Charter.
[401] Section 38(1) of the Charter. But see the exoneration clause in section 38(2) of the Charter.
[402] Section 3(1) of the Charter.
[403] Bailey 2009 note 15 at 179-181.
[404] Ibid at 180.
[405] For the mechanism in Victoria, see section 37 of the Charter.

judgments relevant to a human right. In *Momcilovic v The Queen*,[406] French CJ stated that section 32(2) 'does not authorise a court to do anything which it cannot already do',[407] and that '[s]ection 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application'.[408] French CJ further said about the operation of section 32(1) that

> It operates upon constructional choices which the language of the statutory provision permits. Constructional choice subsumes the concept of ambiguity but lacks its negative connotation. It reflects the plasticity and shades of meaning and nuance that are the natural attributes of language and the legal indeterminacy that is avoided only with difficulty in statutory drafting.[409]

If a statutory provision cannot be interpreted consistently with a human right, the VSC 'may make' a declaration of inconsistent interpretation.[410] Such declaration does not affect the validity of the statutory provision and does not create additional remedial rights for individuals.[411]

The Charter has a limited number of sections explicitly referring to children. Section 17 (2) provides that 'Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child'. Section 23 addresses the rights of children in the criminal process, and section 25(3) provides for a right to a criminal law procedure that considers a child's age and promotes the rehabilitation of child offenders. According to the Explanatory Memorandum, the rights protected in the Charter, including the child-specific rights, derive primarily from the ICCPR rather than the CRC.[412] The operation of the Charter was reviewed after four and eight years respectively of operation.[413] The four year review process had to consider, *inter alia*, the desirability of including CRC rights as human rights under the Charter,[414] and it recommended that additional rights *not* be introduced into the Charter.[415] The eight years review gave no attention to the CRC, but recommended that the Charter be amended to include a provision recognising to all persons born in Victoria the right to a name and to be registered as soon as practicable after birth.[416]

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[406] *Momcilovic v The Queen* [2011] HCA 34 ('*Momcilovic'*). For comments, see S Tully 'Momcilovic v The Queen (2012) 245 CLR 1' 2011 *Australian International Law Journal* 279.
[407] *Momcilovic* para 18.
[408] French CJ para 51 (also paras 49-50); Crennan and Kiefel JJ paras 565, 566, 684. According to Tully, the approach taken by the High Court adheres to 'orthodox principles of statutory construction', with the Charter yielding to statutory provisions (Tully 2011 note 406 at 281).
[409] French CJ para 50.
[410] Section 36(2) of the Charter.
[411] Section 36(5) of the Charter. Section 39(3) excludes awards of damages for breaches of the Charter.
[412] Parliament of Victoria (2006) *Charter of Human Rights and Responsibilities Bill Explanatory Memorandum* at 1, 14, 17 and 18 (online).
[413] As required by sections 44 and 45 of the Charter respectively.
[414] Section 44(2)(a)(ii) of the Charter.
[415] Scrutiny of Acts and Regulations Committee (2011) *Review of the Charter of Human Rights and Responsibilities Act 2006*, Recommendation 2 at 52 (online). For submissions in relation to the CRC, see paras 236-249.
[416] M Brett Young (2015) *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* at 222 (online). The recommendation was grounded in article 24(2) of the ICCPR rather than article 7 of the CRC.

The following paragraphs turn to the presentation of the relevant case law, focusing on cases in which the CRC was meaningfully engaged with.

4.4.7.2 The CRC and the exercise of judicial powers under the Charter

In two cases, Bell J relied on section 6(2)(b) of the Charter to issue directions for the adaptation of sentencing and bail proceedings concerning children. This section reads:

> This Charter applies to … (b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3.

The Children, Youth and Families Act 2005 (Vic) ('the CYFA') adapted the proceedings in the children's courts to suit children's needs. Although most children are dealt with in the children's courts, some appear before the VSC because of the seriousness of their crimes. This was the case in *DPP v SL*[417] and *DPP v SE*.[418] Bell J held that under section 6(2)(b), he was obliged to apply the relevant Charter rights when exercising his functional responsibilities in relation to sentencing, bail proceedings and detention at court and trial.[419] The Charter reflected the standards of the ICCPR and the CRC,[420] which could also be taken into account as discretionary considerations to justify the directions otherwise made according to the Charter.[421] As stated by Bell J:

> These requirements [enabling a more child-friendly process] arise as a matter of human rights under the Charter and, on a discretionary basis, under certain international obligations. They especially arise under the fundamental principle of the best interests of the child.[422]

This enabled the Court to issue directions for child-friendly procedures at sentencing and bail.[423] The Court directed, therefore, that, *inter alia*, the children be separated from accused adults[424] when at court and not be handcuffed; that a more child-friendly and less intimidating courtroom be used; that the judge and the counsels do not robe; and that the child does not sit in the dock.[425] The Court gave special attention to securing an effective participation of the child in the sentencing process, resting its reasoning on sections 8(3) (equal protection under the law) and 25(3) of the Charter (right to procedures which take into account a child's age and the desirability of rehabilitation), and, in relation to the later section, 'its counterparts in the ICCPR and CROC',[426] including the views of the CRC Committee on ensuring an effective participation by children in legal processes.[427]

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[417] [2016] VSC 714.
[418] [2017] VSC 13.
[419] *DPP v SL* paras 5-6.
[420] *DPP v SL* para 7.
[421] *DPP v SL* para 10.
[422] *DPP v SE* para 11, summarising the reasoning in *DPP v SL* fns omitted. The Court acknowledged that its reasoning in *DPP v SL* was based on 'ss 6(2)(b), 8(3), 17(2), 23(1), (2) and (3) and 25(3) of the Charter, arts 10(2)(b), 14(4) and 24(1) of the ICCPR and arts 37(c) and 40(1) and (2) of CROC' (*DPP v SE* fn 10).
[423] DPP v SL (sentencing); *DPP v SE* (bail).
[424] To support the need to detain children separately from adults, Bell J referred to the interpretation of article 37(c) by the CRC Committee in *General Comment 10* (*DPP v SL* para 8).
[425] For the full set of directions, see *DPP v SL* para 25. Similar directions were given in relation to the bail hearing in *DPP v SE* paras 16-17.
[426] *DPP v SL* para 11 fn omitted. The reference to the CRC sent to art 40(1) CRC.
[427] *DPP v SL* para 11.

A notable feature of Bell J's approach in *DPP v SL* and *DPP v SE,* was the consistency with which he stressed that the directions were issued as an *obligation* under the Charter but arose also from taking the CRC and ICCPR into consideration as *discretionary considerations*.[428] This two-pronged justification is important. First, preserving the autonomy of the CRC is useful for cases where the complementarity with the Charter is less pronounced. The VSC can then rely on the CRC as a discretionary consideration. Second, it cements the jurisprudence which supports the use of the CRC in the exercise of courts' discretion. For Australian jurisdictions lacking legislation which explicitly enables courts to resort to international treaties, the above cases have persuasive value, and encourage the courts to resort to the CRC in the exercise of their discretion. The degree of influence of the CRC in these cases is difficult to establish with certainty because convergent guidance derived from other sources was also relied on.[429] While this is an issue warranting further consideration, it is telling that Bell J uses language similar to that of the CRC Committee,[430] and his directions respond specifically to the issues raised by the latter in its relevant general comments.

4.4.7.3 The CRC and interpretation of the Charter

The first two cases concern the detention of children in a separate unit of an adult prison in Melbourne. On 12-13 November 2016 riots occurred at one of the two detention facilities for children, resulting in significant damage and consequent loss of accommodation, and the subsequent housing of children in inadequate conditions. On 17 November 2016, by way of an executive order, a part (Grevillea unit) of an adult prison was excised from the rest of the prison (Barwon prison), with Grevillea being immediately declared a youth remand and youth justice centre. Grevillea and Barwon shared a roof, but the units were completely separate. After establishing Grevillea, on 21 November 2016 the first young offenders (aged 15-18) were transferred there, despite the unit being unsuitable for accommodating children.[431]

In *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children*,[432] the plaintiff children challenged, amongst others, the conformity with the Charter of the orders which established Grevillea as a youth detention facility.[433] The CRC was relied on by Garde J to decide that section 17(2) (the right to protection as is in his/her best interests)[434] was engaged.[435] Referring to section 32(2) of the Charter,[436] Garde J decided

[428] *DPP v SL* paras 9, 11, 14, 16; *DPP v SE* para 12.
[429] Bell J refers also to ECtHR decisions (*DPP v SL* para 12), CYFA 2005 (para 13), and practice directions from the UK (paras 15-16).
[430] Bell J cites CRC Committee *General Comment 12 (2011): The Right of the Child to be Heard* (*DPP v SL* para 11).
[431] *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796 paras 57-92; 108; 121-125 (for example, lengthy lock-down periods, limited outdoor time, poor education services, reduced opportunities for family visits, harsh treatment by staff, absence of adequate medical and psychosocial support, etc).
[432] [2016] VSC 796 ('*Certain Children* 2016').
[433] *Certain Children* 2016 para 142.
[434] Section 17(2) reads: 'Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child'.
[435] A right is engaged when a decision limits a right, regardless as to whether such limitation is justifiable under section 7(2) or not (*Certain Children* 2016 para 143). For the purposes of the 'engagement' stage of the inquiry, the rights are to be construed as widely as possible (para 143).
[436] *Certain Children* 2016 para 146.

that the CRC and 'materials from the United Nations inform the scope of the rights protected by s 17(2) of the Charter',[437] and they provide 'an established international framework by which substance and standards can be given to s 17(2)'.[438] Articles 3, 6(2), 12 and 40(1) of the CRC were found to be relevant for this purpose. Article 3(1) of the CRC creates special protective obligations 'because "children differ from adults in their physical and psychological development, and their emotional and educational needs"'.[439] Article 6(2) of the CRC, as interpreted by the CRC Committee, goes against the incarceration of children, which has negative effects on their development.[440] Article 40(1) of the CRC, also as interpreted by the Committee, requires a treatment consistent with children's vulnerability, which respects and promotes their dignity and rehabilitation.[441] Garde J then referred extensively to other requirements arising from the CRC, as interpreted by the Committee.[442] When it decided that section 17(2) of the Charter was engaged, the Court did so on the basis that the orders to establish Grevillea directly affected the children in various ways, contrary to guidance derived from the CRC and the Beijing Rules.[443]

The Court found that in making the impugned orders, the decision-makers did not take into account the rights of the affected children, as required by section 38 of the Charter, and that the ensuing decisions were incompatible with the rights of the detained children.[444] The orders did not impose a reasonable limitation on the rights of children,[445] and were declared invalid,[446] with the consequent obligation for the children to be transferred to a lawfully established detention facility.

Pending the appeal, new executive orders were made once more establishing Grevillea as a remand and youth justice centre.[447] An additional order authorised the use of oleoresin capsicum spray (OC spray) and extendable batons at Grevillea in order to ensure security, good order and the safety of children and staff.[448] The children detained in Grevillea challenged the validity of the new orders, including their transfer to the unit. Under section 38(1) of the Charter, the orders to re-establish Grevillea (and some transfer orders) were again found unlawful. Dixon J found that the rights in sections 17 and 22(1) of the Charter were limited by children being placed in a maximum security adult prison unit, which had a demoralising and

[437] *Certain Children* 2016 para 146. The UN materials to which the Court refers include CRC Committee *General Comment 10 (2007): Children's rights in juvenile justice* and the Beijing Rules (paras 152-153).
[438] *Certain Children* 2016 para 154.
[439] *Certain Children* 2016 para 149 quoting *General Comment 10* para 10.
[440] *Certain Children* 2016 para 149 quoting *General Comment 10* para 11.
[441] *Certain Children* 2016 para 151 referring to *General Comment 10* para 13.
[442] *Certain Children* 2016 para 155 referring to *General Comment 10* paras 87, 89. *Certain Children v Minister for Families and Children & Ors* (NO 2) [2017] VSC 251 ('*Certain Children* 2017') para 263 (per Dixon J).
[443] *Certain Children* 2016 at 157-158; compare with para 155, which refers to guidance from *General Comment 10.*
[444] *Certain Children* 2016 paras 197-203; 223.
[445] *Certain Children* 2016 para 230.
[446] This aspect of the order was maintained in appeal in *Minister for Families and Children v Certain Children by their Litigation Guardian Sister Marie Brigid Arthur* [2016] VSCA 343.
[447] *Certain Children* 2017 para 9. Certain measures were taken to address some of the concerns identified by Garde J in *Certain Children* 2016 prior to the new orders being issued (*Certain Children* 2017 para 300). Garde J's judgement, the appeal against it and the new orders occurred between 21 December and 30 December 2016.
[448] *Certain Children* 2017 para 11.

dehumanising effect on them,[449] and by authorising the use of OC spray at Grevillea, with negative consequences on the children detained.[450] Dixon J found these limitations not to be proportionate with the important values which sections 17(2) and 22(1) protected.[451]

It was once more in giving content to section 17 that the Court turned to the CRC. Dixon J noted the similarity between articles 24(1) of the ICCPR and article 3 of the CRC, and section 17 of the Charter respectively.[452] In relation to the content of section 17(2), Dixon J found that the best interests of the child requires hearing and giving due weight to the views of the child in a wide range of matters, including the decisions of transfer to Grevillea. The Court referred to *General Comment 12* of the CRC Committee to support its wide approach to matters which require the hearing of the concerned child.[453] For Dixon J, the international instruments stressed that children require different treatment in the criminal justice process for reasons of their age and continuing development.[454] In the administration of juvenile justice, article 3 requires that the best interests should be a paramount consideration, because, as the Committee stressed, children differ from adults in their development and needs.[455] Dixon J endorsed the views of Garde J in terms of various requirements arising from the CRC in relation to the detention of children, which informed the content of section 17(2) of the Charter, such as maintaining family contact, quality of physical environment, education opportunities, securing children's developmental needs, medical care, and disciplinary measures consistent with the dignity of the child.[456] It is not surprising, therefore, that the limitations identified by Dixon J in relation to section 17(2),[457] largely constitute contraventions to the CRC standards as interpreted by the Committee, and which Garde J and Dixon J have embraced in defining the content of this section.[458]

The next case shows that the Court continues to engage with the Convention independently of the Charter.[459] In *ZZ v Secretary, Department of Justice*[460] an assessment notice was refused to the applicant who wished to become a bus driver, as he was found to pose a risk to children due to his criminal record consisting of serious offences (not related to children and not sex offences). Bell J referred to several provisions of the CRC to stress that one of its purposes was to protect children against harm and, correlatively, to impose positive obligations on states to ensure their protection.[461] The Court engaged with the Charter and the CRC independently. In relation to the CRC, it applied the common law principle that, as far as possible, domestic

[449] *Certain Children* 2017 para 424
[450] *Certain Children* 2017 para 433.
[451] *Certain Children* 2017 para 455.
[452] *Certain Children* 2017 para 260. Dixon J endorsed Garde J's reliance on the ICCPR, the CRC and the Beijing Rules in giving content to s 17(2) of the Charter (*Certain Children* 2017 para 262).
[453] *Certain Children* 2017 para 262 (fn 179).
[454] *Certain Children* 2017 para 265.
[455] *Certain Children* 2017 para 262 (fn 181). The Court also referred to articles 6(2) and 40(1) of the CRC.
[456] *Certain Children* 2017 para 263.
[457] *Certain Children* 2017 paras 424, 453.
[458] *Certain Children* 2017 para 263.
[459] In *Tomasevic v Travaglini* [2007] VSC 337, Bell J said in relation to ICCPR that it has 'an independent and ongoing legal significance', which 'is not diminished, but can only be enhanced, by the enactment of the Charter' (para 72).
[460] [2013] VSC 267 ('*ZZ*').
[461] *ZZ* paras 63-66 (articles 3, 19, 34 and 36).

legislation should be construed in conformity with Australia's obligations under international treaties.[462] The application of the Charter and the CRC in this case led to overlapping outcomes: both supported the existence of a positive obligation for the state to protect children against harm, but neither justified a severe limitation of the rights of others (*in casu* the right to work) if no real risk to children existed.[463]

To conclude, the Charter has contributed to the VSC engaging with the Convention by enabling judges to detect the harmony between their standards. Unlike the High Court cases, the relevance and the legitimacy of references to the CRC has not been contested, and positive consequences arose from its application.

4.5 Analysis

4.5.1 The methods of engagement

The engagement of the Australian courts with the CRC is marked by the status of the Convention as an unincorporated treaty, the absence of legal obligation to engage with it, and the CRC yielding to domestic law when a conflict exists. Although incorporation arguments have been put forward by the FCFC, they were legally vulnerable,[464] and were not endorsed by the HCA. The exploration of the incorporation route by the Family Court was possible because of the general convergence, rather than conflict,[465] between the CRC and the Family Law Act. This is a relationship which cannot be taken for granted, as illustrated by the immigration cases discussed in part 4.4.3 above. As important as incorporation or legislative effect may be, it does not secure full effect to the CRC because the Parliament may still deprive the enacted provisions of full effect, including their justiciability.[466]

The use of the CRC in judicial reasoning is discretionary,[467] resulting in an erratic use of the Convention by judges. The willingness of individual judges to integrate it in their reasoning becomes therefore determinant. Illustrative is the contrast between the close attention given to the CRC by the FCFC in several judgments and its marginalisation in the HCA,[468] where the Convention is considered primarily in the separate or dissenting judgments of Kirby J. Tellingly, after his departure from the Court in 2009, except for a 2018 case on appeal from the Supreme Court of Nauru,[469] the HCA last mentioned the CRC in a 2011 judgment.[470]

Some judges have shown concern about the potential conflict between the CRC and domestic laws,[471] while others argued that responsibility for such conflict is to be exacted at international

[462] *ZZ* para 67.
[463] *ZZ* para 68 in relation to the CRC; paras 70-71, in relation to section 17(2) of the Charter.
[464] See discussion in part 4.4.1.
[465] Cases of potential conflict are rare, but an example is *H v W* discussed in part 4.4.1.
[466] *AS v MIBP* discussed in part 4.4.1.
[467] Unless mandated by a statute.
[468] Compare *Re Z* and *B and B v MIMIA* (Family Court) with *GPAO* and *MIMIA v B* (High Court).
[469] *DWN027 v The Republic of Nauru* [2018] HCA 2.
[470] *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32.
[471] *B and B v MIMIA*; *Re Jamie*; *DPP v SL*.

level and not by domestic judges.[472] The legal position is that if a potential conflict between domestic norms and the CRC cannot be resolved by applying statutory interpretation rules and presumptions, the courts have to apply the domestic law irrespective of its inconsistency with the Convention. Courts seem therefore powerless in cases of overt conflict between the CRC and domestic Australian law. However, engagement with the exercise of external affairs power potentially enlivened by the CRC would allow the courts directly to consider this conflict and possibly declare federal laws invalid because of inconsistency with the CRC. In this way, although CRC rights are not protected in the Constitution, they may acquire some constitutional relevance, however limited.[473] So far, there has been little judicial engagement with the external affairs power in the context of the CRC, and conflicting views have been expressed.[474] Recent legislative developments could revive the debate, and the CRC may find itself in a strengthened position: a recent statute has enlivened the exercise of external affairs power[475] and the Parliament has explicitly indicated its intention to give effect to the CRC in recent family law reform.[476]

Courts have accepted, in principle, that the CRC can be relied on to interpret statutes in conformity with it.[477] In *AMS v AIF*, Gleeson CJ, Gummow and McHugh JJ suggested that the CRC contains 'aspirational rather than normative'[478] provisions, and questioned its interpretive role, considering that a statute 'is to be interpreted and applied, so far as its language permits, so that it is in conformity and not in conflict with established *rules* of international law'.[479] As *aspirations* are not *rules*, this reasoning throws some doubt over the interpretive role of the CRC. This may have been, however, an isolated pronouncement, considering that in *Re Woolley* some of the same judges seemed prepared to accept the interpretive role of the Convention, without expressing concerns about its alleged aspirational nature.[480] The interpretive relevance of the CRC was also limited where no statutory ambiguity was identified,[481] or where the matter was essentially one of constitutional law, such as the division of legislative competence between states and the Commonwealth or the jurisdiction of federal courts.[482]

None of the cases identified in this work show a majority of the HCA interpreting statutes in conformity with the CRC, despite the 'in principle' support for the possibility. On the other hand, and without departing from the position that the CRC does not prevail over conflicting

[472] *Teoh* per McHugh J para 37; *Lam* per McHugh and Gummow JJ para 98
[473] As discussed in part 4.4.2, the legislation would only be invalidated in case of substantial inconsistency with the treaty. Further, the legislation could be reintroduced under other heads of powers (if relevant) to circumvent issues arising from a potential inconsistency with the CRC.
[474] See discussion in part 4.4.2.
[475] See note 224.
[476] Part 4.4.2.
[477] *De L* (Kirby J); GPAO (Kirby J); *Re Woolley* per Gleeson CJ, McHugh J and Kirby J writing separately.
[478] *AMS v AIF* per Gleeson CJ, McHugh and Gummow JJ para 50.
[479] *AMS v AIF* per Gleeson CJ, McHugh and Gummow JJ para 50 (my emphasis).
[480] See the separate judgments of Gleeson CJ and McHugh J in *Re Woolley*, where the interpretive role of the CRC is implicitly accepted.
[481] *AMS v AIF* per Callinan J paras 280-281; *Re Z* per Fogarty J para 183.
[482] *AMS v AIF* per Gleeson CJ, McHugh and Gummow J para 50; Kirby J paras 168 & 169; Hayne J para 222; *GPAO* (scope of the best interests provision in the FLA); *MIMIA v B* (the scope of the welfare power of the Family Court).

domestic law,[483] the Family Court has embraced the CRC in the interpretation of the FLA. Once more, this was facilitated by the close relationship between the two.[484] Positive is also the practice of the VSC, that, relying on section 32(1) of the 2006 Charter, used the CRC and the Committee's general comments to give meaning to various provisions of the Charter.[485] It seems therefore that legislative endorsements of the 'domestic value'[486] of the CRC, reflected in the convergence of its standards with domestic law, and statutory authorisation to rely on the CRC have facilitated the use of the CRC by courts.

Only the Family Court has so far engaged with the CRC and its relationship with the principle of legality. A majority of the Court supported its application to protect CRC rights in *B and B v MIMIA* and *KN & SD,* as discussed in part 4.4.5. As the view has not been endorsed by the HCA and it departs from the existing case law, it remains controversial. Further developments are not excluded, however. CRC rights may be protected under the Victoria Charter by a rule akin to the principle of legality, unless a clear contrary intention is present in a statute. In *Momcilovic*, Gleeson CJ said that '[s]ection 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application'.[487] Thus, to the extent that CRC rights influence the interpretation of the Charter rights, they may be protected by a presumption with similar impact with the principle of legality.

In *Teoh*, engagement with the CRC occasioned the Court to develop a new avenue to engage with unincorporated treaties. It is difficult to say whether this was conjectural or depended on special features of the CRC, but the reasoning of the majority suggests that the latter may be true. Mason CJ and Deane J stated that a legitimate expectation arose 'particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children'.[488] Gaudron J's reasoning also implies that a legitimate expectation would not arise from a treaty which did not correspond to domestic values.[489] Analyses of recent cases show that lower courts continue to apply this doctrine but only in relation to the CRC,[490] albeit without discussing its potentially special features.[491] Nonetheless, it remains significant that it was the CRC which moved judges to create a new method to give effect to treaties when the existing ones were considered by the High Court insufficient to give effect to the Convention.

The 2006 Victoria Charter created additional avenues for the CRC to be applied by the courts in that State. It permitted the CRC to be relied on for the interpretation of the Charter itself and

[483] *Murray*; *Re Z* per Nicholson CJ and Frederico J para 416.
[484] *B and B: Family Law Reform Act* 1995; *B and B v MIMIA*; *Murray*; *Re Jamie*.
[485] *Certain Children* cases.
[486] M Waters 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' 2007 (107) *Columbia Law Review* 628 at 701.
[487] French CJ para 51 (also paras 49-50); Crennan and Kiefel JJ paras 565, 566, 684. According to Tully, the approach taken by the High Court adheres to 'orthodox principles of statutory construction', with the Charter yielding to statutory provisions (2011 note 406 at 281).
[488] *Teoh* per Mason CJ and Deane J para 34. The wide ratification of the CRC as a justification for it creating a legitimate expectation is also mentioned by Toohey J para 29.
[489] *Teoh* per Gaudron para 6.
[490] Edgar and Thwaites 2018 note 365 at 43.
[491] *Amohanga v Minister for Immigration and Citizenship* [2013] FCA 31.

of Victorian statutes. The Charter leaves undisturbed the primacy of the will of the legislature, and as yet, no declaration of inconsistent interpretation[492] with the Charter (interpreted with reference to the CRC) has been made. Nonetheless, the CRC contributed significantly to the far-reaching judgements in *Certain Children*, where the VSC found decisions of public authorities in relation to the detention of juvenile offenders incompatible with section 17(2) of the Charter, whose content was based on relevant CRC provisions.

The potential for CRC impact on statutory interpretation may be limited by the requirement in section 32(2) of the Charter that only international law 'relevant to a human right' as defined in the Charter may be relied on. This may result in socio-economic or protection rights in the CRC being excluded from playing an interpretive function. This is so because the definition of 'human rights' under the Charter is limited to civil and political rights,[493] and some CRC rights have no immediate equivalent in the Charter's catalogue of rights. It is, however, encouraging that the VSC has given the phrase 'relevant to a human right' a wide meaning, and it relied for the interpretation of the Charter on articles such as 6(2), 19, 34 and 36, whose nature extends beyond civil or political rights.[494] A further limitation is that while the CRC may contribute to defining the scope/legal content of Charter rights (at the 'engagement' stage), it has no role in the remainder of Charter inquiry (the limitation and justification stage, under section 7(2)). [495] On one side, the interpretive absorption of the CRC standards into the content of the Charter gives them added protection because limitations to Charter rights need to pass a stringent test under section 7(2). On the other side, a trespass to a Charter provision which has absorbed a CRC norm is permissible if its limitation can be justified under the Charter, irrespective of it contravening the CRC.

The most penetrating effects of the CRC are seen in the Victorian jurisprudence through the mediation of the Charter, which has clearly emboldened the courts to make extensive use of the CRC and the Committee's general comments,[496] the latter being absent in the reasoning of the other two courts. Reliance on general comments widened the reference framework for the interpretation of relevant domestic laws, often in ways which maximised the protection of rights.

Importantly, the VSC has sometimes preserved the autonomy of the CRC, engaging with it independently of the Charter when this was relevant.[497] The Court did not need to take this course, but by doing so, its jurisprudence becomes relevant for Australian jurisdictions which do not have human rights statutes, and it creates precedents for the application of the CRC when the Charter and the Convention do not overlap or converge.

The traditional methods of engaging with unincorporated treaties expose the vulnerability of the CRC especially before the High Court. There is some judicial wariness about the CRC.

[492] Section 36(2) of the Charter.
[493] Section 3 of the Charter.
[494] *Certain Children* 2016 and *ZZ.*
[495] *Certain Children* cases and *ZZ.*
[496] See especially the *Certain Children* cases.
[497] *DPP v SL; DPP v SE; ZZ.* In these cases, the Court distinguished between the CRC and Charter-reasoning, although the outcome of the two approaches was ultimately the same.

Legislative intransigence, especially in immigration legislation, left no space for creative consistent interpretation by some courts; and constitutional arrangements prevented best interests-associated concepts and institutions (such as the welfare and *parens patriae* jurisdictions) to extend beyond their traditional ambit.[498] Telling of the vulnerability of traditional techniques in giving effect to the CRC is that in no case was the CRC used to develop the common law,[499] or by the High Court to give a child-focused interpretation to a domestic statute. It is one case only that the VSC has relied on one of these techniques.[500] Some advancements have been made in giving the CRC effect in the exercise of judicial discretion, with the case law of the Family Court and the VSC providing strong support for the technique.[501] However, the position of the HCA on this technique is unknown.

The peripheral role of the CRC in many judgments of the High Court contrasts with the openness of the Family Court and the VSC toward it. While the High Court preferred to avoid dealing with difficult CRC-related issues such as incorporation arguments, external affairs power or the relevance on the CRC being a declared instrument under the HRCA, the Family Court was willing to address them from the perspective of the relationship between the Convention and the Family Law Act, or family law more generally.[502] Similarly, the VSC judges welcomed the opportunity to engage with the CRC under the 2006 Charter and to seek guidance from the general comments of the Committee.[503] While the absence of substantial engagement with the CRC by the HCA has created an arid children's rights jurisprudence at the highest judicial level, it left space for courts more amenable and better equipped by statutes to accommodate the CRC standards, to develop their own jurisprudence.

4.5.2 Non-normative approaches

Formally-recognised techniques discussed above do not capture the full array of techniques used by judges to relate to the CRC. Courts have used additional methods that have no intrinsic constraining effect and are not formally recognised as distinct methods to engage with international law. These methods are informal, subtle and diffuse, and difficult to capture in conventional legal language. In this work, they are referred to as 'non-normative approaches'.

Non-normative approaches involve using the CRC as a reference framework which enable judges to look at the domestic law in some new light, provided there is no obvious conflict between the CRC and the domestic law. When used in this way, the Convention may assist the courts better to understand and apply domestic law; or to 'discover' correspondent domestic legal concepts able to give effect to the Convention. Thus, unincorporated treaties may be 'an often useful context for the exposition of what Australian law requires',[504] and international

[498] *Re Z; B and B v MIMIA; Re Woolley*.
[499] In *Teoh*, Gaudron J noted the similarity between article 3(1) and an alleged pre-existing common law right, but the CRC was used to 'discover' that right rather than develop it. In *Re Woolley*, potentially extending the ambit of the *parens patriae* doctrine was relevant but was not argued before the Court.
[500] *ZZ*.
[501] Part 4.4.6.
[502] *Murray; B and B Family Law Reform Act 1995; B and B v MIMIA.*
[503] Compare, for example, *Re Woolley* (generic reference to the CRC) with *Certain Children* cases (detailed consideration of the CRC standards).
[504] *Koroitamana v Commonwealth of Australia* [2006] HCA 28 per Kirby J para 66 (referring to articles 7 and 8 of the CRC).

law 'may also sometimes assist a judge to exercise the applicable statutory powers'.[505] International instruments may 'reveal but do not resolve the conflicting interests',[506] and they may 'help to put … controversies into a conceptual context and express the basic values which must be taken into account'.[507] Although they do not 'throw much light on how they [conflicts of interests] should be resolved',[508] international instruments highlight interests which may be otherwise overlooked. In *Teoh*, Gaudron J 'discovered' a right which might have remained dormant had the CRC not been considered – the common law right to have the best interests of the citizen child considered,[509] a close equivalent of article 3(1) of the Convention. In *Re Z* and *B and B v MIMIA*, the wider scope of the best interests of the child under the CRC inspired the Family Court to seek convergent features in domestic law, so as to extend the scope of autochthonous provisions supportive of the best interests of the child. *In Re TLB*, article 9 of the CRC directed Bell J's attention to the relevance of the best interests of the child for his decision. In *DPP v TY*, the consideration given to the CRC enabled the judge to identify common law rules 'giving primary emphasis to youth and rehabilitation as a mitigating factor when sentencing children'.[510]

These approaches have been criticised in the past for avoiding the 'hard questions' concerning the relationship between the international and domestic law.[511] They can be further criticised for maintaining the *status quo* rather than advancing the protection of rights. Without dismissing these concerns, ultimately, these approaches use the resourcefulness of the domestic law and judicial creativity to give effect to the CRC in the face of legislative ambivalence or hostility. While they rest on a measure of convergence between domestic law and the CRC they are not deprived of value when conflict exists. Although courts cannot provide a remedy, they may take note of the incompatibility between domestic and international standards,[512] placing it therefore into the public domain, where it can be considered publicly and politically.

4.5.3 The impact of judicial engagement with the CRC

The High Court jurisprudence is marked by the intractability of the immigration legislation and the web of constitutional issues with which CRC-related issues blended (primarily the division between federal and States legislative powers and the type of jurisdiction of the courts). The absence of wholesale incorporation by federal statute, or of constitutional status has limited the impact of the CRC more generally.

This is apparent in the difficulties in mainstreaming its rights. The FCFC has attempted to circumvent the unincorporated status of the CRC by mainstreaming its standards through some

[505] *AMS v AIF* per Kirby J para 169 (fn omitted).
[506] *AMS v AIF* per Gleeson CJ, McHugh and Gummow JJ para 50.
[507] *AMS v AIF* per Kirby J para 169.
[508] *AMS v AIF* per Kirby J para 169
[509] In *DJL v The Central Authority* [2000] HCA 17, Kirby J embraced Gaudron J's view (para 135).
[510] *DPP v TY* para 50.
[511] Dyzenhaus, Hunt and Taggart (2001 note 47 at 18) point out to the use of a similar technique by British courts to 'discover' fundamental rights in the common law. This was problematic because it 'pre-empts any serious or conscientious consideration of international rights requirements by the lazy assertion of an identity between them and the common law list' (ibid).
[512] *MIMIA v B* per Kirby J para 171.

best interests-related provisions in the FLA.[513] Had this view been endorsed, some best interests provisions in the FLA would have found application beyond that Act, and they would have been able to inform the application of State or Territory legislation under section 109 of the Constitution. This approach was rejected by the HCA in *GPAO* and *MIMIA v B.* The absence of constitutional clout deprives the CRC of another avenue of mainstreaming its standards across all states and territories, and matters legislated on by the Commonwealth Parliament, and of having a substantial say in controlling federal legislation.

With incorporation and legitimate expectation arguments having lost currency, statutory interpretation remains the most likely technique to advance the CRC in judicial reasoning. However, the impact of this method is inevitably constrained by the scope of the interpreted statute, as proved with the Family Law Act. In *B & B: Family Law Reform Act 1995*, the FCFC held that it was only those CRC provisions relevant for the object and purpose of the FLA (the relationship between parents and children) that can be used for its interpretation. This has not prevented the FCFC, however, from occasionally considering provisions not fitting strictly into this category.[514] As the majority in *Re Z* said, the best interests of children cannot be compartmentalised and courts may need to approach matters concerning children holistically,[515] despite the sometimes-artificial divisions in relation to jurisdiction.

The most notable jurisprudence has developed around article 3(1). It started with *Teoh,* where reliance on article 3(1) enabled the majority to decide that the best interests of the child can be 'extracted' from its traditional confines (such as family law or child protection)[516] and be applied to all actions concerning children. *Teoh* has been said to promote only a procedural protection of rights,[517] and its utility 'beyond the identification of an interest sufficient to trigger the application of procedural fairness'[518] has been questioned. These concerns do not diminish the importance of the case for the rights of children – *Teoh* provided a counterweight to the absence of a comprehensive domestic children's rights framework, by legitimising recourse to the CRC to make such children's rights visible in litigation. Without creating an obligation for decision-makers to take the CRC into account, it required it to be taken into account 'in a practical sense'[519] by '[s]ome sort of mental activity'[520] being directed at the rights of children.

Reliance on domestic institutions (welfare of the child, welfare jurisdiction or *parens patriae*) convergent with article 3(1) of the CRC continued as an apparently deliberate strategy in response to the vulnerability of the CRC as an unincorporated treaty.[521] VSC cases, and notably the *Certain Children* cases, rest on the best interests provision in the Victorian Charter (section 17(2)). In giving content to this section, the VSC did not rely exclusively on article 3(1) of the

[513] *Re Z* (the current section 60CA) and *B and B v MIMIA* (section 67ZC; the welfare jurisdiction).
[514] See references to article 37 in *B and B v MIMIA*, or articles 19 and 34 in *Langmeil.*
[515] *Re Z* Nicholson CJ and Frederico J para 325.
[516] For discussion of children's interests as sentencing factors in Australia, see T Walsh and H Douglas 'Sentencing parents: The Consideration of dependent children' 2016 (37) *Adelaide Law Review* 135.
[517] J Todres 'Emerging limitations on the rights of the child: The U.N. Convention on the Rights of the Child and its early case law' 1998-1999 (30) *Columbia Human Rights Law Review* 159.
[518] Lacey 2004b note 362 at 155.
[519] Allars 1995 note 62 at 229.
[520] Ibid.
[521] *Re Z*; *MIMIA v B* and *Re Woolley*.

CRC, but utilised other relevant CRC provisions (articles 6, 12, 37 and 40) and general comments of the CRC Committee. This is a welcome judicial articulation of a rights-based approach to a best interests provision with a wide scope (i.e., not confined to a specific area of law), and a confirmation of the independent legal clout of such provision. This approach is similar with techniques used in other jurisdictions, where the best interests of the child has been used as a gateway for giving effect to CRC rights.[522] It suggests that reliance on article 3(1) (and associated institutions) is sometimes used as a reserve strategy, in the absence of other avenues to allow the CRC to produce domestic effects.

It is sometimes difficult to establish the independent legal effect of the CRC. In some cases, the CRC reasoning is subsidiary to domestic law[523] or it is simply inconclusive.[524] As mentioned previously, apart from *Teoh*, the CRC has made little difference to the majority judgments in the HCA. In many cases of the VSC, such as *DPP v TY*, *In Re TLB*, *DPP v SL*, *DPP v SE* and *ZZ*, the CRC reasoning was additional to or it reinforced the reasoning under domestic law. However, a forensic analysis which seeks to identify outcomes relating exclusively and independently to the CRC may be unrealistic and may overlook subtler ways in which the CRC has influenced domestic jurisprudence. For example, in *Re Jamie*, the FCFC used articles 5 and 12 to guide the court in the exercise of welfare jurisdiction when the statute did not prescribe the relevant factors. In *Certain Children* 2017,[525] the VSC interpreted the best interests provision in the 2006 Victoria Charter so as to require giving consideration to the views of the child, as per article 12 of the CRC.[526] Also in the *Certain Children* cases, the VSC relied heavily on the CRC to give contour to what amounts to a lawful detention regime for children under the 2006 Victoria Charter. In *DPP v TY*, the CRC prompted Bell J to use his discretionary powers to ensure that the relevant body decides, on the day of sentencing, whether the accused could serve his sentence in a juvenile centre to avoid him being unnecessarily sent to an adult prison.[527] Here, the CRC had a diffuse effect on the attitude of the court, and the reliance on it was motivated by the Court's belief that its exercise of discretion under the influence of the CRC 'will be the better for it'.[528]

In other cases, the CRC has increased children's visibility in legal processes and has prompted courts to consider children as legal subjects independently of the legal position of their parents. The judgments of the majority in *Teoh* are illustrative. The CRC has drawn the courts' attention to the vulnerability of children as citizens to whom the state owes protection independent of that provided by their parents.[529] The CRC has also prompted some judges to conceptualise legal issues in a child-sensitive way. In *De L*, for example, Kirby J discusses extensively the

[522] See France (Chapter 3 above), where the courts have sometimes applied article 3(1) of the CRC so as to protect the substance of other rights.
[523] *GPAO* (per Kirby J); *B and B v MIMIA*; Gaudron J in *Teoh*.
[524] *Re Z* per Nicholson CJ and Frederico J para 317; *Murray* para 149.
[525] *Certain Children* 2017 para 262.
[526] This was a position accepted *obiter* in the earlier case of *A & B v Children's Court of Victoria* [2012] VSC 589 paras 94-95, 109-110 (the Court did not rely on the CRC because it found that the statutory provision which required interpretation was not ambiguous).
[527] *DPP v TY* para 69-70.
[528] *DPP v TY* para 51.
[529] *Teoh* per Gaudron paras 3-5.

difficulties faced by children in expressing views in contentious family law litigation. In *Re JJT; Ex Parte Victoria Legal Aid*,[530] the same judge mentioned the Convention briefly in footnotes (11 and 29), but acknowledged children's vulnerability in family law disputes, and the need to take such vulnerability into account when interpreting and applying statutes providing for the legal representation of children. This conceptualisation is not, unfortunately, immune to legislative intransigence. As illustrated by *Re Woolley*, arguments premised on the vulnerability of children and international obligations to treat illegal immigrant children according to such vulnerability failed in front of the legislative diktat.

Absence of deep engagement with the CRC or uncertainty about its impact does not deprive the references to the CRC of significance. The willingness of judges to acknowledge the CRC when they have no obligation to do so shows some 'judicial curiosity' in relation to the Convention. The willingness to consider the Convention enables the courts to find domestic concepts which can accommodate CRC values, and which may have otherwise lain dormant and unutilised.[531] Even cases where the engagement with the CRC is not extensive or it is limited to reinforcing of domestic standards, or where the Convention has no tangible impact or voice of its own,[532] contribute to an accumulation of pronouncements which support the relevance and the legitimacy of the CRC in judicial reasoning.

4.6 Conclusions

The interaction between the CRC and domestic judicial reasoning in Australia is complex, and made difficult by its unincorporated status and the federal legislative reluctance to give it full effect. Formal means of application are indirect, and their effect may be superseded by legislation. In the field of immigration especially, the jurisprudence of the courts reflects this legislative intransigence. Constitutional obstacles related to the distribution of powers between the Commonwealth and the States have also affected the capacity of the courts to give effect to the CRC. Overall, detailed engagement with the Convention is not common, and the attention given to its standards is often limited. On the positive side, the jurisprudence of the Family Court and the VSC shows that statutory endorsements of the value of the CRC have resulted in these courts being more open to the Convention and to engaging more meaningfully with it.

Despite challenges, the CRC remains relevant for the courts. Australian law has strengths (some yet to be fully explored) which have contributed and may still contribute to the CRC being given domestic effect.[533] The Convention has had the most notable impact when judges

[530] [1998] HCA 44.
[531] See part 4.5.2 above.
[532] For illustrations, see *CDJ v VAJ* [1998] HCA 67 (in relation to the paramountcy principle, per Kirby J fn 182); *Cattanach v Melchior* [2003] HCA 38 (article 18; Gleeson CJ para 35).
[533] For example, the common law tradition and the more significant role played by judges in law-making than that played by their civil law systems counterparts; the existence of domestic institutions whose convergence with the CRC has not been fully explored (see the *parens patriae* comments made by various judges in *Re Woolley*); or the significant potential for advancing the rights of children through the jurisprudence developed under States' human rights acts.

were able to identify convergence/complementarity and lack of conflict between the CRC and domestic law. The use of the CRC to guide judicial discretion and the non-normative techniques developed by courts accommodate such non-antagonistic relationship with the domestic law, and facilitate the engagement with the Convention.

As other authors have argued, the judicial potential of the CRC is still to be fully explored.[534] Very few issues have been definitively addressed by the HCA, which leaves scope for further developments. The exercise of external affairs powers in the context of the CRC and its consequences await clarification. The views expressed by Gaudron J in *Teoh* that best interests of the child is a common law right and the state is a 'safety net' for the rights of children carry potential for further development. The numerous *obiter* statements made by Kirby, Gummow and McHugh JJ in their separate judgments in *Re Woolley* remain unexplored, as does Kirby J's statement in *GPAO* that the welfare of the child and his/her best interests, although similar concepts, may be distinct.[535] No major case involving the CRC has been dealt with by the HCA in recent years, but hopefully with a legal position strengthened by legislative endorsements, when such case reaches the Court, the Convention will find a warmer reception.

[534] Tobin 2016 note 94 at 34, for example.
[535] Same view in *Re Z* per Nicholson CJ and Frederico J para 309.

Chapter 5: South Africa

5.1 Introduction

South Africa presents a valuable case study of the interaction between the CRC and domestic law for several reasons. The Constitution of the Republic of South Africa, 1996 ('the Constitution') contains a children's rights clause which has been heavily influenced by the CRC.[1] Although South Africa has recently enacted comprehensive child-related statutes,[2] for more than a decade the Constitution and the CRC were the main children's rights framework for the South African courts. Further, South Africa has an interesting system of reception of international law in that it combines monist and dualist features. This can shed some light on the strengths and weaknesses of various approaches to the reception of the CRC in domestic legal systems from the perspective of courts.

This case study focuses on the jurisprudence of the Constitutional Court ('the CC') and the Supreme Court of Appeal ('the SCA'), with occasional references to relevant High Court cases. The focus on these courts enables an analysis of last instance constitutional and non-constitutional jurisprudence in relation to the rights of children.[3]

The chapter is structured as follows: Part 5.2 contains an overview of the legal rules which govern the relationship between international treaties and domestic law, which is followed in part 5.3 by an introduction to the relationship between the CRC and the South African law. Part 5.4 contains a presentation of the case law, which is followed by the analytical part of the study. Conclusions are drawn in part 5.6.

5.2 The relationship between international treaties and the South African law

South Africa is a country with a common law tradition, with strong English law influences in relation to international public law.[4] After a period of racial segregation which reached its height between 1948 and 1990, the country engaged in a process of democratic reform, which included the negotiation of an Interim Constitution,[5] free elections in 1994, and then the drafting of the Constitution of the Republic of South Africa, 1996. The Constitution is

[1] Section 28 of the Constitution.
[2] Children's Act 38 of 2005 (partially into force 1 July 2007, and then the balance in 1 April 2010' 'the Children's Act') and Child Justice Act 75 of 2008 (in force 1 April 2010; 'the Child Justice Act')).
[3] Through the Constitution Seventeenth Amendment Act of 2012 (effective 1 February 2013), the Constitutional Court became the court of highest jurisdiction in all matters (constitutional and non-constitutional). Up to that point, the SCA was the highest court in non-constitutional matters. For more, see P de Vos and W Freedman (eds) *South African Constitutional Law in Context* (2014) at 212.
[4] J Dugard *International Law: A South African Perspective* (2005) at 50.
[5] Constitution of South Africa Act 200 of 1993.

supreme,[6] and it contains a comprehensive and justiciable Bill of Rights that 'applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'.[7] The development of the common law is subject to 'the spirit, purport and objects of the Bill of Rights'.[8]

The relationship between international law and domestic law has been influenced by the recent history of the country. From a 'delinquent state'[9] generally 'hostile'[10] to international law, South Africa moved to being a state committed to participation in the international community,[11] which valued international law as 'one of the pillars of the new democracy'.[12] The commitment to the harmonisation[13] of international and domestic law is reflected in the constitutionalisation of the courts' obligation to consider and use international law.[14] The courts have engaged with international law in far-reaching judgments such as *S v Makwanyane*[15] (in which the death penalty was declared unconstitutional); *S v Williams*[16] (in which corporal punishment was declared unconstitutional as a sentencing option for juveniles); *Christian Education South Africa v Minister of Justice* (international obligations were invoked in support of the prohibition of corporal punishment in all schools),[17] to name but a few.[18] Human rights treaties have not been enacted into law, but some rights are given effect through the Constitution, statutes or the common law;[19] other rights lack explicit domestic recognition.[20]

Regardless of how international law influences domestic law, the Constitution is supreme,[21] and giving domestic effect to an international norm must not result in a conflict with the

[6] This means that law or conduct inconsistent with it is invalid to the extent of the inconsistency (section 2 read with section 172(1)(a) of the Constitution). All superior courts – the High Court, the Supreme Court of Appeal and the Constitutional Court – have constitutional jurisdiction as per above.
[7] Section 8(1) of the Constitution.
[8] Section 39(2) of the Constitution.
[9] J Dugard 'International Law and the South African Constitution' 1997 (8) *European Journal of International Law* 77 at 77. On international disapproval and sanctions, see Dugard 2005 note 4 at 20.
[10] Dugard 1997 note 9 at 77. For exceptions from this hostile attitude, see J Dugard 'The South African Judiciary and International Law in the Apartheid Era' 1998 (14) *South African Journal on Human Rights* 110; J Dugard 'Twenty Years of Human Rights Scholarship and Ten Years of Democracy' 2004 (20) *South African Journal on Human Rights* 345 at 347.
[11] Dugard 2005 note 4 at 22.
[12] Dugard 1997 note 9 at 77. Also, J Dugard 'International Law and the "Final" Constitution' 1995 (11) *South African Journal on Human Rights* 241.
[13] Term used by Dugard to describe the relationship between international law and domestic law (Dugard 1995 note 12 at 242).
[14] G Hudson 'Neither Here Nor There: The (Non-) Impact of International Law on Judicial Reasoning in Canada and South Africa' 2008 (21) *Canadian Journal of Law and Jurisprudence* 321 at 336. See generally, J Dugard 'The Role of International Law in Interpreting the Bill of Rights' 1994 (10) *South African Journal on Human Rights* 208; M Olivier 'International human rights agreements in South African law: procedure, policy and practice (part 2)' 2003 (3) *Tydskrif vir die Suid Afrikaanse Reg* 490 at 491-492.
[15] 1995 (3) SA 391 (CC) ('*Makwanyane'*).
[16] 1995 (3) SA 632 (CC).
[17] 2000 (10) BCLR 1051 (CC).
[18] For details, see Dugard 2005 note 4 at 338. The concrete impact of international law in these cases is, however, not always easy to establish (see Hudson 2008 note 14).
[19] In the field of children's rights, notable are the Children's Act and the Child Justice Act.
[20] Article 9(5) of the International Covenant on Civil and Political Rights, 1966 ('the ICCPR'), for example. See M Killander 'Judicial Immunity, Compensation for Unlawful Detention and the Elusive Self-Executing Treaty Provision: *Claassen v Minister of Justice and Constitutional Development* 2010 (6) SA 399 (WCC)' 2010 (26) *South African Journal on Human Rights* 386 at 387.
[21] Section 2 of the Constitution.

Constitution.[22] Several constitutional provisions ensure that courts engage with international law, as discussed below.

5.2.1 Section 231: The status of international agreements in the South African law

South Africa combines features of both dualist and monist approaches.[23] Section 231(1) and (2) of the Constitution reflects the primarily dualist approach to treaties, providing that an international agreement signed by the executive and approved by the Parliament is not part of the South African law unless enacted into law by national legislation.[24] Section 231(4) of the Constitution reads:

> Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

When domestically enacted,[25] the provisions of an international treaty become 'ordinary domestic statutory obligations'[26] save when the Parliament decides differently.[27] By exception, self-executing provisions of treaties are automatically law in the Republic. A self-executing norm has an infra-constitutional, and infra-statutory status, since in order to be considered self-executing, a treaty norm must not be inconsistent with the Constitution or national statutes.

The notion of self-execution was a novelty in the domestic law. Some scholars expressed reservations about this innovation,[28] but others acknowledged its potential to assist with treaty implementation in cases of legislative inaction, omissions or distortions.[29] The term 'self-executing provision' is not defined by the Constitution and needs clarification by courts.[30] The courts, however, have shown 'discomfort'[31] in dealing with this fraught legal institution, and

[22] *Glenister v President of the Republic of South Africa and Others* 2011 (7) BCLR 651 (CC) ('*Glenister II*') per Moseneke DCJ and Cameron J para 205.
[23] Views may differ. Some consider South Africa dualist (J Sloth-Nielsen 'Children's rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child' 2002 (10) *International Journal of Children's Rights* 137 fn 8); others, monist (A Skelton 'South Africa' in T Liefaard and J Doek *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 13 at 15); while others, hybrid (D Sloss 'Treaty Enforcement in Domestic Courts: A Comparative Analysis' in D Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 1 at 7). Cameron J writing extra-judicially has argued that the Constitution 'cut[s] across the well-known debate' between monism and dualism (E Cameron 'Constitutionalism, Rights, and International Law: The Glenister Decision' 2012-2013 (23) *Duke Journal of Comparative and International Law* 389 at 391).
[24] For distinctions between parliamentary approval and enactment, see Dugard 2005 note 4 at 59-60, and *Glenister II* per Ngcobo CJ paras 88-103; Moseneke DCJ and Cameron J paras 179-182.
[25] For the variety of techniques used, see Dugard 2005 note 4 at 61.
[26] *Glenister* II per Moseneke DCJ and Cameron J para 181; per Ngcobo CJ para 102.
[27] *Glenister* II per Ngcobo CJ para 100.
[28] Dugard 2005 note 4 at 62; N Botha and M Olivier 'Ten years of international law in the South African courts: Reviewing the past and assessing the future' 2004 (29) *South African Yearbook of International Law* 65 at 76; Olivier 2003 note 14 at 495.
[29] Olivier 2003 note 14 at 495.
[30] N Botha 'Public International Law' 2009 *Annual Survey of South African Law* 1137 at 1151. For the difficulties encountered by courts in engaging with the notion of self-execution, see W Scholtz and G Ferreira 'The interpretation of section 231 of the South African Constitution: a lost ball in the high weeds!' 2008 (XLI) *Comparative International Law of South Africa* 324.
[31] N Botha 'Public International Law' 2010 *Annual Survey of South African Law* 1269 ('Botha 2010a') at 1275.

have avoided it[32] or dealt with it superficially.[33] A fully-developed 'autochthonous meaning'[34] of the concept of self-execution is therefore missing, and unless unavoidable, the inherent difficulties with the concept of self-execution and judicial doubts about its usefulness[35] are likely to divert the courts toward the less controversial interpretive injunctions in sections 39 and 233.[36]

The domestic incorporation of an international agreement does not transform its standards into constitutional rights and obligations.[37] In the *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others*,[38] the Court decided that courts determine the compatibility of statutes with the Constitution, the international law being 'irrelevant to that determination'.[39] Thus, legislation may be found constitutionally valid even if contrary to international law. Although this position may be 'disconcerting',[40] international law remains relevant for the enquiry because 'there can be no "proper" interpretation of the Constitution without a consideration of international law'.[41]

5.2.2 International treaties and the interpretation of domestic law

5.2.2.1 Section 39(1): International law and the interpretation of the Bill of Rights

Section 39 is titled 'Interpretation of Bill of Rights', and section 39(1) reads:

> When interpreting the Bill of Rights, a court, tribunal or forum -
>
> a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> b. must consider international law; and

[32] *President of the Republic of South Africa & others v Quagliani; President of the Republic of South Africa & others v Van Rooyen & another; Goodwin v Director General Department of Justice and Constitutional Development* 2009 ZACC 1 (for critical comments, see N Botha 'Justice Sachs and the use of international law by the Constitutional Court: Equity or expediency?' 2010 (25) *South African Public Law* 235 ('Botha 2010b) at 238). In *Glenister II*, the majority has arguably blurred the distinction between interpretation and judicial incorporation but did not discuss self-execution.

[33] In *Claassen v Minister of Justice and Constitutional Development and Another* 2010 (6) SA 399 (WCC) ('*Claasen'*) the High Court raised the issue of self-execution *mero motu,* and it found that article 9(5) of the ICCPR concerning the right to compensation in cases of wrongful detention had no constitutional equivalent and was thus not applicable because the ICCPR was not self-executing (para 36). The Court was criticised for bluntly deciding that the ICCPR was not self-executing in its entirety, and for not considering section 231(4) of the Constitution in its reasoning (N Botha 2010 'The broader influence of the International Covenant for the Protection of Civil and Political Rights in South African municipal law: Do we need incorporation?' 2010 (35) *South African Yearbook of International Law* 270 ('Botha 2010c') at 274). For discussion, see Killander 2010 note 20.

[34] G Ferreira and W Scholtz 'Has the Constitutional Court found the lost ball in the high weeds? The interpretation of section 231 of the South African Constitution' 2009 (XLII) *Comparative International Law of South Africa* 264 at 271. For distinctions with the American concept of self-execution, see Dugard 2005 note 4 at 62 and A O'Shea 'International law and the Bill of Rights' paras 7A2-7A4 (Last updated October 2004 – SI 15) in *Bill of Rights Compendium* (loose leaf publication; LexisNexis Butterworths, South Africa); Scholtz and Ferreira 2008 note 30 at 332.

[35] For example, as a self-executing norm has the status of ordinary statutory norms, it does not assist in constitutional review; and, conflict between statutory provisions and a treaty norm prevents the latter from being considered a part of domestic law.

[36] Killander 2010 note 20 at 389.

[37] *Glenister II* per Ngcobo CJ para 100 -102; per Moseneke DCJ and Cameron J paras 181-183.

[38] 1996 (8) BCLR 1015 ('*AZAPO*').

[39] *AZAPO* para 26.

[40] Dugard 2005 note 4 at 68.

[41] Dugard 2005 note 4 at 69. The interpretive role of international law was acknowledged in *AZAPO* para 26.

c. may consider foreign law.

'A jewel in the Constitution',[42] section 39(1)(b) (and its Interim Constitution precursor, section 35), allows the domestic law to develop in harmony with international law.[43] It is under the auspices of these provisions that the 'demand'[44] for the application of international law has most often been made.

Section 39(1)(b) refers to 'international law' generally, and makes no distinction between binding and non-binding instruments.[45] The term 'must' in section 39(1)(b) contains a clear injunction that requires the courts to act upon it even when the same outcome can be obtained without considering international law.[46] The term 'consider' is open to meanings varying from a cursory reference to international law, to meaningful engagement with its substance, and to acting in accordance with international law. Arguably, 'the appropriate way to treat international law is to look at and evaluate – in other words "to consider" – its provisions and to give reasons either for adopting or rejecting the solution proposed by international law'.[47] This ensures that the use of international law is not formulaic, and that there is engagement with its substance, without the courts abandoning the possibility to depart from international law.

The second interpretive challenge raised by the phrase 'must consider' is that it does not indicate the weight to be attached to international law.[48] Unlike section 233 that requires that in statutory interpretation courts must prefer an interpretation consistent with international law, no such requirement is present in section 39(1)(b).[49] It is accepted that the phrase does not dictate to the courts that they must act according to international law,[50] and although courts 'are not bound to follow it … neither can we [the courts] ignore it'.[51] This position is illustrated in *Grootboom,* where the Court acknowledged international law and carefully engaged with its substance, but did not follow it.[52] The Constitution preserves therefore the right of the courts to depart from international law in order to develop an interpretation of the Bill of Rights which takes account of South Africa's own history, values and realities.[53]

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[42] Dugard 1995 note 12 at 242. For a detailed analysis of the application of section 39(1) and (2) of the Constitution, see I Currie and J de Waal *The Bill of Rights Handbook* (2013) Ch 6.
[43] Dugard 1995 note 12 at 242. Also, Cameron 2012-2013 note 23 at 390.
[44] Botha and Olivier 2004 note 28 at 74.
[45] *Makwanyane* per Chaskalson P para 35. For further engagement with non-binding international instruments, see *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) ('*Grootboom'*) and *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC) ('*TAC'*).
[46] See the point reflected in *Glenister II* per Moseneke DCJ and Cameron J para 201.
[47] J Tuovinen 'The Role of International Law in Constitutional Adjudication: Glenister v. President of the Republic of South Africa' 2013 (130) *South African Law Journal* 661 at 669.
[48] See O'Shea 2004 note 34.
[49] Same view is held by Hudson (2008 note 14 at 348), who argues that section 233 is the 'weightier section' because it requires compliance with international law.
[50] Dugard (1994 note 14 at 214) commenting on the corresponding provision in the Interim Constitution, but the position remains valid under the 1996 Constitution. Also, *Makwanyane* per Chaskalson P para 39.
[51] *S v Williams* para 50.
[52] The Court refused to adopt the minimum core obligations concept coined by the Committee on Economic and Social Rights.
[53] *S v Williams* para 50. In *Makwanyane*, Mokgoro J (para 304) stated that the constitutional requirement to consider international law in interpreting the Bill of Rights is an acknowledgement of the lack of relevant domestic

The courts have largely applied section 39(1)(b) as if a conformity requirement is implied within it. Arguments in favour of extending the conformity requirement to the interpretation of the Bill of Rights[54] are supported by *Kaunda and Others v President of the Republic of South Africa*[55] where Chaskalson CJ said that section 233 'must apply equally to the provisions of the Bill of Rights and the Constitution as a whole'.[56] This is problematic, considering that section 233 refers clearly to 'legislation', and possibly unnecessary, considering that other interpretive techniques can achieve the same aims.[57] Further, constitutional interpretation in conformity with international law does not always result in superior human rights protection, and at times, autochthonous norms and values have been found to be more protective of the individual.[58]

Glenister II expanded the interpretive relevance of international law to include not only the interpretation of substantive rights in the Bill of Rights but also of the content of constitutional obligations of the state in relation to human rights, under section 7(2) of the Constitution.[59] Problematically, the majority claimed to be using international law as a source of persuasion, but instead it gave it a role of authority[60] by allowing it to define the domestic obligations of the state. This is arguably more than can be obtained through interpretation alone, and has attracted criticism[61] but also praise. [62]

In addition to the interpretation of the Bill of Rights, international law may play a role in the development of common law or customary law *via* the spirit, purport and object of the Bill of Rights. Section 39(2) of the Constitution reads:

> When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

jurisprudence (similarly, Chaskalson P para 37). For further discussion, see D Hovell and G Williams 'A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' 2005 (29) *Melbourne University Law Review* 95 at 121, 128.

[54] O'Shea 2004 note 34 para 7A2.

[55] 2005 (4) SA 235 (CC) ('*Kaunda*').

[56] *Kaunda* para 33. Support, may arguably be found in *Glenister II*, per Ngcobo J para 97 and Moseneke DCJ and Cameron J para 178.

[57] Section 39(1)(a) of the Constitution which requires that in interpreting the Bill of Rights, the courts, amongst others, 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'.

[58] In *Makwanyane*, Chaskalson P (para 39) did not follow the international law (that did not prohibit the death penalty) and this led to an enhanced protection of individual rights under the Interim Constitution.

[59] Moseneke DCJ and Cameron J paras 189, 190, 194. For comments, see C Gowar 'The status of international treaties in the South African domestic legal system: Small steps towards harmony in light of Glenister?' 2011 *South African Yearbook of International Law* 307.

[60] See, generally, Tuovinen 2013 note 49 especially at 663 and 666. In *Glenister II*, section 7(2) read with section 39(1)(b) of the Constitution was the departing point for the majority, but the concrete constraints on the Parliament stemmed from international law. Bishop and Brickhill suggest that by making international law a 'standard for constitutional obligations', the majority engaged 'arguably [in] a process of translation, rather than interpretation' M Bishop and J Brickhill 2011 (1) *Juta Quarterly Reports Constitutional Law* (Juta online) para 2.1.2.

[61] For a presentation of some critical opinions, see Gowar 2011 note 59 at 322 and, generally, Tuovinen 2013 note 49.

[62] N Botha 'Public International Law' 2011 *Annual Survey of South African Law* 1174 at 1184; P de Vos '*Glenister*: A monumental judgment in defence of the poor' on *Constitutionally Speaking* blog (18 March 2011).

This is so because 'the spirit, purport and objects of the bill of right … are inextricably linked to international law'.[63]

5.2.2.2 Section 233: International law and the interpretation of legislation

The common law presumption that statutory interpretation should be consistent with international law is given constitutional recognition in section 233 of the Constitution, which reads:

> When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

There is no explicit requirement that legislation be ambiguous for international law to be relied on for interpretation purposes.

5.2.3 Brief assessment of the impact of the constitutional framework

The formal framework presented above is indicative of a legal system receptive to international law,[64] where the courts have accepted a role in the process of constitutional transformation.[65] However, the constitutional injunctions in relation to the use of international law have not resulted in its consistent, coherent or predictable application.[66] The 'high level of abstraction and minimal case law' at international level may make international law less suited for usage in domestic litigation.[67] In principle, this 'utilitarian' approach was rejected in *Glenister II,* where the majority stressed that although it could decide the matter without resorting to international law, section 39(1)(b) 'makes it constitutionally obligatory' to consider international law so as to 'respect the careful way in which the Constitution itself creates concordance and unity between the Republic's external obligations under international law, and their domestic legal impact'.[68] Despite such powerful statements, the reality remains that the courts do not consistently refer to international law, and sometimes, the application of international law divides the courts.[69] The existing constitutional framework accommodates therefore both international law-friendly approaches and more reserved judicial views.[70]

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[63] N Botha 'The Role of International Law in the Development of South African Common Law' 2001 (26) *South African Yearbook of International Law* 253 at 259 cited by Dugard 2005 note 4 at 69.

[64] It was even argued that international standards may be adopted in the South African law by way of interpretation, this constituting 'a form of monism' (G Ferreira and A Ferreira-Snyman 'The Incorporation of Public International Law into Municipal Law and Regional Law Against the Background of the Dichotomy Between Monism and Dualism' 2014 (14) *Potchefstroom Electronic Law Journal* 1471 at 1477).

[65] Hovell and Williams 2005 note 53 at 106

[66] Ibid at 115; Hudson 2008 note 14 at 348.

[67] Hovell and Williams 2005 note 53 at 118. The authors note that 'in many cases, international law may have had little to offer' (at 120), or was 'often not useful, let alone determinative' (at 128). This may have been Sachs J's thinking in *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others* 1995 (10) BCLR 1382 ('*Coetzee'*), where he noted that international law did not elucidate the problem brought to the court (paras 52 – 54).

[68] *Glenister II* per Moseneke DCJ and Cameron J para 201.

[69] *Glenister II*, and in the children's rights field, *C and Others v Department of Health and Social Development, Gauteng and Others* 2012 (4) BCLR 329 (CC) per Jafta J.

[70] Bishop and Brickhill 2011 note 60 para 2.1.2 point that the distinction between the majority and minority is in the '*intensity* [emphasis in original] of the interpretive influence of international law': 'great' for the majority, but more limited for the minority.

In terms of the quality of engagement, there are concerns that the *domestic* normative value of international norms is not clarified by courts.[71] While the courts are aware of the existence of human rights treaties, they are 'not always sure what to do with them',[72] and 'they are not used for any analytical or comparative purposes and do not contribute in any way to the decision reached by the court'.[73] Instead, international law is used 'simply to identify basic values or principles and to accordingly lend support to decisions which have been reached on other, typically domestic grounds'.[74] Thus, the full normative power of international treaties is not capitalised on, and the constitutional avenues through which international law may influence South African law are under-utilised. An illustration is the courts' preference for the use of international law primarily for Bill of Rights interpretation purposes[75] without considering more incisive methods, such as self-execution.

These strengths and weaknesses of the interaction between international and domestic law before the South African courts are likely to affect how the courts engage with the CRC, discussed further below, after a presentation of the relationship between the CRC and the South African law.

5.3 The CRC and the South African law

South Africa signed the CRC in 1993, and ratified it on the symbolic day of 16 June 1995.[76] The Convention has had a profound influence[77] on the drafting of children's rights clauses in the Interim and Final Constitutions.[78] Section 28 of the Constitution was said to respond in an

[71] Botha 2010c note 33 at 273. There are, however, exceptions, such as *Claasen* (see Botha 2010a note 31 at 1273); and *Glenister II* per Ngcobo CJ paras 92, 93, 96 and 97.
[72] Botha and Olivier 2004 note 28 at 65.
[73] Ibid at 65. For similar concerns, see Dugard 1997 note 9 at 90-91; Olivier 2003 note 14 at 502; Hudson 2008 note 14 at 349.
[74] Hudson 2008 note 14 at 352. Hovell and Williams refer to the Court approaching international law 'as a source of normative guidance on basic principles' (2005 note 53 at 118). In *Coetzee,* Sachs J said in relation to the use of international law: 'due attention to such [international] experience with a view to finding principles rather than to extracting rigid formulae, and to look for rationales rather than rules' (para 57).
[75] Botha and Olivier 2004 note 28 at 75; Hovell and Williams 2005 note 53 Tables 2 and 3.
[76] United Nations Treaty Collection *Status of Treaties: Convention on the Rights of the Child* (online). On 16 June 1976 a student uprising started in Soweto, which was met with gunfire by the apartheid government. See South African History Online (2013) *The June 16 Soweto Youth Uprising.*
[77] See Skelton 2015 note 23 at 14; J Sloth-Nielsen 'Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law' 1995 (11) *South African Journal of Human Rights* 401; J Sloth-Nielsen 'The Role of International Human Rights Law in the Development of South Africa's Legislation on Juvenile Justice' 2001 (5) *Law, Democracy & Dev*elopment 59. Some primary sources: Constitutional Assembly, Constitutional Committee *Supplementary Memorandum on Bill of Rights and Party Submissions* (not dated) (it frequently mentions the CRC and other international instruments as support for draft constitutional clauses); and Panel of Constitutional Experts (1996) *Memorandum* especially paras 3.3 and 3.4 (both online).
[78] Section 30 of the Interim Constitution contained a shorter register of rights than section 28 of the Final Constitution. For discussion, see A Skelton 'Constitutional Protection of Children's Rights' in T Boezaart (ed) *Child Law in South Africa* (2017) 327 at 327.

'expansive way' to South Africa's obligations under the CRC,[79] in a manner which amounts, according to some authors, to a constitutionalisation of the CRC.[80]

Section 28 reads:

> (1) Every child has the right—
> (a) to a name and a nationality from birth;
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
> (c) to basic nutrition, shelter, basic health care services and social services;
> (d) to be protected from maltreatment, neglect, abuse or degradation;
> (e) to be protected from exploitative labour practices;
> (f) not to be required or permitted to perform work or provide services that—
> (i) are inappropriate for a person of that child's age; or
> (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
> (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
> (i) kept separately from detained persons over the age of 18 years; and
> (ii) treated in a manner, and kept in conditions, that take account of the child's age;
> (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
> (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
>
> (2) A child's best interests are of paramount importance in every matter concerning the child.
>
> (3) In this section "child" means a person under the age of 18 years.

The significance of the CRC for the South African law, and especially the Constitution, is linked to the country's history of apartheid. Children were severely affected by apartheid and played an active role in the fight for its demotion.[81] Many rights in section 28 are a direct response to children's plight during apartheid: arbitrary detention, denial of nationality, deprivation of basic necessities, and separation from parents.[82] The scope of constitutionally protected rights was expanded under the influence of the CRC, which was effectively used by the children's rights movement to advocate for a broad constitutionalisation of children's rights.[83] Repeated references to international law created an expectation that international law

[79] *M v S (Centre for Child Law Amicus Curiae*) 2007 (12) BCLR 1312 (CC) ('*M v S'*) para 16. For comprehensive analyses of section 28, see J Robinson 'Children's Rights in the South-African (sic) Constitution' 2003 (6) *Potchefstroom Electronic Law Journal* 22; A Skelton 'Constitutional Protection of Children's Rights' in T Boezaart (ed) *Child Law in South Africa* (2009) 265.

[80] G Barrie 'International Human Rights Conventions' in *Bill of Rights Compendium* (LexisNexis Butterworths online; chapter updated 2012) para 1B19. Sloth-Nielsen limits the constitutionalisation argument to the 'major features of the Convention' (2002 note 23 at 139), which is more accurate.

[81] See T Mosikatsana 'Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights under the Final Constitution' 1998 (3) *Michigan Journal or Race and Law* 341; J van der Vyver 'Municipal Legal Obligations of States Parties to the Convention on the Rights of the Child: The South African Model' 2006 (20) *Emory International Law Review* 9 at 10; J van der Vyver 'International Standards for the Promotion and Protection of Children's Rights: American and South African Dimensions' 2009 (15) *Buffalo Human Rights Law Review* 81; Robinson 2003 note 79 especially fn 112; Sloth-Nielsen 2001 note 77.

[82] Sloth-Nielsen 2001 note 77 at 59. Also, Mosikatsana 1998 note 81.

[83] Skelton 2015 note 23 at 14; Sloth-Nielsen 2001 note 77 at 71

will be given effect domestically.[84] This was given a boost by Nelson Mandela (elected as the country's president in April 1994), who expressed support for the application of the CRC in South Africa.[85] While 'political will lay at the root of the successful implementation of children's rights'[86] in the early days of democratic South Africa, the constitutionalisation of the rights of children was meant to ensure that they would be given attention even if political good-will fades,[87] or when there may be opposition from public opinion.[88]

Despite its influence on section 28 of the Constitution, the CRC has not been enacted into domestic law.[89] However, the CRC has influenced the comprehensive reform of the South African child-focused legislation,[90] which culminated with the adoption of the Children's Act 38 of 2005[91] and Child Justice Act 75 of 2008.[92] The South African legal framework has been found by the CRC Committee to be generally compliant with the Convention,[93] and the country received praise for 'the progressive application by the judiciary … of the rights and principles stipulated in the Convention'[94] and for the 'the excellent jurisprudence'[95] on the application of the best interests of the child.

This generally positive assessment is no reason for complacency, as there are aspects in the existing legal framework which may fall short of the CRC, such as the right to life not including a right to survival and development, and the absence of protection against discrimination on grounds of parents' status;[96] low age of marriage (12 for girls and 14 for boys), harmful cultural practices, the legislative endorsement of corporal punishment at home and the low age of criminal responsibility.[97]

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[84] Sloth-Nielsen 2001 note 77 at 72.
[85] Sloth-Nielsen 1995 note 77 at 401.
[86] J Sloth-Nielsen 'Chicken Soup or Chainsaws: Some Implications of the Constitutionalisation of Children's Rights in South Africa' 1996 (27) *Acta Juridica* 6 at 23.
[87] Ibid at 25.
[88] Consider, for example, controversial practices such as virginity testing, traditional African circumcision or corporal punishment in the home, which still enjoy popular and/or legislative support.
[89] P Mahery 'The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law' in T Boezaart (ed) *Child Law in South Africa* (2009) 309 at 324.
[90] There are other statutes which contribute to protecting the rights of children. See for example, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and Prevention and Combating of Trafficking in Persons Act 7 of 2013.
[91] Mahery 2009 note 89 at 324. Section 2 (c) of the Children's Act indicates as one of its objects to give effect to South Africa's international obligations in relation to the well-being of children. The Preamble refers to the CRC amongst other relevant international instruments.
[92] Section 3(i) of the Child Justice Act provides that, amongst others, the rights in the CRC are guiding principles that must be considered. The Preamble of the Act indicates as one of the aims of the Act the creation of a juvenile justice system which complies, amongst others, with South Africa's obligations under the CRC.
[93] CRC Committee (2016) *Concluding observations on the second periodic report of South Africa* para 4. South Africa was chronically late in submitting its reports to the Committee. The initial report was submitted in 1997 and addressed in CRC Committee (2000) *Concluding observations of the Committee on the Rights of the Child: South Africa*.
[94] CRC Committee (2016) *Concluding observations* para 5.
[95] Ibid para 25.
[96] Sloth-Nielsen 1995 note 77 at 417, 418.
[97] CRC Committee (2016) *Concluding observations* paras 21, 35, 39-40; 71. In *DPP, YG v S* [2017] ZAGPJHC 290 ('*YG v S*'), the High Court declared the common law defence of reasonable chastisement as being unconstitutional. The appeal against the judgment was heard by the Constitutional Court on 29 November 2018 (still awaiting judgment as of 9 September 2019). Recently, the Children's Amendment Bill, 2018 was published

To conclude, the CRC operates in South Africa from a position of strength which rests on several factors: a constitutional framework which allows international law to influence the development of domestic law; a comprehensive children's rights clause in the Constitution, and child-focused legislation; and the legitimacy of children's rights in political discourse and in society more generally. With these in mind, the discussion turns to the presentation and the analysis of the case law.

5.4 The CRC in the South African case law

5.4.1 Previous literature

Insightful work has previously studied the use of the CRC by the South African courts. Sloth-Nielsen and her co-authors comprehensively analysed court judgments which cover the period 1996 – 2013.[98] Skelton has also written on the topic,[99] and Ngidi analysed judicial use of the CRC vis-à-vis the international law arguments presented by the children's rights litigation body Centre for Child Law.[100] According to these authors, the impact of the CRC on the courts' reasoning has been significant and 'the overall effect that the CRC and ACRWC have had in South African constitutional jurisprudence punches way beyond their weight'.[101]

These studies trace the evolution of the children's rights jurisprudence in South Africa, in which the CRC and other international instruments have played a part. They document, for example, the positive impact of specialised public interest litigators and their reliance on international law; a consistent referral to international instruments by the courts; a diversification of areas of law where children's rights are considered, and judicial receptiveness to the interpretation of rights at international level (including by the CRC Committee).[102] It has been shown that the CRC is invoked when possible alongside section 28 of the Constitution 'to provide additional ballast',[103] and that the courts have developed a solid autochthonous children's rights jurisprudence,[104] in which the CRC is present without dominating the

for comment; it proposes the introduction in the Children's Act of section 12A, which deems unlawful any punishment 'in which physical force or action is used and intended to cause some degree of pain or harm to the child' (Government Notice No 1185 Children's Act (38/2005): Invitation to comment on the Children's Amendment Bill, 2018 *Government Gazette* 42005, 29 October 2018). A raise in the age of criminal capacity from 10 to 12 has been mooted (South African Government (2016) *Joint Justice Committees want consultation on age of criminal capacity* (online)).

[98] Sloth-Nielsen 2002 note 23; J Sloth-Nielsen and B Mezmur '2 + 2 = 5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)' 2008 (16) *International Journal of Children's Rights* 1; Sloth-J Sloth-Nielsen and H Kruuse 'A Maturing Manifesto: The Constitutionalisation of Children's Rights in South African Jurisprudence 2007-2012' 2013 (21) *International Journal of Children's Rights* 646.

[99] Skelton 2015; A Skelton 'Child Justice in South Africa: Application of International Instruments in the Constitutional Court' 2018 (26) *International Journal of Children's Rights* 391.

[100] R Ngidi 'The Role of International Law in the Development of Children's Rights in South Africa: A Children's Rights Litigator's Perspective' in M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 173.

[101] Sloth-Nielsen and Kruuse 2013 note 98 at 677. The 'ACRWC' refers to the African Charter on the Rights and Welfare of the Child, 1990.

[102] Sloth-Nielsen and Kruuse 2013 note 98 at 677.

[103] Sloth-Nielsen and Mezmur 2008 note 98 at 27. Ngidi, a children's rights practitioner, states that international law is used to 'enhance arguments before the courts' (2010 at 174).

[104] The authors coin the term 'constitutional child' as a symbolic cross-cutting term, illustrative of the impact of the Constitution on the law concerning children (2013 note 98 at 648). They find in jurisprudence a 'constitutional

reasoning.[105] Sometimes, writers give credit to the Convention even if it is not mentioned, is given only limited attention or cannot be clearly linked to the outcome.[106] Except for isolated remarks,[107] children's rights writers seldom criticise the courts' engagement with the CRC.

Other authors have been more critical of the courts, lamenting their failure to use the CRC when relevant[108] and to engage with its substance when giving content to children's socio-economic rights.[109] It was argued that in *Grootboom*, for example, reliance on the CRC could have led to a child-focused interpretation of socio-economic rights in the Constitution.[110] Although some of the concerns raised by *Grootboom* were addressed in *TAC II*, this was not motivated by a desire to bring domestic jurisprudence in line with the CRC.[111]

Limited systematic attention has been given to how the courts engage with the framework discussed in part 5.2 and its interaction with the CRC. For example, with some exceptions,[112] the self-execution of the CRC is hardly acknowledged, even when far-reaching statements are made that South Africa 'has crossed the line from dualism to monism in its recourse to international law, especially insofar as "soft" law is concerned',[113] or that '[t]he constitutional provision in section 28 is merely an entry point into a whole gamut of other sources at the international level, which then become directly applicable domestically'.[114] Arguments that the CRC has been directly applied by the Constitutional Court have also been made by Skelton, seemingly based on the intensity of impact which the CRC has had on some judgments.[115] The term 'self-executing provision' in section 231(4) of the Constitution is not used in relation to these direct application statements, and it is not clear whether 'directly applicable' means the

childhood' which is a mixture of 'protection coupled with emancipation', a picture consistent with art 5 CRC (ibid at 671).

[105] Skelton shares a similar view (2015 note 23 at 15).

[106] Examples of cases considered by Sloth-Nielsen and Mezmur (2008 note 98) as illustrative for the positive impact of the CRC but in which the Convention is not mentioned include *Khosa and Others v Minister of Social Development, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) ('*Khosa*'); *J and Another v Director General, Department of Home Affairs and Others* 2003 (5) SA 621 (CC); *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC) ('*TAC*'). Skelton (2015 note 23) does the same in relation to *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) and *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2004 (1) SA 406 (CC).

[107] For example, Skelton criticised Jafta J's position in *C and Others v Department of Health and Social Development, Gauteng and Others* 2012 (4) BCLR 329 (CC) as giving 'rise to some concern with regard to international law', and which is 'narrow, legalistic' (2015 note 23 at 23).

[108] Rosa and Dutschke pointed that the Constitutional Court did not refer to the CRC in *Khosa*, despite articles 2 and 26 being directly relevant (S Rosa and M Dutschke 'Child Rights at the Core: The Use of International Law in South African Cases on Children's Socioeconomic Rights' 2006 (22) *South African Journal on Human Rights* 224 at 252).

[109] Rosa and Dutschke 2006; L Stewart 'The Grootboom judgment, interpretative manoeuvring and depoliticising children's rights' 2011 (26) *South African Public Law* 97 especially at 101.

[110] See generally Rosa and Dutschke 2006 note 108 and Stewart 2011 note 109.

[111] Rosa and Dutschke 2006 note 108 at 250.

[112] Relying on *Grootboom* (para 26), Rosa and Dutschke state that a 'binding international law agreement like the UNCRC should in principle be directly applicable in the Court' (ibid at 244).

[113] Sloth-Nielsen and Kruuse 2013 note 98 at 671.

[114] Ibid at 677.

[115] Skelton 2018 note 99 at 405 (discussing *Centre for Child Law v Minister for Justice and Constitutional Development and Others (NICRO as Amicus Curiae*) 2009 (11) BCLR 1105 (CC) and at 414 (discussing *J v National Director of Public Prosecutions and another (Childline South Africa and others as amici curiae)* 2014 (7) BCLR 764 (CC)).

same thing with 'self-executing', or the term is used metaphorically to stress that the South African courts give effect to the CRC. Further, little effort has been made to distinguish between the impact of the Constitution, especially section 28 of the Constitution,[116] and that of the CRC, the two often being taken as having identical standards.

Sometimes, the terminology used in academic writing to describe the courts' engagement with the CRC does not mirror the constitutional language in sections 39(1)(b) and 233. Thus, it has been said that the CC jurisprudence is 'rooted'[117] in international and regional law, or that the CRC 'contextualise[s]'[118] constitutional provisions. Reference is made to 'recourse'[119] by the courts to the CRC or using it as a 'backdrop'.[120] Significance is attached to the fact that courts 'mention' the CRC, or that a court 'highlights', 'quotes verbatim' or uses the CRC 'to support the Court's reasoning'.[121] This terminology tells us little about whether the courts do what they ought to: consider the CRC in the interpretation of the Bill of Rights as per section 39(1)(b), or interpret domestic legislation to avoid inconsistency with the CRC as per section 233. This terminological uncertainty mirrors courts' own lack of clarity on the issue, as illustrated in part 5.4.2.

The divergent views in relation to the impact of the CRC and the lack of clarity on how the courts utilise the constitutional framework discussed in part 5.2 call for a closer analysis of the techniques utilised by courts, the extent of attention they give to the CRC, and the outcome of the engagement. Consistent with the approach explained in Chapter 1, the focus of this analysis is on cases where the courts have engaged meaningfully with the CRC. The case law is discussed under headings which reflect the framework of domestic reception presented in part 5.2 above, starting with the use of the CRC for constitutional interpretation purposes, then statutory interpretation purposes and self-execution. Part 5.4.2.4 presents cases in which the engagement with the CRC cannot be captured under the framework discussed in part 5.2 above.

5.4.2 The case law

By way of introduction, a brief quantitative account may be of interest. As of 1 November 2018,[122] 23 Constitutional Court and 17 SCA cases have mentioned the CRC. Of the Constitutional Court cases, four are not child rights-related, the CRC not being engaged with.[123] Of the remaining 19, limited attention is given to the CRC in eight (8) cases,[124] leaving the

[116] Skelton acknowledges, however, the difficulty of distinguishing between their impact (ibid at 401).
[117] Skelton 2015 note 23 at 15
[118] Ibid at 25.
[119] Sloth-Nielsen and Kruuse 2013 note 98 at 648
[120] Ibid at 657.
[121] Sloth-Nielsen and Mezmur 2008 note 98 at 8,12.
[122] Search conducted on the website of the Southern African Legal Information Institute (*SAFLII*) http://www.saflii.org/.
[123] *Certification of the Amended Text of the Constitution of The Republic of South Africa, 1996* 1997 (1) BCLR; *Mail and Guardian Media Ltd and Others v Chipu NO and Others* 2013 (11) BCLR 1259 (CC); *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC); *Glenister II*.
[124] There are cases in which the CRC is referred to generically (*Grootboom* para 75; *Raduvha v Minister of Safety and Security and Another* 2016 (10) BCLR 1326 (CC) para 20 fn 13; and *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* 2018 (8) BCLR 921 (CC) para 60). In other cases, the engagement is

number of cases in which the Court applies itself to the CRC to eleven (11). Of the 17 SCA cases mentioning the CRC, limited engagement has occurred in nine (9) cases.[125]

A second preliminary point is that there are important children's rights cases which do not mention the CRC although the Convention was potentially relevant, such as *MEC for Education: Kwazulu-Natal and Others v Pillay,*[126] *Johncom Media Investments Ltd v M and Others,*[127] *TAC,*[128] *Sonderup v Tondelli and Another,*[129] *Khosa,*[130] *J and Another v Director General, Department of Home Affairs and Others,*[131] and *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another.*[132]

minimal. In *Bannatyne v Bannatyne and Another* 2003 (2) BCLR 111, in fn 29, after referring to section 28(2), the Court states that '[i]nternational law also affirms the "best interests" principle…', statement which is then followed by the text of article 3(1). In *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC), after acknowledging the injunction in section 39(1)(b), the Court refers to the Preamble of the CRC and quotes from article 2 (para 55). In *Du Toit and Another v Minister of Welfare and Population Development and Others* 2002 (10) BCLR 1006, after engaging with section 28(2), the Court acknowledges the recognition of the paramountcy of the best interests in international law and foreign law, and then refers to article 3 in fn 19. It also refers to the Preamble (fn 21). In *Geldenhuys v National Director of Public Prosecutions and Others* 2009 (2) SA 310 (CC), the Court refers to article 1 of the CRC when quoting from the arguments of the respondents (para 12 fn 6). In *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* 2011 (8) BCLR 761 (CC), the Court dealt with the horizontal application of the right to education and the role of the courts when this right might conflict with the rights of others (e.g. the right to property). The Court refers to articles 28 and 29 of the CRC (para 40 fn 41; para 43 fn 48)) to show that the right to education is recognised internationally as an important right. It also mentions article 3(1) in a footnote to the main text where the Court recites section 28(2) of the Constitution (fn 79). No immediate consequences arise from the engagement with the CRC, which remains background information.

[125] Sometimes, the references to the CRC are generic (*B v S* 1995 (3) SA 571 (A) at 582B; *Singh and Another v Ebrahim* [2010] ZASCA 145) per Snyders JA (concurred with by Maya JA para 124 fn 18; *Mugridge v S* 2013 (2) SACR 111 (SCA) ('*Mugridge*'); *Ntaka v S* [2008] 3 All SA 170 (SCA) per Maya JA para 14, fn 3). In *Brooks and another v National Director of Public Prosecutions* [2017] 2 All SA 690 (SCA), the Court mentioned the CRC in its quotes from previous cases. In *Brossy v Brossy* [2012] ZASCA 151, the Court refers to the arguments by Centre for Child Law who pointed to the CRC (and ACRWC) and their protection of the right to be heard (para 17). Mention is then made in fn 3 to article 12 CRC. In *City of Johannesburg v Rand Properties (Pty) Ltd* [2007] 2 All SA 459 (SCA), the CRC is acknowledged as one of the international treaties dealing with the right to adequate housing (para 19 fn 4 referring art 27(3) of the CRC). In *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 (2) SACR 183 (SCA), the Court referred to the CRC as being one of the international instruments seeking to ensure the protection of vulnerable persons against sexual abuse and violence (para 1 fn 1 referring to article 19). *AB and Another v Pridwin Preparatory School and Others* [2018] ZASCA 150 concerns the constitutionality of contractual clauses between a private school and the parents of two children. The CRC is mentioned only in the dissenting judgment of Mocumie JA, who invokes article 12 of the CRC in parallel with section 28(2) of the Constitution and domestic cases (paras 115, 119, 123).

[126] 2008 (1) SA 474 (CC) (religious and cultural rights of children in schools).

[127] 2009 (4) SA 7 (CC) (freedom of expression and protection of privacy of children whose parents are divorcing).

[128] Concerning the right to access to health services by pregnant women and their new-born babies to prevent the transmission of HIV.

[129] 2001 (1) SA 1171 (CC) (the compatibility of the Convention on the Civil Aspects of International Child Abduction, 1980 with section 28(2) of the Constitution).

[130] 2004 (6) SA 505 (CC) (access to social grants by permanent residents and their children).

[131] 2003 (5) BCLR 463 (recognition of same-sex life partner as the parent of a child born through artificial insemination of her partner).

[132] 2014 (2) SA 168 (CC) ('*Teddy Bear Clinic'*) (constitutional validity of legislation which criminalised consensual sexual penetration and other non-penetrative forms of sexual interaction between children aged 12 to 16).

5.4.2.1 The CRC and the interpretation of the Bill of Rights

Intercountry adoptions: Minister for Welfare and Population Development v Fitzpatrick and Others[133] *and AD and DD v DW and Others*[134]

These cases raised the application of the principle of subsidiarity to intercountry adoptions in South Africa before the principle was adopted explicitly in the domestic law. The principle requires that domestic arrangements for the care of a child are to be preferred over placing a child with an adoptive family overseas.

Fitzpatrick concerned an English family residing permanently in South Africa who wished to adopt a South African toddler who they fostered. Section 18(4)(f) of the Child Care Act 74 of 1983, now repealed, prohibited the adoption of a South African child by a foreign national who did not apply for naturalisation in South Africa.[135] The Court declared the above statutory provision as inconsistent with section 28(2) of the Constitution because it prevented an individualised assessment of what may be in the best interests of a particular child.[136] The Court mentioned the CRC in two contexts: in interpreting section 28(2) of the Constitution; and in addressing arguments raised by the state and the *amicus*, that the declaration of invalidity should be suspended because the existing legislation was not adequate to address concerns pertaining to the process of intercountry adoption,[137] including respect for the principle of subsidiarity contained in article 21(b) of the CRC[138] (and the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption ('the Hague Convention')).[139]

The influence of the CRC on the Court's approach to section 28(2) is uncertain. The Court made the far-reaching and influential statement that section 28(2) is a right independent of those in section 28(1),[140] but it is not apparent that this was prompted or encouraged by the CRC. In fact, the Court preceded by 13 years a similar position taken by the CRC Committee in relation to article 3(1) of the CRC.[141] In its best interests reasoning, the Court quotes article 3(1)[142] to support its observation that the best interests standard has not been given exhaustive content in the South African, international or foreign law.[143] This strengthened the Court's view

[133] 2000 (7) BCLR 713 (CC) ('*Fitzpatrick*').
[134] 2008 (4) BCLR 359 (CC) ('*AD v DW*').
[135] See fn 2 in *Fitzpatrick* for the text.
[136] *Fitzpatrick* para 20.
[137] *Fitzpatrick* para 23. The concerns referred to the ability of the South African authorities to perform the background checks in relation to foreign adopters, protection against child trafficking and 'inadequate provision to give effect to the principle of subsidiarity' (fn omitted).
[138] Article 21(b) states: 'Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin'.
[139] *Fitzpatrick* para 27.
[140] M Couzens 'The Contribution of the South African Constitutional Court to the Jurisprudential Development of the Best Interests of the Child' in A Diduck, N Peleg and H Reece (eds) *Law in Society: Reflections on Children, Family, Culture and Philosophy. Essays in Honour of Michael Freeman* (2015) 521.
[141] CRC Committee *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)*.
[142] In fn 11, alongside African Charter on the Rights and Welfare of the Child, 1990 and relevant literature.
[143] *Fitzpatrick* para 18.

that the standard should remain flexible 'as individual circumstances will determine which factors secure the best interests of a particular child'.[144]

The use of the CRC is clearer in the Court's dealing with the principle of subsidiarity. The Court found that 'the requirement in section 40 of the Act that courts are to take into consideration the religious and cultural background of the child, on the one hand, and the adoptive parents, on the other'[145] responded to concerns covered by the principle of subsidiarity.[146] In footnote, the Court noted that

> [a]lthough no express provision is made for the principle of subsidiarity in our law, courts would nevertheless be obliged to take the principle into account when assessing the "best interests of the child", as it is enshrined in international law, and specifically article 21(b) of the Children's Convention. This obligation flows from the imperative in s 39(1)(b) of the Constitution that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law".

Thus, the principle of subsidiarity was to be considered as a part of the best interests enquiry.

The principle of subsidiarity and its relationship with the best interests of the child was revisited in *AD v DW*, where the SCA and the Constitutional Court took slightly different approaches.

The applicants, an American couple, wished to adopt a South African toddler. They approached the High Court for a custody and sole guardianship order, which would have enabled them to take the child to the US and adopt her there. The High Court rejected the application, considering that, in substance, it was an intercountry adoption application that fell under the jurisdiction of the children's court. The judgment was appealed to the SCA, which with a narrow majority (3:2) dismissed the appeal.[147] The decision of the majority relied substantially on the principle of subsidiarity in the CRC, ACRWC and the Hague Convention,[148] whose requirements were, in its view, not complied with. The minority did not reject the relevance of the principle of subsidiarity, but held that its requirements were complied with in this specific case[149] and by the existing legal framework more generally.[150]

In her majority judgment Theron AJA (as she then was) held that the granting of a custody and guardianship order with a view of concluding an adoption overseas was 'contrary to the principles of the UNCRC and the African Charter'[151] which required that equivalent standards and safeguards be applied to both domestic and international adoptions.[152] The Court decided

[144] *Fitzpatrick* para 18 (fn omitted).
[145] *Fitzpatrick* para 32.
[146] Which it defined as 'the principle that intercountry adoption should be considered strictly as an alternative to the placement of a child with adoptive parents who reside in the child's country of birth' (*Fitzpatrick* fn 13). The definition which the Court embraced seems closer to that in article 4(b) of the Hague Convention than that in article 21(b) of the CRC, without the Court having explained its choice.
[147] *De Gree and Another v Webb and Others (Centre for Child Law as amicus curiae)* 2007 (5) SA 184 (SCA) ('*De Gree'*).
[148] By then, the Hague Convention had been ratified by South Africa and it was in the process of being incorporated into the Children's Act (see Chapter 16 and Schedule 1). As of 1 July 2010 (date of entry into effect of the relevant Children's Act provisions, the Hague Convention is part of the domestic law.
[149] *De Gree* per Heher JA para 48, 55.
[150] *De Gree* para 50.
[151] *De Gree* per Theron AJA para 15.
[152] *De Gree* per Theron AJA; per Ponnan J para 84.

that section 39(1)(b) of the Constitution requires that the principle of subsidiarity be taken into account when assessing the best interests of the child, despite it not having been explicitly provided for in the domestic law (at the time).[153]

The appellants argued that the best interests of the *individual* child required that the High Court grant the custody and guardianship order. This position was embraced by the minority in the SCA, who considered the adoption to be in the best interests of the child affected by the dispute. The majority showed substantial concern for the interests of children more generally. Citing articles 3(1) and 21 of the CRC and the Hague Convention, the Court noted that the fundamental principle underlining these instruments was the best interests of the child, which these conventions sought to protect through various mechanisms.[154] It was in the interest of children generally that intercountry adoptions be concluded in accordance with the principles provided in international instruments,[155] including the subsidiarity principle.

The principle of subsidiarity drove the reasoning of the majority, with Ponnan JA referring to it as 'foundational' to intercountry adoption.[156] Theron AJA said that a court 'should not sanction an adoption procedure which is in conflict with international treaties which South Africa has ratified and which are designed to safeguard the best interests of the child'.[157] Ponnan JA added that 'in choosing between two possible procedural options a court should … rather plump for the one that is compatible with this country's international legal obligations than the one that is not'.[158]

The SCA judgement was appealed to the Constitutional Court.[159] Sachs J, writing for the Court, noted that the lacuna in the domestic law in relation to intercountry adoptions had to be covered by international law, and especially the subsidiarity principle.[160] The stringent mechanisms to regulate the practice and prevent its potential abuse, introduced by the Hague Convention,[161] show that 'the framers appear to have felt it would be permissible to reduce the relatively autonomous effect of the subsidiarity principle as expressed in the CRC and the African Charter on the Rights and Welfare of the Child … , and bring it into closer alignment with the best interests of the child principle'.[162] The principle of subsidiarity in article 4(b) of the Hague Convention uses language which is 'notably less peremptory' [163] than the language in the CRC and ACRWC, opening therefore the possibility that in certain circumstances a placement outside the country of birth will better serve the interests of the child.[164] However, while the

[153] *De Gree* per Theron AJA para 12.
[154] *De Gree* per Theron AJA para 17. Ponnan JA also referred to the same international instruments to draw the conclusion that they provide a child-centred approach to intercountry adoptions which seeks to eliminate abuses in the practice (paras 85, 86 and 94).
[155] *De Gree* per Theron AJA para 17.
[156] *De Gree* per Ponnan JA para 96.
[157] *De Gree* per Theron AJA para 27. Also, Ponnan JA para 92.
[158] *De Gree* per Ponnan JA para 92.
[159] *AD and DD v DW and Others* 2008 (4) BCLR 359 (CC).
[160] *AD v DW* para 36.
[161] *AD v DW* para 43 onwards.
[162] *AD v DW* para 47
[163] *AD v DW* para 47.
[164] *AD v DW* para 48.

principle of subsidiarity should be adhered to as a 'core factor'[165] given its protective function, it is not the 'ultimate governing factor in intercountry adoptions'.[166] That is because the Constitution requires 'in all cases, including inter-country adoption, to ensure that the best interests of the child will be paramount'.[167] In a footnote, the Court referred to article 3 of the CRC, as well as articles 21 of the CRC and 4 and 24 of the ACRWC, noting that in the context of adoption, the two conventions give the best interests of the child more weight than in other legal matters.[168] Sachs J found the position of the majority of the SCA – that the principle of subsidiarity was an impediment to the granting of the order by the High Court – to be 'too bald',[169] and decided that 'the subsidiarity principle itself must be seen as subsidiary to the paramountcy principle'.[170]

In both cases, therefore, the courts have relied on the CRC to interpret section 28(2) of the Constitution, and in the process, sought to give effect to the principle of subsidiarity as it applies to intercountry adoptions, a principle not explicitly recognised by the domestic law at the time.

The right to parental and family care

M v S (Centre for Child Law Amicus Curiae)[171]

This is one of the most important cases which considers the rights of children in South Africa, and one in which the Court discusses extensively the best interests of the child.[172]

The central issue for determination was the obligations arising from section 28(2) of the Constitution for judicial officers who sentence primary caregivers. The accused was the single mother of three children (aged 16, 12 and 8); she was convicted of fraud and sentenced to a short period of incarceration. She appealed her sentence, arguing that the court had not given sufficient consideration to the rights of her children. In upholding the appeal, the majority found that the sentencing court erred in imposing a custodial sentence. Applying section 28(1)(b) read with section 28(2), Sachs J provided guidelines for sentencing courts on how to give effect to children's rights when sentencing primary caregivers.[173] This Justice stated that:

> section 28 must be seen as responding in an expansive way to our international obligations as a State party to the United Nations Convention on the Rights of the Child ("the CRC"). Section 28 has its origins in the international instruments of the United Nations. Thus, since its introduction the CRC has become the international standard against which to measure legislation and policies, and has established a new structure, modelled on children's rights …[174]

[165] *AD v DW* para 49.
[166] *AD v DW* para 49.
[167] *AD v DW* para 49 (fn omitted).
[168] *AD v DW* fn 47.
[169] *AD v DW* para 54.
[170] *AD v DW* para 55.
[171] 2007 (12) BCLR 1312 (CC) ('*M v S*').
[172] J Gallinetti '2kul2Btru: What children would say about the jurisprudence of Albie Sachs' 2010 (25) *South African Public Law* 108.
[173] *M v S* paras 33 and 36.
[174] *M v S* para 16 fns omitted.

The CRC together with the Constitution have introduced a 'change in mindset'[175] which requires that regard

> has to be paid to the import of the principles of the CRC as they inform the provisions of section 28 in relation to the sentencing of a primary caregiver. The four great principles of the CRC which have become international currency, and as such guide all policy in South Africa in relation to children, are said to be survival, development, protection and participation. What unites these principles, and lies at the heart of section 28, I believe, is the right of a child to be a child and enjoy special care.[176]

The height of the Court's use of the CRC is in the quotes above. No attention is given to the wording of the CRC, and apart from article 3(1), the Court does not identify other relevant provisions despite mentioning the Convention's 'four great principles'. In his analysis of section 28(2), in a footnote, Sachs J notes the distinction between article 3(1) and section 28(2), pointing out that the latter 'is notably stronger than the phrase "primary consideration"' in the former,[177] but does not explore the distinction further. Whatever the concerns, it appears that the CRC was used to give content to or to clarify, section 28.

C and Others v Department of Health and Social Development, Gauteng and Others[178]

C v Department of Health concerned the constitutional validity of sections 151 and 152 of the newly enacted Children's Act, which allowed the emergency removal of children to temporary safe care without a court reviewing the removal in the presence of the child and his/her carers.[179] The challenge to the constitutional validity of the above provisions of the Children's Act was mounted when social workers removed three children from the care of two parents found working or begging on the streets accompanied by their children.[180] The case reached the Constitutional Court, which had to decide whether the absence of an automatic judicial review of the emergency removal of children as per sections 151 and 152 of the Children's Act above, in the presence of the child and the parents, was constitutional. Three judgments were written. The majority judgment, penned by Yacoob J, makes no reference to the CRC when finding that the impugned statutory provisions breached the Constitution.[181]

The two minority judgments refer to the CRC, but differ in relation to its significance. Skweyiya J (concurred with by Froneman J) found that the emergency removal of a child according to sections 151 and 152 of the Children's Act was an interference with the right to parental and family care in section 28(1)(b) of the Constitution.[182] Although section 28(1)(b) of the Constitution recognises the right to alternative care, that right was secondary to the right to parental and family care.[183] To support the primacy of parental and family care over

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[175] *M v S* para 16.
[176] *M v S* para 17 fns omitted.
[177] *M v S* fn 31.
[178] 2012 (4) BCLR 329 (CC) ('*C v Department of Health*').
[179] The case was to be presented to a court within 90 days of the removal; during this period a social workers' report was compiled for the court. See section 155(2) of the Children's Act.
[180] One of the children accompanied her shoe-making father on the street because her mother was in the hospital giving birth, and the other two children were together with their blind mother who was begging for a living.
[181] Yacoob J found that the absence of an automatic judicial review of the emergency removal of children was contrary to section 28(2) of the Constitution and section 34 (access to courts).
[182] *C v Department of Health* per Skweyiya J para 24.
[183] *C v Department of Health* per Skweyiya J para 24.

alternative care, Skweyiya J relied on the ACRWC and articles 7(1) and 8(1) of the CRC, which he found himself bound to consider under section 39(1)(b) of the Constitution.[184] Once he established that several constitutional rights were infringed upon, Skweyiya J dealt with the reasonableness and justification of the interference with these rights. In determining the appropriate relationship between the limitation and its purpose (as required by section 36(d)), Skweyiya J found it 'helpful to consider the applicable international law'.[185] In this context, this Justice referred *inter alia* to article 9 of the CRC, which he found to set specific requirements for the removal of children from their families.[186] After stressing the importance of the CRC as an 'interpretive influence … on section 28 of the Constitution',[187] Skweyiya J stated that:

> [t]he right to parental care or family care requires that the removal of children from the family environment must be mitigated in the manner described in the UNCRC, in order to satisfy the standard set for the limitation of rights in section 36(1) of the Constitution. The requirements that the removal be subject to automatic review and that all interested parties, including the child concerned, be given an opportunity to be heard, in my view, stand as essential safeguards of the best interests of the child.[188]

Jafta J (joined by Mogoeng CJ) took the view that the CRC had no role in the constitutional review, which was to be conducted solely in relation to section 28 of the Constitution. The statutory scheme was not contrary to the Constitution, because the latter did not require that the removal of a child from the family be subject to an automatic judicial review.[189] Jafta J dismissed the CRC arguments as follows:

> Section 28 does not refer to automatic review at all. Therefore, the requirement for judicial review in the Convention does not form part of the section. Nor can it be incorporated into the section. Consequently, it cannot be used as a constitutional standard for determining the validity of legislation. This is so despite the fact that the Convention and the Charter were ratified and are binding on South Africa. International law may form part of our law if it is not inconsistent with the Constitution or an Act of Parliament. This illustrates that where there is an inconsistency between international law and an Act of Parliament, the latter prevails.[190]

This indeed 'gives rise to some concern with regard to international law',[191] and contrasts with the nuanced approach taken by Skweyiya J. For Jafta J, as section 28 did not provide for a judicial review, such requirement could not be incorporated into that section by way of judicial interpretation. Ironically, Jafta J's judgment contains the first judicial statement that the CRC may be directly applicable in the South African law, had it not been (as per Jafta J) inconsistent with the Constitution and the Children's Act.

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[184] *C v Department of Health* per Skweyiya J para 25.
[185] *C v Department of Health* per Skweyiya J para 32.
[186] *C v Department of Health* per Skweyiya J para 32, quoting the text of article 9(1) and (2) of the CRC, and stressing the requirements of removal subject to judicial review and the requirements in relation to the participation in the removal proceedings of all interested parties.
[187] *C v Department of Health* per Skweyiya J para 33.
[188] *C v Department of Health* per Skweyiya J para 34.
[189] This view was rightly criticised by Skelton for being a 'narrow, legalistic' view of the relationship between the Bill of Rights and international law (2015 note 23 at 23).
[190] *C v Department of Health* per Jafta J para 109 (fn omitted).
[191] Skelton 2015 note 23 at 23.

The contribution of the CRC to Skweyiya J's reasoning is, however, significant. First, articles 7(1) and 8(1) of the CRC are used to interpret section 28(1)(b) of the Constitution and clarify its scope. This enabled the conclusion that parental and family care is the primary form of care for children, and appropriate alternative care is subsidiary to it. Second, section 28(1)(b) of the Constitution is sparse, and does not mention explicitly the conditions in which children can be separated from their families. Reliance on article 9 of the CRC enabled Skweyiya J to address the gap, by declaring that 'the removal from the family environment must be mitigated in the manner described in the UNCRC' in order to satisfy the requirements of the limitation clause of the Constitution.[192]

Third, reliance on the CRC improved the transparency and the cogency of Skweyiya J's judgment when compared with the majority judgment. Yacoob J found the impugned statutory framework inconsistent with sections 28(2) and 34 of the Constitution, but the reasoning is sparse and does not explain why automatic judicial review and no other measure satisfies the best interests of the child.[193] Skweyiya J on the other side, clearly locates the requirement for judicial review in the CRC, giving a sounder foundation to his judgment.

Education environment

In *Juma Musjid* the CRC was mentioned by the Court when dealing with the right to education, but the reliance on the Convention was limited. In other cases so far, the school was the context in which other rights operated, but the right to education was not at stake.

In *Le Roux and Others v Dey; Freedom of Expression Institute and Another as Amici Curiae*[194] three teenagers (aged 15 to 17) played a prank on the principal and deputy principal of the school they attended. They superimposed the heads of their two teachers on the picture of two men depicted in a sexually suggestive position. The deputy principal successfully sued the children for defamation, and the case reached the Constitutional Court in the appeal of the children.

Four judgments were written, of which only one mentions the CRC. The majority judgment paid only limited attention to the rights of children, and found the children liable for defamation. The dissenting judgments of Yacoob J and Skweyiya J focused on children's rights, but only Skweyiya J's judgment mentions the CRC. This Justice found article 3 of the CRC 'appealing'[195] because of the 'interesting difference' between article 3 of the Convention and section 28(2) of the Constitution, respectively the fact that the former refers to the best interests of the child as 'a primary consideration' rather than of 'paramount importance', as provided in the latter.[196] From this distinction, Skweyiya J drew the conclusion that

> the best interests of the child consideration is not artificially elevated above all others; rather, it forms the basis and starting point from which the matter is to be considered. Once the considerations relevant to this foundation are clearly cemented, one can then begin to examine the other rights that enter the

[192] *C v Department of Health* per Skweyiya J para 34.
[193] See, for example, *C v Department of Health* per Yacoob J para 77.
[194] 2011 (6) BCLR 577 (CC) ('*Le Roux*').
[195] *Le Roux* per Skweyiya J para 211.
[196] *Le Roux* per Skweyiya J para 211.

> balance, without losing sight of the fact that the best interests of the child remain "of paramount importance".[197]

Although reliance on the CRC was not extensive, article 3 of the CRC influenced Skweyiya J's reasoning. Interestingly, it was the *difference* between the international and the constitutional text which proved valuable, in that it enabled this Justice to see the constitutional text in a different light and formulate a practical test useful in cases where the interests of children conflict with those of others.

Children as victims and offenders

This is the category of cases best represented in the jurisprudence of the two courts, with the CRC being considered in cases concerning sentencing of juvenile offenders and post-sentencing measures, as well as the treatment of child victims and witnesses.

Director of Public Prosecutions, KZN v P[198]

The case concerned the sentencing of a 14 years-old-girl, who, when aged 12 years and 5 months, instigated two persons to kill her grandmother. In appeal, the Supreme Court of Appeal overturned the sentence of the High Court, and imposed a suspended sentence, coupled with correctional supervision.

The Supreme Court of Appeal accepted that the approach to sentencing juveniles is informed by section 28(1)(g) of the Constitution and international instruments, especially those adopted under the aegis of the United Nations.[199] The Court noted, amongst others, the relevance of article 40(1) of the CRC (treating the child so as to promote the child's dignity and worth, taking into account the child's age and the desirability of promoting the child's reintegration). It also stressed that section 28(1)(g) was a 'replica' of section 37(b) of the CRC in its approach to deprivation of the liberty of the child as a last resort and for the shortest period of time.[200] The Court concluded that:

> [h]aving regard to section 28(1)(g) of the Constitution and the relevant international instruments, as already indicated, it is clear that in every case involving a juvenile offender, the ambit and scope of sentencing will have to be widened in order to give effect to the principle that a child offender is 'not to be detained except, as a measure of last resort' and if detention of a child is unavoidable, this should be 'only for the shortest appropriate period of time'.[201]

The Court considered that imprisonment was called for,[202] but expressed concerns over the absence of adequate facilities to detain imprisoned children[203] and the poor supervision exercised by the Department of Correctional Supervision over those sentenced to correctional supervision.[204]

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[197] *Le Roux* per Skweyiya J para 211.
[198] [2006] 1 All SA 446 (SCA) ('*DPP v P*').
[199] *DPP v P* para 11. In addition to the CRC, the Court also referred to the Minimum Rules for the Administration of Juvenile Justice (1985) ('the Beijing Rules'); see para 16.
[200] *DPP v P* para 15.
[201] *DPP v P* para 18.
[202] *DPP v P* para 22.
[203] *DPP v P* para 23.
[204] *DPP v P* para 25.

Although ultimately the outcome of the case was not the most favourable to the child, the Court engaged with the CRC in a manner which helped it develop the domestic law. Article 37(b) of the CRC was relied on to add weight to section 28(1)(g) of the Constitution, so in that sense it did not move the law forward. Article 40(1), however, raised aspects not explicitly referred to in the Constitution, respectively a child-focused treatment of the child-offender (including in relation to the conditions of detention) and an orientation of the sentence toward reintegration. While the Court did not impose direct imprisonment because it was 'too late',[205] rather than because the imprisonment conditions were inadequate and thus contrary to international norms, the reasoning suggests that detention conditions of juveniles may be a relevant consideration for a sentencing court. It was by looking at the situation through the lens of the CRC that the Court was able to conceptualise and confer legal relevance to the deficiencies in the detention regime of children.

The Court did not mention the constitutional provision which justified its engagement with the CRC. It appears that it did not simply refer to the CRC to interpret or add strength to section 28(1)(g) of the Constitution, but also to assist the Court in imposing an appropriate sentence,[206] and thus the exercise of its discretion. By not mentioning section 39 of the Constitution, the Court avoided identifying a constitutional provision which it arguably interpreted by considering the CRC, creating a wider space for engaging with international law.

Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others[207]

This case raised the question as to whether several statutory provisions which aimed at protecting the rights of child witnesses and complainants who testify in criminal cases were compliant with section 28(2) of the Constitution. The impugned provisions established the conditions under which a child victim and/or a child witness could testify through intermediaries, be heard in camera or with the use of closed-circuit television in cases concerning sexual offences.[208] Judicial discretion, rather than a positive obligation to use these methods to protect children's vulnerability, was considered by the High Court to be inconsistent with the best interests of the child, and the relevant statutory provisions were declared unconstitutional.

In confirmation proceedings, the Constitutional Court took a different view, and decided that the impugned provisions could be interpreted in a constitutionally-compatible way. Many constitutional issues were raised by the case,[209] but the focus here is on the Court's engagement

[205] *DPP v P* para 26.
[206] See especially *DPP v P* para 11 where the Court states that: 'This issue [sentencing] must of course now be considered not only with reference to the so-called traditional approach to sentencing but also with due regard to the sentencing regime foreshadowed in section 28(1)(g) of the Constitution of the Republic of South Africa Act, 1996 and international developments as reflected in, for instance, instruments issued under the aegis of the United Nations'.
[207] 2009 (7) BCLR 637 (CC) ('*DPP*').
[208] *DPP* per Ngcobo J para 3.
[209] These include judges raising constitutional issues *mero motu*, and the appropriate position of a court when it becomes aware of systemic problems in the implementation of statutes which are aimed at protecting the interests of children.

with the CRC. The reasoning of the majority (per Ngcobo J)[210] is dominated by the best interests of the child provision, which the majority often invoked to stress the special obligations of *the courts* to protect them. Overall, the Court decided that section 39(2) of the Constitution requires courts to interpret statutes in accordance with the Bill of Rights, including therefore section 28(2) of the Constitution.[211] In interpreting statutes, courts must do so in a way that minimises risks to children's development and well-being which may arise from the application of the law.

The majority gave substantial attention to section 28(2),[212] and it relied on article 3(1) of the CRC as well as the 2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime to interpret it. The Court stressed that international instruments were 'relevant considerations' under section 39(1)(b), and that when interpreting domestic statutes, courts should prefer an interpretation that is consistent with international law, according to section 233.[213] It stated that:

> [t]he international and regional instruments on the rights of the child therefore provide a framework within which section 28(2), and ultimately the invalidated provisions, can be evaluated and understood.[214]

The Court referred to article 3(1) of the CRC (and article 4 of the ARWC) and noted its similarity with section 28(2).[215] It thereafter quoted from General Comment No. 7 of the CRC Committee[216] to make the point that the principle was introduced in the CRC because children's immaturity makes them reliant on authorities for having their rights and interests respected.[217] Both article 3(1) and General Comment No. 5[218] were then mentioned to stress that *courts* have responsibilities in relation to the protection of the best interests of the child in the exercise of their judicial functions, in that they are required to consider the impact of their decisions on children.[219] The Court then noted that

> [i]t is apparent from the CRC and the Guidelines that courts are required to apply the principle of best interests by considering how the child's rights and interests are, or will be, affected by their decisions. The best interests of the child demand that children should be shielded from the trauma that may arise from giving evidence in criminal proceedings.[220]

The Court moved on to interpret the relevant statutory provisions, and referred to the CRC only in the context of the statutory provisions concerning the appointment of intermediaries. It said that section 170A(1) of the CPA (dealing with the appointment of intermediaries) has an objective consistent with section 28(2) understood in the light of article 3(1) of the CRC and

[210] Skweyiya J alone wrote a dissenting judgment in which the rights of children did not feature.
[211] *DPP* para 84.
[212] *DPP* para 70 onwards.
[213] *DPP* para 75.
[214] *DPP* para 75.
[215] *DPP* para 76.
[216] CRC Committee *General Comment No.7 (2005) Implementing child rights in early childhood* para 13.
[217] *DPP* para 77.
[218] CRC Committee *General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6).*
[219] *DPP* para 77.
[220] *DPP* para 79.

the Guidelines, which is to avoid potential trauma arising from a child testifying in court.[221]

One of the contentious issues was the meaning of the phrase 'undue mental stress and suffering' in section 170A(1) of the CPA, as a pre-requisite for the appointment of an intermediary. The High Court and the *amici* were concerned that this phrase required that a child be first exposed to mental stress before an intermediary could be appointed.[222] The Court disagreed and found that such approach would be contrary to section 28(2) and the object of section 170A(1), and inconsistent with article 3(1) of the CRC, and should therefore be rejected.[223] The Court then indicated the obligations of the courts and of the state in appointing intermediaries.[224]

In *DPP*, the Court used article 3(1) to interpret section 28(2) of the Constitution and section 170A(1) of the CPA.[225] Article 3(1) of the CRC and the general comments relied on by the Court were used primarily to stress the direct responsibility of the *courts* to ensure that when exercising their judicial functions they give paramount importance to the best interests of the child.[226] Article 3(1) of the CRC was useful because it explicitly refers to the *courts* being bound to give effect to the best interests of the child. The same conclusion would have arisen from section 28(2) read with section 8(1) of the Constitution, but the Court strengthened this conclusion by drawing on the CRC.

Surprisingly, the Court did not consider article 12 of the CRC although on numerous occasions it referred to the importance of respecting the wishes and feelings of child witnesses and complainants.[227] It preferred to treat the issue as an aspect of the best interests.

Centre for Child Law v Minister for Justice and Constitutional Development and Others (NICRO as Amicus Curiae)[228]

In *Centre for Child Law* the Court declared statutory provisions which mandated the application of minimum sentencing for children aged 16 or 17 at the time of committing certain offences inconsistent with section 28(1)(g) of the Constitution.[229] This regime increased the severity of sentences applied to the children, and obliterated the distinction between their sentencing regime and that of adults.[230] Cameron J's majority judgment is child-focused and important for the development of the rights of children,[231] but the judgment contains limited references to the CRC. Cameron J notes that section 28 of the Constitution 'draws upon and

[221] *DPP* para 98.
[222] *DPP* para 110.
[223] *DPP* para 110.
[224] *DPP* para 111-113.
[225] See especially *DPP* para 100 in relation to the application of section 233 of the Constitution.
[226] See especially *DPP* paras 95 and 113.
[227] See, for, example *DPP* paras 124-127.
[228] 2009 (11) BCLR 1105 (CC) ('*CCL*').
[229] *CCL* per Cameron J paras 46-48, 64. At stake was the constitutionality of the Criminal Law Amendment Act 105 of 1997 as amended by section 1 of the Criminal Law (Sentencing) Amendment Act 38 of 2007, which came into force on 31 December 2007. The legislative amendments which introduced the minimum sentencing in relation to children was aimed at reversing the decision of the SCA in *Brandt v S* [2005] 2 All SA 1 (SCA) paras 6, 22.
[230] *CCL* para 40.
[231] See especially *CCL* paras 26-32.

reflects the Convention on the Rights of the Child',[232] but draws no inference from this remark. He refers with approval to arguments made by the Centre for Child Law, that international instruments (including the CRC) reject the application of minimum sentencing to children,[233] and require that children be incarcerated as a last resort and for the shortest period of time, and be treated differently from adults.[234] Thereafter, however, Cameron J draws the discussion plainly under the Constitution by saying that the Bill of Rights 'amply embodies these internationally accepted principles', and its provisions 'merely need to be given their intended effect'.[235] The outcome of the application of constitutional principles is no doubt compatible with the CRC, but the reasoning is so strongly rooted in the domestic law that it is difficult to distil the influence of the CRC.[236]

J v National Director of Public Prosecutions and another (Childline South Africa and others as amici curiae)[237]

This case concerned the constitutional validity of section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which provided that upon sentencing a person for a sexual offence against a child or a disabled person, a court must order that the particulars of the offender be entered in a National Register for Sex Offenders. Several adverse consequences arose from the registration,[238] and in certain cases, including that of the current applicant, the particulars can never be removed.[239] The applicant, a 14-year-old child at the time of the offences, was sentenced for several accounts of rape against younger children, and the sentencing magistrate made an order for the child's details to be entered onto the Register. When the matter came before the High Court, the Court decided, *inter alia,* that the rights of the child offender were violated by the above section, which was declared unconstitutional.[240]

In confirmation proceedings, Skweyiya ADCJ (as he then was) found that the mandatory registration was contrary to the best interests of the child because it prevented a differentiation between adult and child offenders, an individualised treatment for the child and a consideration of the representations made by the child.[241] In his reasoning, Skweyiya ADCJ noted that section 28(2) of the Constitution requires, amongst other things, that the child or his/her representative be given the opportunity to make representations and to be heard at all stages of the criminal proceedings.[242] This requirement was anchored in the Child Justice Act (section 3(c)), *C v*

[232] *CCL* para 25 fn omitted. Cameron J quotes articles 37(b) and 40(1) of the CRC (see fns 62, 63).
[233] CCL para 61.
[234] *CCL p*ara 61, referring amongst others to article 37(b) and 40(1) of the CRC.
[235] *CCL* para 63.
[236] A different view appears in Skelton 2015 note 23 at 27, who, nonetheless, writing in 2018 (note 99 at 401), acknowledges that it is sometimes difficult to distinguish between the influence of the CRC and that of the Constitution.
[237] 2014 (7) BCLR 764 (CC) ('*J v NDPP'*).
[238] *J v NDPP* paras 21-25.
[239] *J v NDPP* para 25.
[240] *J v NDPP* para 6.
[241] *J v NDPP* para 42.
[242] *J v NDPP* para 40.

Department of Health and section 10 of the Children's Act, as well as in article 12 of the CRC, and General Comments Nos. 12 and 10 of the CRC Committee.[243]

Quantitatively, the reliance on the CRC was not extensive,[244] but with the general comments of the CRC Committee, it contributed to the Court arriving at the conclusion that hearing the views or representations of the child at *all stages* of the criminal process is a requirement arising from section 28(2) of the Constitution. Although the CRC was relied on alongside domestic sources, amongst those, only section 3(c) of the Child Justice Act provided some explicit support for the participation of the child in the criminal justice process. However, as this section is one of the general principles of the Child Justice Act, its scope is limited by it.[245] Since this Act does not deal with the post-sentencing registration of children convicted of sexual offences against other children, the principle was not directly applicable and could not by itself constitute a foundation for the recognition of the right to be heard in the present case. Thus, because of the vulnerability of the Court's reliance on the Child Justice Act, the CRC and the general comments become the strongest support for the interpretation of section 28(2) of the Constitution toward including the right to be heard throughout the criminal process.

As a brief preliminary conclusion,[246] it can be remarked that the CRC has been used to interpret section 28 of the Constitution in the case law of the Constitutional Court and Supreme Court of Appeal, and has influenced the reasoning of judges. It is rare that judges have reservations in relation to considering the CRC, although the impact of their engagement with it is not always clear. Further, it is not always clear which positive outcomes are related to the Convention and which to the Constitution; and at times it is difficult to establish whether the Convention is applied as an interpretive device as per section 39(1)(b) of the Constitution or in other ways.

5.4.2.2 The CRC and statutory interpretation

Section 233 of the Constitution is seldom relied on in relation to the CRC.[247] It has been relevant in only two of the cases surveyed here: the *DPP* (discussed above) and *Brandt* (discussed below). In *DPP*, the Constitutional Court relied on section 233 explicitly, while in *Brandt* this section was only implicitly applied.

Brandt v S[248]

The case concerned the application of the mandatory sentencing regime to children. The accused was sentenced for, *inter alia*, a murder which he committed when he was 17 years and 7 months old. Applying the minimum sentencing legislation then in force (section 51 of the

[243] See *J v NDPP* para 40 fn 45. CRC Committee *General Comment No. 12 (2009) The right of the child to be heard* and *General Comment No. 10 (2007) Children's rights in juvenile justice*.
[244] It was only made in fn 45.
[245] Section 3(c) of the Child Justice Act reads: 'In the application of this Act [own emphasis], the following guiding principles must be taken into account: … (c) Every child should, as far as possible, be given an opportunity to participate in any proceedings, particularly the informal and inquisitorial proceedings in terms of this Act, where decisions affecting him or her might be taken'.
[246] A more detailed analysis is conducted in part 5.5 below.
[247] Sloth-Nielsen and Mezmur argue, however, that sections 39 and 233 'have taken firm root in children's rights jurisprudence' (2008 note 98 at 26), without pointing specifically to cases in which the latter section was applied.
[248] [2005] 2 All SA 1 (SCA) ('*Brandt*').

Criminal Law Amendment Act 105 of 1997), the High Court sentenced the accused to life imprisonment. In appeal, the SCA interpreted the minimum sentencing legislation in the light of the Constitution,[249] and it decided that in the case of children aged 16-18 the application of the minimum sentence was a matter of discretion for the sentencing court.[250]

The Constitution and international instruments constituted the backdrop of the Court's approach.[251] Citing academic commentators, the Court remarked that international instruments, including the CRC have revolutionised juvenile justice, and their principles have been articulated in the Constitution.[252] International instruments provided guidelines on how to achieve this new approach to juvenile justice, with the CRC having become an

> international benchmark against which legislation and policies can be measured. Traditional theories of juvenile justice now have a new framework within which to situate juvenile justice: a children's rights model.[253]

The Court found that the *leitmotif* of juvenile justice reform was the principle that detention is a matter of last resort and should be imposed for the shortest period of time; this principle is enshrined both in international law (the Court referring here to article 37(b) of the CRC and Beijing Rule 17.1),[254] and section 28(1)(g) of the Constitution. The 'overriding message of the international instruments as well as of the Constitution'[255] was the use of deprivation of liberty as a last resort, the individualization of sentencing and the preparation of the child for his/her release in the society. This background reinforced the Court's interpretation of section 51(3)(b) of the Criminal Law Amendment Act 105 of 1997, in that should the minimum sentencing apply to children automatically, imprisonment would be a first rather than a last resort, and would conflict with the principles of proportionality and individualisation.[256]

The Court in *Brandt* used the CRC to interpret the minimum sentencing legislation. International law is generally used in parallel with sections 28(2) and 28(1)(g) of the Constitution, but the SCA found international instruments useful because of their 'detailed and … specific suggestions' for the realization of constitutional goals.[257] Reliance on the CRC (as well as other instruments and section 28(2) of the Constitution) was placed to stress the need to interpret the minimum sentencing legislation in a way that treated child offenders differently from adult offenders, as opposed to following an interpretation that would obscure such differences.

[249] *Brandt* para 9.
[250] *Brandt* para 12.
[251] *Brandt* para 13.
[252] *Brandt* para 16.
[253] *Brandt* para 17 fn omitted.
[254] *Brandt* para 18; also, fn 15.
[255] *Brandt* para 19.
[256] *Brandt* para 22.
[257] *Brandt* para 17.

5.4.2.3 The CRC and the self-execution of international treaties

There is no case to this researcher's knowledge in which the courts have confronted the vexed issue of the self-execution of the CRC. This has been so even where opportunities arose for the courts to apply the CRC directly, upon establishing the existence of a *lacuna* in the domestic law (e.g. the absence of the subsidiarity principle as it applies to intercountry adoptions).[258] The strongest explicit judicial declaration in relation to a potential direct application of the CRC is the oblique statement of Jafta J in his dissenting judgment in *C v Department of Health*, according to which '[i]nternational law may form part of our law if it is not inconsistent with the Constitution or an Act of Parliament'.[259] Ultimately, however, Jafta J found that the CRC was not part of the South African law because of its alleged conflict with the Children's Act and the Constitution.

On occasion, the courts appear to have applied the CRC directly. For example, in *F v F*[260] (a relocation matter), a father asked the SCA to hear the child directly, and based his request directly on article 12 of the CRC.[261] The Court noted that '[a] court must of course take a child's wishes into account where the child is old enough to articulate his or her preferences',[262] but did not identify domestic support for this assertion, leaving article 12 of the CRC as the only explicit support for the Court's position. The father's request was rejected because of the negative consequences for the child of being heard directly, and because the court (as an appeal court) was procedurally ill-equipped to deal with the request.[263] The Court engaged with the implications of article 12 of the CRC as if it were a domestic norm, without questioning its domestic status. In the High Court case of *R v H and Another*,[264] the Court raised *mero motu* the desirability of appointing a legal representative for a child involved in an acrimonious divorce. The Court justified this with section 28(1)(h) of the Constitution, but then indicated its view that it has obligations arising directly from the CRC:

> In terms of art 12 of the United Nations Convention on the Rights of the Child (the Convention), the Court is required to afford a child who is capable of forming a view on a matter affecting him or her, the right to express those views. Such views are to be given due weight according to the age and maturity of the child.[265]

Cases such as *F v F* and *R v H* are rare and arguably problematic to the extent that they do not frontally engage with section 231(4) of the Constitution, which enables the courts to consider applying the CRC directly if they so wish.

5.4.2.4 *Sui generis* forms of engagement

There are cases in which it is difficult to ascertain how the CRC is being used. Two factors collude to create this difficulty: the courts not referring specifically to the sections of the

[258] *Fitzpatrick* and *AD v DW*.
[259] *C v Department of Health* per Jafta J para 109.
[260] [2006] 1 All SA 571 (SCA).
[261] *F v F* para 24.
[262] *F v F* para 25.
[263] *F v F* paras 25, 26.
[264] 2005 (6) SA 535 (C) ('*R v H*').
[265] *R v H* para 6.

Constitution which justify their reliance on the CRC; and the use of techniques which do not fit neatly in the categories discussed in part 5.2.

In *Christian Education South Africa v Minister of Education*[266] ('*Christian Education'*) the question for the Court was whether a statutory provision (section 10 of the Schools Act 1996) that prohibited corporal punishment in schools violated the religious rights of parents whose children attended independent schools and who consented to the use of such punishment.[267] The rights of children were only considered in the limitation analysis, when the Court established whether the state obligations in relation to the rights of children and broader societal goals justified the limitation of parents' rights to exercise their religion. The state defended the statute by arguing that the infliction of corporal punishment in schools violated several constitutional rights,[268] and that the state had international obligations to ban corporal punishment in schools, including under articles 37(a), 19 and 28(2) of the CRC.[269] The Court agreed that

> [t[he State is further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse or degradation. More specifically, by ratifying the United Nations Convention on the Rights of the Child, it undertook to take all appropriate measures to protect the child from violence, injury or abuse.[270]

The Court concluded that the blanket ban on corporal punishment was justified by the state's constitutional obligations, as it sought to promote respect for the dignity and integrity of children.[271]

At a close analysis, the CRC standards are not engaged with in any detail although they are quoted in the judgment,[272] and the concrete impact of the CRC is limited. The Court found support for the prohibition of corporal punishment in the CRC, but it did not say how it arrived at its conclusion considering that none of the cited provisions explicitly prohibited corporal punishment.[273] By comparison, article 27 of the ICCPR, is compared with and distinguished from the relevant constitutional standards by the Court.[274] This suggests that the CRC was used only to add weight to state obligations already provided in the Constitution,[275] and thus mainly as 'additional ballast'.[276]

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[266] 2000 (10) BCLR 1051 (CC) ('*Christian Education'*).
[267] Sections 15 and 31(1) of the Constitution were argued to have been breached. For the full array of rights claimed to be breached, see *Christian Education* paras 7, 16.
[268] *Christian Education* para 8.
[269] *Christian Education* para 13 fn 11, where the text of the above provisions is indicated in full.
[270] *Christian Education* para 40 (fn omitted). Fn 44 afferent to the above text refers to articles 4, 19 and 34 of the CRC.
[271] *Christian Education* para 50.
[272] See fns 11 and 44.
[273] By contrast, in the *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, Arbour J made a comprehensive argument as to why corporal punishment is prohibited under the CRC.
[274] *Christian Education* para 23.
[275] Sections 12 and 28(1)(d) of the Constitution.
[276] Term used by Sloth-Nielsen and Mezmur 2008 note 98 at 27.

In *Geldenhuys v The State*[277] the Supreme Court of Appeal pointed out that the state has constitutional as well as international obligations to protect children against abuse.[278] The accused challenged the constitutionality of the age of consent to sexual intercourse set by the legislature above the age of 12, arguing that a child aged 12 may be regarded as competent to make decisions regarding sexual activity.[279] The Court decided that setting a minimum age for consent to sexual activities was aimed at protecting children and was consistent with the Constitution and South Africa's international obligations.[280] It is not certain how the Court uses the CRC, as this was not a case of interpreting a statute in the light of the CRC. The Court said that '[i]t must be remembered that the State is both constitutionally and internationally obliged to protect its children from all forms of abuse'[281] and 'it is clear that the establishment of a legal age of consent to sexual activities … is perfectly in line with South Africa's constitutional and international obligations'.[282] Deliberately or not, the CRC standard is treated on par with the constitutional standards in sections 28(1)(b) and 28(2), without the Court discussing the legitimacy of this approach. It can perhaps be argued that article 34 of the CRC[283] was used to interpret section 28(1)(d) of the Constitution. The constitutional standard is general in its reference to protection against maltreatment, neglect, abuse or degradation, while the CRC provision was more specific in relation to protection against sexual exploitation. This may be why the Court found it of 'particular importance'.[284] However, the Court does not invoke section 39(1)(b) of the Constitution, and affirming the validity of statutory provisions because of their compatibility with the CRC borders an elevation of the international standard to a constitutional level.

In *Centre for Child Law v Governing Body of Hoërskool Fochville and another*,[285] the Centre for Child Law submitted in support of its intervention application an affidavit which contained information critical of the concerned school, obtained from children who expressed their desire to be separately represented in a dispute concerning admission to the school. The school sought to compel the Centre to disclose the questionnaires completed by children,[286] which the Centre refused on grounds that they constituted privileged documents and that maintaining confidentiality protected the interests of the children who feared victimisation. The Supreme Court of Appeal decided that, according to rule 35(2) of the Uniform Rules of the Court, a court has discretion in deciding the disclosure, a discretion which it exercises by balancing the relevant interests, which included the interests of children in this case.[287]

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[277] [2008] 3 All SA 8 (SCA) ('*Geldenhuys'*).
[278] *Geldenhuys* paras 58, 59. The Court referred to article 34 of the CRC, along with the relevant provisions of the ACRWC and the Children's Act.
[279] *Geldenhuys* para 57. See section 14(1)(b) of the Sexual Offences Act.
[280] *Geldenhuys* para 63. The Court found, however, that the statutory framework was inconsistent with the Constitution in that it provided different ages of consent in relation to homosexual and heterosexual acts respectively.
[281] *Geldenhuys* para 58.
[282] *Geldenhuys* para 63.
[283] Mentioned by the Court in para 59.
[284] *Geldenhuys* para 59.
[285] [2015] 4 All SA 571 (SCA) ('*Hoërskool')*.
[286] Rule 35(12) of the Uniform Rules of Court provides that when reliance is placed on a document in an affidavit, the party that filled the affidavit could be compelled to produce that document to the other party.
[287] *Hoërskool* para 19.

'A useful starting point' in establishing the interests of the children was children's rights to separate representation (including legal representation) which flows from the children's right to participate, which is 'widely recognised in international law and forms part of South African law'.[288] The Court drew support for its position from articles 12 of the CRC and 4(2) of the ACRWC,[289] section 28(1)(h) of the Constitution[290] and various rights in relation to child participation that are provided for in the Children's Act.[291] According to the Court, children in this case had the right to be heard in a manner that would not damage their best interests,[292] and this was best secured by having the Centre represent the children and by maintaining their confidentiality.[293] The Court relied on support from the CRC (and the ACRWC) to conclude that a child's right to participate in proceedings can be exercised through a legal representative, as opposed through directly or through their guardians.[294]

It is difficult to ascertain how the Court uses the CRC. It uses a direct application formula, by mentioning that CRC and ACRWC participation provisions form part of the domestic law,[295] but then reverts to discussing domestic norms. The impression is that domestic and international norms are applied jointly and each contributed with specific aspects to the reasoning of the Court: the constitutional standard reflected a right to *legal* representation (as opposed to other types of representation); the international standards recognised a right to participate through a representative (lawyer or otherwise); and the Children's Act standards were sufficiently wide to accommodate a combination of the previous standards: a right to participate through a legal representative. Thus, the position of the Court is founded on an amalgamation of domestic and international norms, in which little distinction is made between them in terms of legal status.

It is possible to approach the Court's ruling as an example of the CRC being used in the exercise of judicial discretion. The interests of children were a relevant consideration for the Court in deciding on the disclosure issue, and were identified, amongst others, by referring to the rights in the CRC. Perhaps because the CRC norms were not used in a normative capacity (but rather to reveal the interests relevant for a court's balancing act), reference to section 39(1)(b) and 233 of the Constitution was not made, and arguably would not have been necessary as none of the operations under the said provisions were engaged with by the Court.

[288] *Hoërskool* para 19.
[289] *Hoërskool* para 20.
[290] *Hoërskool* para 22. However, this section was not directly relevant because this was not a case where children were represented at the state's expense so as to avoid a substantial injustice, as required by the above section.
[291] See sections 10 (general right to participate); 14 (right to access to courts including being assisted by others) and 15 (a reiteration of standing criteria in the Constitution).
[292] *Hoërskool* paras 25, 26.
[293] Especially *Hoërskool* para 27.
[294] The Court noted: 'Section 14 emphatically states that every child has the right to bring a matter to court. It states further that a child may be assisted in bringing the matter to court. It does not state who must assist and does not repeat the common law requirement of being assisted by a guardian' (*Hoërskool* para 23).
[295] It states, with reference to prior cases, that 'The child's right to be heard and to have his or her views taken into account, in terms of the UNCRC and ACRWC, has been recognised as forming part of South African law' (*Hoërskool* para 20).

Reliance on the CRC in the exercise of judicial discretion is arguably present in two more cases. In *S v P*,[296] in deciding that a sentence of ten years imprisonment imposed on a grandfather for the rape of his grandson was appropriate, the Court mentioned the CRC generically, and stated that:

> [f]urthermore [to the obligations arising from section 28(1)(d)], in terms of our constitutional mandate to consider international law (see ss 231, 232, 233 and 234 of the Constitution), the United Nations Convention on the Rights of the Child, 1989, places an obligation on the Republic to eradicate violence against children.[297]

The relevance for the *courts* of the international obligations assumed by South Africa is not addressed, and the reference to constitutional provisions concerning the use of international law is not justified.[298] Consequently, it is difficult to ascertain whether the Court used the CRC simply to strengthen the obligations for sentencing courts arising from section 28(1)(d) of the Constitution, or whether the expectation of the Court is that sentencing courts consider the CRC as an independent factor when sentencing offenders who commit sexual crimes against children. The fact that the Court did not refer to section 39(1)(b) of the Constitution, leaves the latter possibility open.

Du Toit v Ntshinghila and others[299] concerned an accused charged with possession of child pornography who challenged the lawfulness of the prosecutors' decision not to provide him with copies of the images alleged to constitute child pornography.[300] It was held that a court had certain discretion in compelling the disclosure[301] and that countervailing interests may justify a decision not to disclose by way of copies (the normal practice) but to resort to a different means of disclosure (such as private viewing). In this case, the privacy interests of the children depicted in the images were amongst those countervailing interests. It was stated that the courts were enjoined to consider international law, as per sections 39 and 233 of the Constitution.[302] The interests of children were established in relation to a wide range of domestic and international norms,[303] including article 3(1) of the CRC,[304] and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and pornography, 2000.[305] Despite referring to sections 39 and 233 of the Constitution, the Court did not use the CRC to interpret section 35 of the Constitution or a statute. Like in *Hoërskool*, it used the CRC (and other legal instruments) to define the interests of children which were to be balanced against the right to fair trial of the accused, and which may justify some limitations thereof.

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[296] 2000 (2) SA 656 (SCA).
[297] *S v P* para 13.
[298] None of the sections quoted by the Court are relevant *in casu*.
[299] [2016] 2 All SA 328 (SCA) ('*Du Toit v Ntshinghila')*.
[300] This was an issue falling under article 35(3) of the Constitution, and related to the right to a fair trial.
[301] *Du Toit v Ntshinghila* paras 8 and 9.
[302] *Du Toit v Ntshinghila* paras 10-11, and fn 7. It is not clear, however, what statute was to be interpreted in a manner consistent with international obligations.
[303] Including article 4 of the ACRWC, section 28(2) of the Constitution, relevant jurisprudence and the Children's Act.
[304] *Du Toit v Ntshinghila p*ara 12.
[305] *Du Toit v Ntshinghila* para 11.

To conclude, the cases discussed above show that sometimes the courts engage with the CRC in a manner which does not match the formal framework described in part 5.2. This may be decried as a problematic practice but it has resulted in new ways of giving effect to the CRC, as discussed more fully in part 5.5 below.

5.5 Analysis

5.5.1 The engagement of the courts with the CRC

The courts have generally been receptive to the CRC, and related soft-law instruments, such as general comments of the Committee and other UN documents.[306] While the courts do not always give close attention to the Convention, apart from Jafta J's rejection of the CRC in *C v Department of Health* on grounds that it was not incorporated domestically, the legitimacy of references to the CRC has not been contested. As a consequence, there is little judicial preoccupation with the domestic legal status of the CRC. Whether this indicates an unconditional embracing of the CRC is a matter of some uncertainty, as the CRC has generally been invoked to obtain outcomes also supported by the Constitution, and the state has not opposed its application by courts.[307]

The enabling constitutional framework discussed in part 5.2 has saved the courts from having to tightly justify their consideration of the CRC, and created space for engagement with the substance of the CRC norms. Most judicial engagement with the CRC has occurred in the interpretation of section 28, as per section 39(1)(b) of the Constitution. Despite the latter section not requiring a consistent interpretation, in most cases the courts interpret the constitutional standard in harmony with the CRC.[308] In this way, aspects of the CRC become 'constitutionalised' in that by influencing the interpretation of the relevant constitutional norms, they influence the constitutional review process.[309] The process is facilitated by the convergence between the CRC and constitutional norms, often noted by the courts themselves.[310] Indeed, no case acknowledges the existence of potential inconsistency between constitutional norms and the CRC. There are cases in which the courts have noted differences between them, but the judges avoided formally declaring the conflict. In *AD v DW*, for example, Sachs J reconciled the paramountcy requirement in section 28(2) of the Constitution with the weaker formulation in article 3(1) of the CRC ('a primary consideration') by noting that in the specific context of adoptions the CRC itself recognised the best interests as 'the' primary consideration.[311]

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[306] In only two cases were general comments referred to (*DPP* para 77*; J v NDPP*). Other instruments referred to include the Beijing Rules (*DPP v P*) and Guidelines on Justice Matters involving Child Victims and Witnesses of Crime (*DPP*).

[307] In some cases, the state itself referred to the CRC in argument (*Christian Education*; *Fitzpatrick*) or supported a solution which was consistent with the CRC, even when that questioned the validity of domestic law (*YG v S*, where the High Court declared the reasonable chastisement defence to be unconstitutional).

[308] See, for example, the majority interpretation of section 28(2) of the Constitution in *De Gree*, so as to avoid conflict with article 21(b) of the CRC.

[309] *Fitzpatrick*; *Geldenhuys*; *C v Department of Health* per Skweyiya J; *J v NDPP*.

[310] *Christian Education*; *Brandt*; *CCL*; *Geldenhuys*; *Hoërskool.*

[311] Article 21 of the CRC.

Cases in which the courts used the CRC to interpret statutes in a manner consistent with the Convention are far fewer, with *DPP* and *Brandt* being the only ones identified during this study. There are cases, however, which although not statutory interpretation cases, see the two courts use the CRC as an analytical tool in assessing the constitutionality of impugned statutes. Thus, in *Christian Education* and *Geldenhuys*, the CC and the SCA respectively, partially justified their finding that relevant statutes were constitutional with reference to the CRC and state obligations thereof. The similarity between constitutional and CRC standards obscures the triangular relation between domestic statutes, the Constitution and the CRC, whereby the interpretation of statutes is 'controlled' both by the Constitution and the CRC. Jafta J was alert to this in *C v Department of Health*, when he took the view that because the Constitution did not require automatic judicial review of removal, such requirement could not be imported from the CRC. Regardless of the correctness of Jafta J's view, it indicates at least the possibility of tensions within the triangle. This is possible, for example, in areas identified as problematic by the CRC Committee.[312] Virginity testing is one such example: the practice is permitted by section 12(4)-(7) of the Children's Act under certain conditions, but it is criticised by the CRC Committee for being contrary to the CRC.[313]

Despite the general openness to the CRC, neither of the two courts considered the self-execution of the CRC under section 231(4) of the Constitution. One of the furthest-reaching constitutional tools to give effect to international treaties has been unutilised in relation to the CRC. This was a lost opportunity especially prior to the extensive legal reform operated through the Children's Act and the Child Justice Act, when the *lacunae* in domestic law created opportunities for self-execution. A clear illustration concerns the principle of subsidiarity. In *AD v DW*, Sachs J recognised the role of international law in filling gaps in domestic law, but did not consider the self-execution of the principle of subsidiarity. The reason remains a matter of speculation. It may simply be because the argument was not made; or because the Court considered that tension existed with the Constitution (the principle of subsidiarity favouring collective best interests while the constitutional standard favours individual best interests); or it felt bound to follow the interpretation precedent in *Fitzpatrick*; or perhaps because it was not necessary to do so considering that the Children's Act was awaiting entry into force and introduced the principle into the South African law. Whatever the reason, an opportunity to engage with the self-execution of the CRC was lost. This was not rectified in subsequent judgments.

In *C v Department of Health,* Skweyiya J referred to the CRC as 'the applicable international law'.[314] He stated that article 9 of the CRC 'sets the specific requirements in respect of the removal of children from their families',[315] indicating thereafter that the effect of the removal must be mitigated as provided for in the CRC.[316] The language used by Justice Skweyiya is strongly normative: the international standards are 'applicable', and the CRC 'sets the

[312] See part 5.3 above.
[313] CRC Committee *Concluding observations* 2016 paras 39-40.
[314] *C v Department of Health* per Skweyiya J para 32.
[315] *C v Department of Health* per Skweyiya J para 32.
[316] *C v Department of Health* per Skweyiya J para 34.

requirements' to be complied with. The CRC is approached in a 'relationship of authority'[317] with the domestic law, in that it determines when constitutional rights can be limited. Arguably, this goes beyond the process of interpretation envisaged by section 39(1)(b) of the Constitution, and borders on direct application.[318] In *J v NDPP*, Skweyiya ADCJ notes that article 12 'obliges state parties' to ensure child participation, and the General Comment No. 12, which interprets the above article, requires child participation throughout the juvenile justice process.[319] Nowhere does this Justice wrestle with the *domestic* value of this *international obligation*.

Sachs J and Skweyiya J do not refer to section 39(1)(b) in the above judgments. This may indicate a doubt that they genuinely embarked on an interpretive process as opposed to a covert direct application of the CRC. The intensity of the CRC influence in these cases, and the amalgamation of the CRC norms with constitutional or statutory norms without questioning the formers' domestic status in other cases[320] may indicate a *de facto* direct application of the CRC. Sloth-Nielsen and Kruuse are perhaps correct to argue that, in relation to the rights of children, South Africa 'has crossed the invisible line from dualism to monism'.[321]

This researcher does not share the positive feelings which accompany the above statement. The courts' avoidance of engaging with section 231(4) of the Constitution and its potential requirements is concerning. Insisting that courts engage with this section and distinguish between the effects of this section and those of section 39(1)(b) and 233 of the Constitution, or at a minimum, they indicate the section in the Constitution under which they consider the CRC may sound legalistic. However, when the border is so fine between 'importing' international standards and utilising them in different ways, reference to the relevant constitutional provisions may clarify the courts' use of the CRC. Self-execution and direct application are deeply contested legal institutions, whose controversies South African judges seem deliberately to avoid.[322] From this perspective, Jafta J was correct to question the technique used by Skweyiya J in *C v Department of Health*, which borders direct application but skips the potentially taxing enquiry in section 231(4) of the Constitution. Judges are generally guarded against incorporating international standards 'by the back door'.[323] Distinct criteria apply to decide if an international norm is self-executing or directly applicable, and such criteria have also been mooted in South Africa.[324] To draw the conclusion that courts apply the CRC directly because they quote, mention, have recourse to, consider or even give effect to the Convention may be reading too much into judgments in the absence of a formal engagement by the courts with section 231(4) of the Constitution. It is also difficult to accept that in the

[317] Expression used by Tuovinen 2013 note 49 at 663 in a comment to *Glenister II*.
[318] It may be possible to look at Skweyiya J's approach differently. This Justice may have drawn into the *substantive* content of the right to parental and family care, the *procedural* safeguards provided for in article 9(1) and (2) of the CRC (*C v Department of Health* per Skweyiya J para 34).
[319] Fn 45. The view that this is a case in which the CRC was directly applied is shared by Skelton (2018 note 99 at 414).
[320] *F v F*; *R v H*; *Hoërskool*.
[321] Sloth-Nielsen and Kruuse 2013 note 98 at 671. Skelton (2018 note 99) also advances the idea that in some cases (*CCL* and *J v NDPP*) the Constitutional Court has applied the CRC directly.
[322] See part 5.3 above.
[323] *Glenister II* per Ngcobo CJ para 112, and the position of Jafta J in *C v Department of Health*.
[324] Dugard 2005 note 4 at 62.

children's rights field, and *no other*, the South African courts have insidiously applied international standards directly. It is submitted that to the extent that the courts do not engage with section 231(4) of the Constitution when seeking to give direct effect to the CRC, they are incorrect and do not create good law. While *de facto* direct application may have resulted in favourable outcomes for children and may have given effect to the CRC, it does not lead to the formulation of legal principles which can be applied in subsequent cases. To this extent, these cases do not strengthen the legal position of the CRC in the South African law by cementing it in binding precedent which cannot be easily displaced.

The reluctance to consider the self-execution of the CRC (apart from the absence of the concept in arguments by counsel) may be linked with the practicalities of specific cases. Arguably, most children's rights cases in which the courts had an opportunity to engage with self-execution are cases in which the courts lacked an incentive to do so or because the self-execution was not a pressing need. In some cases, the courts were able to avoid it by relying on alternative reasoning, while in others a finding of self-execution would have made little difference to the outcome. In *Fitzpatrick*, the wide interpretation given by the Court to section 28(2) of the Constitution absorbed the principle of subsidiarity with no need to decide on its self-execution. In addition, in *AD v DW*, there was little point for the courts to declare the principle of subsidiarity as being self-executing whilst the Children's Act, which incorporated the Hague Convention was awaiting entry into force. Further, in most cases, the Convention was applied alongside a supporting constitutional provision. Given the convergence of the two categories of norms, the courts might have approached them as a normative conglomerate in which sharp delimitations are not necessary. Since the same outcome could be obtained by simply applying the constitutional norm, it would have made little difference to declare a CRC norm as self-executing.[325] Where the overlap between the Constitution and the CRC was not perfect, the CRC only contributed in small increments and did not create a normative 'storm' through a wholesale importation of Convention norms.[326]

Leaving behind the issue of the self-execution of the CRC, this researcher supports an overall positive assessment of how the South African highest courts have given effect to the CRC. Some concerns are raised about *how* the courts utilise the constitutional framework which legitimises their recourse to the Convention. This framework is important because it informs a court's decision as to whether, when and to what effect it considers the CRC, and it clarifies the perspective from which the CRC is approached. Nonetheless, the courts do not always

[325] In *Glenister II*, Ngcobo CJ stressed that even if a norm was to be considered directly applicable it only had the status of statutory (and not constitutional) norm (para 103 fn omitted).

[326] In *J v NDPP*, for example, the Court used the CRC to expand the scope of section 28(2) of the Constitution so as to include the right of child offenders to be heard throughout the entire criminal justice process. In *C v Department of Health*, Skweyiya J used the CRC to support his view that the emergency removal of a child had to be subject of an automatic judicial review. Judicial review of administrative decisions as well appeals against court orders exist in the South African law. The reliance on the CRC added only the qualification of such review being automatic.

acknowledge this framework.[327] While in some cases the type of usage can be deduced from the reasoning,[328] in other cases this is more difficult to do.[329]

In *Christian Education* and *Geldenhuys* the Court affirmed the constitutional validity of two statutes by a parallel reference to constitutional and international obligations, including those arising from the CRC. In *M v S*, Sachs J embraced the view that the CRC has become 'an international standard against which to measure legislation and policies'.[330] How is the position of the courts to be understood in the light of the *AZAPO* judgment, which affirms that the constitutionality of statutes and conduct is to be measured against the Constitution and not against international instruments?[331] The Court did not engage with the relevance of international obligations for the constitutional review process, and did not refer to section 39(1)(b) of the Constitution. By not referring to the relevant constitutional sections which inform their engagement with international law, deliberately or not, the courts avoid providing conceptual clarity on the relationship between the CRC and domestic law. They also avoid self-reflection on whether they consider the CRC in an interpretation enterprise or differently. Apart from raising analytical difficulties, this lack of clarity inhibits the identification and conceptualisation of innovations made by courts in considering the CRC and a debate about their constitutional legitimacy.

A paradox emerges when looking at the case law through the perspective of the formal constitutional framework discussed in part 5.2: this framework is concomitantly underutilised and insufficient to capture the courts' engagement with the CRC. It is *underutilised* in that the self-execution of the CRC is overlooked, and section 233 of the Constitution is seldom relied on. It is *insufficient* in that the courts appear to give effect to the CRC in ways other than those discussed in part 5.2 above. Two such additional methods of engagement seem to be reflected in the case law discussed here: the use of the CRC as a frame of reference[332] and the reliance on the CRC to guide judicial discretion. Admittedly, the identification of these methods is not infallible. It is brought about not because they are clearly reflected in judgments, but rather because they do not fit into the constitutional framework discussed in part 5.2. As a consequence, these categories are embryonic and uncertain as to their actual existence, legitimacy, normative boundaries and potential development into independent means to give effect to the CRC.

The use of the CRC as a reference framework is arguably present where courts make statements about the compatibility between domestic standards and the CRC. Thus, the CRC is acknowledged as a standard against which legislation and policies,[333] or even contracts are to be assessed;[334] or a background against which the constitutional provisions are to be

[327] *Hoërskool*; *Brandt*; *DPP v P*; *M v S* (in some aspects of reasoning) and *J v NDPP*.
[328] In *Brandt*, for example.
[329] *Du Toit v Ntsingilla*; *S v P* and *J v NDPP*.
[330] *M v S* per Sachs J para 16.
[331] See discussion in part 5.2 above.
[332] Sloth-Nielsen and Mezmur 2008 note 98 at 27.
[333] *Christian Education*; *DPP v P*; *Geldenhuys* and *M v S*.
[334] In *AB v Pridwin Preparatory School*, in a dissenting judgment, Mocumie JA decided that a contractual clause between parents and a private school which did not provide for the hearing of the child prior to the termination of

understood.[335] The CRC is an umbrella under which the domestic law develops and section 28 of the Constitution is understood. While this may resemble an interpretation process, it is arguably distinct. In some cases, the courts do not necessarily identify a specific constitutional provision which is interpreted in the light of a specific CRC provision.[336] An example is *M v S*, where the Court relied on the CRC not to interpret a specific constitutional provision, but rather to distil the right to be a child and to be treated differently. In this process, the Court was aided by the principles of the CRC, whose essence is reflected in the judgment. The technique may also be reflected in those cases where the courts stress the alignment between constitutional norms and the CRC,[337] or where compatibility with the CRC contributes to a finding of constitutionality.[338] As constitutional and CRC standards are considered identical, the former does not assist as an interpretation tool but strengthens the weight and legitimacy of the constitutional norm.

Reliance on the CRC as a guide to judicial discretion was placed in cases concerning the disclosure of documents during litigation, sentencing (of child offenders and also of adults when the victims were children),[339] appointment of intermediaries and disclosure of documents in the context of the right to fair trial.[340] It is not clear what constitutional support exists for this technique, and whether it will develop into an independent method to give effect to the CRC. Arguably, this is not inevitable or necessary, and it is possible for the courts to preserve the influence of the CRC in the exercise of discretion by utilising it in the interpretation of the Bill of Rights, which binds the courts in their exercise of judicial function.[341]

A final aspect is the consistency with which courts refer to the CRC. There are significant children's rights cases in which the CRC is not mentioned despite its relevance, or cases in which reference to the CRC is made only in minority or separate judgments.[342] Contrary to expectation, over a period of more than 20 years, the two highest South African courts have only engaged in some detail with the CRC in about 19 cases. The formal legal framework that mandates a consideration of international law has not, therefore, secured a consistent application of the Convention.

A question brought about by this unpredictable usage is whether the CRC should be considered even when domestic standards overlap with it, or when domestic law and jurisprudence are

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the contract for reasons of parental misconduct, was in conflict with the Children's Act and the CRC, *inter alia* (para 115).

[335] *CCL*.

[336] *Coetzee* may be seen as an illustration of this approach, where Sachs J was advocating for recourse to international instruments 'with a view to finding principles rather than to extracting rigid formulae, and to look for rationales rather than rules' (para 57).

[337] *CCL* and *Brandt*.

[338] *Christian Education* and *Geldenhuys*.

[339] *Mugridge v S* para 57 fn 17.

[340] *DPP*; *DPP v P*; *Du Toit v Ntshingila*; *Hoërskool* and *S v P*.

[341] Section 8(1) of the Constitution.

[342] For cases where the CRC is not referred to, see the introduction to part 5.2 above. In addition, in *Le Roux* and *C v Department of Health* the majority did not consider the CRC. In *Christian Education*, Sachs J missed the opportunity to refer to article 12 of the CRC when it expressed its regret that a curator *ad litem* was not appointed for the children. The same omission is found in *DPP*.

more developed than the CRC.[343] Domestic South African law is to a large extent aligned to the CRC, as discussed in part 5.3 above, and in many respects, the South African children's rights jurisprudence is more comprehensive than international developments. There might therefore be little incentive for the courts to consider the Convention should it not be useful. But, the wording of section 39(1)(b) of the Constitution compels courts to consider international law, as stressed by the majority in *Glenister II*.[344] In *Makwanyane*, however, Mokgoro J stressed that the reasoning behind the constitutional requirement to consider international law was the then-underdeveloped domestic jurisprudence. A subsidiarity reasoning is implied in this position, which envisages reliance on international norms when domestic standards are insufficiently developed.

Juma Musjid brings the usefulness of the CRC or otherwise to the fore. The Court mentioned the CRC several times and quoted from it, but did not discuss its standards, which have no discernible impact. The Convention might not have been 'useful': the matter concerned the horizontal application of the right to education, on which the CRC has no explicit input. Other cases discussed in this work confirm that courts may be drawn to the Convention should they consider it useful for the case at hand. In *C v Department of Health*, Skweyiya J found it 'helpful to consider the applicable international law'.[345] In *Le Roux*, the same Justice found article 3(1) of the CRC 'appealing'.[346] In *DPP*, Ngcobo J repeatedly mentioned article 3(1) of the CRC to stress the courts direct responsibility to give paramount consideration to the child's best interests. In *Brandt*, the SCA found that international instruments 'are detailed and provide specific suggestions'[347] in relation to the administration of juvenile justice. In *Hoërskool*, the Court stated that the CRC (amongst other things) was 'a useful starting point'[348] in identifying the interests to be balanced. Thus, if the CRC assists a court in concrete ways this may be an incentive to consider it. Identifying its usefulness may rest on demonstrating the added value of the Convention, an issue discussed more fully in part 5.5.2.

5.5.2 The impact of the CRC on judicial reasoning

The South African legal framework accommodates impact of different degree or intensity,[349] from self-execution to a benign 'consideration' of international treaties in the interpretation of the Bill of Rights.

Taken in the abstract, self-execution is a high-impact method of engagement. In reality self-execution has played no explicit role in the courts' giving effect to the Convention. It is through considering the CRC in the interpretation of the Constitution and, occasionally, statutes that the CRC has produced its most significant effects. The CRC has served as an analytical tool in

[343] Article 41 of the CRC provides that '[n]othing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) The law of a State party …'. Nonetheless, this article may not be relevant at all times.
[344] *Glenister II* per Moseneke DCJ and Cameron J para 201.
[345] *C v Department of Health* para 32.
[346] *Le Roux* para 211.
[347] *Brandt* para 17.
[348] *Hoërskool* para 19.
[349] Commenting on *Glenister* II, Brickhill and Bishop talk about the '*intensity* [emphasis in original] of the interpretive influence of international law' (2011 note 60 para 2.1.2).

the constitutional assessment of legislation[350] and existing judicial policies.[351] The position of the CRC has been boosted by courts applying section 39(1)(b) of the Constitution so as to create harmony between the CRC and the Bill of Rights. By contributing to the interpretation of constitutional norms and guiding their development, some (aspects of the) CRC norms can be said to have been indirectly constitutionalised or 'constitutionalised by proxy'. Thus, in *Fitzpatrick*, article 21(b) of the CRC was used to interpret section 28(2) of the Constitution. In *DPP*, article 3(1) was used to interpret the same section. In *Brandt*, the validity of the minimum sentencing legislation in relation to children aged 16-17 was confirmed because the Court was able to give it an interpretation consistent with section 28(1)(g) of the Constitution, which enshrined principles recognised in international law, including article 37(b) of the CRC.[352] In *CCL*, the Court noted the overlap between section 28(1)(g) of the Constitution and articles 37(b) and 40(1) of the CRC,[353] and declared minimum sentencing unconstitutional in as far as it applied to children. In *J v NDPP*, article 12 was used to give content to section 28(2) of the Constitution as applied in the context of juvenile justice. Through this process, the relevant CRC norms (or parts thereof) arguably acquire constitutional status. By contrast, if a Convention provision is declared self-executing, it acquires an under-constitutional and under-statutory status,[354] and it might not therefore be relevant in the process of constitutional review of law and conduct.[355]

As indicated in Chapter 1 above, this work has sought to identify cases of meaningful engagement with the CRC, where courts give a careful consideration to the content of the Convention and to its implications. While the two courts mention the Convention often, they seldom analyse its content. The reasons are not apparent, but considering that in many cases the CRC was used to support a position grounded in domestic law, usually in constitutional provisions, the courts might have taken the view that cursory attention suffices. This 'additional ballast'[356] approach to engaging with the Convention prevents a clear distinction between its independent effect and that of the Constitution.[357] Sometimes, additional light can be thrown on the independent effect of the Convention by comparing majority and minority judgments. In *De Gree*, reliance on the principle of subsidiarity by a majority of the SCA, permitted the judges to consider the best interests of children as a class, an aspect marginalised by minority judges who focused exclusively on the interests of the individual child.[358] In *C v Department of Health*, reliance on the CRC by Skweyiya J arguably gave his judgment a more solid justification when compared to the majority judgment. In *Le Roux*, again writing separately,

[350] *Fitzpatrick; Geldenhuys; Brandt; DPP v P; C v Department of Health; J v NDPP*.
[351] *M v S*.
[352] *Brandt* para 18.
[353] *CCL* paras 61, 63.
[354] See part 5.2.1 above.
[355] A question which arises here is to what extent, once a norm is declared self-executing and becomes domesticated, it retains its independent normativity as an international norm which can still be considered for interpretation purposes under section 39(1)(b) of the Constitution.
[356] Sloth-Nielsen and Mezmur 2008 note 98 at 27.
[357] This observation is also made by Skelton 2018 note 99 at 401.
[358] Compare, for example, *AD v DW* per Heher JA para 33 with Theron AJA paras 13, 17.

Skweyiya J was able to make practical suggestions as to the application of section 28(2) of the Constitution by considering article 3(1) of the CRC.

A further disadvantage of the bulk consideration of the CRC in parallel with the Constitution is that there is little clarity in a children's rights context on the approach the courts would take if a genuine conflict between the two norms existed. So far, the conflict has been avoided. Illustrative is the position in *AD v DW*, where Sachs J addressed the tension between the CRC, the Hague Convention and section 28(2) of the Constitution respectively. This Justice found the Hague formulation of the subsidiarity principle more in line with the best interests of the child under the Constitution, but identified support for this approach in the CRC itself by stressing that, in the adoption context, the best interests of the child was given more weight than in article 3(1) of the Convention.

A limited consideration of the substance of the CRC is not desirable, but minimal engagement cases should not be too easily dismissed as irrelevant. Sometimes, one may need to look further than forensically measuring use and impact. Thus, in *M v S*, Sachs J did not discuss the CRC extensively; only one article is mentioned and there are inaccuracies in his reference to the 'four great principles of the CRC'.[359] Sachs J treats the Convention as an over-arching standard which cannot be reduced to the mathematical sum of its articles, and whose philosophy is reflected in section 28 of the Constitution.[360] The normative value of specific CRC provisions is muted in favour of the general tenor of the Convention, as encapsulated in its principles. Sachs J's 'right to childhood' (meaning the right to special legal treatment for children) is built with support from the spirit of the general principles of the CRC.[361] Further, however limited the references are, they show the determination of the courts to use the Convention. This creates a solid basis for relying on it in subsequent case law, and opens the door to consider the input of the CRC Committee, which may enrich the jurisprudence of the courts.[362]

Where the courts have closely engaged with the wording of the CRC, meaningful consequences emerged. Thus, the CRC helped the courts justify a differential legal treatment for children in relation to adults,[363] or confirm the constitutionality of legislation protective of children that may interfere with the rights of adults.[364] The Convention was occasionally relied on to fill gaps in domestic law. In *Fitzpatrick* and *AD v DW* the courts have detected a gap in the

[359] Sachs J identifies the four CRC principles (survival, development, protection, and participation) in the work of South African Law Commission (*The Review of the Child Care Act (18 April 1998) First Issue Paper 13 Project 110* para 2.1) rather than in that of the CRC Committee, according to which the principles are non-discrimination, the best interests of the child, the right to survival and development and the right to be heard.
[360] 'The right to childhood' as Sachs J refers to it later (*M v S* para 19).
[361] Children's participation (*M v S* paras 18 and 19); survival and development (para 19); protection by the state (para 20).
[362] Up to now, the South African courts have engaged with the output of the Committee in six cases (including cases from the High Court): *DPP*; *J v NDPP*; *S v Kwalase* [2000] JOL 7128 (C); *Kirsh v Kirsh* (1999) 2 All SA 193 (C); *Mubake and Others v Minister of Home Affairs and Others* 2016 (2) SA 220 (GP); *YG v S*.
[363] *Brandt* (discretion in relation to minimum sentencing as applied to 16-17-year-olds); *J v NDPP* (need for judicial discretion in relation to placing the names of child sex offenders on the relevant Register); *Le Roux* (per Skweyiya J: defamation law should be adapted when applied to children).
[364] *Christian Education* (constitutionality of legislation prohibiting use of corporal punishment in all schools) and *Geldenhuys* (constitutionality of legislation setting a minimum age for children involved in sexual activity with adults).

domestic law, which they have addressed by interpreting section 28(2) of the Constitution so as to include considerations that informed the subsidiarity principle in intercountry adoptions. In *C v Department of Health* and *J v NDPP*, Skweyiya J relied on the CRC (articles 9 and 12 respectively) to interpret section 28(2) of the Constitution so as to require the participation of the child, despite the constitutional text not providing for such. In *AD v DW*, Sachs J utilises the distinction between section 28(2) of the Constitution and article 3(1) of the CRC to justify why the former is to be interpreted differently from the latter. In *M v S*, Sachs J noted the distinction between the 'paramount consideration' to be given to the best interests of children according to section 28(2) of the Constitution, as opposed to 'a primary consideration' as per article 3(1) of the CRC.[365] A plus in domestic protection was implied in this distinction, and thus a strict limitation inquiry under section 36 of the Constitution was needed to limit the right in section 28(2) of the Constitution. In *DPP*, Ngcobo J used article 3(1) of the CRC to stress the courts' direct obligations to give paramount consideration to the best interests of children as per the wording of that article. In *Le Roux*, Skweyiya J applied article 3(1) to guide the interpretation of section 28(2), in respect of how to consider the best interests of children in a legal enquiry where such interests may conflict with other legitimate interests. In *C v Department of Health*, close attention to article 9 of the CRC assisted Skweyiya J in detecting a defect in the domestic statutory framework, which then led to legislation being declared unconstitutional. An important conclusion arises from these considerations, namely that meaningful legal consequences have flown from the courts' stressing both the convergence and the divergence between the CRC and the domestic law.

The similarity between the constitutional and CRC standards questions the value of engaging with the CRC when the same outcome can be obtained by simply applying the Constitution. Two arguments support a consistent consideration of the CRC. First, it should not be too easily assumed that domestic and CRC standards are identical. Differences may only be unveiled in specific cases,[366] and the expanding jurisprudence on the rights of children (from the CRC Committee and domestic courts) may throw new light on the relationship between the two standards.

Second, the similarity between standards does not exclude certain differences between the domestic and international norms, which may reveal the added value of the CRC for domestic legal enquiries. Thus, in *Fitzpatrick* the engagement with the CRC revealed a gap in the domestic law, and it allowed the Court to discover in domestic legislation a legal provision which accommodated the concerns to which the principle of subsidiarity responded. In the same case, article 3(1) of the CRC provided support for the Court's view that the best interests of the child must remain a flexible standard which permits adaptation to individual circumstances.[367] In *De Gree*, consideration of the principle of subsidiarity in the context of applying section 28(2) of the Constitution revealed potential tensions between the best interests of children taken individually, and the best interests of children as a class. In *C v Department*

[365] *M v S* para 25 (also fn 31).
[366] As seen in *C v Department of Health*, which concerned the constitutionality of legislation purporting to have given effect to the CRC.
[367] *Fitzpatrick* para 18.

of Health, reliance on the CRC by Skweyiya J allowed this Justice to interpret section 28(1)(b) of the Constitution so as to recognise the primacy of parental and family care over other forms of care. Section 28(1)(b) is sparse and issues in relation to the separation of children from their family are not explicitly addressed. Engagement with the CRC enabled Skweyiya J to identify signposts which assisted him in the development of that section. In *DPP v P*, the Court used the CRC to give legal relevance to the deficiencies it discovered in the system for the incarceration of child offenders. By considering the CRC, the Court introduced, as a potentially relevant factor in sentencing, aspects not explicitly recognised in domestic law (here, the conditions for the incarceration of children). In *DPP*, the Court relied repeatedly on article 3(1) of the CRC to stress the courts' direct responsibility to protect the best interests of children in discharging their judicial function. This was enabled by this article's explicit mention (and its confirmation in subsequent general comments of the CRC Committee) of the *courts* as being bound to act in the best interests of the child. In *J v NDPP*, article 12 of the CRC and general comments of the CRC Committee provided the strongest explicit support for interpreting section 28(2) of the Constitution so as to include a right to be heard at all stages of the criminal process. In these cases, the CRC has not revolutionised the domestic law but it has in small increments assisted in its development by revealing problems with the domestic framework, assisting with discovering domestic norms which can address those problems, or by guiding the development of the law. The engagement of the courts with the CRC in these cases rested on the courts finding the CRC useful in specific cases. This suggests the need for a conscious effort to identify the added value of the CRC, both generally and in specific cases. In a legal system well-endowed with a progressive Constitution and comprehensive child-related statutes and case law, the sustainability of the use of the CRC may depend on persuading the courts of its continued value.

Whether judicial engagement with the CRC, which has not resulted in major overhaul of the South African law and whereby the impact of the CRC is often tied-up with the Constitution, amounts to *significant* impact may be a matter of contention, and perhaps, subjective evaluation. Whatever doubts there may be about the impact of the Convention, arguing that its influence on judicial reasoning is negligible would be inaccurate. Sometimes, the influence of the CRC has been rather subtle and diffuse, or difficult to conceptualise.[368] In this study, an attempt has been made to isolate as far as possible the independent effect of the CRC, including that 'something' which the Convention may have added to the reasoning of judges. But this may be difficult to establish in a syllogistic fashion. While this researcher does not subscribe to the view that mere coexistence of the CRC with a child-friendly outcome in specific judgments proves the impact of the CRC, she fully agrees that the influence of the Convention cannot be explained solely through micro-analysis,[369] and that the Convention has also

[368] This sometimes results in different evaluations of the application of the CRC by courts. For example, this writer has excluded the *Teddy Bear Clinic* case from this analysis, despite its importance, because the CRC is not mentioned. Skelton, however, includes it in analysis of cases which illustrate the application of international law by the Constitutional Court (Skelton 2018 note 99). She acknowledges that international law is not referred to in the judgment, but identifies in the reasoning of the Court concepts with equivalent in the CRC, and concludes that the judgment 'is arguably imbued with the principles derived' from the CRC and other international instruments (ibid at 410).

[369] By looking at individual cases (Sloth-Nielsen and Mezmur 2008 note 98 at 27).

exercised 'less tangible'[370] influences, including by 'changing hearts and minds over time'.[371] Despite their nebulous normative significance, these less tangible influences strengthen the legitimacy of the CRC as a habitual presence in the judicial discourse. They show that the Convention 'has become an essential frame of reference in the South African legal system'.[372] While in concrete cases the impact of the CRC may seem minimal, its acceptance and respect by the judiciary suggest that it has a well-established place in judicial reasoning. Although the Convention appears at times as a set of norms 'in abeyance', kept passive at times, courts know that it is available to use to prevent a straying from the values it protects.

5.6 Conclusion

The CRC is a well-established and largely uncontested presence in judicial reasoning in South Africa, a position clearly facilitated by an enabling constitutional framework consisting of provisions which require courts to consider international law and a provision which deals explicitly with the rights of children. This has not secured, however, a consistent and meaningful engagement with the CRC at all times. Therefore, this study puts forward a more cautious view of the impact of the CRC on domestic jurisprudence than those expressed by previous writers. Of concern are the limited attention given to the content of the CRC provisions in some cases; the over-reliance on section 39(1)(b) of the Constitution as a vehicle to give effect to the CRC, and the courts not acknowledging the constitutional provisions which justify their reliance on the CRC. At times, this prevents a full understanding of how the courts have used the CRC, and the identification of innovations in their engagement with the Convention.

Although section 39(1)(b) of the Constitution does not require that the Constitution (and in this context, section 28) be interpreted in conformity with the CRC, the Constitutional Court and the SCA have done so and generally preserved harmony between the two standards. The CRC is therefore often used alongside section 28 of the Constitution. This makes it difficult to discern the independent impact of the CRC on specific cases, which once more invites to caution when drawing conclusions about the effect of the Convention on the South African jurisprudence. No major overhaul of domestic jurisprudence can be unreservedly associated with the application of the CRC by courts in individual cases, and, in some of the leading children's rights cases, the impact of the CRC has been limited. This does not detract from the child-focused nature of such judgments, but it shows that the impact of the CRC is more limited than might perhaps be expected from a jurisdiction hailed as being very receptive of the Convention.

It cannot be denied that the CRC has left its mark on the South African jurisprudence, although conceptualising how this has occurred might not always be easy. The CRC has contributed to the interpretation of constitutional norms, and thus to the constitutional review process in some

[370] Sloth-Nielsen 2001 note 77 at 79.
[371] Ibid.
[372] Sloth-Nielsen and Mezmur 2008 note 98 at 27.

cases. It has also assisted in the development of the domestic law, by justifying, orienting or facilitating the development of the law in a child-focused direction. The influence of the CRC is also manifested in non-normative ways, the CRC having assisted courts to identify domestic norms which accommodate the spirit of the Convention or having served as a lens in the constitutional review process. Last to mention, but no less important, is acceptance of the Convention as a reference framework for understanding and developing domestic jurisprudence.

Overall, this case study shows that the CRC continues to have a meaningful role even in a legal system where the children's rights and their jurisprudence are well-developed.

Chapter 6: Analysis

6.1 Introduction

Three questions guided this study:

1. How do courts engage with the CRC in the light of the domestic framework which informs the relationship between domestic law and international treaties?
2. What has been the impact on the judicial reasoning of the engagement with the CRC?
3. What are the (facilitating or inhibiting) factors which have informed that engagement?

Article 4 of the Convention, its general implementation provision, is permissive rather than prescriptive in relation to the position of the courts. It does not require, like other treaties, that states enable courts to deal with allegations of rights violations under the CRC. It does not refer specifically to the courts, neither does it mention an obligation for states to provide remedies in cases of CRC violations, an obligation often associated with an international requirement for the courts to give effect to an international treaty. Thus, much is left to the domestic law to decide what role, if any, the courts are to play.

Two aspects counterbalance the weaknesses of article 4: that for some provisions, due to their nature, courts are the 'appropriate'[1] mechanisms of implementation; and the position of the Committee, which envisages a significant role for the courts in pursuit of a maximalist vision of the effectiveness of the CRC. As shown in Chapter 2, for the Committee, all CRC rights are justiciable; remedies (including judicial) ought to be provided if a violation of rights occurs; the courts are to apply the CRC directly in those legal systems where this is possible; and, regardless of the type of legal system, the courts should ensure that the Convention prevails over domestic law.

This maximalist, cosmopolitan vision of the Committee encounters the complexity of domestic systems. Domestically, courts are part of a greater institutional mechanism in which international law is not the dominant paradigm, and where the powers of the courts depend on internal constitutional arrangements and the powers of other branches of the state. Because courts are often tasked to manage the interaction between domestic and international legal orders, our understanding of their role is caught between the high international aspirations and the reality of domestic law. By analysing relevant case law from Australia, France and South Africa, this work has canvased this domestic reality by starting from the most basic point of a legal enquiry of this nature: the domestic legal value of the CRC, in the light of the formal rules which inform its relationship with the respective domestic legal orders.

[1] Article 4(1) of the CRC.

6.2 Direct and indirect application of the CRC: Monist *versus* dualist approaches?

The legal framework which regulates the interaction between the CRC and domestic law has been approached therefore as the basis and the basics of the courts' engagement with the Convention. This permitted the placing of the three systems on a spectrum: monist, where the CRC is directly applicable (France); dualist, where the CRC can be applied only indirectly (Australia) and hybrid, where the CRC can be applied both directly and indirectly (South Africa).

Generally, the courts in the three systems are aware of the CRC, but this has not resulted in a consistent engagement with it. Even in South Africa, where an explicit constitutional obligation exists to consider international law in the interpretation of the Bill of Rights, the CRC is not consistently applied. In Australia, the absence of an obligation to consider international law has 'ostracised' the CRC to the separate judgments of judges willing to discuss it. In France, international treaties are part of the domestic law, but whether that equates to an obligation for the courts to consider them is not certain. Encouragingly, in 2015, the Council of State found that a court committed 'an error of law' by not assessing the compatibility of a statutory provision with article 3(1) of the CRC.[2]

The techniques used by courts to give effect to the CRC are different, and they confirm that courts which can apply treaties directly conceptualise their enquiry differently from those which cannot.[3] Direct application, and its possible companion – the supremacy of the Convention over domestic law – is attractive as an implementation mechanism. Its advantages are obvious: immediate domestic application of the CRC; the possibility of expanding the range of rights recognised domestically; and potential priority over inconsistent domestic norms. The alluring simplicity of concepts such as direct application and supremacy of the CRC is deceiving, their application complicated, and, in practice, they have delivered less than they seem to promise. The CRC has vulnerabilities in relation to the direct application criteria,[4] a warning sign that the direct application of the Convention is contentious. In France, like in other monist systems,[5] courts have been wary of directly applying the Convention and have limited the direct application to a few provisions, predominantly article 3(1). Assertions of the Convention's domestic supremacy over statutes are even rarer, with the Court of Cassation not having yet declared a statute inconsistent with the CRC, and the Council of State having done so in two cases only.[6] South African judges have been silent on the self-execution of the CRC despite having had opportunities to enquire into the matter and their general openness to international law.

[2] CE, No. 375887, 2015. (CE for 'Conseil d'Ètat').
[3] M van Alstine 'The Role of Domestic Courts in Treaty Enforcement: Summary and Conclusions' in D Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 555 at 566.
[4] Part 2.3.1.4 Chapter 2.
[5] Ibid.
[6] Part 3.5.3.1 Chapter 3.

The reasons for the reluctance to apply the CRC directly do not always have a *legal* explanation. Thus, in France, the vulnerability of the Convention in relation to satisfying the criteria for direct application blended with judicial policy reasons (i.e., concerns related to the separation of powers). In South Africa, no reason is explicitly given by courts for not considering the self-execution of the CRC, although it may be possible that section 28 of the Constitution of the Republic of South Africa, 1996 ('the South African Constitution') was thought to make it unnecessary.

The binding nature at domestic level or the domestic *bindingness*[7] of the CRC has preoccupied the courts to different degrees, and from different perspectives. When directly applied, the CRC performs a role equivalent with a domestic statute, and is expected to have similar features. Thus, courts in France have enquired into the domestic normativity of the CRC '*as is'*.[8] From this perspective, reference to implementation measures, including legislation, in article 4; or certain norms being addressed to states; or some norms lacking clarity, precision or not creating subjective rights, led to a denial of the direct application of the entire CRC or some provisions respectively. Courts in Australia and South Africa have rarely enquired into the intrinsic legal qualities or normativity of CRC provisions,[9] because the Convention did not need to operate like a statute. Thus, norms unlikely to be applied directly in monist jurisdictions, such as articles 5,[10] 11 (and 35),[11] 18(1),[12] 19[13], 28,[14] 29,[15] and 34,[16] have been used indirectly in the latter jurisdictions, to interpret domestic law.

Based on this study, it can be suggested that a distinction is possible between highly normative courts (deeply preoccupied with the domestic *bindingness* of the CRC) and mildly normative courts (which are less so). This distinction cuts across the three systems. French courts and the Australian High Court are highly normative. The French courts only engaged with the norms they found of direct application, and some Australian judges have approached the absence of incorporation as a terminus point for their engagement with the CRC.[17] On the other side, the

[7] The term has been coined by Karen Knop in K Knop 'Here and There: International Law in Domestic Courts' 1999-2000 (32) *New York University Journal of International law and Politics* 501. See also part 1.5 above.
[8] A Nollkaemper *National Courts and the International Rule of Law* (2011) at 118.
[9] For such exceptions, see references to the potentially aspirational nature of the CRC in *AMS v AIF* [1999] HCA 26 per Gleeson CJ, McHugh and Gummow JJ para 50; *MIMIA v B* [2004] HCA 20 per Callinan J para 222; or the refusal to consider the Convention by Jafta J (concurred with by Mogoeng CJ) in *C and Others v Department of Health and Social Development, Gauteng* 2012 (4) BCLR 329 (CC) ('*C v Department of Health'*) because it was not incorporated (para 109).
[10] *Re Jamie* [2013] FamCAFC 110 per Bryant CJ (Australia).
[11] *Murray v Director, Family Services, ACT* [1993] FamCA 103 ('*Murray'*) para 159.
[12] *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* [2004] HCA 49 ('*Re Woolley')* per Kirby J (Australia).
[13] *B and B and the Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FamCA 451 ('*B and B v MIMIA'*) (Australia); *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) ('*Christian Education'*) (South Africa); *ZZ v Secretary, Department of Justice* [2013] VSC 267 ('*ZZ*') (Australia).
[14] *Christian Education* and *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* 2011 (8) BCLR 761 (CC) ('*Juma Musjid'*) (South Africa).
[15] *Juma Musjid*.
[16] *Geldenhuys v The State* [2008] 3 All SA 8 (SCA) *('Geldenhuys'*) (South Africa) and *ZZ* (Australia).
[17] Some judges noted the vulnerability of the CRC as an unincorporated instrument (Mason CJ and Deane J in *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 *('Teoh')* para 28*;*

South African courts are mildly normative and they do not delve much into the domestic *bindingness* of the CRC. Nonetheless, status-related issues were explicitly relied on in all three systems when the courts/judges intended *not to give effect* to the CRC.[18]

The highly normative courts seem concerned with the legitimacy of their reliance on the Convention. In South Africa, constitutional injunction relating to the use of international law, provisions concerning the rights of children and, more recently, comprehensive child-focused legislation enacted, *inter alia*, to give effect to the Convention, reflect a political and legal agreement about the domestic value of international law generally and of the rights of children in particular. This assures the courts that when giving effect to the CRC they are not at variance with the will of the legislature. In Australia and France, on the other hand, the reluctance to give constitutional and full legislative effect to the CRC may discourage the courts from applying the Convention, even if this results in a violation of international obligations.[19] In Australia, the contrast between the jurisprudence of the High Court and that of the Family Court and the Victoria Supreme Court respectively, shows that legislative endorsement has positive effects on judicial engagement with the Convention.

While it is useful to divide legal systems into monist and dualist in order broadly to understand the different ways in which courts engage with the Convention, the operationalisation of each approach may differ between countries. Thus, in France, the CRC is automatically a part of the domestic law, has supra-legislative status but no constitutional clout; it has been applied mostly directly, with limited consideration to indirect application. In South Africa, a self-executing CRC provision would have an infra-legislative status, but self-execution has been rendered *de facto* redundant by indirect application, and especially by the injunction that the Convention be considered in the interpretation of the Bill of Rights. In Australia, the CRC can be relied on for statutory interpretation purposes primarily if ambiguity exists in legislation and the laws were passed after the CRC came into force for Australia. A CRC-consistent interpretation should then be followed. In South Africa, the CRC must be considered for the interpretation of the Bill of Rights whether it is ambiguous or not, but a consistent interpretation therewith is not mandatory.

Thus, beyond general features (directly applicable or not; supreme over domestic law or not; incorporated or not; applicable for interpretation purposes or not) it may be difficult to identify a monist or dualist typology of judicial application of the CRC. This is compounded by the fact that, apart from the formal structure of reception (connected to whether a system is monist or dualist), there are other factors which mark the courts' application of the CRC.

Callinan J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6 ('*Lam')* para 147.

[18] Jafta J (Mogoeng CJ concurring) in *C v Department of Health* (South Africa); denial of direct effect to socio-economic rights, for example, in France; and frequent observations by some judges of the High Court of Australia, that the CRC has not been domestically incorporated.

[19] McHugh J in *Teoh*; McHugh and Gummow JJ in *Lam*; French Court of Cassation (note 104 Chapter 3).

Similarities

Despite differences, there are also notable similarities between the three systems. This encourages giving consideration to a cosmopolitan framework as a means better to understand the role of the courts in giving effect to the Convention. First, the CRC itself is judicially considered in all systems even when its standards have been absorbed to a certain extent in domestic legislation. The preservation of the normative autonomy of the CRC shows that courts value engaging with it directly, without the mediation of the legislature. In many instances, the courts have not departed or are unlikely to depart from how the legislatures have given effect to the Convention, but direct references stress its continued domestic relevance.

The legal framework which enables the courts to engage with the CRC has been underutilised in all three systems. Direct application and assertions of CRC supremacy remain cautiously handled in France,[20] and the South African courts have never formally engaged with the self-execution of the CRC. In Australia, the High Court has engaged minimally with the Convention as a tool of statutory interpretation; the implications of the CRC being a declared treaty under the Australian Human Rights Commission Act have not been clarified; and the CRC is yet to play a role in the development of the common law.

At the same time, in Australia and South Africa courts have given effect to the CRC in ways that do not fit neatly in the formal framework of reception. The terms 'non-normative' or '*sui generis'* approaches'[21] have been used in this work to designate these techniques, which go beyond what the courts are explicitly authorised to do by the legal framework; and lack an intrinsic constraining effect. The CRC is used instead as a reference framework or as an analytical tool in relation to the domestic law. Admittedly, these methods are amorphous and difficult to gather under a conventional legal term, but denying their existence would ignore the resourcefulness of domestic legal systems, judicial creativity and the reality of adjudication in an increasingly complex normative environment. Some examples illustrate these points. In several South African cases the CRC has been used as a reference norm against which domestic legislation and policy were assessed.[22] In Australia, Kirby J expressed the view that courts 'can note and call attention'[23] to the inconsistency between the domestic law and the CRC irrespective of the fact that they are bound to give effect to the domestic law. International law can be used as a 'conceptual context' for disputes or to 'express the basic values which must be taken into account'[24] (including the interests of children) as they 'reveal but do not resolve conflicting interests'.[25] A better understanding of domestic law,[26] a discovery in the domestic

[20] A similar situation exists in Romania (see M Couzens 'Romanian courts and the UN Convention on the Rights of the Child: A case study' 2016 (24) *International Journal of Children's Rights* 851).
[21] Knop talks about 'less deterministic' or persuasive usage (Knop 1999-2000 note 7 at 511-512).
[22] Part 5.5.1.
[23] *MIMIA v B* per Kirby J para 171.
[24] *AMS v AIF* per Kirby J para 169.
[25] *AMS v AIF* per Gleeson CJ, McHugh J and Gummow J para 50.
[26] *Koroitamana v Commonwealth of Australia* [2006] HCA 28 per Kirby J para 66.

law of convergent or carrier norms for the CRC,[27] and a 'better' discharge of judicial function[28] are other possible non-normative influences. The non-normative techniques may have arisen from the tension between the domestic vulnerability of the CRC and the courts' acknowledgement of its relevance. They have sometimes assisted the courts to transcend the normative vulnerability of the CRC, and allowed its spirit to penetrate the judicial reasoning. By doing so, these methods assist in building an autochthonous children's rights jurisprudence infused with CRC values but easier to accept domestically.

These methods have been criticised for allowing the courts to circumvent the difficulties raised by clarifying the role and influence of international law on domestic judicial reasoning.[29] Without dismissing this concern,[30] a different perspective can be suggested. Therefore, the formal rules of reception enshrined in a state's law may be approached as explicitly/positively authorising certain techniques of engagement with the CRC, without, however, excluding techniques not explicitly mentioned therein. The latter techniques should not therefore be seen as illegitimate, and could be used if they do not otherwise breach domestic law.

Attempts at mainstreaming the rights of children in judicial reasoning have been inspired or supported by the CRC in all jurisdictions, and have been based primarily on innovative uses of article 3. Jurisprudence in Australia and France demonstrates this point most clearly.[31] In Australia, article 3(1) of the CRC has been invoked in support of extending the welfare jurisdiction of the Family Court beyond the confines of the parent-child relationship,[32] including to immigration detention.[33] In France, article 3(1) has become very popular, with courts bringing under its umbrella many disputes in areas of law where the interests of children are not an explicit statutory consideration. These courts have engaged in a constitutional-type application of article 3(1) of the CRC, which arguably compensates for the absence of constitutional recognition for the rights of children in these jurisdictions.

Another commonality between jurisdictions is the courts' reliance on the CRC when they wrestle with the question as to whether a special/different legal treatment should be applied to children as opposed to adults.[34] This does not always result in a technical application of the

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[27] In *Teoh,* Gaudron J argued the existence of a common law right by observing the convergence between the CRC and the domestic law. For a similar approach, see Hereux-Dubé J in *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 ('*Baker*') para 71. In *Minister for Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC) *('Fitzpatrick')*, prompted by CRC arguments, the South African Constitutional Court identified in the domestic law provisions which satisfied the requirements of the subsidiary principle as applied to inter-country adoptions.

[28] For example, Bell J in *DPP v TY (No 3)* [2007] VSC 489 (Australia).

[29] D Dyzenhaus, M Hunt and M Taggart 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' 2001 (1) *Oxford University Commonwealth Journal* 5 at 18.

[30] There are other concerns with these techniques, such as their informal nature and dependency on judicial discretion, which make them vulnerable to judicial abandonment.

[31] In South Africa, article 3 is often invoked, but its independent impact is more difficult to establish because of its overlap with section 28(2) of the Constitution.

[32] *Re Z.*

[33] *B and B v MIMIA.*

[34] In France, illustrative are *L'Association Aides* and *L'Observatoire* 2008 (see discussion in part 3.5.3.2); in Australia, *Teoh* and *B and B v MIMIA*; and in South Africa, *M v S (Centre for Child Law Amicus Curiae)* 2007 (12) BCLR 1312 (CC) ('*M v S'*); *Centre for Child Law v Minister for Justice and Constitutional Development and Others (NICRO as Amicus Curiae)* 2009 (11) BCLR 1105 (CC) ('*CCL'*); *J v National Director of Public*

CRC, but it enables the judges either to look at the matter in a novel way, not explicitly required by the domestic law, or at least to give the rights of children more visibility in the application of domestic law.

To conclude, broadly dividing legal systems into monist, dualist and hybrid is useful only as a first step in understanding the interaction between the CRC and the courts in a cosmopolitan world community. Domestic variations in the reception framework influence how courts engage with the CRC, and prevent the development of a unitary and detailed model (monist or dualist) of engagement. At the same time, regardless of the model of reception, similarities exist, and they encourage the search for a cosmopolitan framework which has an inevitable degree of generality and within which the role of the courts can be understood.

6.3 The impact of the courts' engagement with the CRC

If assessed across the three systems, the norms with which the courts have engaged are varied and include all categories of rights in the CRC. The courts seem to prefer the norms which are closely connected to the traditional judicial function (i.e., juvenile justice, family disputes, or child protection) including those which mention the courts. This supports the point made in Chapter 2 that courts may engage differently and display different levels of openness toward the Convention,[35] depending on the type of norm up for consideration. Thus, the mention of courts in article 3(1) encouraged them to engage with this article.[36] A similar attempt was made by the Full Court of the Family Court in Australia in relation to article 19, but it was rebuked by the High Court.[37] The juvenile justice provisions have also been popular with the courts.[38] The reasons for the openness toward certain provisions are not certain, but they may relate to their usefulness for the courts and the fact that their values can be accommodated by the existing laws or in exercising judicial discretion, and in this they pose a limited risk in relation to the separation of powers. By contrast, in-depth engagement with CRC socio-economic rights is lacking.[39] The reasons may vary from controversies in relation to their justiciability in

Prosecutions and another (Childline South Africa and others as amici curiae) 2014 (7) BCLR 764 (CC) ('*J v NDPP'*).

[35] Part 2.2.1.

[36] *Re Z* and *B v MIMI*A (Australia); *DPP* (South Africa); P Bordry 'Le Conseil d'État français et la Convention internationale relative aux droits de l'enfant' 2001 (5) *Journal du Droit des Jeunes* 16 at 19 and J Rongé 'La Convention internationale relative aux droits de l'enfant: On avance ou on recule?' 2004 (10) *Journal du Droit des Jeunes* 9 at 19 (France).

[37] *B and B v MIMIA* per Nicholson CJ and O'Ryan J para 286 (see the emphasis on 'for judicial involvement'). Callinan J (in appeal) held that the CRC does not require to be given effect by conferral of jurisdiction on the Family Court (*MIMIA v B* para 222).

[38] Courts in all systems engaged with articles 37 and 40 of the CRC.

[39] Occasionally, the courts mention such rights. See, for example, *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796 per Garde J para 146 and *Certain Children V Minister for Families and Children* (NO 2) [2017] VSC 251 per Dixon J para 262 (both referring to article 6(2)); *ZD v Secretary to the Department of Health and Human Services* [2017] VSC 806 para 76 (referring to article 24).

Australia and France, to the availability of an autochthonous register of socio-economic rights and developed jurisprudence in South Africa.[40]

The impact of the CRC on judicial reasoning in the three systems is better understood as a continuum of legal effects rather than an '"all-or-nothing question": does the international provision have *full* direct applicability or is it simply *irrelevant* for the judge?'[41] The continuum contains cases that give benign consideration to the CRC (where its legal consequences are difficult to discern), as well as cases where the Convention drives the legal reasoning (high-end impact); and intermediate cases. Constitutional frameworks of reception condition to a certain extent the impact of the CRC, with certain outcomes being possible in some jurisdictions but not in others. For example, Australian or South African courts cannot set aside domestic legislation if contrary to the CRC; Australian courts cannot apply the CRC directly; and French courts can set aside (i.e., not utilise them in a specific dispute) domestic norms incompatible with the CRC but cannot declare them invalid. To what extent this affects the meaningfulness of the Convention's impact is discussed below.

From an abstract perspective, direct application is at the high-end of the continuum because it makes possible the immediate application of the CRC as domestic law; it may result in the protection of rights not explicitly provided by domestic law; and it may cover gaps in domestic law, and control the legality of administrative acts. Direct application enables the CRC to be applied as the 'rule of decision'.[42] When complemented by the domestic supremacy of international treaties, direct application may result in the CRC being given priority over conflicting domestic law. Interpretation and other indirect usages are, arguably, medium or lower-end methods because the domestic operation of the Convention depends on the existence of domestic law which requires interpretation or development.

The French case law illustrates best the use of the CRC to produce a high-end impact. In *Benjamin*, article 7 of the CRC enabled the Court of Cassation to protect a right not provided for in the domestic law, and thereby filled a gap therein. Directly applying the CRC and asserting its supra-legislative status, the Council of State set aside domestic legislation and invalidated administrative decisions (individual or normative) inconsistent with the Convention. This is not to say that the CRC has had a significant impact in all cases; instead, French judges (writing extra-judicially) have noted the concomitant use of the CRC and ECHR which deprives the former of a clear-cut impact.[43] One should not forget, however, that the complexities surrounding direct application/self-execution, have created obstacles or even deprived the Convention of domestic effect.

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[40] For example, the relevant Convention provisions were simply mentioned in *Juma Musjid* (article 28); *Christian Education* (articles 28 and 29).

[41] M Scheinin 'General introduction' in M Scheinin (ed) *International Human Rights Norms in the Nordic and Baltic Countries* (1996) 11 at 19 (emphasis in the text). Similarly, J Pieret 'L'influence du juge belge sur l'effectivite de la Convention: retour doctrinal et jurisprudential sur le concept d'effet direct' in J Pieret and A Schaus (eds) *Entre ombres et lumières: cinquante ans d'application de la Convention européenne des droits de l'homme en Belgique* (2008) at 27 (pre-print version).

[42] Term used by D Sloss 'Treaty Enforcement in Domestic Courts: A Comparative Analysis' in D Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 1 at 11.

[43] See part 3.5.3.2.

Case law in Australia and South Africa contains many examples of low-end impact. Judges of the High Court of Australia have pointed to the absence of incorporation of the CRC or the lack of ambiguity in the statute requiring interpretation to give cursory or no attention to the Convention.[44] In South Africa, the CRC is arguably sometimes invoked as 'additional ballast',[45] contributing little to the reasoning of the courts.

The reality of judicial application shows, nonetheless, that the CRC can have a meaningful impact, of equivalent intensity, in all types of systems. As a system which combines dualist and monist features, the South African case study shows that typically dualist methods of application may secure a more powerful impact than the typically monist ones. Thus, a self-executing norm has infra-constitutional and infra-statutory status, while contribution to the interpretation of a constitutional provision results in an indirect constitutionalisation of the relevant Convention aspect.[46] Even without being directly applied, the CRC has contributed to filling gaps in the domestic law,[47] and has resulted in positive consequences for the development of domestic law both when its similarities and/or differences with the South African Constitution were considered by judges.[48]

In *Teoh*, the High Court of Australia placed the Convention at the centre of its reasoning and the importance of the rights provided by it prompted the Court to craft a new avenue to give effect to unincorporated international treaties. Unfortunately, the openness to the CRC in *Teoh* has not been replicated since in the judgments of this Court. The Full Family Court found support in the CRC for mainstreaming the rights of children and their best interests in judicial decision-making, for giving more prominence to the rights of children as independent rights holders, and for expanding the protection for the rights of children beyond that recognised by domestic statutes.[49] Victoria Supreme Court judges utilised the CRC to guide their discretion and to secure a more child-friendly legal treatment for children in conflict with the law.[50]

Further, when assessing impact, one should also look beyond specific cases. Positive uses of the CRC in the common law, primarily dualist systems, create binding legal precedents with future impact, as opposed to the ad hoc decisions on direct application rendered by the civil law courts. Also, while auxiliary, the interpretive role of the Convention in dualist or hybrid states may not be neutral, and may thus control the meaning of domestic law since it is the CRC-compatible meaning that should be preferred.[51]

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[44] Part 4.5.3.
[45] J Sloth-Nielsen and B Mezmur '2 + 2 = 5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)' 2008 (16) *International Journal of Children's Rights* 1 at 27.
[46] See Skweyiya J's position in *C v Department of Health* and *J v NDPP* in relation to the right to be heard.
[47] In *Fitzpatrick*, where it used the CRC to address the absence of an explicit domestic recognition of the principle of subsidiarity as applied in intercountry adoptions.
[48] *M v S* and *Le Roux and Others v Dey; Freedom of Expression Institute and Another as Amici Curiae* 2011 (6) BCLR 577 (CC) ('*Le Roux'*) per Skweyiya J (see part 5.5.2).
[49] Part 4.5.3.
[50] Part 4.4.6.
[51] Section 39(1)(b) of the South African Constitution does not, technically, require that the Bill of Rights be interpreted in conformity with the CRC. Nonetheless, in practice, this conformity was sought by judges.

The Convention has also had subtle, but equally meaningful, effects. The influence of the Convention is often reflected in small increments in the domestic law rather than in major overhaul therein. It has enriched judicial reasoning with legal aspects that might have been absent had it not been considered.[52] It has provided the legal justification to consider the rights of children in matters where such rights have not been considered before;[53] it has stimulated the drafting of child rights-focused judgments;[54] and it has prompted the courts to look beyond the artificial compartmentalisation of children's rights issues into discrete areas of domestic law.[55] In Australia and France, countries with limited or no constitutional protection for the rights of children and with no consolidated legislation incorporating or transforming the CRC, the Convention has been relied on to justify the mainstreaming of children's rights or interests in judicial reasoning.[56] The influence of the CRC has been at times diffuse, and visible in the attitude of judges rather than in legally quantifiable outcomes or reasons.[57]

Common to the cases in which the CRC has had a meaningful impact is that it has added to the reasoning of the courts *something* not immediately derived from other legal instruments (national or international). The Convention had therefore an added value in the legal reasoning.[58] The South African case study contains examples of how careful consideration of article 3(1) of the CRC, with its similarities and distinctions with domestic law, enabled judges to derive meaningful legal consequences.[59] Examples of the added value of the CRC exist in other legal systems, where, for example, the interests of children were considered even where domestic law did not require such.[60]

The impact of the CRC is not always easy to identify because of its potential overlap with other legal instruments. This is not unique to the CRC, considering that the application of international law is 'contingent on domestic law'[61] and that legislative reform has reduced the need for direct reliance on international instruments.[62] The Convention blends with other norms and contributes to *some* aspects of a judgment rather than being determinative of the reasoning on its own.[63] The convergence of the CRC with some domestic norms in Australia[64] and South Africa has enabled judges to rely on it and enrich the meaning of domestic law. In France the

[52] Part 5.5.2.
[53] *Teoh* (immigration)*;* the best interests jurisprudence in France (immigration, deportation, law enforcement against parents, etc; see part 3.5.3.2).
[54] Illustrative are *De L v Director-General Department of Community Services (NSW)* [1996] HCA 5 per Kirby J (Australia, discussed in part 4.4.3.1); the Council of State judgments in surrogacy and *kafala* cases (part 3.5.3.1); *Fitzpatrick; Le Roux* per Skweyiya J and *C v Department of Health* per Skweyiya J in South Africa.
[55] *Re Z* and *B and B v MIMIA* (Australia).
[56] *Re Z* and *B and B v MIMIA*.
[57] For example, Nicholson CJ and Kirby J.
[58] As defined in part 1.5.
[59] Part 5.5.2.
[60] Article 3(1) jurisprudence in France (part 3.5.3.2), and cases such as *Teoh* and *In Re TLB* [2007] VSC 439 in Australia.
[61] A Nollkaemper 'The Duality of Direct Effect of International Law' 2014 (25) *The European Journal of International Law* 105 at 110.
[62] M Killander and H Adjolohoun 'International law and domestic human rights litigation in Africa: An introduction' in M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 3 at 14.
[63] France is the exception in that when applied directly, it is the CRC which determines the solution.
[64] See the Victoria Supreme Court and Family Court jurisprudence.

overlap between the CRC and the ECHR has contributed to the acceptance of the Convention by courts.[65] While this makes the impact of the Convention less clear,[66] the joint application or consideration of the CRC with other norms has created normative alliances with more well-established domestic or international standards, which has facilitated the effect of the CRC.

The meaningful impact of the CRC rests on a careful consideration of its standards, which is, however, often lacking. Sometimes judges refer generically to the Convention, without identifying relevant provisions.[67] In most such cases, the Convention is not taken sufficiently seriously and has a limited impact. Admittedly, these cases are not desirable.[68] However, their significance should not be easily dismissed as they testify to a judicial belief in the independent domestic value of the CRC. While they do not unpack its meaning, such judgments create a foundation on which more meaningful engagement can take place in the future. They show an increased acceptance of the CRC that may assist in overcoming some of the obstacles associated with its application,[69] including concerns about its suitability for judicial application.

Reluctant engagements with the CRC or its plain rejection have value too by calling for attention to potential challenges raised by its application. For example, the reluctance of the French courts to apply the CRC directly invites reflection on its direct applicability. French judges have also raised questions about the implications of an *in abstracto* application of article 3(1) of the CRC to control the operation of legislation. The judgment of Jafta J in *C v Department of Health* calls into question the reluctance of South African judges to discuss the self-execution of the CRC. The judgment of McHugh J in *Teoh* calls for closer analysis of the implications of applying the best interests of the child to matters concerning children indirectly; while Gleeson CJ and McHugh J's views in *Re Woolley* point to a need to develop more sophisticated children's rights arguments, which take into consideration the tensions between different rights of children.[70] Also in *Re Woolley*, Callinan J criticised the argument on behalf

[65] Part 3.6.2.3. This has occurred in other European jurisdictions (Couzens 2016 note 20). The manner in which the EU law has facilitated the acceptance of the CRC by French courts is less clear and requires closer analysis. For the period 2009 (when the Charter of Fundamental Rights of the European Union came into force) - 24 June 2019, only three (3) judgments of the Court of Cassation mentioned article 24 of the Charter (dealing with the rights of children) (years of judgments: 2012, 2014 and 2015) and five (5) judgments of the Council of State did so (the first judgment being in 2014). It may be that by 2009, the two French high courts were already accustomed to applying the CRC by itself or in combination with the ECHR in such a way that it made recourse to the Charter less important.

[66] In *B and B v MIMIA*, for example, the Family Court used the CRC as an 'alternative/reserve' reasoning; in *Teoh*, Gaudron J referred to the CRC as being of 'subsidiary significance' (para 3).

[67] *Re Woolley* (Gleeson CJ paras 7, 11, 31; McHugh J paras 107, 114) (Australia); Jafta J in *C v Department of Health* and cases cited in note 123 Chapter 5. For France, see for example, CE, No. 400055, 2016; CE, No. 406256, 2017.

[68] Tobin has criticised the superficial engagement of the courts with the CRC (J Tobin 'Judging the judges: Are they adopting the rights approach in matters involving children?' 2009 (33) *Melbourne University Law Review* 579). Waters refers to this as 'harmless window-dressing' (M Waters 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' 2007 (107) *Columbia Law Review* 628 at 660) but regards it more positively, as an indication of the courts' willingness to engage with international law.

[69] J Himes *The United Nations Convention on the Rights of the Child: Three Essays of the Challenge of Implementation* (1993) at 7. Himes referred to social and political acceptability which may enhance legal acceptability, but the idea remains valid in relation to court usage.

[70] They rejected a blanket approach to children's vulnerability and lack of capacity, which they saw as dependent on individual characteristics or circumstances.

of the children for failing 'to deal adequately with the hard and inescapable reality that their vulnerability could well be greater if they were to be separated from their parents',[71] should their application succeed. There is a sense arising from the comments in *Re Woolley* that children's rights arguments were 'beaten with their own stick'. Although discouraging, these comments should be seen as tools to identify the vulnerabilities of the CRC, and as sounding boards for children's rights arguments. In this way, they may assist in developing arguments that are more sophisticated and more upfront in dealing with the idiosyncrasies and contradictions inherent in the rights of children, and, as a consequence, are more convincing for judges.

6.3.1 Article 3(1) of the CRC: A favourite of the courts

Article 3(1) and its impact deserve special attention as the most popular provision with the courts surveyed in this study.[72] This is surprising considering the vagueness criticism raised in relation to it.[73] Nonetheless, the alleged legal weakness of article 3(1) has turned out to be its strength, with domestic and international jurisprudence[74] confirming it as a repository of legal opportunities which can advance the rights of children.

Several consequences are associated with the use of article 3(1). It encouraged courts to extend the reach of domestic best interests concepts or legal provisions,[75] and has been central to the courts' preoccupation with providing children with a legal treatment that gives consideration to their age and vulnerability. In South Africa, this was achieved through the CRC-inspired section 28(2) of the Constitution, while in Australia and France, article 3(1) of the CRC was used to compensate for the absence of an overarching statutory or constitutional norm that requires that children be treated differently in law.[76] In France, the wide direct application of article 3(1) has achieved a quasi-constitutionalisation of the best interests of the child, which is now frequently applied in civil and administrative cases. Article 3(1) has also assisted the courts to consider the rights and interests of children independently so as to avoid the negative consequences of parental behaviour (such as immigration breaches, criminal offending) being visited on their children.[77] It has sometimes been used as an entry point for CRC values when its domestic status remained uncertain,[78] or it has enabled courts to recognise to children

[71] *Re Woolley* per Callinan J para 254.
[72] The same has been found in other jurisdictions. See, for example, W Vandenhole 'The Convention of the Rights of the Child in Belgian Case Law' in T Liefaard and J Doek (eds) *Litigating the Rights of the Child*: *The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 105; L Lundy et al (2012) *The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries* (online).
[73] See, for example, U Kilkelly 'The Convention on the Rights of the Child after Twenty-five Years: Challenges of Content and Implementation' in M Ruck, M Peterson-Badali, and M Freeman (eds) *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (2017) 80 at 85.
[74] CRC Committee *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)* ('*General Comment 14'*).
[75] See especially, *Re Z* and *B v MIMIA* (Australia); *Cinar; L'Association Aides* and *Observatoire* (France); *M v S* (South Africa).
[76] In Victoria, once a 'best interests' provision was inserted in a statute with a wide scope, this provision was used as an entry point for other CRC rights. See discussion in part 4.4.7.3 above.
[77] *Teoh* (Australia); *M v S* (South Africa); France (part 3.5.3.2 A). For other jurisdictions, see *Baker* (Canada); *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (NZ) ('*Tavita'*); *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* [2011] UKSC 4 (UK) ('*ZH'*) (part 2.3.2.1).
[78] See especially the French jurisprudence, where values covered by articles not recognised as having direct effect were given protection under article 3(1) of the CRC (part 3.5.2).

benefits not granted by other legal instruments and to justify considering children's interests in matters concerning them only indirectly.

Article 3(1) has prompted some domestic acknowledgement of the complexity of the concept of the best interests of the child. While the phrase 'the best interests of the child' is often used monolithically, it has different formulations in different jurisdictions and distinct meanings in different contexts,[79] and it is given different weight.[80] *Teoh* in Australia has perhaps started this conversation by advancing a procedure-oriented vision of its meaning, according to which the best interests of the child is to be given a paramount importance but not at all times priority or maximum weight. Seemingly independent of *Teoh*, this approach has been developed or refined further, in Australia and elsewhere. For example, Kirby J noted in *AMS v AIF* that the Family Law Act reflected an approach to the best interests of the child similar to that of article 3(1) of the CRC, which enabled the courts to take into account other legitimate interests.[81] The South African Constitutional Court operates extensively with the article 3(1)-inspired constitutional provision, which it accepted as an independent right and consequently made subject to limitations according to the South African Constitution. The French Court of Cassation expects transparency in relation to consideration given to the best interests of the child, and the Council of State expects that domestic law is assessed against article 3(1).[82] Under its influence, the traditional best interests of the child concept (confined to family and protection matters) has transformed into a *human rights* concept. The extent and the implications of this transformation are still to be fully explored, but what is immediately apparent is that the human rights version of the best interests trades its absolutism (i.e., its automatic prevalence over other interests) in exchange of a wider scope.[83]

Another consequence of this transformation is perhaps the recognition of the independent normative power of article 3(1) (and inspired norms) in that it can generate its own legal consequences and it has an independently enforceable legal content.[84] The crystallisation of the independent clout of article 3(1) and associated norms is at different stages in the three jurisdictions, and has taken place in different ways,[85] but the case law is evolving. Notable is the emergence of a critical discourse in relation to the over-use of best interests which may stifle the development of other rights of children. In France, over-reliance on article 3(1) may have limited the chance of other CRC provisions being considered for direct application. The suitability of an *in abstracto* application of article 3(1), to assess the validity of some domestic

[79] Compare, for example, article 3(1) of the CRC with section 28(2) of the South African Constitution and section 17(2) of the Victoria Charter.
[80] Compare adoption with immigration matters.
[81] *AMS v AIF* per Kirby J para 193.
[82] Part 3.5.3.1.
[83] This is not to say that the best interests of the child can never be the determinative factor. A clear example os such situation remains that of adoption.
[84] This is contrary to earlier views that article 3(1) does not create specific rights and duties (P Alston 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' 1994 (8) *International Journal of Law and the Family* 1 at 15; G Van Bueren *The International Law on the Rights of the Child* (1998) at 46).
[85] In South Africa, section 28(2) of the Constitution, was declared an independent right in *Fitzpatrick* paras 17-18. Gaudron J in *Teoh* made a similar statement in relation to the Australia common law. In France, however, article 3(1) is applied without being declared an independent right.

norms, has also been questioned.[86] Critical discussions about the over-use of the best interests of the child may also be starting to emerge in the other jurisdictions.[87] Some courts have managed to avoid the 'convenience application' of best interests provisions. For example, the Victoria Supreme Court has applied section 8(3) of the Charter of Human Rights and Responsibilities Act 2006 (Vic) ('the Victoria Charter') (right to equality before the law) to treat children differently from adults.[88] The legal justifications for a differential treatment for children are not therefore dependent on a 'monopoly' of the best interests of the child.

The reasons for the popularity of this article may be a matter of some speculation, but two explanations can be suggested. First, domestic judges are familiar with the concept of the best interests of the child, and domestic *aliases* provided a bridge between domestic law and the CRC, with judges considering that they did not radically depart from what was already accepted domestically. Second, the flexibility of article 3(1) has allowed the courts to mould its application on a wide range of legal issues and contexts.

A cautionary note is necessary. While the CRC and domestic jurisdictions may converge in giving legal recognition to the best interests of the child, they may do so in different ways. Article 3(1) of the CRC is a constitutional-type standard, in that it envisages its application by all state bodies and in all the decisions concerning the child. This is not likely to be replicated in states where the best interests of the child has only a sectoral recognition. An illustration is provided by the Australian law. The best interests of the child is 'the paramount consideration' when the Family Court decides whether a parenting order should be made;[89] the Family Court has a welfare jurisdiction wherein it 'must regard the best interests of the child as the paramount consideration';[90] and the 2006 Victoria Charter recognises the right of the child 'to such protection as is in his or her best interests and is needed by him or her by reason of being a child'.[91] While *the best interests of the child* may be a common 'keyword' in the above norms, their meaning and their reach differ considerably. This fragmentation of the concept may deny it many of the benefits that article 3(1) seeks to deliver.

A surprising finding in relation to the best interests jurisprudence is that it converges with the position of the Committee. In 2014, the Committee issued a general comment on article 3(1), where it noted the tripartite nature of the article (principle, rule of procedure, and an

[86] See part 3.5.3.1, especially sources in note 250.
[87] McHugh J in *Teoh*; Fogarty J in *Re Z* para 29 (raising concerns about state security secrecy, taxation, social security information, or Cabinet discussions); Callinan J in *Lam* para 147 (in relation to sentencing of a parent). D Bryant 'It's my body, isn't it? Children, medical treatment and human rights' 2009 (35) *Monash University Law Review* 193 at 207 (urging open consideration of children's rights rather than 'to quietly subsume human rights considerations under the rubric of "best interests"'); N Cantwell 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' in T Liefaard and J Sloth-Nielsen (eds) *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (2016) 61; M Couzens 'Le Roux v Dey and Children's Rights Approaches to Judging' 2018 (21) *Potchefstroom Electronic Law Journal*; A Skelton 'Child Justice in South Africa: Application of International Instruments in the Constitutional Court' 2018 (26) *International Journal of Children's Rights* 391 at 415.
[88] Part 4.4.7.2.
[89] Section 60CA of the Family Law Act.
[90] Section 67ZC(2) Family Law Act.
[91] Section 17(2) of the Victoria Charter.

independent right).[92] Most interesting is the convergence between the view of the Committee and that of some courts in relation to article 3(1) and similar domestic norms respectively, regarding the existence of a *right* to have a child's best interests taken as a primary consideration. This is a significant leap for the concept of the best interests of the child, which has previously been approached as a principle or as a standard, but not as a *right*. The position of the Committee has long been preceded by judicial developments in the systems discussed here. Mason CJ and Deane J in *Teoh* implied that article 3(1) has an independent normative value and Gaudron J argued the existence of a 'common law right … to have a child's best interests taken into account, at least as a primary consideration' in discretionary decisions which affect a child's welfare.[93] Gaudron J's association of the best interests of a child with an independent right was pioneering and preceded by almost two decades the similar statement made by the Committee. In 1997, the French Council of State applied article 3(1) independently in *Cinar*; and in 2000, in *Fitzpatrick*, a unanimous South African Constitutional Court declared that section 28(2) of its Constitution, which largely reflects article 3(1), contains an independent constitutional right.

The extent, the reasons and the potential arising from this convergence of views require further analysis.[94] At a minimum, it shows that it is possible for courts from different legal traditions and legal systems to adopt a similar view towards article 3(1); and that national courts and the Committee, despite their different institutional perspectives on the CRC, share some common views on this article. These findings open up opportunities for development, as discussed in Chapter 7.

6.4 Factors that influence the courts' engagement with the CRC

One of the research questions of this study concerned the identification of factors which facilitate and inhibit respectively the application of the CRC by domestic courts. During the study it became apparent that some factors may play an ambivalent role (both facilitating and inhibiting). For example, constitutional provisions which permit direct application facilitate the application of the CRC, but when they are given a restrictive meaning, they become obstructing factors. Further, a presumption that domestic legislation is to be interpreted in conformity with international obligations is a facilitating factor, but may be undermined by clear legislative provisions to the contrary. A different distinction between factors was made therefore between CRC-related (mainly international) and non-CRC-related (mainly domestic) factors. This distinction responds broadly to the approach discussed in Chapter 2, which draws attention to the different perspectives (domestic and international) in relation to the role of the courts in giving effect to the CRC.

[92] CRC Committee *General Comment 14* (especially para 6).
[93] *Teoh* per Gaudron J para 4.
[94] This can relate to whether and how courts and the Committee have mutually influenced their respective positions in relation to the best interests of the child. The wording of the *General Comment* and of respective judgments suggest independent and parallel developments, but a definitive conclusion should not be drawn exclusively based on these texts.

6.4.1 CRC-related factors

These factors relate to the content of the CRC. As discussed in Chapter 2, article 4 has vulnerabilities which diminish its usefulness as support for the role of the courts in giving effect to the CRC. However, of the courts surveyed here,[95] only the French Court of Cassation relied on this article to justify its reluctance to apply the Convention, a position which it abandoned later. Callinan J mentioned article 4 in *MIMIA v B* to note that this article gives the state discretion in implementing CRC obligations,[96] but made no comments in relation to its potential consequence for courts. Thus, in the jurisdictions analysed here, article 4 of the Convention has had a neutral role in the application of the CRC by courts.

The CRC has been criticised for being vague, aspirational, or programmatic. This concern has not been universal amongst courts,[97] and France is the only system where these concerns have had some prominence; but even there, they are not ventilated in judgments – rather in extra-judicial commentary by judges. As French judgments are sparse, there is room for uncertainty and speculation about the reasons for courts having rejected the direct application of some CRC provisions (e.g., the provision is insufficiently clear and precise, or it does not create an individual right, or it is addressed to the state). The intrinsic normativity of the CRC provisions has not been queried in South Africa; and, in Australia, judges have only occasionally raised *obiter* concerns about the potentially aspirational nature of the Convention.[98]

The variation in approach arguably arises from the different bases on which the courts engage with the CRC. As discussed in part 6.2 above, when the Convention is applied directly, courts are preoccupied by its intrinsic normativity; while when it is applied indirectly, the attention shifts to the underlining value protected in the text, which the judges can extract regardless of how this is formulated.

The absence of a communications procedure prior to the adoption of the 2011/2014 Optional Protocol on a communications procedure generated restrictive judicial views concerning the role of the courts in giving effect to the CRC in Australia and France.[99] To what extent the monitoring mechanism has truly influenced the courts remains open to debate, considering that, in France at least, the restrictive stance was abandoned before the Protocol was adopted. More clarity on how a stronger monitoring mechanism might influence the courts' application of the CRC will be obtained once the courts interact with Committee's findings on individual communications. This will verify the view that domestic courts act differently if they know they do not have the 'last word'[100] on the application of the Convention. So far, some courts

[95] But see its influence elsewhere (part 2.2.1 and 2.3.1.4).
[96] *MIMIA v B* per Callinan J para 222.
[97] Chapter 2 note 216, with a discussion of judicial practice in Romania and Bulgaria.
[98] Callinan J in *MIMIA v B* para 222; and, somewhat obliquely, Gleeson CJ, McHugh and Gummow JJ in *AMS v AIF* para 50.
[99] See the view of some French judges and academics (part 3.3.1) and McHugh J in *Teoh*.
[100] T Buergenthal 'Self-executing and non-self-executing treaties in national and international law' in *Collected Courses of the Hague Academy of International Law/Recueil des cours* (1992) 303 at 394. See discussion in part 2.3.1.3.

have showed explicit[101] or implicit[102] concern about contravening international obligations; but, for other courts, allegiance to domestic institutions has been a more powerful consideration.[103]

6.4.2 Factors not related to the CRC

6.4.2.1 Structure of reception

Once 'received' in a domestic system, the CRC does not operate in a vacuum, but instead it interacts with domestic laws, substantive and procedural, which constitute the 'structure of reception'[104] for the CRC.

The relationship between domestic laws and the CRC can be diverse, ranging from inconsistency or compliance to neutrality (i.e., laws that *prima facie* neither promote nor hinder the domestic effect of the Convention). The solutions differ between systems in relation to laws which are inconsistent with the Convention, as discussed in part 6.2 above. However, when there was no overt conflict with the CRC the position is more similar, with courts being assured that giving some effect to the CRC does not conflict with the will of the legislatures. This comes to the fore most clearly in Australia. The weaknesses in the legal status of the Convention were overcome when judges identified convergence with domestic law. Notable are, for example, Gaudron J's view on the existence of a common law right to consider the best interests of the child expressed in *Teoh*; and attempts by a majority of the Family Court to extend its welfare jurisdiction relying on article 3 of the CRC in *RE Z* and *B and B v MIMIA*. The similarity between some CRC standards and the Family Law Act led to a more relaxed position in relation to the ambiguity requirement as a precondition for using the CRC to interpret this statute. The convergence between sentencing rules at common law and juvenile justice norms in the CRC have enabled the Victoria Supreme Court to rely on the Convention in the exercise of sentencing discretion.[105] By contrast, the Australian High Court found it difficult to accommodate the Convention in immigration cases, where domestic law was hostile to its values.

In other systems too, convergence between the CRC and domestic norms encouraged judges to give effect to the Convention. In France, it was argued that the Court of Cassation accepted the direct application of article 12 when statutory recognition was already given to this article;[106] and, in South Africa, the general convergence of section 28 of its Constitution with the CRC has been a significant facilitating factor in the engagement with the CRC.

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[101] See, for example the position in *Tavita*; *ZH*; Arbour J in dissent in the *Canadian Foundation* (all discussed in part 2.3.2.1 above).
[102] The French Court of Cassation has adjusted its surrogacy jurisprudence to that of the ECtHR.
[103] In France, it has been argued that the Court of Cassation deliberately refrained from a direct application of the CRC to determine the legislature to give effect to it (C Sciotti-Lam *L'applicabilité des traités internationaux relatifs aux droits de l'homme en droit interne* (2004) at 412). Further, the Australian High Court ignored the views of the Human Rights Committee in *MIMIA v B* (with only Kirby J mentioning them in his judgment). Also, McHugh J in *Teoh* and McHugh and Gummow JJ in *Lam*.
[104] Sciotti-Lam 2004 note 103 at 441.
[105] Part 4.4.6.
[106] Part 3.3.2.

These experiences suggest that the narrower the gap between domestic law and the CRC, the easier it is for the courts to give it effect. The convergence of domestic law with some CRC provisions may illustrate their 'domestic value',[107] and thus the existence of some domestic agreement between courts, executives and legislatures about their importance. This makes the application of Convention norms less controversial, even in the absence of legislative incorporation or transformation.[108] The attitude of the state in litigation where the CRC is invoked may also give an indication of the domestic value of a treaty. For example, in many of the Australian cases discussed in Chapter 5, the reliance on the CRC by parties was opposed by the state;[109] while in South Africa, not only did the state not oppose CRC-related arguments,[110] but it relied on the CRC itself.[111]

While *in abstracto* some systems may appear less CRC-friendly than others, *in concreto* this may be compensated by the resourcefulness of the domestic law and the courts' ability to use autochthonous legal mechanisms to give effect to the CRC. In Australia, some judges have used judicial discretion as an entry point for the CRC,[112] or have relied on non-normative avenues as a strategy to engage with the Convention.[113] These mechanisms have also been used in South Africa in order to diversify the effect of the CRC. In Australia and South Africa, separate or dissenting judgments have developed the CRC jurisprudence. Notably, this is how the Convention was 'kept alive' by Justice Kirby in the High Court of Australia; separate or dissenting judgments by other justices have also raised questions of importance for the operation of the CRC.[114] In South Africa, where the Convention was ignored by the majority, it was sometimes addressed in separate judgments.[115]

6.4.2.2. Social and political context

The favourable political and social context has been a facilitating factor in the application of the CRC in South Africa, which is not replicated in the other jurisdictions. Children's contribution to the fight against apartheid, a strong pro-children's rights advocacy movement at the time when the country was drafting a post-totalitarian constitution, and a responsive political will have contributed to the constitutionalisation of the rights of children and the creation of a climate favourable for their enforcement. Having contributed to the demise of apartheid, human rights were generally supported and credited with the power to achieve social change. In the field of children's rights this is clearly illustrated by the numerous cases of wider societal interest which involved the participation of public interest litigation bodies or NGOs. No such boosts operated in the other two systems. In France, the engagement with the CRC is dominated by individual cases, and by what appears to be a technically-oriented application of

[107] Waters 2007 note 68 at 701.
[108] Waters suggests that courts assess the 'domestic value' of a treaty from the perspective of the executive and the legislature; the higher the domestic value of a treaty, the more forward the courts can be in its application (ibid).
[109] *Teoh; Re Z; B and B v MIMIA; Re Woolley*.
[110] *C v Department of Health.*
[111] *Fitzpatrick* para 27; *Christian Education* para 13.
[112] See Bell J in *DPP v TY* (discussed in part 4.6.2 above).
[113] Part 4.7.2 above.
[114] See McHugh J in *Teoh*, and Callinan J in *MIMIA v B.*
[115] Skweyiya J in *Le Roux* and *C v Department of Health*.

the law, somewhat discrete from the social context.[116] In Australia there has been little general and political support for human rights, including children's rights, with this being partly rationalised through an unjustified feeling of 'self-sufficiency'[117] in terms of human rights performance.

6.4.2.3 Jurisdictional arrangements

The jurisdiction of domestic courts may influence whether and how they engage with the Convention. In France, for example, administrative courts have been well ahead of their judicial counterparts in applying the CRC, because their jurisdiction includes verifying the legality of administrative action, including against international instruments which form part of the public law. It was sufficient therefore for international norms to have some constraining power, even if they did not have *stricto senso* direct effect.[118] Judicial courts, on the other hand, do not control the lawfulness of official acts and instead, decide disputes between individuals, in relation to individual rights.

Jurisdictional issues feature in Australia too. The Family Court and Victoria Supreme Court have a quantitatively and qualitatively richer children's rights jurisprudence than the High Court. Although the basic rules concerning the relationship between the CRC and domestic law applied by these courts are the same, the jurisdiction of the former courts strengthens their ability to apply the Convention. The influence of the CRC on the successive reforms of the Family Law Act 1975 makes it easier for the Family Court to rely on the Convention. Further, the 2006 Victoria Charter allows reliance on the CRC for statutory interpretation purposes. This has even enabled the Victoria Supreme Court to consider the general comments of the Committee and therefore to enlarge the reference framework for the analysis and the interpretation of the domestic law.

Thus, different courts have different tools to recognise and give effect to the normative value of the Convention, and its interaction with multiple courts allows for the discovery of the diverse legal potential of the CRC.[119] Depending on the system, a norm which may not be of direct application could inform the control of constitutionality of a statute,[120] or may be used for interpretation purposes; or a norm not applicable by a court in the immigration context could nonetheless be applied by another in a juvenile justice context.[121] A diverse case law

[116] With more cases, however, being promoted by specialised NGOs, it is possible that this approach may change.
[117] J Tobin 'Finding rights in the "wrongs" of our law: Bringing international law home' 2005 (30) *Alternative Law Journal* 164 at 164.
[118] See definitions in Chapter 2 part 2.3.1.2.
[119] This may occur in other jurisdictions too. In *Baker* (discussed in more detail in part 2.3.2.1), Iacobucci J would have found it unproblematic to use the CRC in assessing the reasonableness of administrative discretion if that discretion involved a Charter right but disagreed with such use if a Charter right was not at stake (para 81).
[120] Article 34 in *Geldenhuys* (South Africa); articles 28 and 29 in *Christian Education* (South Africa). Arguably, in South Africa this is less important than in jurisdictions where direct effect is central to giving effect to treaties. Nonetheless, analyses from latter category of jurisdictions show that courts 'liberated' from the constraints of direct effect, were able to consider the Convention more closely. This is the case with the Belgian Constitutional Court (Vandenhole 2015 note 72 at 110).
[121] See, for example, the position regarding article 37 by the High Court of Australia in *MIMIA v B* by contrast with that of the Victoria Supreme Court in the *Certain Children* cases.

develops in this way, building up trust in the CRC as a legal instrument and encouraging its further application.[122]

Although the engagement with the CRC by different courts is relatively autonomous, the case law may be shaped by their interaction. In France the case law of the Council of State has influenced the Court of Cassation and *vice versa*.[123] The ECtHR jurisprudence has encouraged the application of the Convention in France (and other European jurisdictions[124]). The benefit of the interaction with the case law of constitutional and international courts is that they are accustomed to applying abstract norms. In doing so, they challenge possible misconceptions held by ordinary courts that CRC provisions are not 'really law'.[125] In this way, they indirectly encourage the application of the Convention by ordinary domestic courts.

However, the courts' interaction has not always been favourable to the CRC. In Australia, attempts by the Family Court to expand the influence of the CRC have been rejected by the High Court.[126] In France, the confined children's rights jurisprudence of the Constitutional Council did not stimulate the courts to apply the Convention. Jurisprudential reinforcements of a CRC-problematic position in relation to anonymous births, for example, by the Constitutional Council and the ECtHR provided no incentive for the Court of Cassation to assess the compatibility of domestic law with the CRC. Nonetheless, imperfect alignment between the positions of various courts allowed the CRC to develop in the interstices. In Australia, the limited application of the CRC by the High Court left space for the Family Court and the Victoria Supreme Court to develop their Convention case law by taking advantage of their more favourable statutory position. In France, the Court of Cassation relied on the CRC to depart from the jurisprudence of the Constitutional Council and the ECtHR, and to take a position more favourable to children.[127]

Thus, the existence of multiple jurisdictional options to engage with the Convention has increased its chances of application.

6.4.2.4 The level of jurisprudential development of the CRC and the rights of children

This factor has an ambivalent nature which plays up differently in different legal systems. A developed CRC jurisprudence may encourage its further development. In France, the more accepted direct application has become the more willing have been the courts to apply article 3 and to extend its ambit. It is also possible that the more judicially developed legal norms are, the less likely it is for them to be perceived as imperfect, imprecise or incomplete. This would enhance the CRC's chances to be seen as meeting the objective criterion of direct application. Conversely, the absence of case law may enable the application of the CRC. In Australia, for

[122] In France, for example, the jurisprudence of the Council of State has been credited with influencing the change in the Court of Cassation's own approach to the direct application of the CRC.
[123] Part 3.6.2.3.
[124] Couzens 2016 note 20.
[125] To paraphrase Scheinin 1996 note 41 at 17.
[126] *GPAO*; *MIMIA v B*.
[127] *Benjamin* and the application of article 7 of the CRC.

example, the limited application of the CRC by the High Court allowed other courts to develop their Convention jurisprudence.

Developed autochthonous or regional child-related jurisprudence may interfere with the application of the CRC. In Australia, the well-developed jurisprudence in relation to the welfare and *parens patriae* jurisdictions has made it difficult successfully to rely on the CRC in order to displace or to develop the traditional views on the best interests of the child along the lines of article 3(1) of the CRC.[128] In South Africa, there is a thriving children's rights jurisprudence, whose driver has been section 28 of the Constitution. The existence of a developed autochthonous children's rights jurisprudence may reduce the importance of the CRC for the courts and lead to inconsistent reliance on it. The jurisprudence of the ECtHR has indirectly encouraged French courts to consider and accept the CRC.[129] The first case in which the Court of Cassation applied the CRC directly is said to have been so influenced, and the same court changed its approach to surrogacy under the influence of the ECtHR. There is, however, a risk that if ECtHR (or ECJ) case law acts as a filter for the CRC, courts will not analyse the Convention independently from its relationship with the ECHR or European Community law. Thus, if the reference point for the application of the CRC and the rights of children more generally remains the domestic or supra-national jurisprudence there is the risk that alternative legal views in relation to the Convention (such as those of the CRC Committee) will be ignored.

6.5 Conclusion

The formal rules of reception which permit a distinction between monist, dualist and hybrid systems and direct or indirect application cannot capture or fully explain how domestic courts apply the CRC. They remain useful as a starting point, but ultimately prove their own insufficiency. The interaction between domestic courts and the CRC is complex, and no framework of reception is inherently more effective than the other. The monist approach with the possibility of direct application and domestic supremacy of the CRC has sometimes been less effective than dualist-like indirect forms of application. That is because of the complexity of factors which inform the judicial application of the CRC,[130] which go well beyond terse constitutional or legal statements about the domestic status of the Convention.

[128] *MIMIA v B* and *Re Woolley*.
[129] This is valid for other European jurisdictions too. See Couzens 2016 note 20, in relation to Romania.
[130] This work has identified the structure of reception, social and political context, diversity of courts and the development of the children's rights jurisprudence in a given state.

Chapter 7:

Conclusions and Recommendations

7.1 Concluding remarks

Early studies and early judicial practice gave limited consideration to the CRC as a legal instrument. Many gaps were left in understanding what was and could be the role of the courts in giving it effect. The current context has changed considerably, and although limited to three jurisdictions, this study shows that courts apply the CRC and do so widely, proving the legal versatility of the Convention and its domestic relevance. Judicial application of the CRC – as the ultimate confirmation of its *legal* dimensions – refutes concerns about its unenforceable nature due to its alleged aspirational character.

In taking a cosmopolitan perspective, this study attempted to capture the diversity of interactions between the CRC and domestic courts in legal systems with a variety of formal rules of reception. This cosmopolitan perspective was analytical rather than normative, in that it was accepted that there is a common aim to give effect to the CRC but there are many ways in which this can be achieved, including in relation to judicial application. The novelty of the CRC and the global challenge that its standards have posed to all legal systems created the premise that domestic experiences, however disparate, hold lessons that are useful for other jurisdictions. This cosmopolitan premise is further strengthened in this study by the similarities which exist even between these very different legal systems. Institutionally, this perspective is supported by the Committee, whose most comprehensive output – the general comments – are undifferentiated between legal systems, and that regards courts generally as important players in giving effect to the Convention. It is concerning that so far the courts have given only limited attention to the Committee's output, depriving their reasoning of an important reference point in relation to the rights of children. However, the judicial engagement with the CRC has been dynamic, and generally in a favourable direction. The factors which have determined this dynamic differ between jurisdictions,[1] but they include the output of international bodies such as the ECtHR (in France) or the CRC Committee (for the Victoria Supreme Court). This creates hope that the expanding Committee output (including in relation to individual communications) would not be ignored by the courts, and would be able to influence their engagement with the Convention.

With a weak general implementation provision in article 4, much depends on what domestic law permits or enables the courts to do to give effect to the CRC. The traditional entry point for analysing that domestic law has been the methods of reception of international treaties, and primarily the dichotomy between direct and indirect application. In the three jurisdictions

[1] Varying from (limited) legislative endorsement in Australia; increased familiarity with the CRC and its direct application in France; and constitutional endorsement in South Africa.

analysed here the formal reception framework was a predictor of the method of engagement (direct/indirect) and of the potential consequences of application (whether the CRC is a rule of decision or an aid in the interpretation of domestic instruments). Paradoxically, this formal framework was both underutilised and surpassed by the courts. Thus, some possibilities of giving judicial effect to the CRC have not been used,[2] while in some cases courts went beyond the formal framework in their method of engagement and the consequences of their application.[3]

Although direct application is *prima facie* the most far-reaching and effective way to give effect to the CRC, the reality contradicts this assumption, and restrictive approaches to direct application have frustrated these expectations. Instead, this study shows that regardless of the rules of reception, all legal systems may provide opportunities for meaningful engagement with the Convention. To appreciate this meaningful impact it is necessary to acknowledge that this is not an issue of 'full effect' versus 'no effect'. In all systems there are degrees of effect or even diffuse effects that cannot be captured in conventional legal terms. With the exception of France, where CRC provisions have sometimes been the rule of decision, it is rare to see the Convention being the dominant reason for a judgment. The CRC is rather interwoven with other relevant domestic or international norms, making it difficult to distil its independent impact. This is not surprising considering that the Convention operates in a rich normative space, but it suggests that to retain its relevance it has to offer *something,* an added value which other relevant instruments do not. For example, as the ECHR offers limited protection to socio-economic rights and has less detailed provisions applicable to children, the CRC remains useful despite the more developed implementation mechanisms of the former.[4] In South Africa, the Constitutional Court found support in article 12 of the CRC for an interpretation of section 28(2) of the Constitution so as to include the right of the child to be heard throughout the criminal process.[5] The Victoria Supreme Court found it useful to refer to the CRC and the Committee's jurisprudence to give content to the comparatively sparse provisions in the Victoria Charter.[6] For effectiveness reasons,[7] however, it is desirable that this added value does not conflict with domestic law and can be accommodated by domestic law.

In the jurisdictions analysed here, article 3(1) was popular. Courts have recognised its independent normative value, sometimes as a right in itself. It was used as a gateway for the protection of other rights in the Convention, and has facilitated the lifting of the best interests from its habitual sphere of application. It has been a core justification for a special legal treatment to be applied to children when compared to adults. The jurisprudence of the courts

[2] For example, by not applying the CRC directly even if they are entitled to do so, by shying away from asserting the prevalence of the Convention over domestic norms, by not considering the CRC consistently, by not developing the common law under the influence of the CRC, etc.
[3] Illustrated in the Australian and South African case law.
[4] This is illustrated, for example, in the Court of Cassation assessment of legislation concerning child support against article 3(1) (part 3.5.2), and the Council of State's child-centred decisions (part 3.5.3.2).
[5] *J v National Director of Public Prosecutions and another (Childline South Africa and others as amici curiae)* 2014 (7) BCLR 764 (CC).
[6] Part 4.4.7.3.
[7] In case of conflict, based on this study, it would be unusual for the CRC norms to be preferred even when that option is theoretically open to the courts.

resembles closely the position of the CRC Committee in terms of the nature of article 3(1) and the content of equivalent domestic norms. This is a boost for the legal status of article 3(1) and a clear rebuttal of critical views about its normative force. The opportunities opened by this reality are explored below.

7.2 Conceptualising the role of the courts in giving effect to the CRC

The work on this thesis started with the observation that the role of the domestic courts in giving effect to the CRC is insufficiently understood and conceptualised despite the popularity of the Convention.[8] 'To conceptualise' is understood here as an operation which enables one to extract general ideas from particular experiences. In the context of the courts' application of the CRC, this concerns issues such as the interaction of the CRC with the legal reasoning, the factors which affect that interaction and the impact of the Convention on the reasoning of the courts.

The overall aim of the thesis became therefore to assist in conceptualising the role of the courts in giving effect to the CRC in a context where states have almost universally pledged respect for the Convention but retain a sovereign right to decide how to give effect to it, and, implicitly, what role to assign to domestic courts in this process. The cosmopolitan vision of the Convention comes, therefore, face-to-face with the particularism of domestic legal systems, co-existing and informing how the role of the courts vis-à-vis the CRC is understood.

While international and domestic perspectives may converge in some points, it is clear that the CRC Committee (the driver of the cosmopolitan vision) holds a maximalist view in relation to the courts' contribution to the implementation and the enforcement of the Convention, while domestic courts are more reserved in this regard. There are good reasons to support the view of the Committee, but a legally sound view rests on acknowledging the different institutional positions from which the Committee and the courts approach the latter's relationship with the Convention: the Committee engages with the CRC from the international vantage point of a supra-national institution concerned with the compliance by states (as unitary subjects of international law) with treaty obligations; while the courts engage with the CRC from a domestic vantage point, as one of the three branches of the state (judiciary, executive and legislatures), with responsibilities to respect the domain of the other branches.

An illustration of this dynamic is the application of the Convention in Australia,[9] where there is a compartmentalisation of laws concerning children, and no unifying children's rights standard that applies across all areas of law. Cases such as *GPAO, MIMIA v B* and *Re Woolley* show the vulnerability of this approach in that it prevents the application of best interests standards in all areas of law, as required by article 3(1). Thus, as desirable as the position of

[8] See part 1.2 above.
[9] These are provisions which are addressed or are relevant for the entire state apparatus, such as the general principles.

the Committee, grounded in the CRC, may be to ensure the effectiveness of the Convention, it cannot be automatically embraced domestically without some reckoning.

Positively, the Convention has been accepted by courts as a reference framework in relation to the rights of children. The practical implications of this acceptance as a 'set of meta-norms'[10] are, however, more difficult to unpack. The basis and the basics in conceptualising the role of the courts remain the formal legal framework of reception.

In highly normative systems (such as France) or those where the engagement with international law is controversial (such as Australia) judges pay close attention to legal status. Concerns arising therefrom result in the application of the Convention being rejected on grounds connected to status (i.e., not directly applicable or not incorporated). In mildly normative systems or where there is evidence of convergence between the CRC and with legislative/constitutional will, the application is easier and courts do not address status issues to any great extent if at all (see South Africa or the Family Court in Australia).

The Convention is a complex legal instrument, the implementation of which depends on numerous domestic actors. The courts will find some CRC provisions easier to engage with than others primarily because they are closer to the functions traditionally performed by judges. This means that it may not be possible to have an all-encompassing approach to the role of the courts, applicable to all substantial CRC provisions, but that some differentiation may be necessary according to the direct relevance of specific provisions in relation to court functions.

However, the conceptualisation of the role of the courts needs to move further to respond to litigation reality, as suggested below. Courts give effect to the CRC in ways which do not fit neatly into what they are positively authorised to do under the reception framework. A distinction may therefore be necessary between *within-framework* (normative) and *beyond-framework* (non-normative) methods of engagement. While this terminology is perfectible, it is submitted that the two categories reflect the reality of courts' interaction with the Convention. The normative means are clearly legitimate, being authorised by the reception framework, but the non-normative ways require some more debate about their legitimacy. They have clearly facilitated the domestic effect of the CRC, but they should not become escape routes for courts unwilling to tackle difficult questions about its relationship with domestic law.

The identification of the non-normative methods and their corresponding impact show that taking a forensic approach to understanding the application of the CRC is unlikely to capture the sometimes subtle ways in which the Convention has influenced judges. It is not always easy to establish a causal link between a court engaging with the CRC and a positive outcome in a case, but is possible that the Convention has influenced the way in which a judge has approached a matter and the factors that it found relevant for the resolution of the case. This type of impact is difficult to prove with mathematic precision, but it may have a more sustainable impact than, say, a decision in which the CRC was directly applied.

[10] Term used by W Vandenhole 'The Convention of the Rights of the Child in Belgian Case Law' in T Liefaard and J Doek (eds) *Litigating the Rights of the Child*: *The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 105 at 118.

Domestic systems have autochthonous legal resources or institutions outside of the formal reception framework which can be of significant assistance in facilitating the effect of the CRC. There may be, for example, domestic institutions or legal concepts which can act as 'carriers' for CRC values even if incorporation or transformation has not technically taken place. The smaller the gap between the CRC and the domestic standard, the likelier it is that the courts would give effect to the former. The multitude of courts entitled to engage with the Convention operates as a judicial safety net and creates opportunities for its multiple legal dimensions to be discovered. It may also generate, if not a dialogue between courts, at least judicial introspection regarding the application of the CRC.

When applied by courts, the CRC may be in competition with other relevant sources of law, or, on the contrary, it may benefit from the convergence with other norms, which pull the CRC into the legal reasoning, giving it some visibility and credit for a decision. A principled approach to this issue is not present in any of the systems in which this practice is used, and calls for more focused attention.

In this researcher's view, a proper understanding of the role of the courts in giving effect to the CRC in specific systems starts with the formal rules of reception, but needs to consider many other factors, such as the structure of reception (including the general compatibility between the domestic framework and the CRC; and the legal tradition which may allow the courts to innovate in terms of giving effect to the CRC); the level of connection between various CRC provisions and the domestic functions of the courts; the multitude of courts engaging with the Convention and the potential consequences of this jurisprudential fragmentation; and the consequences of norms inflation for the application of the CRC. It is also necessary to consider that factors which impact on domestic judicial application can have an ambivalent effect (facilitating or obstructive), depending on the context. Thus, caution must be exercised and *in abstracto* generalisation of the role or effect of such factors must be avoided. It must be stressed that these are not exhaustive factors, and that studies of other legal systems may reveal the relevance of other issues which must be taken into consideration for a more comprehensive understanding of what courts have done and can do to give effect to the CRC.[11]

Domestic courts and the development of the CRC

The contribution of domestic law to the development of international law has become a separate field of enquiry, and this thesis has not focused purposefully on it. However, there are some connected aspects raised by this research that should not go unnoticed.

The domestic application and development of the Convention are essential for its existence, and this study has shown that the CRC has an intense domestic life. The CRC has been drawn into many disputes, including contentious and politicised legal issues such as immigration, surrogacy and corporal punishment. While other domestic developments contribute to keeping the Convention alive, it is the application by the courts that captures its essence of *being*

[11] In a study of Romanian courts, the current researcher showed the impact of historical context, judicial and political inertia, and lack of judicial independence as factors with impact on the judicial application of the CRC (M Couzens 'Romanian courts and the UN Convention on the Rights of the Child: A case study' 2016 (24) *International Journal of Children's Rights* 851).

(understood as being what one is meant to be/what was created or intended for) – its struggle to fit in and deliver benefits to children, to find a place in an environment where there are friends and enemies, and where it has to accept competing with others. The domestic vibrancy of the CRC transcends, however, the domestic sphere in that it instils life in the Convention more generally. The international existence of the CRC is virtual,[12] reactive and filtered, being primarily based on information supplied from the domestic sphere. This is illustrated in the work of the Committee: it reacts to domestic developments and it distils domestic experiences in universally-relevant material, which it then makes available for domestic use around the world. Thus, domestic developments should be encouraged and made known so as to contribute to the CRC reaching its potential.

Beyond the abstract reflections above, there are concrete ways in which domestic case law contributes to the development of the CRC. The judicial application of the Convention gives credibility to the CRC as a legal instrument, suitable for adjudication. Domestic courts have found it particularly relevant where they sought legal grounds to treat children differently from adults on account of their immaturity and vulnerability. This is an important insight relevant especially for the Committee and its future work.

Domestic courts may assist in discovering the yet-uncovered CRC potential and limitations. As mentioned above, courts have preceded the Committee in declaring a right to have the best interests of the child given a primary consideration,[13] and could do so in the future. The Victoria Supreme Court has relied on an equal protection under the law provision in the Victoria Charter to justify a distinct legal treatment for children.[14] Article 2 of the CRC could therefore provide an alternative legal reasoning to the over-use of article 3(1) for the purpose of giving children special treatment.

Further, courts may assist in developing the CRC by interpreting its norms. The unpacking of article 3(1) (in terms of its scope, weight and balancing against competing norms) illustrates the potential for this. The judgment of Gaudron J in *Teoh* is a precursor of the CRC Committee's identification of article 3(1) as one of its fundamental principles.[15] Together with the above judgment, the *Fitzpatrick* judgment of the South African Constitutional Court is at the forefront of approaching the best interests of the child as a right in itself. Cases across the three jurisdictions 'lift' the best interests of the child from its traditional sphere of application (family law and child protection), making it relevant even for decisions in contentious and politicised legal contexts such as immigration.

Domestic judgments may expose vulnerabilities in the CRC and children's rights arguments, encouraging therefore a search for solutions. For example, concerns about the aspirational

[12] In the international sphere, the CRC exists in something similar to laboratory conditions – separate from the environment in which is supposed to operate. The purpose of 'lifting' the CRC to the international sphere is primarily to study the Convention, to understand its meaning, and its functioning in domestic jurisdictions, with the aim of returning that knowledge to the CRC's normal, domestic, habitat in order to make its workings more efficient.

[13] It is not claimed here that the courts have determined or influenced the position of the Committee.

[14] See part 4.4.7.2.

[15] A Twomey 'Minister for Immigration and Ethnic Affairs v Teoh' 1995 (23) *Federal Law Review* 348 at 357-358.

nature of the CRC, or the suitability of an increasingly wide scope of the best interests of the child, or in relation to the cogency of CRC-based arguments should be considered by the Committee in engaging with the Convention.

7.3 Recommendations

Arising from this research, a few suggestions can be made to improve the application of the CRC by domestic courts. Consistent with the non-normative cosmopolitanism embraced in this work, no uniform approach is advocated for. The version of cosmopolitanism employed here is respectful of legal diversity and the creativity and richness of domestic systems which, it is submitted, can be harnessed for the benefit of the Convention. It is also based on the understanding that strengths in some systems could perhaps never be 'imported' into others, and domestic vulnerabilities of the CRC in some jurisdictions are non-issues in other jurisdictions.

This, however, does not prevent the formulation of suggestions with some degree of generality and chance of replication beyond the systems considered here. These suggestions are aimed primarily at the courts, the Committee and the research community.

1. The current under-utilisation of the formal framework of engagement calls for its fuller consideration. In parallel, there is a need to acknowledge the diversification of methods of engagement, and their positive impact on increasing the chances of the Convention to be applied. Exclusive reliance on one engagement method is likely to result in a limited application of the Convention. However, the development by courts of any additional means of engagement should be accompanied by transparent judicial reasoning (and academic analysis) in order to ensure their legally principled development. This work has drawn attention to what has been called non-normative engagement methods, and called on for them to be acknowledged and critically analysed, in order to ensure that judicial engagement with the Convention occurs in a legally correct way, which has a lasting impact on the case law in any given jurisdiction.

2. It is necessary to acknowledge that the type of legal system (monist, dualist, hybrid) and the formal rules of domestic reception of the Convention constitute only the starting point of an enquiry into what informs the role of courts in giving effect to the CRC. The discussion needs to move further, and each legal system (through their courts or research community) needs to reflect on factors beyond the rules of reception which affect how the courts give effect to the Convention. The factors suggested in part 6.4 were only indicative, albeit probably common to many systems, and many other factors can be uncovered and addressed if their significance is acknowledged.

3. Regardless of the type of legal system, courts should give closer attention to the CRC provisions and reflect that in their judgments. The meaning of the CRC is far from being self-evident and requires careful unpacking. Also, it should not be easily assumed,

based on a general correspondence in terminology and without careful analysis, that domestic law is compatible with the Convention. Skipping these important steps robs the CRC of a meaningful application, which the current framework of reception allows in all systems. Instead, the courts should spell out more carefully their interpretation of the Convention and how it articulates with their reasoning. This would make judgments more transparent and explain what the courts find the CRC useful for.

4. Court judgments, and especially those that are critical or cautious, are useful tools for reflection in relation to the interaction between the CRC and domestic law, and as sounding boards for children's rights arguments. Ultimately, they are self-learning tools for children's rights proponents, who can use them to understand the potential reluctance of some judges to apply the CRC. Many topics for such reflection arise from this study: Is the Convention aspirational? Why do some courts consider its norms incomplete? Do all the substantive CRC articles create rights, and does this matter? Is the best interests of the child suitable for an *in abstracto* application? Are child-focused judgments seen as biased by other judges? Is there a critical discourse on the rights of children and is there a need for such? Would its potential development persuade more judges that applying the rights of children needs not be an activist position but can instead be integrated in the mainstream legal reasoning? Etc.

5. More attention needs to be given to situations in which a potential overlap exists between the CRC and other legal instruments, domestic and international. A first suggestion is that, however apparently close such norms are, an overlap should not be assumed without being verified. In fact, considering the special features of the Convention (and especially its general principles) and its capacity to introduce child-focused aspects into the legal enquiry, it can be doubted that complete overlap can exist. These special features of the Convention must be preserved by resisting the engulfment of the Convention by other legal instruments.

   To face 'normative competition' and retain its imprint on legal reasoning, the Convention should be developed independently. The concrete importance of the Convention in a norm-rich environment inhabited by more developed and accepted norms, comes from what it offers in addition to those norms, or, what has been termed in this work 'the added value of the CRC'. Identifying the added value of the CRC stresses the utility of the Convention and may present the courts with an incentive to apply it. This approach (which encourages the application of the Convention when it has something special to offer, rather than every time it may be relevant) is not inimical to the CRC itself. Article 41 recognises the priority application of more protective domestic or international standards, and is an implicit recognition that the CRC applies when it improves on the existing legal standards.

   It is submitted that this added value should be given more focused attention by courts, academia and the CRC Committee. Academia, for example, can analyse more carefully the relationship between the CRC and similar norms, which are considered in tandem

with the Convention. The Committee can further develop the content of the general principles, especially articles 2 and 6, as the essence of what distinguishes it from other international instruments. The openness of the courts to article 3(1) and the determination with which they turned a much-criticised provision into an effective legal tool and one of the most influential features of the Convention, support this suggestion. While none of the other principles come close to the popularity of article 3(1), there is no inherent reason for them not to develop in similar ways.

This emphasis on the added value ought not be taken to suggest that the CRC should be dissociated from other legal instruments. In some cases, this would be impossible and disadvantageous for the CRC.[16] What is pleaded for here is a realistic and balanced approach,[17] in which application with other instruments enhances the effect of the CRC rather than submerging its child-centred features.

6. More usage of the Committee's output by the courts is desirable. Its under-utilisation so far deprives the courts of an alternative reference discourse to that of powerful although not child-focused poles of legal authority or opinion (domestic or international). As members of the CRC 'interpretive community',[18] there is scope for communication between the courts and the Committee. The development of a 'vertical'[19] communication can take place on both axes: courts-to-Committee and Committee-to-courts.[20] The Committee is clearly important in giving meaning to the CRC, but so are the courts, as discussed in part 7.2. The Committee can operate as a nodal point for good judicial practices, which it can distil into internationally-appealing legal terms, absorbed into the Committee's output and thereafter communicated to domestic audiences, including the courts. As showed in part 6.3.1, there is convergence between the courts' approach to article 3(1) or domestic best interests provisions, which shows that a communication of this nature is not impossible or unrealistic.

   For meaningful communication to take place changes may be needed on both sides – courts and the Committee. For example, the judgments of the French Court of Cassation are impenetrable to an outsider, without literature guidance. However valuable these judgments are, the Committee may find it difficult to extract meaning therefrom. A too advocacy-oriented output could make the views of the Committee less valuable for the courts that may instead seek guidance from bodies which employ a conventional legal reasoning.

[16] For example, in South Africa or Australia, the CRC can only be applied together with domestic norms (save when a CRC provision may be found self-executing by a South African court).
[17] Sometimes a detailed consideration of CRC provisions may not be necessary when, for example, the CRC has already influenced the development of relevant domestic precedent.
[18] J Tobin 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' 2010 (23) *Harvard Human Rights Journal* 1 at 4.
[19] As used here, this term has no hierarchical connotations, and does not suggest any subordination between the courts and the Committee.
[20] For the reasons explained above, this work does not advocate for a harmonisation of the courts and Committee's approaches.

7. With some caution, there is scope for the courts to learn from each other. Article 3 jurisprudence discussed here showed some convergence of views between courts operating in very different legal systems. Multiple implications emerge. For example, this jurisprudence constitutes state practice and invites an investigation into the customary international law status of this provision.[21] Further, it shows that a 'horizontal' judicial communication between domestic courts operating in vastly different systems is not impossible. Children's rights have a short history, and their judicial development is in its early stages. Novel issues are constantly raised before domestic courts, and in the absence of domestic precedents or insights, courts may find it useful to look elsewhere.

The final thought of this work is that the CRC is ultimately what those who engage with it make it to be. The more legal engagement, the more meaning it develops. The CRC came into effect at a time of good international will and universal sympathy for human rights. The time was then suitable for the Convention to be utilized primarily as a persuasion tool or as a guiding beacon for the states. The context has changed, and not only is state support for human rights under some doubt, but there is also an expectation that human rights treaties deliver tangible outcomes for individuals and increase state accountability in relation to the treatment of their subjects. Shifting attention to the legal dimensions of the CRC is appropriate since legal obligations and rights lock in benefits when political commitment fluctuates. The courts are central to this process of uncovering and strengthening the legal dimensions of the CRC, and ultimately securing the sustainability of the Convention's ideals.

[21] This is not necessarily a new idea. Provost wrote (with no elaboration) that 'it is difficult to imagine better candidates for customary status' than article 3(1) of the CRC and the prohibition against torture (R Provost 'Judging in Splendid Isolation' 2008 (56) *American Journal of Comparative Law* 125 at 137).

De toepassing van het Verdrag inzake de Rechten van het Kind door nationale rechters

Samenvatting (Dutch summary)

Dit proefschrift onderzoekt de toepassing van het Verdrag inzake de Rechten van het Kind (IVRK) door nationale rechters, in het licht van het nationale rechtssysteem dat de relatie bepaalt tussen internationale verdragen en het nationale recht. Het onderzoek richt zich op de jurisprudentie in drie landen – Australië, Frankrijk en Zuid-Afrika – welke doelbewust zijn geselecteerd omdat zij drie verschillende soorten rechtssystemen vertegenwoordigen, respectievelijk een dualistisch, monistisch en hybride systeem. Het onderzoek is uitgevoerd vanuit een kosmopolitisch perspectief waarbij de nationale jurisprudentie is gebruikt als instrument voor het verkrijgen van een beter begrip van het IVRK en de doorwerking daarvan in de geselecteerde nationale rechtsordes. Het doel van dit proefschrift is derhalve niet om de drie verschillende rechtssystemen met elkaar te vergelijken, maar om een beter begrip te krijgen van het IVRK als rechtsinstrument voor de rechterlijke macht.

Kenmerkend voor de kosmopolitische visie van het IVRK is de positie van het Comité voor de Rechten van het Kind van de Verenigde Naties (het Comité) ten aanzien van de rol van de nationale rechters bij de implementatie van het IVRK. Volgens het Comité spelen rechters een belangrijke rol in de toepassing van het IVRK. Zij moeten waar aan de orde directe werking toekennen aan het IVRK, de in het IVRK neergelegde rechten geldend maken en in gegeven situaties bepalen of aan het IVRK voorrang moet worden verleend ingeval van strijdigheid tussen het IVRK en het nationale recht. Deze maximalistische visie van Comité staat in contrast tot de meer terughoudende positie van de nationale rechters ten aanzien van de toepassing van het IVRK, gelet op de formele regels betreffende de doorwerking van internationaal recht.

De analyse van de jurisprudentie van de hoogste rechters in de drie rechtssystemen laat zien dat de formele regels ten aanzien van de doorwerking van het internationale recht een beginpunt zijn voor de rechters, maar niet altijd verklaren waarom, hoe en met wat voor effect de rechters het IVRK toepassen. De rechters hebben het IVRK creatief toegepast en hebben zo, binnen de mogelijkheden van het nationale recht, zwakke plekken in het betreffende rechtssysteem kunnen compenseren. Het is evident dat het IVRK vaak parallel aan andere nationale en internationale regelgeving opereert. De toepassing en impact is afhankelijk van de aansluiting van het IVRK bij juridische kwesties die niet ondersteund worden door andere rechtsinstrumenten (een toegevoegde waarde, zoals dit benoemd is in deze thesis.)

Het proefschrift onderstreept onder meer het belang van erkenning van de complexiteit van de rol van de rechterlijke macht in de toepassing van het IVRK, mede in het licht van de geldende verhouding tussen nationaal en internationaal recht; en het pleit voor nader onderzoek naar de toegevoegde waarde van het IVRK ten opzichte van andere wet- en regelgeving. Het roept op tot een dialoog tussen het Comité voor de Rechten van het Kind en de rechterlijke macht ten aanzien van de toepassing en interpretatie van het IVRK in de nationale rechtsorde.

Abstract

This thesis explores the application of the United Nations Convention on the Rights of the Child, 1989 ('the CRC') by domestic courts, in the light of the formal domestic rules which govern the relationship between international treaties and domestic law. The focus of the research has been on case law from three legal systems – Australia, France and South Africa – purposefully selected to represent three different reception models of international treaties in the domestic legal order, dualist, monist and hybrid respectively. The research has been conducted from a cosmopolitan perspective, in that the domestic jurisprudence has been used as an instrument for obtaining a better understanding about the CRC and its interaction with the selected domestic orders. The purpose of the thesis is not, therefore, to compare the three legal systems with one another, but rather to acquire a better understanding of the CRC as a legal instrument enforceable by courts.

Representative for the cosmopolitan vision which surrounds the CRC is the position of the Committee on the Rights of the Child ('the Committee') in relation to the role of domestic courts in giving effect to the Convention. The position of the Committee is that the courts are significant in giving effect to the CRC and should apply the CRC directly where possible, enforce all of its rights and resolve conflicts between the CRC and domestic law in favour of the Convention. This maximalist vision of the Committee confronts the more reserved position of the domestic courts in relation to their role in giving effect to the CRC, in the light of the formal rules concerning the relationship between domestic and international law.

The analysis of cases emanating from courts of highest jurisdiction in the three legal systems demonstrates that the formal rules of reception of international law in these systems are a starting point for the courts, but do not always explain why, how and with what effects the courts have given effect to the CRC. The courts have applied the Convention creatively, building on the strengths of their respective systems and compensating in this way for potential vulnerabilities in the domestic reception framework. It is shown that the Convention often operates in parallel with other domestic and international law, and its application and impact may depend on the CRC adding to the legal inquiry aspects not supported by other legal instruments (an added value, as this is termed in this thesis).

The thesis calls for, *inter alia*, an acknowledgement of the complexity of the role of the courts in giving effect to the CRC, as informed both by domestic and international law; and for a closer exploration of the added value of the Convention in relation to other laws. It also encourages a dialogue between the CRC Committee and the courts in relation to the interpretation of the CRC.

Curriculum Vitae

Meda Couzens (Ocna Mureş, 28 April 1975) has a law degree from Babeş-Bolyai University, Cluj Napoca (Romania). She trained to become a public prosecutor and thereafter worked for seven years as a prosecutor in Bucharest. In 2004 Meda obtained a Master's degree from the University of Bucharest and in 2005, an LLM from the University of London. In 2005, Meda moved to South Africa where she taught at Durban University of Technology (2006-2007), while studying for a Master's degree in children's rights at the University of KwaZulu-Natal, Durban. She graduated with this degree in 2009. From 2008 until 2015 Meda taught at the University of KwaZulu-Natal subjects such as human rights, constitutional law and family law. She specialised in the rights of children, and in 2011 she was promoted to a Senior lecturer position. In September 2012 Meda became an external PhD candidate at Leiden Law School of Leiden University where she conducted her research under the supervision of Prof. Ton Liefaard and Prof. Julia Sloth-Nielsen. From 2015, Meda has been living in Sydney, Australia where she teaches (casually) Public International Law at the University of Sydney Law School.

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