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

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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.