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

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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.*