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

Couzens, M.M.

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Author: Couzens, M.M.
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Chapter 5: South Africa

5.1 Introduction

South Africa presents a valuable case study of the interaction between the CRC and domestic law for several reasons. The Constitution of the Republic of South Africa, 1996 ('the Constitution') contains a children's rights clause which has been heavily influenced by the CRC.[1] Although South Africa has recently enacted comprehensive child-related statutes,[2] for more than a decade the Constitution and the CRC were the main children's rights framework for the South African courts. Further, South Africa has an interesting system of reception of international law in that it combines monist and dualist features. This can shed some light on the strengths and weaknesses of various approaches to the reception of the CRC in domestic legal systems from the perspective of courts.

This case study focuses on the jurisprudence of the Constitutional Court ('the CC') and the Supreme Court of Appeal ('the SCA'), with occasional references to relevant High Court cases. The focus on these courts enables an analysis of last instance constitutional and non-constitutional jurisprudence in relation to the rights of children.[3]

The chapter is structured as follows: Part 5.2 contains an overview of the legal rules which govern the relationship between international treaties and domestic law, which is followed in part 5.3 by an introduction to the relationship between the CRC and the South African law. Part 5.4 contains a presentation of the case law, which is followed by the analytical part of the study. Conclusions are drawn in part 5.6.

5.2 The relationship between international treaties and the South African law

South Africa is a country with a common law tradition, with strong English law influences in relation to international public law.[4] After a period of racial segregation which reached its height between 1948 and 1990, the country engaged in a process of democratic reform, which included the negotiation of an Interim Constitution,[5] free elections in 1994, and then the drafting of the Constitution of the Republic of South Africa, 1996. The Constitution is

[1] Section 28 of the Constitution.
[2] Children's Act 38 of 2005 (partially into force 1 July 2007, and then the balance in 1 April 2010' 'the Children's Act') and Child Justice Act 75 of 2008 (in force 1 April 2010; 'the Child Justice Act')).
[3] Through the Constitution Seventeenth Amendment Act of 2012 (effective 1 February 2013), the Constitutional Court became the court of highest jurisdiction in all matters (constitutional and non-constitutional). Up to that point, the SCA was the highest court in non-constitutional matters. For more, see P de Vos and W Freedman (eds) *South African Constitutional Law in Context* (2014) at 212.
[4] J Dugard *International Law: A South African Perspective* (2005) at 50.
[5] Constitution of South Africa Act 200 of 1993.

supreme,[6] and it contains a comprehensive and justiciable Bill of Rights that 'applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'.[7] The development of the common law is subject to 'the spirit, purport and objects of the Bill of Rights'.[8]

The relationship between international law and domestic law has been influenced by the recent history of the country. From a 'delinquent state'[9] generally 'hostile'[10] to international law, South Africa moved to being a state committed to participation in the international community,[11] which valued international law as 'one of the pillars of the new democracy'.[12] The commitment to the harmonisation[13] of international and domestic law is reflected in the constitutionalisation of the courts' obligation to consider and use international law.[14] The courts have engaged with international law in far-reaching judgments such as *S v Makwanyane*[15] (in which the death penalty was declared unconstitutional); *S v Williams*[16] (in which corporal punishment was declared unconstitutional as a sentencing option for juveniles); *Christian Education South Africa v Minister of Justice* (international obligations were invoked in support of the prohibition of corporal punishment in all schools),[17] to name but a few.[18] Human rights treaties have not been enacted into law, but some rights are given effect through the Constitution, statutes or the common law;[19] other rights lack explicit domestic recognition.[20]

Regardless of how international law influences domestic law, the Constitution is supreme,[21] and giving domestic effect to an international norm must not result in a conflict with the

[6] This means that law or conduct inconsistent with it is invalid to the extent of the inconsistency (section 2 read with section 172(1)(a) of the Constitution). All superior courts – the High Court, the Supreme Court of Appeal and the Constitutional Court – have constitutional jurisdiction as per above.
[7] Section 8(1) of the Constitution.
[8] Section 39(2) of the Constitution.
[9] J Dugard 'International Law and the South African Constitution' 1997 (8) *European Journal of International Law* 77 at 77. On international disapproval and sanctions, see Dugard 2005 note 4 at 20.
[10] Dugard 1997 note 9 at 77. For exceptions from this hostile attitude, see J Dugard 'The South African Judiciary and International Law in the Apartheid Era' 1998 (14) *South African Journal on Human Rights* 110; J Dugard 'Twenty Years of Human Rights Scholarship and Ten Years of Democracy' 2004 (20) *South African Journal on Human Rights* 345 at 347.
[11] Dugard 2005 note 4 at 22.
[12] Dugard 1997 note 9 at 77. Also, J Dugard 'International Law and the "Final" Constitution' 1995 (11) *South African Journal on Human Rights* 241.
[13] Term used by Dugard to describe the relationship between international law and domestic law (Dugard 1995 note 12 at 242).
[14] G Hudson 'Neither Here Nor There: The (Non-) Impact of International Law on Judicial Reasoning in Canada and South Africa' 2008 (21) *Canadian Journal of Law and Jurisprudence* 321 at 336. See generally, J Dugard 'The Role of International Law in Interpreting the Bill of Rights' 1994 (10) *South African Journal on Human Rights* 208; M Olivier 'International human rights agreements in South African law: procedure, policy and practice (part 2)' 2003 (3) *Tydskrif vir die Suid Afrikaanse Reg* 490 at 491-492.
[15] 1995 (3) SA 391 (CC) ('*Makwanyane'*).
[16] 1995 (3) SA 632 (CC).
[17] 2000 (10) BCLR 1051 (CC).
[18] For details, see Dugard 2005 note 4 at 338. The concrete impact of international law in these cases is, however, not always easy to establish (see Hudson 2008 note 14).
[19] In the field of children's rights, notable are the Children's Act and the Child Justice Act.
[20] Article 9(5) of the International Covenant on Civil and Political Rights, 1966 ('the ICCPR'), for example. See M Killander 'Judicial Immunity, Compensation for Unlawful Detention and the Elusive Self-Executing Treaty Provision: *Claassen v Minister of Justice and Constitutional Development* 2010 (6) SA 399 (WCC)' 2010 (26) *South African Journal on Human Rights* 386 at 387.
[21] Section 2 of the Constitution.

Constitution.[22] Several constitutional provisions ensure that courts engage with international law, as discussed below.

5.2.1 Section 231: The status of international agreements in the South African law

South Africa combines features of both dualist and monist approaches.[23] Section 231(1) and (2) of the Constitution reflects the primarily dualist approach to treaties, providing that an international agreement signed by the executive and approved by the Parliament is not part of the South African law unless enacted into law by national legislation.[24] Section 231(4) of the Constitution reads:

> Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

When domestically enacted,[25] the provisions of an international treaty become 'ordinary domestic statutory obligations'[26] save when the Parliament decides differently.[27] By exception, self-executing provisions of treaties are automatically law in the Republic. A self-executing norm has an infra-constitutional, and infra-statutory status, since in order to be considered self-executing, a treaty norm must not be inconsistent with the Constitution or national statutes.

The notion of self-execution was a novelty in the domestic law. Some scholars expressed reservations about this innovation,[28] but others acknowledged its potential to assist with treaty implementation in cases of legislative inaction, omissions or distortions.[29] The term 'self-executing provision' is not defined by the Constitution and needs clarification by courts.[30] The courts, however, have shown 'discomfort'[31] in dealing with this fraught legal institution, and

[22] *Glenister v President of the Republic of South Africa and Others* 2011 (7) BCLR 651 (CC) ('*Glenister II*') per Moseneke DCJ and Cameron J para 205.
[23] Views may differ. Some consider South Africa dualist (J Sloth-Nielsen 'Children's rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child' 2002 (10) *International Journal of Children's Rights* 137 fn 8); others, monist (A Skelton 'South Africa' in T Liefaard and J Doek *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 13 at 15); while others, hybrid (D Sloss 'Treaty Enforcement in Domestic Courts: A Comparative Analysis' in D Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 1 at 7). Cameron J writing extra-judicially has argued that the Constitution 'cut[s] across the well-known debate' between monism and dualism (E Cameron 'Constitutionalism, Rights, and International Law: The Glenister Decision' 2012-2013 (23) *Duke Journal of Comparative and International Law* 389 at 391).
[24] For distinctions between parliamentary approval and enactment, see Dugard 2005 note 4 at 59-60, and *Glenister II* per Ngcobo CJ paras 88-103; Moseneke DCJ and Cameron J paras 179-182.
[25] For the variety of techniques used, see Dugard 2005 note 4 at 61.
[26] *Glenister* II per Moseneke DCJ and Cameron J para 181; per Ngcobo CJ para 102.
[27] *Glenister* II per Ngcobo CJ para 100.
[28] Dugard 2005 note 4 at 62; N Botha and M Olivier 'Ten years of international law in the South African courts: Reviewing the past and assessing the future' 2004 (29) *South African Yearbook of International Law* 65 at 76; Olivier 2003 note 14 at 495.
[29] Olivier 2003 note 14 at 495.
[30] N Botha 'Public International Law' 2009 *Annual Survey of South African Law* 1137 at 1151. For the difficulties encountered by courts in engaging with the notion of self-execution, see W Scholtz and G Ferreira 'The interpretation of section 231 of the South African Constitution: a lost ball in the high weeds!' 2008 (XLI) *Comparative International Law of South Africa* 324.
[31] N Botha 'Public International Law' 2010 *Annual Survey of South African Law* 1269 ('Botha 2010a') at 1275.

have avoided it[32] or dealt with it superficially.[33] A fully-developed 'autochthonous meaning'[34] of the concept of self-execution is therefore missing, and unless unavoidable, the inherent difficulties with the concept of self-execution and judicial doubts about its usefulness[35] are likely to divert the courts toward the less controversial interpretive injunctions in sections 39 and 233.[36]

The domestic incorporation of an international agreement does not transform its standards into constitutional rights and obligations.[37] In the *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others*,[38] the Court decided that courts determine the compatibility of statutes with the Constitution, the international law being 'irrelevant to that determination'.[39] Thus, legislation may be found constitutionally valid even if contrary to international law. Although this position may be 'disconcerting',[40] international law remains relevant for the enquiry because 'there can be no "proper" interpretation of the Constitution without a consideration of international law'.[41]

5.2.2 International treaties and the interpretation of domestic law

5.2.2.1 Section 39(1): International law and the interpretation of the Bill of Rights

Section 39 is titled 'Interpretation of Bill of Rights', and section 39(1) reads:

> When interpreting the Bill of Rights, a court, tribunal or forum -
>
> a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> b. must consider international law; and

[32] *President of the Republic of South Africa & others v Quagliani; President of the Republic of South Africa & others v Van Rooyen & another; Goodwin v Director General Department of Justice and Constitutional Development* 2009 ZACC 1 (for critical comments, see N Botha 'Justice Sachs and the use of international law by the Constitutional Court: Equity or expediency?' 2010 (25) *South African Public Law* 235 ('Botha 2010b) at 238). In *Glenister II*, the majority has arguably blurred the distinction between interpretation and judicial incorporation but did not discuss self-execution.

[33] In *Claassen v Minister of Justice and Constitutional Development and Another* 2010 (6) SA 399 (WCC) ('*Claasen'*) the High Court raised the issue of self-execution *mero motu,* and it found that article 9(5) of the ICCPR concerning the right to compensation in cases of wrongful detention had no constitutional equivalent and was thus not applicable because the ICCPR was not self-executing (para 36). The Court was criticised for bluntly deciding that the ICCPR was not self-executing in its entirety, and for not considering section 231(4) of the Constitution in its reasoning (N Botha 2010 'The broader influence of the International Covenant for the Protection of Civil and Political Rights in South African municipal law: Do we need incorporation?' 2010 (35) *South African Yearbook of International Law* 270 ('Botha 2010c') at 274). For discussion, see Killander 2010 note 20.

[34] G Ferreira and W Scholtz 'Has the Constitutional Court found the lost ball in the high weeds? The interpretation of section 231 of the South African Constitution' 2009 (XLII) *Comparative International Law of South Africa* 264 at 271. For distinctions with the American concept of self-execution, see Dugard 2005 note 4 at 62 and A O'Shea 'International law and the Bill of Rights' paras 7A2-7A4 (Last updated October 2004 – SI 15) in *Bill of Rights Compendium* (loose leaf publication; LexisNexis Butterworths, South Africa); Scholtz and Ferreira 2008 note 30 at 332.

[35] For example, as a self-executing norm has the status of ordinary statutory norms, it does not assist in constitutional review; and, conflict between statutory provisions and a treaty norm prevents the latter from being considered a part of domestic law.

[36] Killander 2010 note 20 at 389.

[37] *Glenister II* per Ngcobo CJ para 100 -102; per Moseneke DCJ and Cameron J paras 181-183.

[38] 1996 (8) BCLR 1015 ('*AZAPO*').

[39] *AZAPO* para 26.

[40] Dugard 2005 note 4 at 68.

[41] Dugard 2005 note 4 at 69. The interpretive role of international law was acknowledged in *AZAPO* para 26.

c. may consider foreign law.

'A jewel in the Constitution',[42] section 39(1)(b) (and its Interim Constitution precursor, section 35), allows the domestic law to develop in harmony with international law.[43] It is under the auspices of these provisions that the 'demand'[44] for the application of international law has most often been made.

Section 39(1)(b) refers to 'international law' generally, and makes no distinction between binding and non-binding instruments.[45] The term 'must' in section 39(1)(b) contains a clear injunction that requires the courts to act upon it even when the same outcome can be obtained without considering international law.[46] The term 'consider' is open to meanings varying from a cursory reference to international law, to meaningful engagement with its substance, and to acting in accordance with international law. Arguably, 'the appropriate way to treat international law is to look at and evaluate – in other words "to consider" – its provisions and to give reasons either for adopting or rejecting the solution proposed by international law'.[47] This ensures that the use of international law is not formulaic, and that there is engagement with its substance, without the courts abandoning the possibility to depart from international law.

The second interpretive challenge raised by the phrase 'must consider' is that it does not indicate the weight to be attached to international law.[48] Unlike section 233 that requires that in statutory interpretation courts must prefer an interpretation consistent with international law, no such requirement is present in section 39(1)(b).[49] It is accepted that the phrase does not dictate to the courts that they must act according to international law,[50] and although courts 'are not bound to follow it … neither can we [the courts] ignore it'.[51] This position is illustrated in *Grootboom,* where the Court acknowledged international law and carefully engaged with its substance, but did not follow it.[52] The Constitution preserves therefore the right of the courts to depart from international law in order to develop an interpretation of the Bill of Rights which takes account of South Africa's own history, values and realities.[53]

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[42] Dugard 1995 note 12 at 242. For a detailed analysis of the application of section 39(1) and (2) of the Constitution, see I Currie and J de Waal *The Bill of Rights Handbook* (2013) Ch 6.
[43] Dugard 1995 note 12 at 242. Also, Cameron 2012-2013 note 23 at 390.
[44] Botha and Olivier 2004 note 28 at 74.
[45] *Makwanyane* per Chaskalson P para 35. For further engagement with non-binding international instruments, see *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) ('*Grootboom'*) and *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC) ('*TAC'*).
[46] See the point reflected in *Glenister II* per Moseneke DCJ and Cameron J para 201.
[47] J Tuovinen 'The Role of International Law in Constitutional Adjudication: Glenister v. President of the Republic of South Africa' 2013 (130) *South African Law Journal* 661 at 669.
[48] See O'Shea 2004 note 34.
[49] Same view is held by Hudson (2008 note 14 at 348), who argues that section 233 is the 'weightier section' because it requires compliance with international law.
[50] Dugard (1994 note 14 at 214) commenting on the corresponding provision in the Interim Constitution, but the position remains valid under the 1996 Constitution. Also, *Makwanyane* per Chaskalson P para 39.
[51] *S v Williams* para 50.
[52] The Court refused to adopt the minimum core obligations concept coined by the Committee on Economic and Social Rights.
[53] *S v Williams* para 50. In *Makwanyane*, Mokgoro J (para 304) stated that the constitutional requirement to consider international law in interpreting the Bill of Rights is an acknowledgement of the lack of relevant domestic

The courts have largely applied section 39(1)(b) as if a conformity requirement is implied within it. Arguments in favour of extending the conformity requirement to the interpretation of the Bill of Rights[54] are supported by *Kaunda and Others v President of the Republic of South Africa*[55] where Chaskalson CJ said that section 233 'must apply equally to the provisions of the Bill of Rights and the Constitution as a whole'.[56] This is problematic, considering that section 233 refers clearly to 'legislation', and possibly unnecessary, considering that other interpretive techniques can achieve the same aims.[57] Further, constitutional interpretation in conformity with international law does not always result in superior human rights protection, and at times, autochthonous norms and values have been found to be more protective of the individual.[58]

Glenister II expanded the interpretive relevance of international law to include not only the interpretation of substantive rights in the Bill of Rights but also of the content of constitutional obligations of the state in relation to human rights, under section 7(2) of the Constitution.[59] Problematically, the majority claimed to be using international law as a source of persuasion, but instead it gave it a role of authority[60] by allowing it to define the domestic obligations of the state. This is arguably more than can be obtained through interpretation alone, and has attracted criticism[61] but also praise. [62]

In addition to the interpretation of the Bill of Rights, international law may play a role in the development of common law or customary law *via* the spirit, purport and object of the Bill of Rights. Section 39(2) of the Constitution reads:

> When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

jurisprudence (similarly, Chaskalson P para 37). For further discussion, see D Hovell and G Williams 'A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' 2005 (29) *Melbourne University Law Review* 95 at 121, 128.

[54] O'Shea 2004 note 34 para 7A2.

[55] 2005 (4) SA 235 (CC) ('*Kaunda'*).

[56] *Kaunda* para 33. Support, may arguably be found in *Glenister II*, per Ngcobo J para 97 and Moseneke DCJ and Cameron J para 178.

[57] Section 39(1)(a) of the Constitution which requires that in interpreting the Bill of Rights, the courts, amongst others, 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'.

[58] In *Makwanyane,* Chaskalson P (para 39) did not follow the international law (that did not prohibit the death penalty) and this led to an enhanced protection of individual rights under the Interim Constitution.

[59] Moseneke DCJ and Cameron J paras 189, 190, 194. For comments, see C Gowar 'The status of international treaties in the South African domestic legal system: Small steps towards harmony in light of Glenister?' 2011 *South African Yearbook of International Law* 307.

[60] See, generally, Tuovinen 2013 note 49 especially at 663 and 666. In *Glenister II*, section 7(2) read with section 39(1)(b) of the Constitution was the departing point for the majority, but the concrete constraints on the Parliament stemmed from international law. Bishop and Brickhill suggest that by making international law a 'standard for constitutional obligations', the majority engaged 'arguably [in] a process of translation, rather than interpretation' M Bishop and J Brickhill 2011 (1) *Juta Quarterly Reports Constitutional Law* (Juta online) para 2.1.2.

[61] For a presentation of some critical opinions, see Gowar 2011 note 59 at 322 and, generally, Tuovinen 2013 note 49.

[62] N Botha 'Public International Law' 2011 *Annual Survey of South African Law* 1174 at 1184; P de Vos '*Glenister*: A monumental judgment in defence of the poor' on *Constitutionally Speaking* blog (18 March 2011).

This is so because 'the spirit, purport and objects of the bill of right … are inextricably linked to international law'.[63]

5.2.2.2 Section 233: International law and the interpretation of legislation

The common law presumption that statutory interpretation should be consistent with international law is given constitutional recognition in section 233 of the Constitution, which reads:

> When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

There is no explicit requirement that legislation be ambiguous for international law to be relied on for interpretation purposes.

5.2.3 Brief assessment of the impact of the constitutional framework

The formal framework presented above is indicative of a legal system receptive to international law,[64] where the courts have accepted a role in the process of constitutional transformation.[65] However, the constitutional injunctions in relation to the use of international law have not resulted in its consistent, coherent or predictable application.[66] The 'high level of abstraction and minimal case law' at international level may make international law less suited for usage in domestic litigation.[67] In principle, this 'utilitarian' approach was rejected in *Glenister II,* where the majority stressed that although it could decide the matter without resorting to international law, section 39(1)(b) 'makes it constitutionally obligatory' to consider international law so as to 'respect the careful way in which the Constitution itself creates concordance and unity between the Republic's external obligations under international law, and their domestic legal impact'.[68] Despite such powerful statements, the reality remains that the courts do not consistently refer to international law, and sometimes, the application of international law divides the courts.[69] The existing constitutional framework accommodates therefore both international law-friendly approaches and more reserved judicial views.[70]

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[63] N Botha 'The Role of International Law in the Development of South African Common Law' 2001 (26) *South African Yearbook of International Law* 253 at 259 cited by Dugard 2005 note 4 at 69.

[64] It was even argued that international standards may be adopted in the South African law by way of interpretation, this constituting 'a form of monism' (G Ferreira and A Ferreira-Snyman 'The Incorporation of Public International Law into Municipal Law and Regional Law Against the Background of the Dichotomy Between Monism and Dualism' 2014 (14) *Potchefstroom Electronic Law Journal* 1471 at 1477).

[65] Hovell and Williams 2005 note 53 at 106

[66] Ibid at 115; Hudson 2008 note 14 at 348.

[67] Hovell and Williams 2005 note 53 at 118. The authors note that 'in many cases, international law may have had little to offer' (at 120), or was 'often not useful, let alone determinative' (at 128). This may have been Sachs J's thinking in *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others* 1995 (10) BCLR 1382 ('*Coetzee'*), where he noted that international law did not elucidate the problem brought to the court (paras 52 – 54).

[68] *Glenister II* per Moseneke DCJ and Cameron J para 201.

[69] *Glenister II*, and in the children's rights field, *C and Others v Department of Health and Social Development, Gauteng and Others* 2012 (4) BCLR 329 (CC) per Jafta J.

[70] Bishop and Brickhill 2011 note 60 para 2.1.2 point that the distinction between the majority and minority is in the '*intensity* [emphasis in original] of the interpretive influence of international law': 'great' for the majority, but more limited for the minority.

In terms of the quality of engagement, there are concerns that the *domestic* normative value of international norms is not clarified by courts.[71] While the courts are aware of the existence of human rights treaties, they are 'not always sure what to do with them',[72] and 'they are not used for any analytical or comparative purposes and do not contribute in any way to the decision reached by the court'.[73] Instead, international law is used 'simply to identify basic values or principles and to accordingly lend support to decisions which have been reached on other, typically domestic grounds'.[74] Thus, the full normative power of international treaties is not capitalised on, and the constitutional avenues through which international law may influence South African law are under-utilised. An illustration is the courts' preference for the use of international law primarily for Bill of Rights interpretation purposes[75] without considering more incisive methods, such as self-execution.

These strengths and weaknesses of the interaction between international and domestic law before the South African courts are likely to affect how the courts engage with the CRC, discussed further below, after a presentation of the relationship between the CRC and the South African law.

5.3 The CRC and the South African law

South Africa signed the CRC in 1993, and ratified it on the symbolic day of 16 June 1995.[76] The Convention has had a profound influence[77] on the drafting of children's rights clauses in the Interim and Final Constitutions.[78] Section 28 of the Constitution was said to respond in an

[71] Botha 2010c note 33 at 273. There are, however, exceptions, such as *Claasen* (see Botha 2010a note 31 at 1273); and *Glenister II* per Ngcobo CJ paras 92, 93, 96 and 97.
[72] Botha and Olivier 2004 note 28 at 65.
[73] Ibid at 65. For similar concerns, see Dugard 1997 note 9 at 90-91; Olivier 2003 note 14 at 502; Hudson 2008 note 14 at 349.
[74] Hudson 2008 note 14 at 352. Hovell and Williams refer to the Court approaching international law 'as a source of normative guidance on basic principles' (2005 note 53 at 118). In *Coetzee,* Sachs J said in relation to the use of international law: 'due attention to such [international] experience with a view to finding principles rather than to extracting rigid formulae, and to look for rationales rather than rules' (para 57).
[75] Botha and Olivier 2004 note 28 at 75; Hovell and Williams 2005 note 53 Tables 2 and 3.
[76] United Nations Treaty Collection *Status of Treaties: Convention on the Rights of the Child* (online). On 16 June 1976 a student uprising started in Soweto, which was met with gunfire by the apartheid government. See South African History Online (2013) *The June 16 Soweto Youth Uprising.*
[77] See Skelton 2015 note 23 at 14; J Sloth-Nielsen 'Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law' 1995 (11) *South African Journal of Human Rights* 401; J Sloth-Nielsen 'The Role of International Human Rights Law in the Development of South Africa's Legislation on Juvenile Justice' 2001 (5) *Law, Democracy & Dev*elopment 59. Some primary sources: Constitutional Assembly, Constitutional Committee *Supplementary Memorandum on Bill of Rights and Party Submissions* (not dated) (it frequently mentions the CRC and other international instruments as support for draft constitutional clauses); and Panel of Constitutional Experts (1996) *Memorandum* especially paras 3.3 and 3.4 (both online).
[78] Section 30 of the Interim Constitution contained a shorter register of rights than section 28 of the Final Constitution. For discussion, see A Skelton 'Constitutional Protection of Children's Rights' in T Boezaart (ed) *Child Law in South Africa* (2017) 327 at 327.

'expansive way' to South Africa's obligations under the CRC,[79] in a manner which amounts, according to some authors, to a constitutionalisation of the CRC.[80]

Section 28 reads:

> (1) Every child has the right—
> (a) to a name and a nationality from birth;
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
> (c) to basic nutrition, shelter, basic health care services and social services;
> (d) to be protected from maltreatment, neglect, abuse or degradation;
> (e) to be protected from exploitative labour practices;
> (f) not to be required or permitted to perform work or provide services that—
> (i) are inappropriate for a person of that child's age; or
> (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
> (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
> (i) kept separately from detained persons over the age of 18 years; and
> (ii) treated in a manner, and kept in conditions, that take account of the child's age;
> (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
> (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
>
> (2) A child's best interests are of paramount importance in every matter concerning the child.
>
> (3) In this section "child" means a person under the age of 18 years.

The significance of the CRC for the South African law, and especially the Constitution, is linked to the country's history of apartheid. Children were severely affected by apartheid and played an active role in the fight for its demotion.[81] Many rights in section 28 are a direct response to children's plight during apartheid: arbitrary detention, denial of nationality, deprivation of basic necessities, and separation from parents.[82] The scope of constitutionally protected rights was expanded under the influence of the CRC, which was effectively used by the children's rights movement to advocate for a broad constitutionalisation of children's rights.[83] Repeated references to international law created an expectation that international law

[79] *M v S (Centre for Child Law Amicus Curiae*) 2007 (12) BCLR 1312 (CC) ('*M v S'*) para 16. For comprehensive analyses of section 28, see J Robinson 'Children's Rights in the South-African (sic) Constitution' 2003 (6) *Potchefstroom Electronic Law Journal* 22; A Skelton 'Constitutional Protection of Children's Rights' in T Boezaart (ed) *Child Law in South Africa* (2009) 265.

[80] G Barrie 'International Human Rights Conventions' in *Bill of Rights Compendium* (LexisNexis Butterworths online; chapter updated 2012) para 1B19. Sloth-Nielsen limits the constitutionalisation argument to the 'major features of the Convention' (2002 note 23 at 139), which is more accurate.

[81] See T Mosikatsana 'Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights under the Final Constitution' 1998 (3) *Michigan Journal or Race and Law* 341; J van der Vyver 'Municipal Legal Obligations of States Parties to the Convention on the Rights of the Child: The South African Model' 2006 (20) *Emory International Law Review* 9 at 10; J van der Vyver 'International Standards for the Promotion and Protection of Children's Rights: American and South African Dimensions' 2009 (15) *Buffalo Human Rights Law Review* 81; Robinson 2003 note 79 especially fn 112; Sloth-Nielsen 2001 note 77.

[82] Sloth-Nielsen 2001 note 77 at 59. Also, Mosikatsana 1998 note 81.

[83] Skelton 2015 note 23 at 14; Sloth-Nielsen 2001 note 77 at 71

will be given effect domestically.[84] This was given a boost by Nelson Mandela (elected as the country's president in April 1994), who expressed support for the application of the CRC in South Africa.[85] While 'political will lay at the root of the successful implementation of children's rights'[86] in the early days of democratic South Africa, the constitutionalisation of the rights of children was meant to ensure that they would be given attention even if political good-will fades,[87] or when there may be opposition from public opinion.[88]

Despite its influence on section 28 of the Constitution, the CRC has not been enacted into domestic law.[89] However, the CRC has influenced the comprehensive reform of the South African child-focused legislation,[90] which culminated with the adoption of the Children's Act 38 of 2005[91] and Child Justice Act 75 of 2008.[92] The South African legal framework has been found by the CRC Committee to be generally compliant with the Convention,[93] and the country received praise for 'the progressive application by the judiciary … of the rights and principles stipulated in the Convention'[94] and for the 'the excellent jurisprudence'[95] on the application of the best interests of the child.

This generally positive assessment is no reason for complacency, as there are aspects in the existing legal framework which may fall short of the CRC, such as the right to life not including a right to survival and development, and the absence of protection against discrimination on grounds of parents' status;[96] low age of marriage (12 for girls and 14 for boys), harmful cultural practices, the legislative endorsement of corporal punishment at home and the low age of criminal responsibility.[97]

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[84] Sloth-Nielsen 2001 note 77 at 72.
[85] Sloth-Nielsen 1995 note 77 at 401.
[86] J Sloth-Nielsen 'Chicken Soup or Chainsaws: Some Implications of the Constitutionalisation of Children's Rights in South Africa' 1996 (27) *Acta Juridica* 6 at 23.
[87] Ibid at 25.
[88] Consider, for example, controversial practices such as virginity testing, traditional African circumcision or corporal punishment in the home, which still enjoy popular and/or legislative support.
[89] P Mahery 'The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law' in T Boezaart (ed) *Child Law in South Africa* (2009) 309 at 324.
[90] There are other statutes which contribute to protecting the rights of children. See for example, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and Prevention and Combating of Trafficking in Persons Act 7 of 2013.
[91] Mahery 2009 note 89 at 324. Section 2 (c) of the Children's Act indicates as one of its objects to give effect to South Africa's international obligations in relation to the well-being of children. The Preamble refers to the CRC amongst other relevant international instruments.
[92] Section 3(i) of the Child Justice Act provides that, amongst others, the rights in the CRC are guiding principles that must be considered. The Preamble of the Act indicates as one of the aims of the Act the creation of a juvenile justice system which complies, amongst others, with South Africa's obligations under the CRC.
[93] CRC Committee (2016) *Concluding observations on the second periodic report of South Africa* para 4. South Africa was chronically late in submitting its reports to the Committee. The initial report was submitted in 1997 and addressed in CRC Committee (2000) *Concluding observations of the Committee on the Rights of the Child: South Africa*.
[94] CRC Committee (2016) *Concluding observations* para 5.
[95] Ibid para 25.
[96] Sloth-Nielsen 1995 note 77 at 417, 418.
[97] CRC Committee (2016) *Concluding observations* paras 21, 35, 39-40; 71. In *DPP, YG v S* [2017] ZAGPJHC 290 ('*YG v S*'), the High Court declared the common law defence of reasonable chastisement as being unconstitutional. The appeal against the judgment was heard by the Constitutional Court on 29 November 2018 (still awaiting judgment as of 9 September 2019). Recently, the Children's Amendment Bill, 2018 was published

To conclude, the CRC operates in South Africa from a position of strength which rests on several factors: a constitutional framework which allows international law to influence the development of domestic law; a comprehensive children's rights clause in the Constitution, and child-focused legislation; and the legitimacy of children's rights in political discourse and in society more generally. With these in mind, the discussion turns to the presentation and the analysis of the case law.

5.4 The CRC in the South African case law

5.4.1 Previous literature

Insightful work has previously studied the use of the CRC by the South African courts. Sloth-Nielsen and her co-authors comprehensively analysed court judgments which cover the period 1996 – 2013.[98] Skelton has also written on the topic,[99] and Ngidi analysed judicial use of the CRC vis-à-vis the international law arguments presented by the children's rights litigation body Centre for Child Law.[100] According to these authors, the impact of the CRC on the courts' reasoning has been significant and 'the overall effect that the CRC and ACRWC have had in South African constitutional jurisprudence punches way beyond their weight'.[101]

These studies trace the evolution of the children's rights jurisprudence in South Africa, in which the CRC and other international instruments have played a part. They document, for example, the positive impact of specialised public interest litigators and their reliance on international law; a consistent referral to international instruments by the courts; a diversification of areas of law where children's rights are considered, and judicial receptiveness to the interpretation of rights at international level (including by the CRC Committee).[102] It has been shown that the CRC is invoked when possible alongside section 28 of the Constitution 'to provide additional ballast',[103] and that the courts have developed a solid autochthonous children's rights jurisprudence,[104] in which the CRC is present without dominating the

for comment; it proposes the introduction in the Children's Act of section 12A, which deems unlawful any punishment 'in which physical force or action is used and intended to cause some degree of pain or harm to the child' (Government Notice No 1185 Children's Act (38/2005): Invitation to comment on the Children's Amendment Bill, 2018 *Government Gazette* 42005, 29 October 2018). A raise in the age of criminal capacity from 10 to 12 has been mooted (South African Government (2016) *Joint Justice Committees want consultation on age of criminal capacity* (online)).

[98] Sloth-Nielsen 2002 note 23; J Sloth-Nielsen and B Mezmur '2 + 2 = 5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)' 2008 (16) *International Journal of Children's Rights* 1; Sloth-J Sloth-Nielsen and H Kruuse 'A Maturing Manifesto: The Constitutionalisation of Children's Rights in South African Jurisprudence 2007-2012' 2013 (21) *International Journal of Children's Rights* 646.

[99] Skelton 2015; A Skelton 'Child Justice in South Africa: Application of International Instruments in the Constitutional Court' 2018 (26) *International Journal of Children's Rights* 391.

[100] R Ngidi 'The Role of International Law in the Development of Children's Rights in South Africa: A Children's Rights Litigator's Perspective' in M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 173.

[101] Sloth-Nielsen and Kruuse 2013 note 98 at 677. The 'ACRWC' refers to the African Charter on the Rights and Welfare of the Child, 1990.

[102] Sloth-Nielsen and Kruuse 2013 note 98 at 677.

[103] Sloth-Nielsen and Mezmur 2008 note 98 at 27. Ngidi, a children's rights practitioner, states that international law is used to 'enhance arguments before the courts' (2010 at 174).

[104] The authors coin the term 'constitutional child' as a symbolic cross-cutting term, illustrative of the impact of the Constitution on the law concerning children (2013 note 98 at 648). They find in jurisprudence a 'constitutional

reasoning.[105] Sometimes, writers give credit to the Convention even if it is not mentioned, is given only limited attention or cannot be clearly linked to the outcome.[106] Except for isolated remarks,[107] children's rights writers seldom criticise the courts' engagement with the CRC.

Other authors have been more critical of the courts, lamenting their failure to use the CRC when relevant[108] and to engage with its substance when giving content to children's socio-economic rights.[109] It was argued that in *Grootboom*, for example, reliance on the CRC could have led to a child-focused interpretation of socio-economic rights in the Constitution.[110] Although some of the concerns raised by *Grootboom* were addressed in *TAC II*, this was not motivated by a desire to bring domestic jurisprudence in line with the CRC.[111]

Limited systematic attention has been given to how the courts engage with the framework discussed in part 5.2 and its interaction with the CRC. For example, with some exceptions,[112] the self-execution of the CRC is hardly acknowledged, even when far-reaching statements are made that South Africa 'has crossed the line from dualism to monism in its recourse to international law, especially insofar as "soft" law is concerned',[113] or that '[t]he constitutional provision in section 28 is merely an entry point into a whole gamut of other sources at the international level, which then become directly applicable domestically'.[114] Arguments that the CRC has been directly applied by the Constitutional Court have also been made by Skelton, seemingly based on the intensity of impact which the CRC has had on some judgments.[115] The term 'self-executing provision' in section 231(4) of the Constitution is not used in relation to these direct application statements, and it is not clear whether 'directly applicable' means the

childhood' which is a mixture of 'protection coupled with emancipation', a picture consistent with art 5 CRC (ibid at 671).

[105] Skelton shares a similar view (2015 note 23 at 15).

[106] Examples of cases considered by Sloth-Nielsen and Mezmur (2008 note 98) as illustrative for the positive impact of the CRC but in which the Convention is not mentioned include *Khosa and Others v Minister of Social Development, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) ('*Khosa*'); *J and Another v Director General, Department of Home Affairs and Others* 2003 (5) SA 621 (CC); *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC) ('*TAC*'). Skelton (2015 note 23) does the same in relation to *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) and *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2004 (1) SA 406 (CC).

[107] For example, Skelton criticised Jafta J's position in *C and Others v Department of Health and Social Development, Gauteng and Others* 2012 (4) BCLR 329 (CC) as giving 'rise to some concern with regard to international law', and which is 'narrow, legalistic' (2015 note 23 at 23).

[108] Rosa and Dutschke pointed that the Constitutional Court did not refer to the CRC in *Khosa*, despite articles 2 and 26 being directly relevant (S Rosa and M Dutschke 'Child Rights at the Core: The Use of International Law in South African Cases on Children's Socioeconomic Rights' 2006 (22) *South African Journal on Human Rights* 224 at 252).

[109] Rosa and Dutschke 2006; L Stewart 'The Grootboom judgment, interpretative manoeuvring and depoliticising children's rights' 2011 (26) *South African Public Law* 97 especially at 101.

[110] See generally Rosa and Dutschke 2006 note 108 and Stewart 2011 note 109.

[111] Rosa and Dutschke 2006 note 108 at 250.

[112] Relying on *Grootboom* (para 26), Rosa and Dutschke state that a 'binding international law agreement like the UNCRC should in principle be directly applicable in the Court' (ibid at 244).

[113] Sloth-Nielsen and Kruuse 2013 note 98 at 671.

[114] Ibid at 677.

[115] Skelton 2018 note 99 at 405 (discussing *Centre for Child Law v Minister for Justice and Constitutional Development and Others (NICRO as Amicus Curiae*) 2009 (11) BCLR 1105 (CC) and at 414 (discussing *J v National Director of Public Prosecutions and another (Childline South Africa and others as amici curiae)* 2014 (7) BCLR 764 (CC)).

same thing with 'self-executing', or the term is used metaphorically to stress that the South African courts give effect to the CRC. Further, little effort has been made to distinguish between the impact of the Constitution, especially section 28 of the Constitution,[116] and that of the CRC, the two often being taken as having identical standards.

Sometimes, the terminology used in academic writing to describe the courts' engagement with the CRC does not mirror the constitutional language in sections 39(1)(b) and 233. Thus, it has been said that the CC jurisprudence is 'rooted'[117] in international and regional law, or that the CRC 'contextualise[s]'[118] constitutional provisions. Reference is made to 'recourse'[119] by the courts to the CRC or using it as a 'backdrop'.[120] Significance is attached to the fact that courts 'mention' the CRC, or that a court 'highlights', 'quotes verbatim' or uses the CRC 'to support the Court's reasoning'.[121] This terminology tells us little about whether the courts do what they ought to: consider the CRC in the interpretation of the Bill of Rights as per section 39(1)(b), or interpret domestic legislation to avoid inconsistency with the CRC as per section 233. This terminological uncertainty mirrors courts' own lack of clarity on the issue, as illustrated in part 5.4.2.

The divergent views in relation to the impact of the CRC and the lack of clarity on how the courts utilise the constitutional framework discussed in part 5.2 call for a closer analysis of the techniques utilised by courts, the extent of attention they give to the CRC, and the outcome of the engagement. Consistent with the approach explained in Chapter 1, the focus of this analysis is on cases where the courts have engaged meaningfully with the CRC. The case law is discussed under headings which reflect the framework of domestic reception presented in part 5.2 above, starting with the use of the CRC for constitutional interpretation purposes, then statutory interpretation purposes and self-execution. Part 5.4.2.4 presents cases in which the engagement with the CRC cannot be captured under the framework discussed in part 5.2 above.

5.4.2 The case law

By way of introduction, a brief quantitative account may be of interest. As of 1 November 2018,[122] 23 Constitutional Court and 17 SCA cases have mentioned the CRC. Of the Constitutional Court cases, four are not child rights-related, the CRC not being engaged with.[123] Of the remaining 19, limited attention is given to the CRC in eight (8) cases,[124] leaving the

[116] Skelton acknowledges, however, the difficulty of distinguishing between their impact (ibid at 401).
[117] Skelton 2015 note 23 at 15
[118] Ibid at 25.
[119] Sloth-Nielsen and Kruuse 2013 note 98 at 648
[120] Ibid at 657.
[121] Sloth-Nielsen and Mezmur 2008 note 98 at 8,12.
[122] Search conducted on the website of the Southern African Legal Information Institute (*SAFLII*) http://www.saflii.org/.
[123] *Certification of the Amended Text of the Constitution of The Republic of South Africa, 1996* 1997 (1) BCLR; *Mail and Guardian Media Ltd and Others v Chipu NO and Others* 2013 (11) BCLR 1259 (CC); *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC); *Glenister II*.
[124] There are cases in which the CRC is referred to generically (*Grootboom* para 75; *Raduvha v Minister of Safety and Security and Another* 2016 (10) BCLR 1326 (CC) para 20 fn 13; and *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* 2018 (8) BCLR 921 (CC) para 60). In other cases, the engagement is

number of cases in which the Court applies itself to the CRC to eleven (11). Of the 17 SCA cases mentioning the CRC, limited engagement has occurred in nine (9) cases.[125]

A second preliminary point is that there are important children's rights cases which do not mention the CRC although the Convention was potentially relevant, such as *MEC for Education: Kwazulu-Natal and Others v Pillay,*[126] *Johncom Media Investments Ltd v M and Others,*[127] *TAC,*[128] *Sonderup v Tondelli and Another,*[129] *Khosa,*[130] *J and Another v Director General, Department of Home Affairs and Others,*[131] and *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another.*[132]

minimal. In *Bannatyne v Bannatyne and Another* 2003 (2) BCLR 111, in fn 29, after referring to section 28(2), the Court states that '[i]nternational law also affirms the "best interests" principle…', statement which is then followed by the text of article 3(1). In *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC), after acknowledging the injunction in section 39(1)(b), the Court refers to the Preamble of the CRC and quotes from article 2 (para 55). In *Du Toit and Another v Minister of Welfare and Population Development and Others* 2002 (10) BCLR 1006, after engaging with section 28(2), the Court acknowledges the recognition of the paramountcy of the best interests in international law and foreign law, and then refers to article 3 in fn 19. It also refers to the Preamble (fn 21). In *Geldenhuys v National Director of Public Prosecutions and Others* 2009 (2) SA 310 (CC), the Court refers to article 1 of the CRC when quoting from the arguments of the respondents (para 12 fn 6). In *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* 2011 (8) BCLR 761 (CC), the Court dealt with the horizontal application of the right to education and the role of the courts when this right might conflict with the rights of others (e.g. the right to property). The Court refers to articles 28 and 29 of the CRC (para 40 fn 41; para 43 fn 48)) to show that the right to education is recognised internationally as an important right. It also mentions article 3(1) in a footnote to the main text where the Court recites section 28(2) of the Constitution (fn 79). No immediate consequences arise from the engagement with the CRC, which remains background information.

[125] Sometimes, the references to the CRC are generic (*B v S* 1995 (3) SA 571 (A) at 582B; *Singh and Another v Ebrahim* [2010] ZASCA 145) per Snyders JA (concurred with by Maya JA para 124 fn 18; *Mugridge v S* 2013 (2) SACR 111 (SCA) ('*Mugridge*'); *Ntaka v S* [2008] 3 All SA 170 (SCA) per Maya JA para 14, fn 3). In *Brooks and another v National Director of Public Prosecutions* [2017] 2 All SA 690 (SCA), the Court mentioned the CRC in its quotes from previous cases. In *Brossy v Brossy* [2012] ZASCA 151, the Court refers to the arguments by Centre for Child Law who pointed to the CRC (and ACRWC) and their protection of the right to be heard (para 17). Mention is then made in fn 3 to article 12 CRC. In *City of Johannesburg v Rand Properties (Pty) Ltd* [2007] 2 All SA 459 (SCA), the CRC is acknowledged as one of the international treaties dealing with the right to adequate housing (para 19 fn 4 referring art 27(3) of the CRC). In *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 (2) SACR 183 (SCA), the Court referred to the CRC as being one of the international instruments seeking to ensure the protection of vulnerable persons against sexual abuse and violence (para 1 fn 1 referring to article 19). *AB and Another v Pridwin Preparatory School and Others* [2018] ZASCA 150 concerns the constitutionality of contractual clauses between a private school and the parents of two children. The CRC is mentioned only in the dissenting judgment of Mocumie JA, who invokes article 12 of the CRC in parallel with section 28(2) of the Constitution and domestic cases (paras 115, 119, 123).

[126] 2008 (1) SA 474 (CC) (religious and cultural rights of children in schools).

[127] 2009 (4) SA 7 (CC) (freedom of expression and protection of privacy of children whose parents are divorcing).

[128] Concerning the right to access to health services by pregnant women and their new-born babies to prevent the transmission of HIV.

[129] 2001 (1) SA 1171 (CC) (the compatibility of the Convention on the Civil Aspects of International Child Abduction, 1980 with section 28(2) of the Constitution).

[130] 2004 (6) SA 505 (CC) (access to social grants by permanent residents and their children).

[131] 2003 (5) BCLR 463 (recognition of same-sex life partner as the parent of a child born through artificial insemination of her partner).

[132] 2014 (2) SA 168 (CC) ('*Teddy Bear Clinic'*) (constitutional validity of legislation which criminalised consensual sexual penetration and other non-penetrative forms of sexual interaction between children aged 12 to 16).

5.4.2.1 The CRC and the interpretation of the Bill of Rights

Intercountry adoptions: Minister for Welfare and Population Development v Fitzpatrick and Others[133] *and AD and DD v DW and Others*[134]

These cases raised the application of the principle of subsidiarity to intercountry adoptions in South Africa before the principle was adopted explicitly in the domestic law. The principle requires that domestic arrangements for the care of a child are to be preferred over placing a child with an adoptive family overseas.

Fitzpatrick concerned an English family residing permanently in South Africa who wished to adopt a South African toddler who they fostered. Section 18(4)(f) of the Child Care Act 74 of 1983, now repealed, prohibited the adoption of a South African child by a foreign national who did not apply for naturalisation in South Africa.[135] The Court declared the above statutory provision as inconsistent with section 28(2) of the Constitution because it prevented an individualised assessment of what may be in the best interests of a particular child.[136] The Court mentioned the CRC in two contexts: in interpreting section 28(2) of the Constitution; and in addressing arguments raised by the state and the *amicus*, that the declaration of invalidity should be suspended because the existing legislation was not adequate to address concerns pertaining to the process of intercountry adoption,[137] including respect for the principle of subsidiarity contained in article 21(b) of the CRC[138] (and the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption ('the Hague Convention')).[139]

The influence of the CRC on the Court's approach to section 28(2) is uncertain. The Court made the far-reaching and influential statement that section 28(2) is a right independent of those in section 28(1),[140] but it is not apparent that this was prompted or encouraged by the CRC. In fact, the Court preceded by 13 years a similar position taken by the CRC Committee in relation to article 3(1) of the CRC.[141] In its best interests reasoning, the Court quotes article 3(1)[142] to support its observation that the best interests standard has not been given exhaustive content in the South African, international or foreign law.[143] This strengthened the Court's view

[133] 2000 (7) BCLR 713 (CC) ('*Fitzpatrick*').
[134] 2008 (4) BCLR 359 (CC) ('*AD v DW*').
[135] See fn 2 in *Fitzpatrick* for the text.
[136] *Fitzpatrick* para 20.
[137] *Fitzpatrick* para 23. The concerns referred to the ability of the South African authorities to perform the background checks in relation to foreign adopters, protection against child trafficking and 'inadequate provision to give effect to the principle of subsidiarity' (fn omitted).
[138] Article 21(b) states: 'Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin'.
[139] *Fitzpatrick* para 27.
[140] M Couzens 'The Contribution of the South African Constitutional Court to the Jurisprudential Development of the Best Interests of the Child' in A Diduck, N Peleg and H Reece (eds) *Law in Society: Reflections on Children, Family, Culture and Philosophy. Essays in Honour of Michael Freeman* (2015) 521.
[141] CRC Committee *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*.
[142] In fn 11, alongside African Charter on the Rights and Welfare of the Child, 1990 and relevant literature.
[143] *Fitzpatrick* para 18.

that the standard should remain flexible 'as individual circumstances will determine which factors secure the best interests of a particular child'.[144]

The use of the CRC is clearer in the Court's dealing with the principle of subsidiarity. The Court found that 'the requirement in section 40 of the Act that courts are to take into consideration the religious and cultural background of the child, on the one hand, and the adoptive parents, on the other'[145] responded to concerns covered by the principle of subsidiarity.[146] In footnote, the Court noted that

> [a]lthough no express provision is made for the principle of subsidiarity in our law, courts would nevertheless be obliged to take the principle into account when assessing the "best interests of the child", as it is enshrined in international law, and specifically article 21(b) of the Children's Convention. This obligation flows from the imperative in s 39(1)(b) of the Constitution that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law".

Thus, the principle of subsidiarity was to be considered as a part of the best interests enquiry.

The principle of subsidiarity and its relationship with the best interests of the child was revisited in *AD v DW*, where the SCA and the Constitutional Court took slightly different approaches.

The applicants, an American couple, wished to adopt a South African toddler. They approached the High Court for a custody and sole guardianship order, which would have enabled them to take the child to the US and adopt her there. The High Court rejected the application, considering that, in substance, it was an intercountry adoption application that fell under the jurisdiction of the children's court. The judgment was appealed to the SCA, which with a narrow majority (3:2) dismissed the appeal.[147] The decision of the majority relied substantially on the principle of subsidiarity in the CRC, ACRWC and the Hague Convention,[148] whose requirements were, in its view, not complied with. The minority did not reject the relevance of the principle of subsidiarity, but held that its requirements were complied with in this specific case[149] and by the existing legal framework more generally.[150]

In her majority judgment Theron AJA (as she then was) held that the granting of a custody and guardianship order with a view of concluding an adoption overseas was 'contrary to the principles of the UNCRC and the African Charter'[151] which required that equivalent standards and safeguards be applied to both domestic and international adoptions.[152] The Court decided

[144] *Fitzpatrick* para 18 (fn omitted).
[145] *Fitzpatrick* para 32.
[146] Which it defined as 'the principle that intercountry adoption should be considered strictly as an alternative to the placement of a child with adoptive parents who reside in the child's country of birth' (*Fitzpatrick* fn 13). The definition which the Court embraced seems closer to that in article 4(b) of the Hague Convention than that in article 21(b) of the CRC, without the Court having explained its choice.
[147] *De Gree and Another v Webb and Others (Centre for Child Law as amicus curiae)* 2007 (5) SA 184 (SCA) ('*De Gree'*).
[148] By then, the Hague Convention had been ratified by South Africa and it was in the process of being incorporated into the Children's Act (see Chapter 16 and Schedule 1). As of 1 July 2010 (date of entry into effect of the relevant Children's Act provisions, the Hague Convention is part of the domestic law.
[149] *De Gree* per Heher JA para 48, 55.
[150] *De Gree* para 50.
[151] *De Gree* per Theron AJA para 15.
[152] *De Gree* per Theron AJA; per Ponnan J para 84.

that section 39(1)(b) of the Constitution requires that the principle of subsidiarity be taken into account when assessing the best interests of the child, despite it not having been explicitly provided for in the domestic law (at the time).[153]

The appellants argued that the best interests of the *individual* child required that the High Court grant the custody and guardianship order. This position was embraced by the minority in the SCA, who considered the adoption to be in the best interests of the child affected by the dispute. The majority showed substantial concern for the interests of children more generally. Citing articles 3(1) and 21 of the CRC and the Hague Convention, the Court noted that the fundamental principle underlining these instruments was the best interests of the child, which these conventions sought to protect through various mechanisms.[154] It was in the interest of children generally that intercountry adoptions be concluded in accordance with the principles provided in international instruments,[155] including the subsidiarity principle.

The principle of subsidiarity drove the reasoning of the majority, with Ponnan JA referring to it as 'foundational' to intercountry adoption.[156] Theron AJA said that a court 'should not sanction an adoption procedure which is in conflict with international treaties which South Africa has ratified and which are designed to safeguard the best interests of the child'.[157] Ponnan JA added that 'in choosing between two possible procedural options a court should … rather plump for the one that is compatible with this country's international legal obligations than the one that is not'.[158]

The SCA judgement was appealed to the Constitutional Court.[159] Sachs J, writing for the Court, noted that the lacuna in the domestic law in relation to intercountry adoptions had to be covered by international law, and especially the subsidiarity principle.[160] The stringent mechanisms to regulate the practice and prevent its potential abuse, introduced by the Hague Convention,[161] show that 'the framers appear to have felt it would be permissible to reduce the relatively autonomous effect of the subsidiarity principle as expressed in the CRC and the African Charter on the Rights and Welfare of the Child … , and bring it into closer alignment with the best interests of the child principle'.[162] The principle of subsidiarity in article 4(b) of the Hague Convention uses language which is 'notably less peremptory' [163] than the language in the CRC and ACRWC, opening therefore the possibility that in certain circumstances a placement outside the country of birth will better serve the interests of the child.[164] However, while the

[153] *De Gree* per Theron AJA para 12.
[154] *De Gree* per Theron AJA para 17. Ponnan JA also referred to the same international instruments to draw the conclusion that they provide a child-centred approach to intercountry adoptions which seeks to eliminate abuses in the practice (paras 85, 86 and 94).
[155] *De Gree* per Theron AJA para 17.
[156] *De Gree* per Ponnan JA para 96.
[157] *De Gree* per Theron AJA para 27. Also, Ponnan JA para 92.
[158] *De Gree* per Ponnan JA para 92.
[159] *AD and DD v DW and Others* 2008 (4) BCLR 359 (CC).
[160] *AD v DW* para 36.
[161] *AD v DW* para 43 onwards.
[162] *AD v DW* para 47
[163] *AD v DW* para 47.
[164] *AD v DW* para 48.

principle of subsidiarity should be adhered to as a 'core factor'[165] given its protective function, it is not the 'ultimate governing factor in intercountry adoptions'.[166] That is because the Constitution requires 'in all cases, including inter-country adoption, to ensure that the best interests of the child will be paramount'.[167] In a footnote, the Court referred to article 3 of the CRC, as well as articles 21 of the CRC and 4 and 24 of the ACRWC, noting that in the context of adoption, the two conventions give the best interests of the child more weight than in other legal matters.[168] Sachs J found the position of the majority of the SCA – that the principle of subsidiarity was an impediment to the granting of the order by the High Court – to be 'too bald',[169] and decided that 'the subsidiarity principle itself must be seen as subsidiary to the paramountcy principle'.[170]

In both cases, therefore, the courts have relied on the CRC to interpret section 28(2) of the Constitution, and in the process, sought to give effect to the principle of subsidiarity as it applies to intercountry adoptions, a principle not explicitly recognised by the domestic law at the time.

The right to parental and family care

M v S (Centre for Child Law Amicus Curiae)[171]

This is one of the most important cases which considers the rights of children in South Africa, and one in which the Court discusses extensively the best interests of the child.[172]

The central issue for determination was the obligations arising from section 28(2) of the Constitution for judicial officers who sentence primary caregivers. The accused was the single mother of three children (aged 16, 12 and 8); she was convicted of fraud and sentenced to a short period of incarceration. She appealed her sentence, arguing that the court had not given sufficient consideration to the rights of her children. In upholding the appeal, the majority found that the sentencing court erred in imposing a custodial sentence. Applying section 28(1)(b) read with section 28(2), Sachs J provided guidelines for sentencing courts on how to give effect to children's rights when sentencing primary caregivers.[173] This Justice stated that:

> section 28 must be seen as responding in an expansive way to our international obligations as a State party to the United Nations Convention on the Rights of the Child ("the CRC"). Section 28 has its origins in the international instruments of the United Nations. Thus, since its introduction the CRC has become the international standard against which to measure legislation and policies, and has established a new structure, modelled on children's rights …[174]

[165] *AD v DW* para 49.
[166] *AD v DW* para 49.
[167] *AD v DW* para 49 (fn omitted).
[168] *AD v DW* fn 47.
[169] *AD v DW* para 54.
[170] *AD v DW* para 55.
[171] 2007 (12) BCLR 1312 (CC) ('*M v S*').
[172] J Gallinetti '2kul2Btru: What children would say about the jurisprudence of Albie Sachs' 2010 (25) *South African Public Law* 108.
[173] *M v S* paras 33 and 36.
[174] *M v S* para 16 fns omitted.

The CRC together with the Constitution have introduced a 'change in mindset'[175] which requires that regard

> has to be paid to the import of the principles of the CRC as they inform the provisions of section 28 in relation to the sentencing of a primary caregiver. The four great principles of the CRC which have become international currency, and as such guide all policy in South Africa in relation to children, are said to be survival, development, protection and participation. What unites these principles, and lies at the heart of section 28, I believe, is the right of a child to be a child and enjoy special care.[176]

The height of the Court's use of the CRC is in the quotes above. No attention is given to the wording of the CRC, and apart from article 3(1), the Court does not identify other relevant provisions despite mentioning the Convention's 'four great principles'. In his analysis of section 28(2), in a footnote, Sachs J notes the distinction between article 3(1) and section 28(2), pointing out that the latter 'is notably stronger than the phrase "primary consideration"' in the former,[177] but does not explore the distinction further. Whatever the concerns, it appears that the CRC was used to give content to or to clarify, section 28.

C and Others v Department of Health and Social Development, Gauteng and Others[178]

C v Department of Health concerned the constitutional validity of sections 151 and 152 of the newly enacted Children's Act, which allowed the emergency removal of children to temporary safe care without a court reviewing the removal in the presence of the child and his/her carers.[179] The challenge to the constitutional validity of the above provisions of the Children's Act was mounted when social workers removed three children from the care of two parents found working or begging on the streets accompanied by their children.[180] The case reached the Constitutional Court, which had to decide whether the absence of an automatic judicial review of the emergency removal of children as per sections 151 and 152 of the Children's Act above, in the presence of the child and the parents, was constitutional. Three judgments were written. The majority judgment, penned by Yacoob J, makes no reference to the CRC when finding that the impugned statutory provisions breached the Constitution.[181]

The two minority judgments refer to the CRC, but differ in relation to its significance. Skweyiya J (concurred with by Froneman J) found that the emergency removal of a child according to sections 151 and 152 of the Children's Act was an interference with the right to parental and family care in section 28(1)(b) of the Constitution.[182] Although section 28(1)(b) of the Constitution recognises the right to alternative care, that right was secondary to the right to parental and family care.[183] To support the primacy of parental and family care over

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[175] *M v S* para 16.
[176] *M v S* para 17 fns omitted.
[177] *M v S* fn 31.
[178] 2012 (4) BCLR 329 (CC) ('*C v Department of Health*').
[179] The case was to be presented to a court within 90 days of the removal; during this period a social workers' report was compiled for the court. See section 155(2) of the Children's Act.
[180] One of the children accompanied her shoe-making father on the street because her mother was in the hospital giving birth, and the other two children were together with their blind mother who was begging for a living.
[181] Yacoob J found that the absence of an automatic judicial review of the emergency removal of children was contrary to section 28(2) of the Constitution and section 34 (access to courts).
[182] *C v Department of Health* per Skweyiya J para 24.
[183] *C v Department of Health* per Skweyiya J para 24.

alternative care, Skweyiya J relied on the ACRWC and articles 7(1) and 8(1) of the CRC, which he found himself bound to consider under section 39(1)(b) of the Constitution.[184] Once he established that several constitutional rights were infringed upon, Skweyiya J dealt with the reasonableness and justification of the interference with these rights. In determining the appropriate relationship between the limitation and its purpose (as required by section 36(d)), Skweyiya J found it 'helpful to consider the applicable international law'.[185] In this context, this Justice referred *inter alia* to article 9 of the CRC, which he found to set specific requirements for the removal of children from their families.[186] After stressing the importance of the CRC as an 'interpretive influence … on section 28 of the Constitution',[187] Skweyiya J stated that:

> [t]he right to parental care or family care requires that the removal of children from the family environment must be mitigated in the manner described in the UNCRC, in order to satisfy the standard set for the limitation of rights in section 36(1) of the Constitution. The requirements that the removal be subject to automatic review and that all interested parties, including the child concerned, be given an opportunity to be heard, in my view, stand as essential safeguards of the best interests of the child.[188]

Jafta J (joined by Mogoeng CJ) took the view that the CRC had no role in the constitutional review, which was to be conducted solely in relation to section 28 of the Constitution. The statutory scheme was not contrary to the Constitution, because the latter did not require that the removal of a child from the family be subject to an automatic judicial review.[189] Jafta J dismissed the CRC arguments as follows:

> Section 28 does not refer to automatic review at all. Therefore, the requirement for judicial review in the Convention does not form part of the section. Nor can it be incorporated into the section. Consequently, it cannot be used as a constitutional standard for determining the validity of legislation. This is so despite the fact that the Convention and the Charter were ratified and are binding on South Africa. International law may form part of our law if it is not inconsistent with the Constitution or an Act of Parliament. This illustrates that where there is an inconsistency between international law and an Act of Parliament, the latter prevails.[190]

This indeed 'gives rise to some concern with regard to international law',[191] and contrasts with the nuanced approach taken by Skweyiya J. For Jafta J, as section 28 did not provide for a judicial review, such requirement could not be incorporated into that section by way of judicial interpretation. Ironically, Jafta J's judgment contains the first judicial statement that the CRC may be directly applicable in the South African law, had it not been (as per Jafta J) inconsistent with the Constitution and the Children's Act.

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[184] *C v Department of Health* per Skweyiya J para 25.
[185] *C v Department of Health* per Skweyiya J para 32.
[186] *C v Department of Health* per Skweyiya J para 32, quoting the text of article 9(1) and (2) of the CRC, and stressing the requirements of removal subject to judicial review and the requirements in relation to the participation in the removal proceedings of all interested parties.
[187] *C v Department of Health* per Skweyiya J para 33.
[188] *C v Department of Health* per Skweyiya J para 34.
[189] This view was rightly criticised by Skelton for being a 'narrow, legalistic' view of the relationship between the Bill of Rights and international law (2015 note 23 at 23).
[190] *C v Department of Health* per Jafta J para 109 (fn omitted).
[191] Skelton 2015 note 23 at 23.

The contribution of the CRC to Skweyiya J's reasoning is, however, significant. First, articles 7(1) and 8(1) of the CRC are used to interpret section 28(1)(b) of the Constitution and clarify its scope. This enabled the conclusion that parental and family care is the primary form of care for children, and appropriate alternative care is subsidiary to it. Second, section 28(1)(b) of the Constitution is sparse, and does not mention explicitly the conditions in which children can be separated from their families. Reliance on article 9 of the CRC enabled Skweyiya J to address the gap, by declaring that 'the removal from the family environment must be mitigated in the manner described in the UNCRC' in order to satisfy the requirements of the limitation clause of the Constitution.[192]

Third, reliance on the CRC improved the transparency and the cogency of Skweyiya J's judgment when compared with the majority judgment. Yacoob J found the impugned statutory framework inconsistent with sections 28(2) and 34 of the Constitution, but the reasoning is sparse and does not explain why automatic judicial review and no other measure satisfies the best interests of the child.[193] Skweyiya J on the other side, clearly locates the requirement for judicial review in the CRC, giving a sounder foundation to his judgment.

Education environment

In *Juma Musjid* the CRC was mentioned by the Court when dealing with the right to education, but the reliance on the Convention was limited. In other cases so far, the school was the context in which other rights operated, but the right to education was not at stake.

In *Le Roux and Others v Dey; Freedom of Expression Institute and Another as Amici Curiae*[194] three teenagers (aged 15 to 17) played a prank on the principal and deputy principal of the school they attended. They superimposed the heads of their two teachers on the picture of two men depicted in a sexually suggestive position. The deputy principal successfully sued the children for defamation, and the case reached the Constitutional Court in the appeal of the children.

Four judgments were written, of which only one mentions the CRC. The majority judgment paid only limited attention to the rights of children, and found the children liable for defamation. The dissenting judgments of Yacoob J and Skweyiya J focused on children's rights, but only Skweyiya J's judgment mentions the CRC. This Justice found article 3 of the CRC 'appealing'[195] because of the 'interesting difference' between article 3 of the Convention and section 28(2) of the Constitution, respectively the fact that the former refers to the best interests of the child as 'a primary consideration' rather than of 'paramount importance', as provided in the latter.[196] From this distinction, Skweyiya J drew the conclusion that

> the best interests of the child consideration is not artificially elevated above all others; rather, it forms the basis and starting point from which the matter is to be considered. Once the considerations relevant to this foundation are clearly cemented, one can then begin to examine the other rights that enter the

[192] *C v Department of Health* per Skweyiya J para 34.
[193] See, for example, *C v Department of Health* per Yacoob J para 77.
[194] 2011 (6) BCLR 577 (CC) ('*Le Roux*').
[195] *Le Roux* per Skweyiya J para 211.
[196] *Le Roux* per Skweyiya J para 211.

> balance, without losing sight of the fact that the best interests of the child remain "of paramount importance".[197]

Although reliance on the CRC was not extensive, article 3 of the CRC influenced Skweyiya J's reasoning. Interestingly, it was the *difference* between the international and the constitutional text which proved valuable, in that it enabled this Justice to see the constitutional text in a different light and formulate a practical test useful in cases where the interests of children conflict with those of others.

Children as victims and offenders

This is the category of cases best represented in the jurisprudence of the two courts, with the CRC being considered in cases concerning sentencing of juvenile offenders and post-sentencing measures, as well as the treatment of child victims and witnesses.

Director of Public Prosecutions, KZN v P[198]

The case concerned the sentencing of a 14 years-old-girl, who, when aged 12 years and 5 months, instigated two persons to kill her grandmother. In appeal, the Supreme Court of Appeal overturned the sentence of the High Court, and imposed a suspended sentence, coupled with correctional supervision.

The Supreme Court of Appeal accepted that the approach to sentencing juveniles is informed by section 28(1)(g) of the Constitution and international instruments, especially those adopted under the aegis of the United Nations.[199] The Court noted, amongst others, the relevance of article 40(1) of the CRC (treating the child so as to promote the child's dignity and worth, taking into account the child's age and the desirability of promoting the child's reintegration). It also stressed that section 28(1)(g) was a 'replica' of section 37(b) of the CRC in its approach to deprivation of the liberty of the child as a last resort and for the shortest period of time.[200] The Court concluded that:

> [h]aving regard to section 28(1)(g) of the Constitution and the relevant international instruments, as already indicated, it is clear that in every case involving a juvenile offender, the ambit and scope of sentencing will have to be widened in order to give effect to the principle that a child offender is 'not to be detained except, as a measure of last resort' and if detention of a child is unavoidable, this should be 'only for the shortest appropriate period of time'.[201]

The Court considered that imprisonment was called for,[202] but expressed concerns over the absence of adequate facilities to detain imprisoned children[203] and the poor supervision exercised by the Department of Correctional Supervision over those sentenced to correctional supervision.[204]

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[197] *Le Roux* per Skweyiya J para 211.
[198] [2006] 1 All SA 446 (SCA) ('*DPP v P*').
[199] *DPP v P* para 11. In addition to the CRC, the Court also referred to the Minimum Rules for the Administration of Juvenile Justice (1985) ('the Beijing Rules'); see para 16.
[200] *DPP v P* para 15.
[201] *DPP v P* para 18.
[202] *DPP v P* para 22.
[203] *DPP v P* para 23.
[204] *DPP v P* para 25.

Although ultimately the outcome of the case was not the most favourable to the child, the Court engaged with the CRC in a manner which helped it develop the domestic law. Article 37(b) of the CRC was relied on to add weight to section 28(1)(g) of the Constitution, so in that sense it did not move the law forward. Article 40(1), however, raised aspects not explicitly referred to in the Constitution, respectively a child-focused treatment of the child-offender (including in relation to the conditions of detention) and an orientation of the sentence toward reintegration. While the Court did not impose direct imprisonment because it was 'too late',[205] rather than because the imprisonment conditions were inadequate and thus contrary to international norms, the reasoning suggests that detention conditions of juveniles may be a relevant consideration for a sentencing court. It was by looking at the situation through the lens of the CRC that the Court was able to conceptualise and confer legal relevance to the deficiencies in the detention regime of children.

The Court did not mention the constitutional provision which justified its engagement with the CRC. It appears that it did not simply refer to the CRC to interpret or add strength to section 28(1)(g) of the Constitution, but also to assist the Court in imposing an appropriate sentence,[206] and thus the exercise of its discretion. By not mentioning section 39 of the Constitution, the Court avoided identifying a constitutional provision which it arguably interpreted by considering the CRC, creating a wider space for engaging with international law.

Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others[207]

This case raised the question as to whether several statutory provisions which aimed at protecting the rights of child witnesses and complainants who testify in criminal cases were compliant with section 28(2) of the Constitution. The impugned provisions established the conditions under which a child victim and/or a child witness could testify through intermediaries, be heard in camera or with the use of closed-circuit television in cases concerning sexual offences.[208] Judicial discretion, rather than a positive obligation to use these methods to protect children's vulnerability, was considered by the High Court to be inconsistent with the best interests of the child, and the relevant statutory provisions were declared unconstitutional.

In confirmation proceedings, the Constitutional Court took a different view, and decided that the impugned provisions could be interpreted in a constitutionally-compatible way. Many constitutional issues were raised by the case,[209] but the focus here is on the Court's engagement

[205] *DPP v P* para 26.
[206] See especially *DPP v P* para 11 where the Court states that: 'This issue [sentencing] must of course now be considered not only with reference to the so-called traditional approach to sentencing but also with due regard to the sentencing regime foreshadowed in section 28(1)(g) of the Constitution of the Republic of South Africa Act, 1996 and international developments as reflected in, for instance, instruments issued under the aegis of the United Nations'.
[207] 2009 (7) BCLR 637 (CC) ('*DPP*').
[208] *DPP* per Ngcobo J para 3.
[209] These include judges raising constitutional issues *mero motu*, and the appropriate position of a court when it becomes aware of systemic problems in the implementation of statutes which are aimed at protecting the interests of children.

with the CRC. The reasoning of the majority (per Ngcobo J)[210] is dominated by the best interests of the child provision, which the majority often invoked to stress the special obligations of *the courts* to protect them. Overall, the Court decided that section 39(2) of the Constitution requires courts to interpret statutes in accordance with the Bill of Rights, including therefore section 28(2) of the Constitution.[211] In interpreting statutes, courts must do so in a way that minimises risks to children's development and well-being which may arise from the application of the law.

The majority gave substantial attention to section 28(2),[212] and it relied on article 3(1) of the CRC as well as the 2005 UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime to interpret it. The Court stressed that international instruments were 'relevant considerations' under section 39(1)(b), and that when interpreting domestic statutes, courts should prefer an interpretation that is consistent with international law, according to section 233.[213] It stated that:

> [t]he international and regional instruments on the rights of the child therefore provide a framework within which section 28(2), and ultimately the invalidated provisions, can be evaluated and understood.[214]

The Court referred to article 3(1) of the CRC (and article 4 of the ARWC) and noted its similarity with section 28(2).[215] It thereafter quoted from General Comment No. 7 of the CRC Committee[216] to make the point that the principle was introduced in the CRC because children's immaturity makes them reliant on authorities for having their rights and interests respected.[217] Both article 3(1) and General Comment No. 5[218] were then mentioned to stress that *courts* have responsibilities in relation to the protection of the best interests of the child in the exercise of their judicial functions, in that they are required to consider the impact of their decisions on children.[219] The Court then noted that

> [i]t is apparent from the CRC and the Guidelines that courts are required to apply the principle of best interests by considering how the child's rights and interests are, or will be, affected by their decisions. The best interests of the child demand that children should be shielded from the trauma that may arise from giving evidence in criminal proceedings.[220]

The Court moved on to interpret the relevant statutory provisions, and referred to the CRC only in the context of the statutory provisions concerning the appointment of intermediaries. It said that section 170A(1) of the CPA (dealing with the appointment of intermediaries) has an objective consistent with section 28(2) understood in the light of article 3(1) of the CRC and

[210] Skweyiya J alone wrote a dissenting judgment in which the rights of children did not feature.
[211] *DPP* para 84.
[212] *DPP* para 70 onwards.
[213] *DPP* para 75.
[214] *DPP* para 75.
[215] *DPP* para 76.
[216] CRC Committee *General Comment No.7 (2005) Implementing child rights in early childhood* para 13.
[217] *DPP* para 77.
[218] CRC Committee *General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6).*
[219] *DPP* para 77.
[220] *DPP* para 79.

the Guidelines, which is to avoid potential trauma arising from a child testifying in court.[221]

One of the contentious issues was the meaning of the phrase 'undue mental stress and suffering' in section 170A(1) of the CPA, as a pre-requisite for the appointment of an intermediary. The High Court and the *amici* were concerned that this phrase required that a child be first exposed to mental stress before an intermediary could be appointed.[222] The Court disagreed and found that such approach would be contrary to section 28(2) and the object of section 170A(1), and inconsistent with article 3(1) of the CRC, and should therefore be rejected.[223] The Court then indicated the obligations of the courts and of the state in appointing intermediaries.[224]

In *DPP*, the Court used article 3(1) to interpret section 28(2) of the Constitution and section 170A(1) of the CPA.[225] Article 3(1) of the CRC and the general comments relied on by the Court were used primarily to stress the direct responsibility of the *courts* to ensure that when exercising their judicial functions they give paramount importance to the best interests of the child.[226] Article 3(1) of the CRC was useful because it explicitly refers to the *courts* being bound to give effect to the best interests of the child. The same conclusion would have arisen from section 28(2) read with section 8(1) of the Constitution, but the Court strengthened this conclusion by drawing on the CRC.

Surprisingly, the Court did not consider article 12 of the CRC although on numerous occasions it referred to the importance of respecting the wishes and feelings of child witnesses and complainants.[227] It preferred to treat the issue as an aspect of the best interests.

Centre for Child Law v Minister for Justice and Constitutional Development and Others (NICRO as Amicus Curiae)[228]

In *Centre for Child Law* the Court declared statutory provisions which mandated the application of minimum sentencing for children aged 16 or 17 at the time of committing certain offences inconsistent with section 28(1)(g) of the Constitution.[229] This regime increased the severity of sentences applied to the children, and obliterated the distinction between their sentencing regime and that of adults.[230] Cameron J's majority judgment is child-focused and important for the development of the rights of children,[231] but the judgment contains limited references to the CRC. Cameron J notes that section 28 of the Constitution 'draws upon and

[221] *DPP* para 98.
[222] *DPP* para 110.
[223] *DPP* para 110.
[224] *DPP* para 111-113.
[225] See especially *DPP* para 100 in relation to the application of section 233 of the Constitution.
[226] See especially *DPP* paras 95 and 113.
[227] See, for, example *DPP* paras 124-127.
[228] 2009 (11) BCLR 1105 (CC) ('*CCL*').
[229] *CCL* per Cameron J paras 46-48, 64. At stake was the constitutionality of the Criminal Law Amendment Act 105 of 1997 as amended by section 1 of the Criminal Law (Sentencing) Amendment Act 38 of 2007, which came into force on 31 December 2007. The legislative amendments which introduced the minimum sentencing in relation to children was aimed at reversing the decision of the SCA in *Brandt v S* [2005] 2 All SA 1 (SCA) paras 6, 22.
[230] *CCL* para 40.
[231] See especially *CCL* paras 26-32.

reflects the Convention on the Rights of the Child',[232] but draws no inference from this remark. He refers with approval to arguments made by the Centre for Child Law, that international instruments (including the CRC) reject the application of minimum sentencing to children,[233] and require that children be incarcerated as a last resort and for the shortest period of time, and be treated differently from adults.[234] Thereafter, however, Cameron J draws the discussion plainly under the Constitution by saying that the Bill of Rights 'amply embodies these internationally accepted principles', and its provisions 'merely need to be given their intended effect'.[235] The outcome of the application of constitutional principles is no doubt compatible with the CRC, but the reasoning is so strongly rooted in the domestic law that it is difficult to distil the influence of the CRC.[236]

J v National Director of Public Prosecutions and another (Childline South Africa and others as amici curiae)[237]

This case concerned the constitutional validity of section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which provided that upon sentencing a person for a sexual offence against a child or a disabled person, a court must order that the particulars of the offender be entered in a National Register for Sex Offenders. Several adverse consequences arose from the registration,[238] and in certain cases, including that of the current applicant, the particulars can never be removed.[239] The applicant, a 14-year-old child at the time of the offences, was sentenced for several accounts of rape against younger children, and the sentencing magistrate made an order for the child's details to be entered onto the Register. When the matter came before the High Court, the Court decided, *inter alia,* that the rights of the child offender were violated by the above section, which was declared unconstitutional.[240]

In confirmation proceedings, Skweyiya ADCJ (as he then was) found that the mandatory registration was contrary to the best interests of the child because it prevented a differentiation between adult and child offenders, an individualised treatment for the child and a consideration of the representations made by the child.[241] In his reasoning, Skweyiya ADCJ noted that section 28(2) of the Constitution requires, amongst other things, that the child or his/her representative be given the opportunity to make representations and to be heard at all stages of the criminal proceedings.[242] This requirement was anchored in the Child Justice Act (section 3(c)), *C v*

[232] *CCL* para 25 fn omitted. Cameron J quotes articles 37(b) and 40(1) of the CRC (see fns 62, 63).
[233] CCL para 61.
[234] *CCL p*ara 61, referring amongst others to article 37(b) and 40(1) of the CRC.
[235] *CCL* para 63.
[236] A different view appears in Skelton 2015 note 23 at 27, who, nonetheless, writing in 2018 (note 99 at 401), acknowledges that it is sometimes difficult to distinguish between the influence of the CRC and that of the Constitution.
[237] 2014 (7) BCLR 764 (CC) ('*J v NDPP'*).
[238] *J v NDPP* paras 21-25.
[239] *J v NDPP* para 25.
[240] *J v NDPP* para 6.
[241] *J v NDPP* para 42.
[242] *J v NDPP* para 40.

Department of Health and section 10 of the Children's Act, as well as in article 12 of the CRC, and General Comments Nos. 12 and 10 of the CRC Committee.[243]

Quantitatively, the reliance on the CRC was not extensive,[244] but with the general comments of the CRC Committee, it contributed to the Court arriving at the conclusion that hearing the views or representations of the child at *all stages* of the criminal process is a requirement arising from section 28(2) of the Constitution. Although the CRC was relied on alongside domestic sources, amongst those, only section 3(c) of the Child Justice Act provided some explicit support for the participation of the child in the criminal justice process. However, as this section is one of the general principles of the Child Justice Act, its scope is limited by it.[245] Since this Act does not deal with the post-sentencing registration of children convicted of sexual offences against other children, the principle was not directly applicable and could not by itself constitute a foundation for the recognition of the right to be heard in the present case. Thus, because of the vulnerability of the Court's reliance on the Child Justice Act, the CRC and the general comments become the strongest support for the interpretation of section 28(2) of the Constitution toward including the right to be heard throughout the criminal process.

As a brief preliminary conclusion,[246] it can be remarked that the CRC has been used to interpret section 28 of the Constitution in the case law of the Constitutional Court and Supreme Court of Appeal, and has influenced the reasoning of judges. It is rare that judges have reservations in relation to considering the CRC, although the impact of their engagement with it is not always clear. Further, it is not always clear which positive outcomes are related to the Convention and which to the Constitution; and at times it is difficult to establish whether the Convention is applied as an interpretive device as per section 39(1)(b) of the Constitution or in other ways.

5.4.2.2 The CRC and statutory interpretation

Section 233 of the Constitution is seldom relied on in relation to the CRC.[247] It has been relevant in only two of the cases surveyed here: the *DPP* (discussed above) and *Brandt* (discussed below). In *DPP*, the Constitutional Court relied on section 233 explicitly, while in *Brandt* this section was only implicitly applied.

Brandt v S[248]

The case concerned the application of the mandatory sentencing regime to children. The accused was sentenced for, *inter alia*, a murder which he committed when he was 17 years and 7 months old. Applying the minimum sentencing legislation then in force (section 51 of the

[243] See *J v NDPP* para 40 fn 45. CRC Committee *General Comment No. 12 (2009) The right of the child to be heard* and *General Comment No. 10 (2007) Children's rights in juvenile justice*.
[244] It was only made in fn 45.
[245] Section 3(c) of the Child Justice Act reads: 'In the application of this Act [own emphasis], the following guiding principles must be taken into account: … (c) Every child should, as far as possible, be given an opportunity to participate in any proceedings, particularly the informal and inquisitorial proceedings in terms of this Act, where decisions affecting him or her might be taken'.
[246] A more detailed analysis is conducted in part 5.5 below.
[247] Sloth-Nielsen and Mezmur argue, however, that sections 39 and 233 'have taken firm root in children's rights jurisprudence' (2008 note 98 at 26), without pointing specifically to cases in which the latter section was applied.
[248] [2005] 2 All SA 1 (SCA) ('*Brandt*').

Criminal Law Amendment Act 105 of 1997), the High Court sentenced the accused to life imprisonment. In appeal, the SCA interpreted the minimum sentencing legislation in the light of the Constitution,[249] and it decided that in the case of children aged 16-18 the application of the minimum sentence was a matter of discretion for the sentencing court.[250]

The Constitution and international instruments constituted the backdrop of the Court's approach.[251] Citing academic commentators, the Court remarked that international instruments, including the CRC have revolutionised juvenile justice, and their principles have been articulated in the Constitution.[252] International instruments provided guidelines on how to achieve this new approach to juvenile justice, with the CRC having become an

> international benchmark against which legislation and policies can be measured. Traditional theories of juvenile justice now have a new framework within which to situate juvenile justice: a children's rights model.[253]

The Court found that the *leitmotif* of juvenile justice reform was the principle that detention is a matter of last resort and should be imposed for the shortest period of time; this principle is enshrined both in international law (the Court referring here to article 37(b) of the CRC and Beijing Rule 17.1),[254] and section 28(1)(g) of the Constitution. The 'overriding message of the international instruments as well as of the Constitution'[255] was the use of deprivation of liberty as a last resort, the individualization of sentencing and the preparation of the child for his/her release in the society. This background reinforced the Court's interpretation of section 51(3)(b) of the Criminal Law Amendment Act 105 of 1997, in that should the minimum sentencing apply to children automatically, imprisonment would be a first rather than a last resort, and would conflict with the principles of proportionality and individualisation.[256]

The Court in *Brandt* used the CRC to interpret the minimum sentencing legislation. International law is generally used in parallel with sections 28(2) and 28(1)(g) of the Constitution, but the SCA found international instruments useful because of their 'detailed and … specific suggestions' for the realization of constitutional goals.[257] Reliance on the CRC (as well as other instruments and section 28(2) of the Constitution) was placed to stress the need to interpret the minimum sentencing legislation in a way that treated child offenders differently from adult offenders, as opposed to following an interpretation that would obscure such differences.

[249] *Brandt* para 9.
[250] *Brandt* para 12.
[251] *Brandt* para 13.
[252] *Brandt* para 16.
[253] *Brandt* para 17 fn omitted.
[254] *Brandt* para 18; also, fn 15.
[255] *Brandt* para 19.
[256] *Brandt* para 22.
[257] *Brandt* para 17.

5.4.2.3 The CRC and the self-execution of international treaties

There is no case to this researcher's knowledge in which the courts have confronted the vexed issue of the self-execution of the CRC. This has been so even where opportunities arose for the courts to apply the CRC directly, upon establishing the existence of a *lacuna* in the domestic law (e.g. the absence of the subsidiarity principle as it applies to intercountry adoptions).[258] The strongest explicit judicial declaration in relation to a potential direct application of the CRC is the oblique statement of Jafta J in his dissenting judgment in *C v Department of Health*, according to which '[i]nternational law may form part of our law if it is not inconsistent with the Constitution or an Act of Parliament'.[259] Ultimately, however, Jafta J found that the CRC was not part of the South African law because of its alleged conflict with the Children's Act and the Constitution.

On occasion, the courts appear to have applied the CRC directly. For example, in *F v F*[260] (a relocation matter), a father asked the SCA to hear the child directly, and based his request directly on article 12 of the CRC.[261] The Court noted that '[a] court must of course take a child's wishes into account where the child is old enough to articulate his or her preferences',[262] but did not identify domestic support for this assertion, leaving article 12 of the CRC as the only explicit support for the Court's position. The father's request was rejected because of the negative consequences for the child of being heard directly, and because the court (as an appeal court) was procedurally ill-equipped to deal with the request.[263] The Court engaged with the implications of article 12 of the CRC as if it were a domestic norm, without questioning its domestic status. In the High Court case of *R v H and Another*,[264] the Court raised *mero motu* the desirability of appointing a legal representative for a child involved in an acrimonious divorce. The Court justified this with section 28(1)(h) of the Constitution, but then indicated its view that it has obligations arising directly from the CRC:

> In terms of art 12 of the United Nations Convention on the Rights of the Child (the Convention), the Court is required to afford a child who is capable of forming a view on a matter affecting him or her, the right to express those views. Such views are to be given due weight according to the age and maturity of the child.[265]

Cases such as *F v F* and *R v H* are rare and arguably problematic to the extent that they do not frontally engage with section 231(4) of the Constitution, which enables the courts to consider applying the CRC directly if they so wish.

5.4.2.4 *Sui generis* forms of engagement

There are cases in which it is difficult to ascertain how the CRC is being used. Two factors collude to create this difficulty: the courts not referring specifically to the sections of the

[258] *Fitzpatrick* and *AD v DW*.
[259] *C v Department of Health* per Jafta J para 109.
[260] [2006] 1 All SA 571 (SCA).
[261] *F v F* para 24.
[262] *F v F* para 25.
[263] *F v F* paras 25, 26.
[264] 2005 (6) SA 535 (C) ('*R v H*').
[265] *R v H* para 6.

Constitution which justify their reliance on the CRC; and the use of techniques which do not fit neatly in the categories discussed in part 5.2.

In *Christian Education South Africa v Minister of Education*[266] ('*Christian Education'*) the question for the Court was whether a statutory provision (section 10 of the Schools Act 1996) that prohibited corporal punishment in schools violated the religious rights of parents whose children attended independent schools and who consented to the use of such punishment.[267] The rights of children were only considered in the limitation analysis, when the Court established whether the state obligations in relation to the rights of children and broader societal goals justified the limitation of parents' rights to exercise their religion. The state defended the statute by arguing that the infliction of corporal punishment in schools violated several constitutional rights,[268] and that the state had international obligations to ban corporal punishment in schools, including under articles 37(a), 19 and 28(2) of the CRC.[269] The Court agreed that

> [t[he State is further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse or degradation. More specifically, by ratifying the United Nations Convention on the Rights of the Child, it undertook to take all appropriate measures to protect the child from violence, injury or abuse.[270]

The Court concluded that the blanket ban on corporal punishment was justified by the state's constitutional obligations, as it sought to promote respect for the dignity and integrity of children.[271]

At a close analysis, the CRC standards are not engaged with in any detail although they are quoted in the judgment,[272] and the concrete impact of the CRC is limited. The Court found support for the prohibition of corporal punishment in the CRC, but it did not say how it arrived at its conclusion considering that none of the cited provisions explicitly prohibited corporal punishment.[273] By comparison, article 27 of the ICCPR, is compared with and distinguished from the relevant constitutional standards by the Court.[274] This suggests that the CRC was used only to add weight to state obligations already provided in the Constitution,[275] and thus mainly as 'additional ballast'.[276]

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[266] 2000 (10) BCLR 1051 (CC) ('*Christian Education'*).
[267] Sections 15 and 31(1) of the Constitution were argued to have been breached. For the full array of rights claimed to be breached, see *Christian Education* paras 7, 16.
[268] *Christian Education* para 8.
[269] *Christian Education* para 13 fn 11, where the text of the above provisions is indicated in full.
[270] *Christian Education* para 40 (fn omitted). Fn 44 afferent to the above text refers to articles 4, 19 and 34 of the CRC.
[271] *Christian Education* para 50.
[272] See fns 11 and 44.
[273] By contrast, in the *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, Arbour J made a comprehensive argument as to why corporal punishment is prohibited under the CRC.
[274] *Christian Education* para 23.
[275] Sections 12 and 28(1)(d) of the Constitution.
[276] Term used by Sloth-Nielsen and Mezmur 2008 note 98 at 27.

In *Geldenhuys v The State*[277] the Supreme Court of Appeal pointed out that the state has constitutional as well as international obligations to protect children against abuse.[278] The accused challenged the constitutionality of the age of consent to sexual intercourse set by the legislature above the age of 12, arguing that a child aged 12 may be regarded as competent to make decisions regarding sexual activity.[279] The Court decided that setting a minimum age for consent to sexual activities was aimed at protecting children and was consistent with the Constitution and South Africa's international obligations.[280] It is not certain how the Court uses the CRC, as this was not a case of interpreting a statute in the light of the CRC. The Court said that '[i]t must be remembered that the State is both constitutionally and internationally obliged to protect its children from all forms of abuse'[281] and 'it is clear that the establishment of a legal age of consent to sexual activities … is perfectly in line with South Africa's constitutional and international obligations'.[282] Deliberately or not, the CRC standard is treated on par with the constitutional standards in sections 28(1)(b) and 28(2), without the Court discussing the legitimacy of this approach. It can perhaps be argued that article 34 of the CRC[283] was used to interpret section 28(1)(d) of the Constitution. The constitutional standard is general in its reference to protection against maltreatment, neglect, abuse or degradation, while the CRC provision was more specific in relation to protection against sexual exploitation. This may be why the Court found it of 'particular importance'.[284] However, the Court does not invoke section 39(1)(b) of the Constitution, and affirming the validity of statutory provisions because of their compatibility with the CRC borders an elevation of the international standard to a constitutional level.

In *Centre for Child Law v Governing Body of Hoërskool Fochville and another*,[285] the Centre for Child Law submitted in support of its intervention application an affidavit which contained information critical of the concerned school, obtained from children who expressed their desire to be separately represented in a dispute concerning admission to the school. The school sought to compel the Centre to disclose the questionnaires completed by children,[286] which the Centre refused on grounds that they constituted privileged documents and that maintaining confidentiality protected the interests of the children who feared victimisation. The Supreme Court of Appeal decided that, according to rule 35(2) of the Uniform Rules of the Court, a court has discretion in deciding the disclosure, a discretion which it exercises by balancing the relevant interests, which included the interests of children in this case.[287]

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[277] [2008] 3 All SA 8 (SCA) ('*Geldenhuys'*).
[278] *Geldenhuys* paras 58, 59. The Court referred to article 34 of the CRC, along with the relevant provisions of the ACRWC and the Children's Act.
[279] *Geldenhuys* para 57. See section 14(1)(b) of the Sexual Offences Act.
[280] *Geldenhuys* para 63. The Court found, however, that the statutory framework was inconsistent with the Constitution in that it provided different ages of consent in relation to homosexual and heterosexual acts respectively.
[281] *Geldenhuys* para 58.
[282] *Geldenhuys* para 63.
[283] Mentioned by the Court in para 59.
[284] *Geldenhuys* para 59.
[285] [2015] 4 All SA 571 (SCA) ('*Hoërskool')*.
[286] Rule 35(12) of the Uniform Rules of Court provides that when reliance is placed on a document in an affidavit, the party that filled the affidavit could be compelled to produce that document to the other party.
[287] *Hoërskool* para 19.

'A useful starting point' in establishing the interests of the children was children's rights to separate representation (including legal representation) which flows from the children's right to participate, which is 'widely recognised in international law and forms part of South African law'.[288] The Court drew support for its position from articles 12 of the CRC and 4(2) of the ACRWC,[289] section 28(1)(h) of the Constitution[290] and various rights in relation to child participation that are provided for in the Children's Act.[291] According to the Court, children in this case had the right to be heard in a manner that would not damage their best interests,[292] and this was best secured by having the Centre represent the children and by maintaining their confidentiality.[293] The Court relied on support from the CRC (and the ACRWC) to conclude that a child's right to participate in proceedings can be exercised through a legal representative, as opposed through directly or through their guardians.[294]

It is difficult to ascertain how the Court uses the CRC. It uses a direct application formula, by mentioning that CRC and ACRWC participation provisions form part of the domestic law,[295] but then reverts to discussing domestic norms. The impression is that domestic and international norms are applied jointly and each contributed with specific aspects to the reasoning of the Court: the constitutional standard reflected a right to *legal* representation (as opposed to other types of representation); the international standards recognised a right to participate through a representative (lawyer or otherwise); and the Children's Act standards were sufficiently wide to accommodate a combination of the previous standards: a right to participate through a legal representative. Thus, the position of the Court is founded on an amalgamation of domestic and international norms, in which little distinction is made between them in terms of legal status.

It is possible to approach the Court's ruling as an example of the CRC being used in the exercise of judicial discretion. The interests of children were a relevant consideration for the Court in deciding on the disclosure issue, and were identified, amongst others, by referring to the rights in the CRC. Perhaps because the CRC norms were not used in a normative capacity (but rather to reveal the interests relevant for a court's balancing act), reference to section 39(1)(b) and 233 of the Constitution was not made, and arguably would not have been necessary as none of the operations under the said provisions were engaged with by the Court.

[288] *Hoërskool* para 19.
[289] *Hoërskool* para 20.
[290] *Hoërskool* para 22. However, this section was not directly relevant because this was not a case where children were represented at the state's expense so as to avoid a substantial injustice, as required by the above section.
[291] See sections 10 (general right to participate); 14 (right to access to courts including being assisted by others) and 15 (a reiteration of standing criteria in the Constitution).
[292] *Hoërskool* paras 25, 26.
[293] Especially *Hoërskool* para 27.
[294] The Court noted: 'Section 14 emphatically states that every child has the right to bring a matter to court. It states further that a child may be assisted in bringing the matter to court. It does not state who must assist and does not repeat the common law requirement of being assisted by a guardian' (*Hoërskool* para 23).
[295] It states, with reference to prior cases, that 'The child's right to be heard and to have his or her views taken into account, in terms of the UNCRC and ACRWC, has been recognised as forming part of South African law' (*Hoërskool* para 20).

Reliance on the CRC in the exercise of judicial discretion is arguably present in two more cases. In *S v P*,[296] in deciding that a sentence of ten years imprisonment imposed on a grandfather for the rape of his grandson was appropriate, the Court mentioned the CRC generically, and stated that:

> [f]urthermore [to the obligations arising from section 28(1)(d)], in terms of our constitutional mandate to consider international law (see ss 231, 232, 233 and 234 of the Constitution), the United Nations Convention on the Rights of the Child, 1989, places an obligation on the Republic to eradicate violence against children.[297]

The relevance for the *courts* of the international obligations assumed by South Africa is not addressed, and the reference to constitutional provisions concerning the use of international law is not justified.[298] Consequently, it is difficult to ascertain whether the Court used the CRC simply to strengthen the obligations for sentencing courts arising from section 28(1)(d) of the Constitution, or whether the expectation of the Court is that sentencing courts consider the CRC as an independent factor when sentencing offenders who commit sexual crimes against children. The fact that the Court did not refer to section 39(1)(b) of the Constitution, leaves the latter possibility open.

Du Toit v Ntshinghila and others[299] concerned an accused charged with possession of child pornography who challenged the lawfulness of the prosecutors' decision not to provide him with copies of the images alleged to constitute child pornography.[300] It was held that a court had certain discretion in compelling the disclosure[301] and that countervailing interests may justify a decision not to disclose by way of copies (the normal practice) but to resort to a different means of disclosure (such as private viewing). In this case, the privacy interests of the children depicted in the images were amongst those countervailing interests. It was stated that the courts were enjoined to consider international law, as per sections 39 and 233 of the Constitution.[302] The interests of children were established in relation to a wide range of domestic and international norms,[303] including article 3(1) of the CRC,[304] and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and pornography, 2000.[305] Despite referring to sections 39 and 233 of the Constitution, the Court did not use the CRC to interpret section 35 of the Constitution or a statute. Like in *Hoërskool*, it used the CRC (and other legal instruments) to define the interests of children which were to be balanced against the right to fair trial of the accused, and which may justify some limitations thereof.

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[296] 2000 (2) SA 656 (SCA).
[297] *S v P* para 13.
[298] None of the sections quoted by the Court are relevant *in casu*.
[299] [2016] 2 All SA 328 (SCA) ('*Du Toit v Ntshinghila')*.
[300] This was an issue falling under article 35(3) of the Constitution, and related to the right to a fair trial.
[301] *Du Toit v Ntshinghila* paras 8 and 9.
[302] *Du Toit v Ntshinghila* paras 10-11, and fn 7. It is not clear, however, what statute was to be interpreted in a manner consistent with international obligations.
[303] Including article 4 of the ACRWC, section 28(2) of the Constitution, relevant jurisprudence and the Children's Act.
[304] *Du Toit v Ntshinghila p*ara 12.
[305] *Du Toit v Ntshinghila* para 11.

To conclude, the cases discussed above show that sometimes the courts engage with the CRC in a manner which does not match the formal framework described in part 5.2. This may be decried as a problematic practice but it has resulted in new ways of giving effect to the CRC, as discussed more fully in part 5.5 below.

5.5 Analysis

5.5.1 The engagement of the courts with the CRC

The courts have generally been receptive to the CRC, and related soft-law instruments, such as general comments of the Committee and other UN documents.[306] While the courts do not always give close attention to the Convention, apart from Jafta J's rejection of the CRC in *C v Department of Health* on grounds that it was not incorporated domestically, the legitimacy of references to the CRC has not been contested. As a consequence, there is little judicial preoccupation with the domestic legal status of the CRC. Whether this indicates an unconditional embracing of the CRC is a matter of some uncertainty, as the CRC has generally been invoked to obtain outcomes also supported by the Constitution, and the state has not opposed its application by courts.[307]

The enabling constitutional framework discussed in part 5.2 has saved the courts from having to tightly justify their consideration of the CRC, and created space for engagement with the substance of the CRC norms. Most judicial engagement with the CRC has occurred in the interpretation of section 28, as per section 39(1)(b) of the Constitution. Despite the latter section not requiring a consistent interpretation, in most cases the courts interpret the constitutional standard in harmony with the CRC.[308] In this way, aspects of the CRC become 'constitutionalised' in that by influencing the interpretation of the relevant constitutional norms, they influence the constitutional review process.[309] The process is facilitated by the convergence between the CRC and constitutional norms, often noted by the courts themselves.[310] Indeed, no case acknowledges the existence of potential inconsistency between constitutional norms and the CRC. There are cases in which the courts have noted differences between them, but the judges avoided formally declaring the conflict. In *AD v DW*, for example, Sachs J reconciled the paramountcy requirement in section 28(2) of the Constitution with the weaker formulation in article 3(1) of the CRC ('a primary consideration') by noting that in the specific context of adoptions the CRC itself recognised the best interests as 'the' primary consideration.[311]

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[306] In only two cases were general comments referred to (*DPP* para 77*; J v NDPP*). Other instruments referred to include the Beijing Rules (*DPP v P*) and Guidelines on Justice Matters involving Child Victims and Witnesses of Crime (*DPP*).

[307] In some cases, the state itself referred to the CRC in argument (*Christian Education*; *Fitzpatrick*) or supported a solution which was consistent with the CRC, even when that questioned the validity of domestic law (*YG v S*, where the High Court declared the reasonable chastisement defence to be unconstitutional).

[308] See, for example, the majority interpretation of section 28(2) of the Constitution in *De Gree*, so as to avoid conflict with article 21(b) of the CRC.

[309] *Fitzpatrick*; *Geldenhuys*; *C v Department of Health* per Skweyiya J; *J v NDPP*.

[310] *Christian Education*; *Brandt*; *CCL*; *Geldenhuys*; *Hoërskool.*

[311] Article 21 of the CRC.

Cases in which the courts used the CRC to interpret statutes in a manner consistent with the Convention are far fewer, with *DPP* and *Brandt* being the only ones identified during this study. There are cases, however, which although not statutory interpretation cases, see the two courts use the CRC as an analytical tool in assessing the constitutionality of impugned statutes. Thus, in *Christian Education* and *Geldenhuys*, the CC and the SCA respectively, partially justified their finding that relevant statutes were constitutional with reference to the CRC and state obligations thereof. The similarity between constitutional and CRC standards obscures the triangular relation between domestic statutes, the Constitution and the CRC, whereby the interpretation of statutes is 'controlled' both by the Constitution and the CRC. Jafta J was alert to this in *C v Department of Health*, when he took the view that because the Constitution did not require automatic judicial review of removal, such requirement could not be imported from the CRC. Regardless of the correctness of Jafta J's view, it indicates at least the possibility of tensions within the triangle. This is possible, for example, in areas identified as problematic by the CRC Committee.[312] Virginity testing is one such example: the practice is permitted by section 12(4)-(7) of the Children's Act under certain conditions, but it is criticised by the CRC Committee for being contrary to the CRC.[313]

Despite the general openness to the CRC, neither of the two courts considered the self-execution of the CRC under section 231(4) of the Constitution. One of the furthest-reaching constitutional tools to give effect to international treaties has been unutilised in relation to the CRC. This was a lost opportunity especially prior to the extensive legal reform operated through the Children's Act and the Child Justice Act, when the *lacunae* in domestic law created opportunities for self-execution. A clear illustration concerns the principle of subsidiarity. In *AD v DW*, Sachs J recognised the role of international law in filling gaps in domestic law, but did not consider the self-execution of the principle of subsidiarity. The reason remains a matter of speculation. It may simply be because the argument was not made; or because the Court considered that tension existed with the Constitution (the principle of subsidiarity favouring collective best interests while the constitutional standard favours individual best interests); or it felt bound to follow the interpretation precedent in *Fitzpatrick*; or perhaps because it was not necessary to do so considering that the Children's Act was awaiting entry into force and introduced the principle into the South African law. Whatever the reason, an opportunity to engage with the self-execution of the CRC was lost. This was not rectified in subsequent judgments.

In *C v Department of Health,* Skweyiya J referred to the CRC as 'the applicable international law'.[314] He stated that article 9 of the CRC 'sets the specific requirements in respect of the removal of children from their families',[315] indicating thereafter that the effect of the removal must be mitigated as provided for in the CRC.[316] The language used by Justice Skweyiya is strongly normative: the international standards are 'applicable', and the CRC 'sets the

[312] See part 5.3 above.
[313] CRC Committee *Concluding observations* 2016 paras 39-40.
[314] *C v Department of Health* per Skweyiya J para 32.
[315] *C v Department of Health* per Skweyiya J para 32.
[316] *C v Department of Health* per Skweyiya J para 34.

requirements' to be complied with. The CRC is approached in a 'relationship of authority'[317] with the domestic law, in that it determines when constitutional rights can be limited. Arguably, this goes beyond the process of interpretation envisaged by section 39(1)(b) of the Constitution, and borders on direct application.[318] In *J v NDPP*, Skweyiya ADCJ notes that article 12 'obliges state parties' to ensure child participation, and the General Comment No. 12, which interprets the above article, requires child participation throughout the juvenile justice process.[319] Nowhere does this Justice wrestle with the *domestic* value of this *international obligation*.

Sachs J and Skweyiya J do not refer to section 39(1)(b) in the above judgments. This may indicate a doubt that they genuinely embarked on an interpretive process as opposed to a covert direct application of the CRC. The intensity of the CRC influence in these cases, and the amalgamation of the CRC norms with constitutional or statutory norms without questioning the formers' domestic status in other cases[320] may indicate a *de facto* direct application of the CRC. Sloth-Nielsen and Kruuse are perhaps correct to argue that, in relation to the rights of children, South Africa 'has crossed the invisible line from dualism to monism'.[321]

This researcher does not share the positive feelings which accompany the above statement. The courts' avoidance of engaging with section 231(4) of the Constitution and its potential requirements is concerning. Insisting that courts engage with this section and distinguish between the effects of this section and those of section 39(1)(b) and 233 of the Constitution, or at a minimum, they indicate the section in the Constitution under which they consider the CRC may sound legalistic. However, when the border is so fine between 'importing' international standards and utilising them in different ways, reference to the relevant constitutional provisions may clarify the courts' use of the CRC. Self-execution and direct application are deeply contested legal institutions, whose controversies South African judges seem deliberately to avoid.[322] From this perspective, Jafta J was correct to question the technique used by Skweyiya J in *C v Department of Health*, which borders direct application but skips the potentially taxing enquiry in section 231(4) of the Constitution. Judges are generally guarded against incorporating international standards 'by the back door'.[323] Distinct criteria apply to decide if an international norm is self-executing or directly applicable, and such criteria have also been mooted in South Africa.[324] To draw the conclusion that courts apply the CRC directly because they quote, mention, have recourse to, consider or even give effect to the Convention may be reading too much into judgments in the absence of a formal engagement by the courts with section 231(4) of the Constitution. It is also difficult to accept that in the

[317] Expression used by Tuovinen 2013 note 49 at 663 in a comment to *Glenister II*.
[318] It may be possible to look at Skweyiya J's approach differently. This Justice may have drawn into the *substantive* content of the right to parental and family care, the *procedural* safeguards provided for in article 9(1) and (2) of the CRC (*C v Department of Health* per Skweyiya J para 34).
[319] Fn 45. The view that this is a case in which the CRC was directly applied is shared by Skelton (2018 note 99 at 414).
[320] *F v F*; *R v H*; *Hoërskool*.
[321] Sloth-Nielsen and Kruuse 2013 note 98 at 671. Skelton (2018 note 99) also advances the idea that in some cases (*CCL* and *J v NDPP*) the Constitutional Court has applied the CRC directly.
[322] See part 5.3 above.
[323] *Glenister II* per Ngcobo CJ para 112, and the position of Jafta J in *C v Department of Health*.
[324] Dugard 2005 note 4 at 62.

children's rights field, and *no other*, the South African courts have insidiously applied international standards directly. It is submitted that to the extent that the courts do not engage with section 231(4) of the Constitution when seeking to give direct effect to the CRC, they are incorrect and do not create good law. While *de facto* direct application may have resulted in favourable outcomes for children and may have given effect to the CRC, it does not lead to the formulation of legal principles which can be applied in subsequent cases. To this extent, these cases do not strengthen the legal position of the CRC in the South African law by cementing it in binding precedent which cannot be easily displaced.

The reluctance to consider the self-execution of the CRC (apart from the absence of the concept in arguments by counsel) may be linked with the practicalities of specific cases. Arguably, most children's rights cases in which the courts had an opportunity to engage with self-execution are cases in which the courts lacked an incentive to do so or because the self-execution was not a pressing need. In some cases, the courts were able to avoid it by relying on alternative reasoning, while in others a finding of self-execution would have made little difference to the outcome. In *Fitzpatrick*, the wide interpretation given by the Court to section 28(2) of the Constitution absorbed the principle of subsidiarity with no need to decide on its self-execution. In addition, in *AD v DW*, there was little point for the courts to declare the principle of subsidiarity as being self-executing whilst the Children's Act, which incorporated the Hague Convention was awaiting entry into force. Further, in most cases, the Convention was applied alongside a supporting constitutional provision. Given the convergence of the two categories of norms, the courts might have approached them as a normative conglomerate in which sharp delimitations are not necessary. Since the same outcome could be obtained by simply applying the constitutional norm, it would have made little difference to declare a CRC norm as self-executing.[325] Where the overlap between the Constitution and the CRC was not perfect, the CRC only contributed in small increments and did not create a normative 'storm' through a wholesale importation of Convention norms.[326]

Leaving behind the issue of the self-execution of the CRC, this researcher supports an overall positive assessment of how the South African highest courts have given effect to the CRC. Some concerns are raised about *how* the courts utilise the constitutional framework which legitimises their recourse to the Convention. This framework is important because it informs a court's decision as to whether, when and to what effect it considers the CRC, and it clarifies the perspective from which the CRC is approached. Nonetheless, the courts do not always

[325] In *Glenister II*, Ngcobo CJ stressed that even if a norm was to be considered directly applicable it only had the status of statutory (and not constitutional) norm (para 103 fn omitted).

[326] In *J v NDPP*, for example, the Court used the CRC to expand the scope of section 28(2) of the Constitution so as to include the right of child offenders to be heard throughout the entire criminal justice process. In *C v Department of Health*, Skweyiya J used the CRC to support his view that the emergency removal of a child had to be subject of an automatic judicial review. Judicial review of administrative decisions as well appeals against court orders exist in the South African law. The reliance on the CRC added only the qualification of such review being automatic.

acknowledge this framework.[327] While in some cases the type of usage can be deduced from the reasoning,[328] in other cases this is more difficult to do.[329]

In *Christian Education* and *Geldenhuys* the Court affirmed the constitutional validity of two statutes by a parallel reference to constitutional and international obligations, including those arising from the CRC. In *M v S*, Sachs J embraced the view that the CRC has become 'an international standard against which to measure legislation and policies'.[330] How is the position of the courts to be understood in the light of the *AZAPO* judgment, which affirms that the constitutionality of statutes and conduct is to be measured against the Constitution and not against international instruments?[331] The Court did not engage with the relevance of international obligations for the constitutional review process, and did not refer to section 39(1)(b) of the Constitution. By not referring to the relevant constitutional sections which inform their engagement with international law, deliberately or not, the courts avoid providing conceptual clarity on the relationship between the CRC and domestic law. They also avoid self-reflection on whether they consider the CRC in an interpretation enterprise or differently. Apart from raising analytical difficulties, this lack of clarity inhibits the identification and conceptualisation of innovations made by courts in considering the CRC and a debate about their constitutional legitimacy.

A paradox emerges when looking at the case law through the perspective of the formal constitutional framework discussed in part 5.2: this framework is concomitantly underutilised and insufficient to capture the courts' engagement with the CRC. It is *underutilised* in that the self-execution of the CRC is overlooked, and section 233 of the Constitution is seldom relied on. It is *insufficient* in that the courts appear to give effect to the CRC in ways other than those discussed in part 5.2 above. Two such additional methods of engagement seem to be reflected in the case law discussed here: the use of the CRC as a frame of reference[332] and the reliance on the CRC to guide judicial discretion. Admittedly, the identification of these methods is not infallible. It is brought about not because they are clearly reflected in judgments, but rather because they do not fit into the constitutional framework discussed in part 5.2. As a consequence, these categories are embryonic and uncertain as to their actual existence, legitimacy, normative boundaries and potential development into independent means to give effect to the CRC.

The use of the CRC as a reference framework is arguably present where courts make statements about the compatibility between domestic standards and the CRC. Thus, the CRC is acknowledged as a standard against which legislation and policies,[333] or even contracts are to be assessed;[334] or a background against which the constitutional provisions are to be

[327] *Hoërskool*; *Brandt*; *DPP v P*; *M v S* (in some aspects of reasoning) and *J v NDPP*.
[328] In *Brandt*, for example.
[329] *Du Toit v Ntsingilla*; *S v P* and *J v NDPP*.
[330] *M v S* per Sachs J para 16.
[331] See discussion in part 5.2 above.
[332] Sloth-Nielsen and Mezmur 2008 note 98 at 27.
[333] *Christian Education*; *DPP v P*; *Geldenhuys* and *M v S*.
[334] In *AB v Pridwin Preparatory School*, in a dissenting judgment, Mocumie JA decided that a contractual clause between parents and a private school which did not provide for the hearing of the child prior to the termination of

understood.[335] The CRC is an umbrella under which the domestic law develops and section 28 of the Constitution is understood. While this may resemble an interpretation process, it is arguably distinct. In some cases, the courts do not necessarily identify a specific constitutional provision which is interpreted in the light of a specific CRC provision.[336] An example is *M v S*, where the Court relied on the CRC not to interpret a specific constitutional provision, but rather to distil the right to be a child and to be treated differently. In this process, the Court was aided by the principles of the CRC, whose essence is reflected in the judgment. The technique may also be reflected in those cases where the courts stress the alignment between constitutional norms and the CRC,[337] or where compatibility with the CRC contributes to a finding of constitutionality.[338] As constitutional and CRC standards are considered identical, the former does not assist as an interpretation tool but strengthens the weight and legitimacy of the constitutional norm.

Reliance on the CRC as a guide to judicial discretion was placed in cases concerning the disclosure of documents during litigation, sentencing (of child offenders and also of adults when the victims were children),[339] appointment of intermediaries and disclosure of documents in the context of the right to fair trial.[340] It is not clear what constitutional support exists for this technique, and whether it will develop into an independent method to give effect to the CRC. Arguably, this is not inevitable or necessary, and it is possible for the courts to preserve the influence of the CRC in the exercise of discretion by utilising it in the interpretation of the Bill of Rights, which binds the courts in their exercise of judicial function.[341]

A final aspect is the consistency with which courts refer to the CRC. There are significant children's rights cases in which the CRC is not mentioned despite its relevance, or cases in which reference to the CRC is made only in minority or separate judgments.[342] Contrary to expectation, over a period of more than 20 years, the two highest South African courts have only engaged in some detail with the CRC in about 19 cases. The formal legal framework that mandates a consideration of international law has not, therefore, secured a consistent application of the Convention.

A question brought about by this unpredictable usage is whether the CRC should be considered even when domestic standards overlap with it, or when domestic law and jurisprudence are

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the contract for reasons of parental misconduct, was in conflict with the Children's Act and the CRC, *inter alia* (para 115).

[335] *CCL*.

[336] *Coetzee* may be seen as an illustration of this approach, where Sachs J was advocating for recourse to international instruments 'with a view to finding principles rather than to extracting rigid formulae, and to look for rationales rather than rules' (para 57).

[337] *CCL* and *Brandt*.

[338] *Christian Education* and *Geldenhuys*.

[339] *Mugridge v S* para 57 fn 17.

[340] *DPP*; *DPP v P*; *Du Toit v Ntshingila*; *Hoërskool* and *S v P*.

[341] Section 8(1) of the Constitution.

[342] For cases where the CRC is not referred to, see the introduction to part 5.2 above. In addition, in *Le Roux* and *C v Department of Health* the majority did not consider the CRC. In *Christian Education*, Sachs J missed the opportunity to refer to article 12 of the CRC when it expressed its regret that a curator *ad litem* was not appointed for the children. The same omission is found in *DPP*.

more developed than the CRC.[343] Domestic South African law is to a large extent aligned to the CRC, as discussed in part 5.3 above, and in many respects, the South African children's rights jurisprudence is more comprehensive than international developments. There might therefore be little incentive for the courts to consider the Convention should it not be useful. But, the wording of section 39(1)(b) of the Constitution compels courts to consider international law, as stressed by the majority in *Glenister II*.[344] In *Makwanyane*, however, Mokgoro J stressed that the reasoning behind the constitutional requirement to consider international law was the then-underdeveloped domestic jurisprudence. A subsidiarity reasoning is implied in this position, which envisages reliance on international norms when domestic standards are insufficiently developed.

Juma Musjid brings the usefulness of the CRC or otherwise to the fore. The Court mentioned the CRC several times and quoted from it, but did not discuss its standards, which have no discernible impact. The Convention might not have been 'useful': the matter concerned the horizontal application of the right to education, on which the CRC has no explicit input. Other cases discussed in this work confirm that courts may be drawn to the Convention should they consider it useful for the case at hand. In *C v Department of Health*, Skweyiya J found it 'helpful to consider the applicable international law'.[345] In *Le Roux*, the same Justice found article 3(1) of the CRC 'appealing'.[346] In *DPP*, Ngcobo J repeatedly mentioned article 3(1) of the CRC to stress the courts direct responsibility to give paramount consideration to the child's best interests. In *Brandt*, the SCA found that international instruments 'are detailed and provide specific suggestions'[347] in relation to the administration of juvenile justice. In *Hoërskool*, the Court stated that the CRC (amongst other things) was 'a useful starting point'[348] in identifying the interests to be balanced. Thus, if the CRC assists a court in concrete ways this may be an incentive to consider it. Identifying its usefulness may rest on demonstrating the added value of the Convention, an issue discussed more fully in part 5.5.2.

5.5.2 The impact of the CRC on judicial reasoning

The South African legal framework accommodates impact of different degree or intensity,[349] from self-execution to a benign 'consideration' of international treaties in the interpretation of the Bill of Rights.

Taken in the abstract, self-execution is a high-impact method of engagement. In reality self-execution has played no explicit role in the courts' giving effect to the Convention. It is through considering the CRC in the interpretation of the Constitution and, occasionally, statutes that the CRC has produced its most significant effects. The CRC has served as an analytical tool in

[343] Article 41 of the CRC provides that '[n]othing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) The law of a State party …'. Nonetheless, this article may not be relevant at all times.
[344] *Glenister II* per Moseneke DCJ and Cameron J para 201.
[345] *C v Department of Health* para 32.
[346] *Le Roux* para 211.
[347] *Brandt* para 17.
[348] *Hoërskool* para 19.
[349] Commenting on *Glenister* II, Brickhill and Bishop talk about the '*intensity* [emphasis in original] of the interpretive influence of international law' (2011 note 60 para 2.1.2).

the constitutional assessment of legislation[350] and existing judicial policies.[351] The position of the CRC has been boosted by courts applying section 39(1)(b) of the Constitution so as to create harmony between the CRC and the Bill of Rights. By contributing to the interpretation of constitutional norms and guiding their development, some (aspects of the) CRC norms can be said to have been indirectly constitutionalised or 'constitutionalised by proxy'. Thus, in *Fitzpatrick*, article 21(b) of the CRC was used to interpret section 28(2) of the Constitution. In *DPP*, article 3(1) was used to interpret the same section. In *Brandt*, the validity of the minimum sentencing legislation in relation to children aged 16-17 was confirmed because the Court was able to give it an interpretation consistent with section 28(1)(g) of the Constitution, which enshrined principles recognised in international law, including article 37(b) of the CRC.[352] In *CCL*, the Court noted the overlap between section 28(1)(g) of the Constitution and articles 37(b) and 40(1) of the CRC,[353] and declared minimum sentencing unconstitutional in as far as it applied to children. In *J v NDPP*, article 12 was used to give content to section 28(2) of the Constitution as applied in the context of juvenile justice. Through this process, the relevant CRC norms (or parts thereof) arguably acquire constitutional status. By contrast, if a Convention provision is declared self-executing, it acquires an under-constitutional and under-statutory status,[354] and it might not therefore be relevant in the process of constitutional review of law and conduct.[355]

As indicated in Chapter 1 above, this work has sought to identify cases of meaningful engagement with the CRC, where courts give a careful consideration to the content of the Convention and to its implications. While the two courts mention the Convention often, they seldom analyse its content. The reasons are not apparent, but considering that in many cases the CRC was used to support a position grounded in domestic law, usually in constitutional provisions, the courts might have taken the view that cursory attention suffices. This 'additional ballast'[356] approach to engaging with the Convention prevents a clear distinction between its independent effect and that of the Constitution.[357] Sometimes, additional light can be thrown on the independent effect of the Convention by comparing majority and minority judgments. In *De Gree*, reliance on the principle of subsidiarity by a majority of the SCA, permitted the judges to consider the best interests of children as a class, an aspect marginalised by minority judges who focused exclusively on the interests of the individual child.[358] In *C v Department of Health*, reliance on the CRC by Skweyiya J arguably gave his judgment a more solid justification when compared to the majority judgment. In *Le Roux*, again writing separately,

[350] *Fitzpatrick; Geldenhuys; Brandt; DPP v P; C v Department of Health; J v NDPP*.
[351] *M v S*.
[352] *Brandt* para 18.
[353] *CCL* paras 61, 63.
[354] See part 5.2.1 above.
[355] A question which arises here is to what extent, once a norm is declared self-executing and becomes domesticated, it retains its independent normativity as an international norm which can still be considered for interpretation purposes under section 39(1)(b) of the Constitution.
[356] Sloth-Nielsen and Mezmur 2008 note 98 at 27.
[357] This observation is also made by Skelton 2018 note 99 at 401.
[358] Compare, for example, *AD v DW* per Heher JA para 33 with Theron AJA paras 13, 17.

Skweyiya J was able to make practical suggestions as to the application of section 28(2) of the Constitution by considering article 3(1) of the CRC.

A further disadvantage of the bulk consideration of the CRC in parallel with the Constitution is that there is little clarity in a children's rights context on the approach the courts would take if a genuine conflict between the two norms existed. So far, the conflict has been avoided. Illustrative is the position in *AD v DW*, where Sachs J addressed the tension between the CRC, the Hague Convention and section 28(2) of the Constitution respectively. This Justice found the Hague formulation of the subsidiarity principle more in line with the best interests of the child under the Constitution, but identified support for this approach in the CRC itself by stressing that, in the adoption context, the best interests of the child was given more weight than in article 3(1) of the Convention.

A limited consideration of the substance of the CRC is not desirable, but minimal engagement cases should not be too easily dismissed as irrelevant. Sometimes, one may need to look further than forensically measuring use and impact. Thus, in *M v S*, Sachs J did not discuss the CRC extensively; only one article is mentioned and there are inaccuracies in his reference to the 'four great principles of the CRC'.[359] Sachs J treats the Convention as an over-arching standard which cannot be reduced to the mathematical sum of its articles, and whose philosophy is reflected in section 28 of the Constitution.[360] The normative value of specific CRC provisions is muted in favour of the general tenor of the Convention, as encapsulated in its principles. Sachs J's 'right to childhood' (meaning the right to special legal treatment for children) is built with support from the spirit of the general principles of the CRC.[361] Further, however limited the references are, they show the determination of the courts to use the Convention. This creates a solid basis for relying on it in subsequent case law, and opens the door to consider the input of the CRC Committee, which may enrich the jurisprudence of the courts.[362]

Where the courts have closely engaged with the wording of the CRC, meaningful consequences emerged. Thus, the CRC helped the courts justify a differential legal treatment for children in relation to adults,[363] or confirm the constitutionality of legislation protective of children that may interfere with the rights of adults.[364] The Convention was occasionally relied on to fill gaps in domestic law. In *Fitzpatrick* and *AD v DW* the courts have detected a gap in the

[359] Sachs J identifies the four CRC principles (survival, development, protection, and participation) in the work of South African Law Commission (*The Review of the Child Care Act (18 April 1998) First Issue Paper 13 Project 110* para 2.1) rather than in that of the CRC Committee, according to which the principles are non-discrimination, the best interests of the child, the right to survival and development and the right to be heard.
[360] 'The right to childhood' as Sachs J refers to it later (*M v S* para 19).
[361] Children's participation (*M v S* paras 18 and 19); survival and development (para 19); protection by the state (para 20).
[362] Up to now, the South African courts have engaged with the output of the Committee in six cases (including cases from the High Court): *DPP*; *J v NDPP*; *S v Kwalase* [2000] JOL 7128 (C); *Kirsh v Kirsh* (1999) 2 All SA 193 (C); *Mubake and Others v Minister of Home Affairs and Others* 2016 (2) SA 220 (GP); *YG v S*.
[363] *Brandt* (discretion in relation to minimum sentencing as applied to 16-17-year-olds); *J v NDPP* (need for judicial discretion in relation to placing the names of child sex offenders on the relevant Register); *Le Roux* (per Skweyiya J: defamation law should be adapted when applied to children).
[364] *Christian Education* (constitutionality of legislation prohibiting use of corporal punishment in all schools) and *Geldenhuys* (constitutionality of legislation setting a minimum age for children involved in sexual activity with adults).

domestic law, which they have addressed by interpreting section 28(2) of the Constitution so as to include considerations that informed the subsidiarity principle in intercountry adoptions. In *C v Department of Health* and *J v NDPP*, Skweyiya J relied on the CRC (articles 9 and 12 respectively) to interpret section 28(2) of the Constitution so as to require the participation of the child, despite the constitutional text not providing for such. In *AD v DW*, Sachs J utilises the distinction between section 28(2) of the Constitution and article 3(1) of the CRC to justify why the former is to be interpreted differently from the latter. In *M v S*, Sachs J noted the distinction between the 'paramount consideration' to be given to the best interests of children according to section 28(2) of the Constitution, as opposed to 'a primary consideration' as per article 3(1) of the CRC.[365] A plus in domestic protection was implied in this distinction, and thus a strict limitation inquiry under section 36 of the Constitution was needed to limit the right in section 28(2) of the Constitution. In *DPP*, Ngcobo J used article 3(1) of the CRC to stress the courts' direct obligations to give paramount consideration to the best interests of children as per the wording of that article. In *Le Roux*, Skweyiya J applied article 3(1) to guide the interpretation of section 28(2), in respect of how to consider the best interests of children in a legal enquiry where such interests may conflict with other legitimate interests. In *C v Department of Health*, close attention to article 9 of the CRC assisted Skweyiya J in detecting a defect in the domestic statutory framework, which then led to legislation being declared unconstitutional. An important conclusion arises from these considerations, namely that meaningful legal consequences have flown from the courts' stressing both the convergence and the divergence between the CRC and the domestic law.

The similarity between the constitutional and CRC standards questions the value of engaging with the CRC when the same outcome can be obtained by simply applying the Constitution. Two arguments support a consistent consideration of the CRC. First, it should not be too easily assumed that domestic and CRC standards are identical. Differences may only be unveiled in specific cases,[366] and the expanding jurisprudence on the rights of children (from the CRC Committee and domestic courts) may throw new light on the relationship between the two standards.

Second, the similarity between standards does not exclude certain differences between the domestic and international norms, which may reveal the added value of the CRC for domestic legal enquiries. Thus, in *Fitzpatrick* the engagement with the CRC revealed a gap in the domestic law, and it allowed the Court to discover in domestic legislation a legal provision which accommodated the concerns to which the principle of subsidiarity responded. In the same case, article 3(1) of the CRC provided support for the Court's view that the best interests of the child must remain a flexible standard which permits adaptation to individual circumstances.[367] In *De Gree*, consideration of the principle of subsidiarity in the context of applying section 28(2) of the Constitution revealed potential tensions between the best interests of children taken individually, and the best interests of children as a class. In *C v Department*

[365] *M v S* para 25 (also fn 31).
[366] As seen in *C v Department of Health*, which concerned the constitutionality of legislation purporting to have given effect to the CRC.
[367] *Fitzpatrick* para 18.

of Health, reliance on the CRC by Skweyiya J allowed this Justice to interpret section 28(1)(b) of the Constitution so as to recognise the primacy of parental and family care over other forms of care. Section 28(1)(b) is sparse and issues in relation to the separation of children from their family are not explicitly addressed. Engagement with the CRC enabled Skweyiya J to identify signposts which assisted him in the development of that section. In *DPP v P*, the Court used the CRC to give legal relevance to the deficiencies it discovered in the system for the incarceration of child offenders. By considering the CRC, the Court introduced, as a potentially relevant factor in sentencing, aspects not explicitly recognised in domestic law (here, the conditions for the incarceration of children). In *DPP*, the Court relied repeatedly on article 3(1) of the CRC to stress the courts' direct responsibility to protect the best interests of children in discharging their judicial function. This was enabled by this article's explicit mention (and its confirmation in subsequent general comments of the CRC Committee) of the *courts* as being bound to act in the best interests of the child. In *J v NDPP*, article 12 of the CRC and general comments of the CRC Committee provided the strongest explicit support for interpreting section 28(2) of the Constitution so as to include a right to be heard at all stages of the criminal process. In these cases, the CRC has not revolutionised the domestic law but it has in small increments assisted in its development by revealing problems with the domestic framework, assisting with discovering domestic norms which can address those problems, or by guiding the development of the law. The engagement of the courts with the CRC in these cases rested on the courts finding the CRC useful in specific cases. This suggests the need for a conscious effort to identify the added value of the CRC, both generally and in specific cases. In a legal system well-endowed with a progressive Constitution and comprehensive child-related statutes and case law, the sustainability of the use of the CRC may depend on persuading the courts of its continued value.

Whether judicial engagement with the CRC, which has not resulted in major overhaul of the South African law and whereby the impact of the CRC is often tied-up with the Constitution, amounts to *significant* impact may be a matter of contention, and perhaps, subjective evaluation. Whatever doubts there may be about the impact of the Convention, arguing that its influence on judicial reasoning is negligible would be inaccurate. Sometimes, the influence of the CRC has been rather subtle and diffuse, or difficult to conceptualise.[368] In this study, an attempt has been made to isolate as far as possible the independent effect of the CRC, including that 'something' which the Convention may have added to the reasoning of judges. But this may be difficult to establish in a syllogistic fashion. While this researcher does not subscribe to the view that mere coexistence of the CRC with a child-friendly outcome in specific judgments proves the impact of the CRC, she fully agrees that the influence of the Convention cannot be explained solely through micro-analysis,[369] and that the Convention has also

[368] This sometimes results in different evaluations of the application of the CRC by courts. For example, this writer has excluded the *Teddy Bear Clinic* case from this analysis, despite its importance, because the CRC is not mentioned. Skelton, however, includes it in analysis of cases which illustrate the application of international law by the Constitutional Court (Skelton 2018 note 99). She acknowledges that international law is not referred to in the judgment, but identifies in the reasoning of the Court concepts with equivalent in the CRC, and concludes that the judgment 'is arguably imbued with the principles derived' from the CRC and other international instruments (ibid at 410).

[369] By looking at individual cases (Sloth-Nielsen and Mezmur 2008 note 98 at 27).

exercised 'less tangible'[370] influences, including by 'changing hearts and minds over time'.[371] Despite their nebulous normative significance, these less tangible influences strengthen the legitimacy of the CRC as a habitual presence in the judicial discourse. They show that the Convention 'has become an essential frame of reference in the South African legal system'.[372] While in concrete cases the impact of the CRC may seem minimal, its acceptance and respect by the judiciary suggest that it has a well-established place in judicial reasoning. Although the Convention appears at times as a set of norms 'in abeyance', kept passive at times, courts know that it is available to use to prevent a straying from the values it protects.

5.6 Conclusion

The CRC is a well-established and largely uncontested presence in judicial reasoning in South Africa, a position clearly facilitated by an enabling constitutional framework consisting of provisions which require courts to consider international law and a provision which deals explicitly with the rights of children. This has not secured, however, a consistent and meaningful engagement with the CRC at all times. Therefore, this study puts forward a more cautious view of the impact of the CRC on domestic jurisprudence than those expressed by previous writers. Of concern are the limited attention given to the content of the CRC provisions in some cases; the over-reliance on section 39(1)(b) of the Constitution as a vehicle to give effect to the CRC, and the courts not acknowledging the constitutional provisions which justify their reliance on the CRC. At times, this prevents a full understanding of how the courts have used the CRC, and the identification of innovations in their engagement with the Convention.

Although section 39(1)(b) of the Constitution does not require that the Constitution (and in this context, section 28) be interpreted in conformity with the CRC, the Constitutional Court and the SCA have done so and generally preserved harmony between the two standards. The CRC is therefore often used alongside section 28 of the Constitution. This makes it difficult to discern the independent impact of the CRC on specific cases, which once more invites to caution when drawing conclusions about the effect of the Convention on the South African jurisprudence. No major overhaul of domestic jurisprudence can be unreservedly associated with the application of the CRC by courts in individual cases, and, in some of the leading children's rights cases, the impact of the CRC has been limited. This does not detract from the child-focused nature of such judgments, but it shows that the impact of the CRC is more limited than might perhaps be expected from a jurisdiction hailed as being very receptive of the Convention.

It cannot be denied that the CRC has left its mark on the South African jurisprudence, although conceptualising how this has occurred might not always be easy. The CRC has contributed to the interpretation of constitutional norms, and thus to the constitutional review process in some

[370] Sloth-Nielsen 2001 note 77 at 79.
[371] Ibid.
[372] Sloth-Nielsen and Mezmur 2008 note 98 at 27.

cases. It has also assisted in the development of the domestic law, by justifying, orienting or facilitating the development of the law in a child-focused direction. The influence of the CRC is also manifested in non-normative ways, the CRC having assisted courts to identify domestic norms which accommodate the spirit of the Convention or having served as a lens in the constitutional review process. Last to mention, but no less important, is acceptance of the Convention as a reference framework for understanding and developing domestic jurisprudence.

Overall, this case study shows that the CRC continues to have a meaningful role even in a legal system where the children's rights and their jurisprudence are well-developed.