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

Couzens, M.M.

Chapter 6: Analysis

6.1 Introduction

Three questions guided this study:

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

Article 4 of the Convention, its general implementation provision, is permissive rather than prescriptive in relation to the position of the courts. It does not require, like other treaties, that states enable courts to deal with allegations of rights violations under the CRC. It does not refer specifically to the courts, neither does it mention an obligation for states to provide remedies in cases of CRC violations, an obligation often associated with an international requirement for the courts to give effect to an international treaty. Thus, much is left to the domestic law to decide what role, if any, the courts are to play.

Two aspects counterbalance the weaknesses of article 4: that for some provisions, due to their nature, courts are the 'appropriate'[1] mechanisms of implementation; and the position of the Committee, which envisages a significant role for the courts in pursuit of a maximalist vision of the effectiveness of the CRC. As shown in Chapter 2, for the Committee, all CRC rights are justiciable; remedies (including judicial) ought to be provided if a violation of rights occurs; the courts are to apply the CRC directly in those legal systems where this is possible; and, regardless of the type of legal system, the courts should ensure that the Convention prevails over domestic law.

This maximalist, cosmopolitan vision of the Committee encounters the complexity of domestic systems. Domestically, courts are part of a greater institutional mechanism in which international law is not the dominant paradigm, and where the powers of the courts depend on internal constitutional arrangements and the powers of other branches of the state. Because courts are often tasked to manage the interaction between domestic and international legal orders, our understanding of their role is caught between the high international aspirations and the reality of domestic law. By analysing relevant case law from Australia, France and South Africa, this work has canvased this domestic reality by starting from the most basic point of a legal enquiry of this nature: the domestic legal value of the CRC, in the light of the formal rules which inform its relationship with the respective domestic legal orders.

[1] Article 4(1) of the CRC.

6.2 Direct and indirect application of the CRC: Monist *versus* dualist approaches?

The legal framework which regulates the interaction between the CRC and domestic law has been approached therefore as the basis and the basics of the courts' engagement with the Convention. This permitted the placing of the three systems on a spectrum: monist, where the CRC is directly applicable (France); dualist, where the CRC can be applied only indirectly (Australia) and hybrid, where the CRC can be applied both directly and indirectly (South Africa).

Generally, the courts in the three systems are aware of the CRC, but this has not resulted in a consistent engagement with it. Even in South Africa, where an explicit constitutional obligation exists to consider international law in the interpretation of the Bill of Rights, the CRC is not consistently applied. In Australia, the absence of an obligation to consider international law has 'ostracised' the CRC to the separate judgments of judges willing to discuss it. In France, international treaties are part of the domestic law, but whether that equates to an obligation for the courts to consider them is not certain. Encouragingly, in 2015, the Council of State found that a court committed 'an error of law' by not assessing the compatibility of a statutory provision with article 3(1) of the CRC.[2]

The techniques used by courts to give effect to the CRC are different, and they confirm that courts which can apply treaties directly conceptualise their enquiry differently from those which cannot.[3] Direct application, and its possible companion – the supremacy of the Convention over domestic law – is attractive as an implementation mechanism. Its advantages are obvious: immediate domestic application of the CRC; the possibility of expanding the range of rights recognised domestically; and potential priority over inconsistent domestic norms. The alluring simplicity of concepts such as direct application and supremacy of the CRC is deceiving, their application complicated, and, in practice, they have delivered less than they seem to promise. The CRC has vulnerabilities in relation to the direct application criteria,[4] a warning sign that the direct application of the Convention is contentious. In France, like in other monist systems,[5] courts have been wary of directly applying the Convention and have limited the direct application to a few provisions, predominantly article 3(1). Assertions of the Convention's domestic supremacy over statutes are even rarer, with the Court of Cassation not having yet declared a statute inconsistent with the CRC, and the Council of State having done so in two cases only.[6] South African judges have been silent on the self-execution of the CRC despite having had opportunities to enquire into the matter and their general openness to international law.

[2] CE, No. 375887, 2015. (CE for 'Conseil d'Ètat').
[3] M van Alstine 'The Role of Domestic Courts in Treaty Enforcement: Summary and Conclusions' in D Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 555 at 566.
[4] Part 2.3.1.4 Chapter 2.
[5] Ibid.
[6] Part 3.5.3.1 Chapter 3.

The reasons for the reluctance to apply the CRC directly do not always have a *legal* explanation. Thus, in France, the vulnerability of the Convention in relation to satisfying the criteria for direct application blended with judicial policy reasons (i.e., concerns related to the separation of powers). In South Africa, no reason is explicitly given by courts for not considering the self-execution of the CRC, although it may be possible that section 28 of the Constitution of the Republic of South Africa, 1996 ('the South African Constitution') was thought to make it unnecessary.

The binding nature at domestic level or the domestic *bindingness*[7] of the CRC has preoccupied the courts to different degrees, and from different perspectives. When directly applied, the CRC performs a role equivalent with a domestic statute, and is expected to have similar features. Thus, courts in France have enquired into the domestic normativity of the CRC '*as is'*.[8] From this perspective, reference to implementation measures, including legislation, in article 4; or certain norms being addressed to states; or some norms lacking clarity, precision or not creating subjective rights, led to a denial of the direct application of the entire CRC or some provisions respectively. Courts in Australia and South Africa have rarely enquired into the intrinsic legal qualities or normativity of CRC provisions,[9] because the Convention did not need to operate like a statute. Thus, norms unlikely to be applied directly in monist jurisdictions, such as articles 5,[10] 11 (and 35),[11] 18(1),[12] 19[13], 28,[14] 29,[15] and 34,[16] have been used indirectly in the latter jurisdictions, to interpret domestic law.

Based on this study, it can be suggested that a distinction is possible between highly normative courts (deeply preoccupied with the domestic *bindingness* of the CRC) and mildly normative courts (which are less so). This distinction cuts across the three systems. French courts and the Australian High Court are highly normative. The French courts only engaged with the norms they found of direct application, and some Australian judges have approached the absence of incorporation as a terminus point for their engagement with the CRC.[17] On the other side, the

[7] The term has been coined by Karen Knop in K Knop 'Here and There: International Law in Domestic Courts' 1999-2000 (32) *New York University Journal of International law and Politics* 501. See also part 1.5 above.
[8] A Nollkaemper *National Courts and the International Rule of Law* (2011) at 118.
[9] For such exceptions, see references to the potentially aspirational nature of the CRC in *AMS v AIF* [1999] HCA 26 per Gleeson CJ, McHugh and Gummow JJ para 50; *MIMIA v B* [2004] HCA 20 per Callinan J para 222; or the refusal to consider the Convention by Jafta J (concurred with by Mogoeng CJ) in *C and Others v Department of Health and Social Development, Gauteng* 2012 (4) BCLR 329 (CC) ('*C v Department of Health'*) because it was not incorporated (para 109).
[10] *Re Jamie* [2013] FamCAFC 110 per Bryant CJ (Australia).
[11] *Murray v Director, Family Services, ACT* [1993] FamCA 103 ('*Murray'*) para 159.
[12] *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* [2004] HCA 49 ('*Re Woolley')* per Kirby J (Australia).
[13] *B and B and the Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FamCA 451 ('*B and B v MIMIA'*) (Australia); *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) ('*Christian Education'*) (South Africa); *ZZ v Secretary, Department of Justice* [2013] VSC 267 ('*ZZ*') (Australia).
[14] *Christian Education* and *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* 2011 (8) BCLR 761 (CC) ('*Juma Musjid'*) (South Africa).
[15] *Juma Musjid*.
[16] *Geldenhuys v The State* [2008] 3 All SA 8 (SCA) *('Geldenhuys'*) (South Africa) and *ZZ* (Australia).
[17] Some judges noted the vulnerability of the CRC as an unincorporated instrument (Mason CJ and Deane J in *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 *('Teoh')* para 28*;*

South African courts are mildly normative and they do not delve much into the domestic *bindingness* of the CRC. Nonetheless, status-related issues were explicitly relied on in all three systems when the courts/judges intended *not to give effect* to the CRC.[18]

The highly normative courts seem concerned with the legitimacy of their reliance on the Convention. In South Africa, constitutional injunction relating to the use of international law, provisions concerning the rights of children and, more recently, comprehensive child-focused legislation enacted, *inter alia*, to give effect to the Convention, reflect a political and legal agreement about the domestic value of international law generally and of the rights of children in particular. This assures the courts that when giving effect to the CRC they are not at variance with the will of the legislature. In Australia and France, on the other hand, the reluctance to give constitutional and full legislative effect to the CRC may discourage the courts from applying the Convention, even if this results in a violation of international obligations.[19] In Australia, the contrast between the jurisprudence of the High Court and that of the Family Court and the Victoria Supreme Court respectively, shows that legislative endorsement has positive effects on judicial engagement with the Convention.

While it is useful to divide legal systems into monist and dualist in order broadly to understand the different ways in which courts engage with the Convention, the operationalisation of each approach may differ between countries. Thus, in France, the CRC is automatically a part of the domestic law, has supra-legislative status but no constitutional clout; it has been applied mostly directly, with limited consideration to indirect application. In South Africa, a self-executing CRC provision would have an infra-legislative status, but self-execution has been rendered *de facto* redundant by indirect application, and especially by the injunction that the Convention be considered in the interpretation of the Bill of Rights. In Australia, the CRC can be relied on for statutory interpretation purposes primarily if ambiguity exists in legislation and the laws were passed after the CRC came into force for Australia. A CRC-consistent interpretation should then be followed. In South Africa, the CRC must be considered for the interpretation of the Bill of Rights whether it is ambiguous or not, but a consistent interpretation therewith is not mandatory.

Thus, beyond general features (directly applicable or not; supreme over domestic law or not; incorporated or not; applicable for interpretation purposes or not) it may be difficult to identify a monist or dualist typology of judicial application of the CRC. This is compounded by the fact that, apart from the formal structure of reception (connected to whether a system is monist or dualist), there are other factors which mark the courts' application of the CRC.

Callinan J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6 ('*Lam')* para 147.

[18] Jafta J (Mogoeng CJ concurring) in *C v Department of Health* (South Africa); denial of direct effect to socio-economic rights, for example, in France; and frequent observations by some judges of the High Court of Australia, that the CRC has not been domestically incorporated.

[19] McHugh J in *Teoh*; McHugh and Gummow JJ in *Lam*; French Court of Cassation (note 104 Chapter 3).

Similarities

Despite differences, there are also notable similarities between the three systems. This encourages giving consideration to a cosmopolitan framework as a means better to understand the role of the courts in giving effect to the Convention. First, the CRC itself is judicially considered in all systems even when its standards have been absorbed to a certain extent in domestic legislation. The preservation of the normative autonomy of the CRC shows that courts value engaging with it directly, without the mediation of the legislature. In many instances, the courts have not departed or are unlikely to depart from how the legislatures have given effect to the Convention, but direct references stress its continued domestic relevance.

The legal framework which enables the courts to engage with the CRC has been underutilised in all three systems. Direct application and assertions of CRC supremacy remain cautiously handled in France,[20] and the South African courts have never formally engaged with the self-execution of the CRC. In Australia, the High Court has engaged minimally with the Convention as a tool of statutory interpretation; the implications of the CRC being a declared treaty under the Australian Human Rights Commission Act have not been clarified; and the CRC is yet to play a role in the development of the common law.

At the same time, in Australia and South Africa courts have given effect to the CRC in ways that do not fit neatly in the formal framework of reception. The terms 'non-normative' or '*sui generis'* approaches'[21] have been used in this work to designate these techniques, which go beyond what the courts are explicitly authorised to do by the legal framework; and lack an intrinsic constraining effect. The CRC is used instead as a reference framework or as an analytical tool in relation to the domestic law. Admittedly, these methods are amorphous and difficult to gather under a conventional legal term, but denying their existence would ignore the resourcefulness of domestic legal systems, judicial creativity and the reality of adjudication in an increasingly complex normative environment. Some examples illustrate these points. In several South African cases the CRC has been used as a reference norm against which domestic legislation and policy were assessed.[22] In Australia, Kirby J expressed the view that courts 'can note and call attention'[23] to the inconsistency between the domestic law and the CRC irrespective of the fact that they are bound to give effect to the domestic law. International law can be used as a 'conceptual context' for disputes or to 'express the basic values which must be taken into account'[24] (including the interests of children) as they 'reveal but do not resolve conflicting interests'.[25] A better understanding of domestic law,[26] a discovery in the domestic

[20] A similar situation exists in Romania (see M Couzens 'Romanian courts and the UN Convention on the Rights of the Child: A case study' 2016 (24) *International Journal of Children's Rights* 851).
[21] Knop talks about 'less deterministic' or persuasive usage (Knop 1999-2000 note 7 at 511-512).
[22] Part 5.5.1.
[23] *MIMIA v B* per Kirby J para 171.
[24] *AMS v AIF* per Kirby J para 169.
[25] *AMS v AIF* per Gleeson CJ, McHugh J and Gummow J para 50.
[26] *Koroitamana v Commonwealth of Australia* [2006] HCA 28 per Kirby J para 66.

law of convergent or carrier norms for the CRC,[27] and a 'better' discharge of judicial function[28] are other possible non-normative influences. The non-normative techniques may have arisen from the tension between the domestic vulnerability of the CRC and the courts' acknowledgement of its relevance. They have sometimes assisted the courts to transcend the normative vulnerability of the CRC, and allowed its spirit to penetrate the judicial reasoning. By doing so, these methods assist in building an autochthonous children's rights jurisprudence infused with CRC values but easier to accept domestically.

These methods have been criticised for allowing the courts to circumvent the difficulties raised by clarifying the role and influence of international law on domestic judicial reasoning.[29] Without dismissing this concern,[30] a different perspective can be suggested. Therefore, the formal rules of reception enshrined in a state's law may be approached as explicitly/positively authorising certain techniques of engagement with the CRC, without, however, excluding techniques not explicitly mentioned therein. The latter techniques should not therefore be seen as illegitimate, and could be used if they do not otherwise breach domestic law.

Attempts at mainstreaming the rights of children in judicial reasoning have been inspired or supported by the CRC in all jurisdictions, and have been based primarily on innovative uses of article 3. Jurisprudence in Australia and France demonstrates this point most clearly.[31] In Australia, article 3(1) of the CRC has been invoked in support of extending the welfare jurisdiction of the Family Court beyond the confines of the parent-child relationship,[32] including to immigration detention.[33] In France, article 3(1) has become very popular, with courts bringing under its umbrella many disputes in areas of law where the interests of children are not an explicit statutory consideration. These courts have engaged in a constitutional-type application of article 3(1) of the CRC, which arguably compensates for the absence of constitutional recognition for the rights of children in these jurisdictions.

Another commonality between jurisdictions is the courts' reliance on the CRC when they wrestle with the question as to whether a special/different legal treatment should be applied to children as opposed to adults.[34] This does not always result in a technical application of the

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[27] In *Teoh,* Gaudron J argued the existence of a common law right by observing the convergence between the CRC and the domestic law. For a similar approach, see Hereux-Dubé J in *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 ('*Baker*') para 71. In *Minister for Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR 713 (CC) *('Fitzpatrick')*, prompted by CRC arguments, the South African Constitutional Court identified in the domestic law provisions which satisfied the requirements of the subsidiary principle as applied to inter-country adoptions.

[28] For example, Bell J in *DPP v TY (No 3)* [2007] VSC 489 (Australia).

[29] D Dyzenhaus, M Hunt and M Taggart 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' 2001 (1) *Oxford University Commonwealth Journal* 5 at 18.

[30] There are other concerns with these techniques, such as their informal nature and dependency on judicial discretion, which make them vulnerable to judicial abandonment.

[31] In South Africa, article 3 is often invoked, but its independent impact is more difficult to establish because of its overlap with section 28(2) of the Constitution.

[32] *Re Z.*

[33] *B and B v MIMIA.*

[34] In France, illustrative are *L'Association Aides* and *L'Observatoire* 2008 (see discussion in part 3.5.3.2); in Australia, *Teoh* and *B and B v MIMIA*; and in South Africa, *M v S (Centre for Child Law Amicus Curiae)* 2007 (12) BCLR 1312 (CC) ('*M v S'*); *Centre for Child Law v Minister for Justice and Constitutional Development and Others (NICRO as Amicus Curiae)* 2009 (11) BCLR 1105 (CC) ('*CCL'*); *J v National Director of Public*

CRC, but it enables the judges either to look at the matter in a novel way, not explicitly required by the domestic law, or at least to give the rights of children more visibility in the application of domestic law.

To conclude, broadly dividing legal systems into monist, dualist and hybrid is useful only as a first step in understanding the interaction between the CRC and the courts in a cosmopolitan world community. Domestic variations in the reception framework influence how courts engage with the CRC, and prevent the development of a unitary and detailed model (monist or dualist) of engagement. At the same time, regardless of the model of reception, similarities exist, and they encourage the search for a cosmopolitan framework which has an inevitable degree of generality and within which the role of the courts can be understood.

6.3 The impact of the courts' engagement with the CRC

If assessed across the three systems, the norms with which the courts have engaged are varied and include all categories of rights in the CRC. The courts seem to prefer the norms which are closely connected to the traditional judicial function (i.e., juvenile justice, family disputes, or child protection) including those which mention the courts. This supports the point made in Chapter 2 that courts may engage differently and display different levels of openness toward the Convention,[35] depending on the type of norm up for consideration. Thus, the mention of courts in article 3(1) encouraged them to engage with this article.[36] A similar attempt was made by the Full Court of the Family Court in Australia in relation to article 19, but it was rebuked by the High Court.[37] The juvenile justice provisions have also been popular with the courts.[38] The reasons for the openness toward certain provisions are not certain, but they may relate to their usefulness for the courts and the fact that their values can be accommodated by the existing laws or in exercising judicial discretion, and in this they pose a limited risk in relation to the separation of powers. By contrast, in-depth engagement with CRC socio-economic rights is lacking.[39] The reasons may vary from controversies in relation to their justiciability in

Prosecutions and another (Childline South Africa and others as amici curiae) 2014 (7) BCLR 764 (CC) ('*J v NDPP'*).

[35] Part 2.2.1.

[36] *Re Z* and *B v MIMI*A (Australia); *DPP* (South Africa); P Bordry 'Le Conseil d'État français et la Convention internationale relative aux droits de l'enfant' 2001 (5) *Journal du Droit des Jeunes* 16 at 19 and J Rongé 'La Convention internationale relative aux droits de l'enfant: On avance ou on recule?' 2004 (10) *Journal du Droit des Jeunes* 9 at 19 (France).

[37] *B and B v MIMIA* per Nicholson CJ and O'Ryan J para 286 (see the emphasis on 'for judicial involvement'). Callinan J (in appeal) held that the CRC does not require to be given effect by conferral of jurisdiction on the Family Court (*MIMIA v B* para 222).

[38] Courts in all systems engaged with articles 37 and 40 of the CRC.

[39] Occasionally, the courts mention such rights. See, for example, *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796 per Garde J para 146 and *Certain Children V Minister for Families and Children* (NO 2) [2017] VSC 251 per Dixon J para 262 (both referring to article 6(2)); *ZD v Secretary to the Department of Health and Human Services* [2017] VSC 806 para 76 (referring to article 24).

Australia and France, to the availability of an autochthonous register of socio-economic rights and developed jurisprudence in South Africa.[40]

The impact of the CRC on judicial reasoning in the three systems is better understood as a continuum of legal effects rather than an '"all-or-nothing question": does the international provision have *full* direct applicability or is it simply *irrelevant* for the judge?'[41] The continuum contains cases that give benign consideration to the CRC (where its legal consequences are difficult to discern), as well as cases where the Convention drives the legal reasoning (high-end impact); and intermediate cases. Constitutional frameworks of reception condition to a certain extent the impact of the CRC, with certain outcomes being possible in some jurisdictions but not in others. For example, Australian or South African courts cannot set aside domestic legislation if contrary to the CRC; Australian courts cannot apply the CRC directly; and French courts can set aside (i.e., not utilise them in a specific dispute) domestic norms incompatible with the CRC but cannot declare them invalid. To what extent this affects the meaningfulness of the Convention's impact is discussed below.

From an abstract perspective, direct application is at the high-end of the continuum because it makes possible the immediate application of the CRC as domestic law; it may result in the protection of rights not explicitly provided by domestic law; and it may cover gaps in domestic law, and control the legality of administrative acts. Direct application enables the CRC to be applied as the 'rule of decision'.[42] When complemented by the domestic supremacy of international treaties, direct application may result in the CRC being given priority over conflicting domestic law. Interpretation and other indirect usages are, arguably, medium or lower-end methods because the domestic operation of the Convention depends on the existence of domestic law which requires interpretation or development.

The French case law illustrates best the use of the CRC to produce a high-end impact. In *Benjamin*, article 7 of the CRC enabled the Court of Cassation to protect a right not provided for in the domestic law, and thereby filled a gap therein. Directly applying the CRC and asserting its supra-legislative status, the Council of State set aside domestic legislation and invalidated administrative decisions (individual or normative) inconsistent with the Convention. This is not to say that the CRC has had a significant impact in all cases; instead, French judges (writing extra-judicially) have noted the concomitant use of the CRC and ECHR which deprives the former of a clear-cut impact.[43] One should not forget, however, that the complexities surrounding direct application/self-execution, have created obstacles or even deprived the Convention of domestic effect.

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[40] For example, the relevant Convention provisions were simply mentioned in *Juma Musjid* (article 28); *Christian Education* (articles 28 and 29).

[41] M Scheinin 'General introduction' in M Scheinin (ed) *International Human Rights Norms in the Nordic and Baltic Countries* (1996) 11 at 19 (emphasis in the text). Similarly, J Pieret 'L'influence du juge belge sur l'effectivite de la Convention: retour doctrinal et jurisprudential sur le concept d'effet direct' in J Pieret and A Schaus (eds) *Entre ombres et lumières: cinquante ans d'application de la Convention européenne des droits de l'homme en Belgique* (2008) at 27 (pre-print version).

[42] Term used by D Sloss 'Treaty Enforcement in Domestic Courts: A Comparative Analysis' in D Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 1 at 11.

[43] See part 3.5.3.2.

Case law in Australia and South Africa contains many examples of low-end impact. Judges of the High Court of Australia have pointed to the absence of incorporation of the CRC or the lack of ambiguity in the statute requiring interpretation to give cursory or no attention to the Convention.[44] In South Africa, the CRC is arguably sometimes invoked as 'additional ballast',[45] contributing little to the reasoning of the courts.

The reality of judicial application shows, nonetheless, that the CRC can have a meaningful impact, of equivalent intensity, in all types of systems. As a system which combines dualist and monist features, the South African case study shows that typically dualist methods of application may secure a more powerful impact than the typically monist ones. Thus, a self-executing norm has infra-constitutional and infra-statutory status, while contribution to the interpretation of a constitutional provision results in an indirect constitutionalisation of the relevant Convention aspect.[46] Even without being directly applied, the CRC has contributed to filling gaps in the domestic law,[47] and has resulted in positive consequences for the development of domestic law both when its similarities and/or differences with the South African Constitution were considered by judges.[48]

In *Teoh*, the High Court of Australia placed the Convention at the centre of its reasoning and the importance of the rights provided by it prompted the Court to craft a new avenue to give effect to unincorporated international treaties. Unfortunately, the openness to the CRC in *Teoh* has not been replicated since in the judgments of this Court. The Full Family Court found support in the CRC for mainstreaming the rights of children and their best interests in judicial decision-making, for giving more prominence to the rights of children as independent rights holders, and for expanding the protection for the rights of children beyond that recognised by domestic statutes.[49] Victoria Supreme Court judges utilised the CRC to guide their discretion and to secure a more child-friendly legal treatment for children in conflict with the law.[50]

Further, when assessing impact, one should also look beyond specific cases. Positive uses of the CRC in the common law, primarily dualist systems, create binding legal precedents with future impact, as opposed to the ad hoc decisions on direct application rendered by the civil law courts. Also, while auxiliary, the interpretive role of the Convention in dualist or hybrid states may not be neutral, and may thus control the meaning of domestic law since it is the CRC-compatible meaning that should be preferred.[51]

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[44] Part 4.5.3.
[45] J Sloth-Nielsen and B Mezmur '2 + 2 = 5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)' 2008 (16) *International Journal of Children's Rights* 1 at 27.
[46] See Skweyiya J's position in *C v Department of Health* and *J v NDPP* in relation to the right to be heard.
[47] In *Fitzpatrick*, where it used the CRC to address the absence of an explicit domestic recognition of the principle of subsidiarity as applied in intercountry adoptions.
[48] *M v S* and *Le Roux and Others v Dey; Freedom of Expression Institute and Another as Amici Curiae* 2011 (6) BCLR 577 (CC) ('*Le Roux'*) per Skweyiya J (see part 5.5.2).
[49] Part 4.5.3.
[50] Part 4.4.6.
[51] Section 39(1)(b) of the South African Constitution does not, technically, require that the Bill of Rights be interpreted in conformity with the CRC. Nonetheless, in practice, this conformity was sought by judges.

The Convention has also had subtle, but equally meaningful, effects. The influence of the Convention is often reflected in small increments in the domestic law rather than in major overhaul therein. It has enriched judicial reasoning with legal aspects that might have been absent had it not been considered.[52] It has provided the legal justification to consider the rights of children in matters where such rights have not been considered before;[53] it has stimulated the drafting of child rights-focused judgments;[54] and it has prompted the courts to look beyond the artificial compartmentalisation of children's rights issues into discrete areas of domestic law.[55] In Australia and France, countries with limited or no constitutional protection for the rights of children and with no consolidated legislation incorporating or transforming the CRC, the Convention has been relied on to justify the mainstreaming of children's rights or interests in judicial reasoning.[56] The influence of the CRC has been at times diffuse, and visible in the attitude of judges rather than in legally quantifiable outcomes or reasons.[57]

Common to the cases in which the CRC has had a meaningful impact is that it has added to the reasoning of the courts *something* not immediately derived from other legal instruments (national or international). The Convention had therefore an added value in the legal reasoning.[58] The South African case study contains examples of how careful consideration of article 3(1) of the CRC, with its similarities and distinctions with domestic law, enabled judges to derive meaningful legal consequences.[59] Examples of the added value of the CRC exist in other legal systems, where, for example, the interests of children were considered even where domestic law did not require such.[60]

The impact of the CRC is not always easy to identify because of its potential overlap with other legal instruments. This is not unique to the CRC, considering that the application of international law is 'contingent on domestic law'[61] and that legislative reform has reduced the need for direct reliance on international instruments.[62] The Convention blends with other norms and contributes to *some* aspects of a judgment rather than being determinative of the reasoning on its own.[63] The convergence of the CRC with some domestic norms in Australia[64] and South Africa has enabled judges to rely on it and enrich the meaning of domestic law. In France the

[52] Part 5.5.2.
[53] *Teoh* (immigration)*;* the best interests jurisprudence in France (immigration, deportation, law enforcement against parents, etc; see part 3.5.3.2).
[54] Illustrative are *De L v Director-General Department of Community Services (NSW)* [1996] HCA 5 per Kirby J (Australia, discussed in part 4.4.3.1); the Council of State judgments in surrogacy and *kafala* cases (part 3.5.3.1); *Fitzpatrick; Le Roux* per Skweyiya J and *C v Department of Health* per Skweyiya J in South Africa.
[55] *Re Z* and *B and B v MIMIA* (Australia).
[56] *Re Z* and *B and B v MIMIA*.
[57] For example, Nicholson CJ and Kirby J.
[58] As defined in part 1.5.
[59] Part 5.5.2.
[60] Article 3(1) jurisprudence in France (part 3.5.3.2), and cases such as *Teoh* and *In Re TLB* [2007] VSC 439 in Australia.
[61] A Nollkaemper 'The Duality of Direct Effect of International Law' 2014 (25) *The European Journal of International Law* 105 at 110.
[62] M Killander and H Adjolohoun 'International law and domestic human rights litigation in Africa: An introduction' in M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 3 at 14.
[63] France is the exception in that when applied directly, it is the CRC which determines the solution.
[64] See the Victoria Supreme Court and Family Court jurisprudence.

overlap between the CRC and the ECHR has contributed to the acceptance of the Convention by courts.[65] While this makes the impact of the Convention less clear,[66] the joint application or consideration of the CRC with other norms has created normative alliances with more well-established domestic or international standards, which has facilitated the effect of the CRC.

The meaningful impact of the CRC rests on a careful consideration of its standards, which is, however, often lacking. Sometimes judges refer generically to the Convention, without identifying relevant provisions.[67] In most such cases, the Convention is not taken sufficiently seriously and has a limited impact. Admittedly, these cases are not desirable.[68] However, their significance should not be easily dismissed as they testify to a judicial belief in the independent domestic value of the CRC. While they do not unpack its meaning, such judgments create a foundation on which more meaningful engagement can take place in the future. They show an increased acceptance of the CRC that may assist in overcoming some of the obstacles associated with its application,[69] including concerns about its suitability for judicial application.

Reluctant engagements with the CRC or its plain rejection have value too by calling for attention to potential challenges raised by its application. For example, the reluctance of the French courts to apply the CRC directly invites reflection on its direct applicability. French judges have also raised questions about the implications of an *in abstracto* application of article 3(1) of the CRC to control the operation of legislation. The judgment of Jafta J in *C v Department of Health* calls into question the reluctance of South African judges to discuss the self-execution of the CRC. The judgment of McHugh J in *Teoh* calls for closer analysis of the implications of applying the best interests of the child to matters concerning children indirectly; while Gleeson CJ and McHugh J's views in *Re Woolley* point to a need to develop more sophisticated children's rights arguments, which take into consideration the tensions between different rights of children.[70] Also in *Re Woolley*, Callinan J criticised the argument on behalf

[65] Part 3.6.2.3. This has occurred in other European jurisdictions (Couzens 2016 note 20). The manner in which the EU law has facilitated the acceptance of the CRC by French courts is less clear and requires closer analysis. For the period 2009 (when the Charter of Fundamental Rights of the European Union came into force) - 24 June 2019, only three (3) judgments of the Court of Cassation mentioned article 24 of the Charter (dealing with the rights of children) (years of judgments: 2012, 2014 and 2015) and five (5) judgments of the Council of State did so (the first judgment being in 2014). It may be that by 2009, the two French high courts were already accustomed to applying the CRC by itself or in combination with the ECHR in such a way that it made recourse to the Charter less important.

[66] In *B and B v MIMIA*, for example, the Family Court used the CRC as an 'alternative/reserve' reasoning; in *Teoh*, Gaudron J referred to the CRC as being of 'subsidiary significance' (para 3).

[67] *Re Woolley* (Gleeson CJ paras 7, 11, 31; McHugh J paras 107, 114) (Australia); Jafta J in *C v Department of Health* and cases cited in note 123 Chapter 5. For France, see for example, CE, No. 400055, 2016; CE, No. 406256, 2017.

[68] Tobin has criticised the superficial engagement of the courts with the CRC (J Tobin 'Judging the judges: Are they adopting the rights approach in matters involving children?' 2009 (33) *Melbourne University Law Review* 579). Waters refers to this as 'harmless window-dressing' (M Waters 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' 2007 (107) *Columbia Law Review* 628 at 660) but regards it more positively, as an indication of the courts' willingness to engage with international law.

[69] J Himes *The United Nations Convention on the Rights of the Child: Three Essays of the Challenge of Implementation* (1993) at 7. Himes referred to social and political acceptability which may enhance legal acceptability, but the idea remains valid in relation to court usage.

[70] They rejected a blanket approach to children's vulnerability and lack of capacity, which they saw as dependent on individual characteristics or circumstances.

of the children for failing 'to deal adequately with the hard and inescapable reality that their vulnerability could well be greater if they were to be separated from their parents',[71] should their application succeed. There is a sense arising from the comments in *Re Woolley* that children's rights arguments were 'beaten with their own stick'. Although discouraging, these comments should be seen as tools to identify the vulnerabilities of the CRC, and as sounding boards for children's rights arguments. In this way, they may assist in developing arguments that are more sophisticated and more upfront in dealing with the idiosyncrasies and contradictions inherent in the rights of children, and, as a consequence, are more convincing for judges.

6.3.1 Article 3(1) of the CRC: A favourite of the courts

Article 3(1) and its impact deserve special attention as the most popular provision with the courts surveyed in this study.[72] This is surprising considering the vagueness criticism raised in relation to it.[73] Nonetheless, the alleged legal weakness of article 3(1) has turned out to be its strength, with domestic and international jurisprudence[74] confirming it as a repository of legal opportunities which can advance the rights of children.

Several consequences are associated with the use of article 3(1). It encouraged courts to extend the reach of domestic best interests concepts or legal provisions,[75] and has been central to the courts' preoccupation with providing children with a legal treatment that gives consideration to their age and vulnerability. In South Africa, this was achieved through the CRC-inspired section 28(2) of the Constitution, while in Australia and France, article 3(1) of the CRC was used to compensate for the absence of an overarching statutory or constitutional norm that requires that children be treated differently in law.[76] In France, the wide direct application of article 3(1) has achieved a quasi-constitutionalisation of the best interests of the child, which is now frequently applied in civil and administrative cases. Article 3(1) has also assisted the courts to consider the rights and interests of children independently so as to avoid the negative consequences of parental behaviour (such as immigration breaches, criminal offending) being visited on their children.[77] It has sometimes been used as an entry point for CRC values when its domestic status remained uncertain,[78] or it has enabled courts to recognise to children

[71] *Re Woolley* per Callinan J para 254.
[72] The same has been found in other jurisdictions. See, for example, W Vandenhole 'The Convention of the Rights of the Child in Belgian Case Law' in T Liefaard and J Doek (eds) *Litigating the Rights of the Child*: *The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 105; L Lundy et al (2012) *The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries* (online).
[73] See, for example, U Kilkelly 'The Convention on the Rights of the Child after Twenty-five Years: Challenges of Content and Implementation' in M Ruck, M Peterson-Badali, and M Freeman (eds) *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (2017) 80 at 85.
[74] CRC Committee *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* ('*General Comment 14'*).
[75] See especially, *Re Z* and *B v MIMIA* (Australia); *Cinar; L'Association Aides* and *Observatoire* (France); *M v S* (South Africa).
[76] In Victoria, once a 'best interests' provision was inserted in a statute with a wide scope, this provision was used as an entry point for other CRC rights. See discussion in part 4.4.7.3 above.
[77] *Teoh* (Australia); *M v S* (South Africa); France (part 3.5.3.2 A). For other jurisdictions, see *Baker* (Canada); *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (NZ) ('*Tavita'*); *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* [2011] UKSC 4 (UK) ('*ZH'*) (part 2.3.2.1).
[78] See especially the French jurisprudence, where values covered by articles not recognised as having direct effect were given protection under article 3(1) of the CRC (part 3.5.2).

benefits not granted by other legal instruments and to justify considering children's interests in matters concerning them only indirectly.

Article 3(1) has prompted some domestic acknowledgement of the complexity of the concept of the best interests of the child. While the phrase 'the best interests of the child' is often used monolithically, it has different formulations in different jurisdictions and distinct meanings in different contexts,[79] and it is given different weight.[80] *Teoh* in Australia has perhaps started this conversation by advancing a procedure-oriented vision of its meaning, according to which the best interests of the child is to be given a paramount importance but not at all times priority or maximum weight. Seemingly independent of *Teoh*, this approach has been developed or refined further, in Australia and elsewhere. For example, Kirby J noted in *AMS v AIF* that the Family Law Act reflected an approach to the best interests of the child similar to that of article 3(1) of the CRC, which enabled the courts to take into account other legitimate interests.[81] The South African Constitutional Court operates extensively with the article 3(1)-inspired constitutional provision, which it accepted as an independent right and consequently made subject to limitations according to the South African Constitution. The French Court of Cassation expects transparency in relation to consideration given to the best interests of the child, and the Council of State expects that domestic law is assessed against article 3(1).[82] Under its influence, the traditional best interests of the child concept (confined to family and protection matters) has transformed into a *human rights* concept. The extent and the implications of this transformation are still to be fully explored, but what is immediately apparent is that the human rights version of the best interests trades its absolutism (i.e., its automatic prevalence over other interests) in exchange of a wider scope.[83]

Another consequence of this transformation is perhaps the recognition of the independent normative power of article 3(1) (and inspired norms) in that it can generate its own legal consequences and it has an independently enforceable legal content.[84] The crystallisation of the independent clout of article 3(1) and associated norms is at different stages in the three jurisdictions, and has taken place in different ways,[85] but the case law is evolving. Notable is the emergence of a critical discourse in relation to the over-use of best interests which may stifle the development of other rights of children. In France, over-reliance on article 3(1) may have limited the chance of other CRC provisions being considered for direct application. The suitability of an *in abstracto* application of article 3(1), to assess the validity of some domestic

[79] Compare, for example, article 3(1) of the CRC with section 28(2) of the South African Constitution and section 17(2) of the Victoria Charter.
[80] Compare adoption with immigration matters.
[81] *AMS v AIF* per Kirby J para 193.
[82] Part 3.5.3.1.
[83] This is not to say that the best interests of the child can never be the determinative factor. A clear example os such situation remains that of adoption.
[84] This is contrary to earlier views that article 3(1) does not create specific rights and duties (P Alston 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' 1994 (8) *International Journal of Law and the Family* 1 at 15; G Van Bueren *The International Law on the Rights of the Child* (1998) at 46).
[85] In South Africa, section 28(2) of the Constitution, was declared an independent right in *Fitzpatrick* paras 17-18. Gaudron J in *Teoh* made a similar statement in relation to the Australia common law. In France, however, article 3(1) is applied without being declared an independent right.

norms, has also been questioned.[86] Critical discussions about the over-use of the best interests of the child may also be starting to emerge in the other jurisdictions.[87] Some courts have managed to avoid the 'convenience application' of best interests provisions. For example, the Victoria Supreme Court has applied section 8(3) of the Charter of Human Rights and Responsibilities Act 2006 (Vic) ('the Victoria Charter') (right to equality before the law) to treat children differently from adults.[88] The legal justifications for a differential treatment for children are not therefore dependent on a 'monopoly' of the best interests of the child.

The reasons for the popularity of this article may be a matter of some speculation, but two explanations can be suggested. First, domestic judges are familiar with the concept of the best interests of the child, and domestic *aliases* provided a bridge between domestic law and the CRC, with judges considering that they did not radically depart from what was already accepted domestically. Second, the flexibility of article 3(1) has allowed the courts to mould its application on a wide range of legal issues and contexts.

A cautionary note is necessary. While the CRC and domestic jurisdictions may converge in giving legal recognition to the best interests of the child, they may do so in different ways. Article 3(1) of the CRC is a constitutional-type standard, in that it envisages its application by all state bodies and in all the decisions concerning the child. This is not likely to be replicated in states where the best interests of the child has only a sectoral recognition. An illustration is provided by the Australian law. The best interests of the child is 'the paramount consideration' when the Family Court decides whether a parenting order should be made;[89] the Family Court has a welfare jurisdiction wherein it 'must regard the best interests of the child as the paramount consideration';[90] and the 2006 Victoria Charter recognises the right of the child 'to such protection as is in his or her best interests and is needed by him or her by reason of being a child'.[91] While *the best interests of the child* may be a common 'keyword' in the above norms, their meaning and their reach differ considerably. This fragmentation of the concept may deny it many of the benefits that article 3(1) seeks to deliver.

A surprising finding in relation to the best interests jurisprudence is that it converges with the position of the Committee. In 2014, the Committee issued a general comment on article 3(1), where it noted the tripartite nature of the article (principle, rule of procedure, and an

[86] See part 3.5.3.1, especially sources in note 250.
[87] McHugh J in *Teoh*; Fogarty J in *Re Z* para 29 (raising concerns about state security secrecy, taxation, social security information, or Cabinet discussions); Callinan J in *Lam* para 147 (in relation to sentencing of a parent). D Bryant 'It's my body, isn't it? Children, medical treatment and human rights' 2009 (35) *Monash University Law Review* 193 at 207 (urging open consideration of children's rights rather than 'to quietly subsume human rights considerations under the rubric of "best interests"'); N Cantwell 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' in T Liefaard and J Sloth-Nielsen (eds) *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (2016) 61; M Couzens 'Le Roux v Dey and Children's Rights Approaches to Judging' 2018 (21) *Potchefstroom Electronic Law Journal*; A Skelton 'Child Justice in South Africa: Application of International Instruments in the Constitutional Court' 2018 (26) *International Journal of Children's Rights* 391 at 415.
[88] Part 4.4.7.2.
[89] Section 60CA of the Family Law Act.
[90] Section 67ZC(2) Family Law Act.
[91] Section 17(2) of the Victoria Charter.

independent right).[92] Most interesting is the convergence between the view of the Committee and that of some courts in relation to article 3(1) and similar domestic norms respectively, regarding the existence of a *right* to have a child's best interests taken as a primary consideration. This is a significant leap for the concept of the best interests of the child, which has previously been approached as a principle or as a standard, but not as a *right*. The position of the Committee has long been preceded by judicial developments in the systems discussed here. Mason CJ and Deane J in *Teoh* implied that article 3(1) has an independent normative value and Gaudron J argued the existence of a 'common law right … to have a child's best interests taken into account, at least as a primary consideration' in discretionary decisions which affect a child's welfare.[93] Gaudron J's association of the best interests of a child with an independent right was pioneering and preceded by almost two decades the similar statement made by the Committee. In 1997, the French Council of State applied article 3(1) independently in *Cinar*; and in 2000, in *Fitzpatrick*, a unanimous South African Constitutional Court declared that section 28(2) of its Constitution, which largely reflects article 3(1), contains an independent constitutional right.

The extent, the reasons and the potential arising from this convergence of views require further analysis.[94] At a minimum, it shows that it is possible for courts from different legal traditions and legal systems to adopt a similar view towards article 3(1); and that national courts and the Committee, despite their different institutional perspectives on the CRC, share some common views on this article. These findings open up opportunities for development, as discussed in Chapter 7.

6.4 Factors that influence the courts' engagement with the CRC

One of the research questions of this study concerned the identification of factors which facilitate and inhibit respectively the application of the CRC by domestic courts. During the study it became apparent that some factors may play an ambivalent role (both facilitating and inhibiting). For example, constitutional provisions which permit direct application facilitate the application of the CRC, but when they are given a restrictive meaning, they become obstructing factors. Further, a presumption that domestic legislation is to be interpreted in conformity with international obligations is a facilitating factor, but may be undermined by clear legislative provisions to the contrary. A different distinction between factors was made therefore between CRC-related (mainly international) and non-CRC-related (mainly domestic) factors. This distinction responds broadly to the approach discussed in Chapter 2, which draws attention to the different perspectives (domestic and international) in relation to the role of the courts in giving effect to the CRC.

[92] CRC Committee *General Comment 14* (especially para 6).
[93] *Teoh* per Gaudron J para 4.
[94] This can relate to whether and how courts and the Committee have mutually influenced their respective positions in relation to the best interests of the child. The wording of the *General Comment* and of respective judgments suggest independent and parallel developments, but a definitive conclusion should not be drawn exclusively based on these texts.

6.4.1 CRC-related factors

These factors relate to the content of the CRC. As discussed in Chapter 2, article 4 has vulnerabilities which diminish its usefulness as support for the role of the courts in giving effect to the CRC. However, of the courts surveyed here,[95] only the French Court of Cassation relied on this article to justify its reluctance to apply the Convention, a position which it abandoned later. Callinan J mentioned article 4 in *MIMIA v B* to note that this article gives the state discretion in implementing CRC obligations,[96] but made no comments in relation to its potential consequence for courts. Thus, in the jurisdictions analysed here, article 4 of the Convention has had a neutral role in the application of the CRC by courts.

The CRC has been criticised for being vague, aspirational, or programmatic. This concern has not been universal amongst courts,[97] and France is the only system where these concerns have had some prominence; but even there, they are not ventilated in judgments – rather in extra-judicial commentary by judges. As French judgments are sparse, there is room for uncertainty and speculation about the reasons for courts having rejected the direct application of some CRC provisions (e.g., the provision is insufficiently clear and precise, or it does not create an individual right, or it is addressed to the state). The intrinsic normativity of the CRC provisions has not been queried in South Africa; and, in Australia, judges have only occasionally raised *obiter* concerns about the potentially aspirational nature of the Convention.[98]

The variation in approach arguably arises from the different bases on which the courts engage with the CRC. As discussed in part 6.2 above, when the Convention is applied directly, courts are preoccupied by its intrinsic normativity; while when it is applied indirectly, the attention shifts to the underlining value protected in the text, which the judges can extract regardless of how this is formulated.

The absence of a communications procedure prior to the adoption of the 2011/2014 Optional Protocol on a communications procedure generated restrictive judicial views concerning the role of the courts in giving effect to the CRC in Australia and France.[99] To what extent the monitoring mechanism has truly influenced the courts remains open to debate, considering that, in France at least, the restrictive stance was abandoned before the Protocol was adopted. More clarity on how a stronger monitoring mechanism might influence the courts' application of the CRC will be obtained once the courts interact with Committee's findings on individual communications. This will verify the view that domestic courts act differently if they know they do not have the 'last word'[100] on the application of the Convention. So far, some courts

[95] But see its influence elsewhere (part 2.2.1 and 2.3.1.4).
[96] *MIMIA v B* per Callinan J para 222.
[97] Chapter 2 note 216, with a discussion of judicial practice in Romania and Bulgaria.
[98] Callinan J in *MIMIA v B* para 222; and, somewhat obliquely, Gleeson CJ, McHugh and Gummow JJ in *AMS v AIF* para 50.
[99] See the view of some French judges and academics (part 3.3.1) and McHugh J in *Teoh*.
[100] T Buergenthal 'Self-executing and non-self-executing treaties in national and international law' in *Collected Courses of the Hague Academy of International Law/Recueil des cours* (1992) 303 at 394. See discussion in part 2.3.1.3.

have showed explicit[101] or implicit[102] concern about contravening international obligations; but, for other courts, allegiance to domestic institutions has been a more powerful consideration.[103]

6.4.2 Factors not related to the CRC

6.4.2.1 Structure of reception

Once 'received' in a domestic system, the CRC does not operate in a vacuum, but instead it interacts with domestic laws, substantive and procedural, which constitute the 'structure of reception'[104] for the CRC.

The relationship between domestic laws and the CRC can be diverse, ranging from inconsistency or compliance to neutrality (i.e., laws that *prima facie* neither promote nor hinder the domestic effect of the Convention). The solutions differ between systems in relation to laws which are inconsistent with the Convention, as discussed in part 6.2 above. However, when there was no overt conflict with the CRC the position is more similar, with courts being assured that giving some effect to the CRC does not conflict with the will of the legislatures. This comes to the fore most clearly in Australia. The weaknesses in the legal status of the Convention were overcome when judges identified convergence with domestic law. Notable are, for example, Gaudron J's view on the existence of a common law right to consider the best interests of the child expressed in *Teoh*; and attempts by a majority of the Family Court to extend its welfare jurisdiction relying on article 3 of the CRC in *RE Z* and *B and B v MIMIA*. The similarity between some CRC standards and the Family Law Act led to a more relaxed position in relation to the ambiguity requirement as a precondition for using the CRC to interpret this statute. The convergence between sentencing rules at common law and juvenile justice norms in the CRC have enabled the Victoria Supreme Court to rely on the Convention in the exercise of sentencing discretion.[105] By contrast, the Australian High Court found it difficult to accommodate the Convention in immigration cases, where domestic law was hostile to its values.

In other systems too, convergence between the CRC and domestic norms encouraged judges to give effect to the Convention. In France, it was argued that the Court of Cassation accepted the direct application of article 12 when statutory recognition was already given to this article;[106] and, in South Africa, the general convergence of section 28 of its Constitution with the CRC has been a significant facilitating factor in the engagement with the CRC.

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[101] See, for example the position in *Tavita*; *ZH*; Arbour J in dissent in the *Canadian Foundation* (all discussed in part 2.3.2.1 above).
[102] The French Court of Cassation has adjusted its surrogacy jurisprudence to that of the ECtHR.
[103] In France, it has been argued that the Court of Cassation deliberately refrained from a direct application of the CRC to determine the legislature to give effect to it (C Sciotti-Lam *L'applicabilité des traités internationaux relatifs aux droits de l'homme en droit interne* (2004) at 412). Further, the Australian High Court ignored the views of the Human Rights Committee in *MIMIA v B* (with only Kirby J mentioning them in his judgment). Also, McHugh J in *Teoh* and McHugh and Gummow JJ in *Lam*.
[104] Sciotti-Lam 2004 note 103 at 441.
[105] Part 4.4.6.
[106] Part 3.3.2.

These experiences suggest that the narrower the gap between domestic law and the CRC, the easier it is for the courts to give it effect. The convergence of domestic law with some CRC provisions may illustrate their 'domestic value',[107] and thus the existence of some domestic agreement between courts, executives and legislatures about their importance. This makes the application of Convention norms less controversial, even in the absence of legislative incorporation or transformation.[108] The attitude of the state in litigation where the CRC is invoked may also give an indication of the domestic value of a treaty. For example, in many of the Australian cases discussed in Chapter 5, the reliance on the CRC by parties was opposed by the state;[109] while in South Africa, not only did the state not oppose CRC-related arguments,[110] but it relied on the CRC itself.[111]

While *in abstracto* some systems may appear less CRC-friendly than others, *in concreto* this may be compensated by the resourcefulness of the domestic law and the courts' ability to use autochthonous legal mechanisms to give effect to the CRC. In Australia, some judges have used judicial discretion as an entry point for the CRC,[112] or have relied on non-normative avenues as a strategy to engage with the Convention.[113] These mechanisms have also been used in South Africa in order to diversify the effect of the CRC. In Australia and South Africa, separate or dissenting judgments have developed the CRC jurisprudence. Notably, this is how the Convention was 'kept alive' by Justice Kirby in the High Court of Australia; separate or dissenting judgments by other justices have also raised questions of importance for the operation of the CRC.[114] In South Africa, where the Convention was ignored by the majority, it was sometimes addressed in separate judgments.[115]

6.4.2.2. Social and political context

The favourable political and social context has been a facilitating factor in the application of the CRC in South Africa, which is not replicated in the other jurisdictions. Children's contribution to the fight against apartheid, a strong pro-children's rights advocacy movement at the time when the country was drafting a post-totalitarian constitution, and a responsive political will have contributed to the constitutionalisation of the rights of children and the creation of a climate favourable for their enforcement. Having contributed to the demise of apartheid, human rights were generally supported and credited with the power to achieve social change. In the field of children's rights this is clearly illustrated by the numerous cases of wider societal interest which involved the participation of public interest litigation bodies or NGOs. No such boosts operated in the other two systems. In France, the engagement with the CRC is dominated by individual cases, and by what appears to be a technically-oriented application of

[107] Waters 2007 note 68 at 701.
[108] Waters suggests that courts assess the 'domestic value' of a treaty from the perspective of the executive and the legislature; the higher the domestic value of a treaty, the more forward the courts can be in its application (ibid).
[109] *Teoh; Re Z; B and B v MIMIA; Re Woolley*.
[110] *C v Department of Health.*
[111] *Fitzpatrick* para 27; *Christian Education* para 13.
[112] See Bell J in *DPP v TY* (discussed in part 4.6.2 above).
[113] Part 4.7.2 above.
[114] See McHugh J in *Teoh*, and Callinan J in *MIMIA v B.*
[115] Skweyiya J in *Le Roux* and *C v Department of Health*.

the law, somewhat discrete from the social context.[116] In Australia there has been little general and political support for human rights, including children's rights, with this being partly rationalised through an unjustified feeling of 'self-sufficiency'[117] in terms of human rights performance.

6.4.2.3 Jurisdictional arrangements

The jurisdiction of domestic courts may influence whether and how they engage with the Convention. In France, for example, administrative courts have been well ahead of their judicial counterparts in applying the CRC, because their jurisdiction includes verifying the legality of administrative action, including against international instruments which form part of the public law. It was sufficient therefore for international norms to have some constraining power, even if they did not have *stricto senso* direct effect.[118] Judicial courts, on the other hand, do not control the lawfulness of official acts and instead, decide disputes between individuals, in relation to individual rights.

Jurisdictional issues feature in Australia too. The Family Court and Victoria Supreme Court have a quantitatively and qualitatively richer children's rights jurisprudence than the High Court. Although the basic rules concerning the relationship between the CRC and domestic law applied by these courts are the same, the jurisdiction of the former courts strengthens their ability to apply the Convention. The influence of the CRC on the successive reforms of the Family Law Act 1975 makes it easier for the Family Court to rely on the Convention. Further, the 2006 Victoria Charter allows reliance on the CRC for statutory interpretation purposes. This has even enabled the Victoria Supreme Court to consider the general comments of the Committee and therefore to enlarge the reference framework for the analysis and the interpretation of the domestic law.

Thus, different courts have different tools to recognise and give effect to the normative value of the Convention, and its interaction with multiple courts allows for the discovery of the diverse legal potential of the CRC.[119] Depending on the system, a norm which may not be of direct application could inform the control of constitutionality of a statute,[120] or may be used for interpretation purposes; or a norm not applicable by a court in the immigration context could nonetheless be applied by another in a juvenile justice context.[121] A diverse case law

[116] With more cases, however, being promoted by specialised NGOs, it is possible that this approach may change.
[117] J Tobin 'Finding rights in the "wrongs" of our law: Bringing international law home' 2005 (30) *Alternative Law Journal* 164 at 164.
[118] See definitions in Chapter 2 part 2.3.1.2.
[119] This may occur in other jurisdictions too. In *Baker* (discussed in more detail in part 2.3.2.1), Iacobucci J would have found it unproblematic to use the CRC in assessing the reasonableness of administrative discretion if that discretion involved a Charter right but disagreed with such use if a Charter right was not at stake (para 81).
[120] Article 34 in *Geldenhuys* (South Africa); articles 28 and 29 in *Christian Education* (South Africa). Arguably, in South Africa this is less important than in jurisdictions where direct effect is central to giving effect to treaties. Nonetheless, analyses from latter category of jurisdictions show that courts 'liberated' from the constraints of direct effect, were able to consider the Convention more closely. This is the case with the Belgian Constitutional Court (Vandenhole 2015 note 72 at 110).
[121] See, for example, the position regarding article 37 by the High Court of Australia in *MIMIA v B* by contrast with that of the Victoria Supreme Court in the *Certain Children* cases.

develops in this way, building up trust in the CRC as a legal instrument and encouraging its further application.[122]

Although the engagement with the CRC by different courts is relatively autonomous, the case law may be shaped by their interaction. In France the case law of the Council of State has influenced the Court of Cassation and *vice versa*.[123] The ECtHR jurisprudence has encouraged the application of the Convention in France (and other European jurisdictions[124]). The benefit of the interaction with the case law of constitutional and international courts is that they are accustomed to applying abstract norms. In doing so, they challenge possible misconceptions held by ordinary courts that CRC provisions are not 'really law'.[125] In this way, they indirectly encourage the application of the Convention by ordinary domestic courts.

However, the courts' interaction has not always been favourable to the CRC. In Australia, attempts by the Family Court to expand the influence of the CRC have been rejected by the High Court.[126] In France, the confined children's rights jurisprudence of the Constitutional Council did not stimulate the courts to apply the Convention. Jurisprudential reinforcements of a CRC-problematic position in relation to anonymous births, for example, by the Constitutional Council and the ECtHR provided no incentive for the Court of Cassation to assess the compatibility of domestic law with the CRC. Nonetheless, imperfect alignment between the positions of various courts allowed the CRC to develop in the interstices. In Australia, the limited application of the CRC by the High Court left space for the Family Court and the Victoria Supreme Court to develop their Convention case law by taking advantage of their more favourable statutory position. In France, the Court of Cassation relied on the CRC to depart from the jurisprudence of the Constitutional Council and the ECtHR, and to take a position more favourable to children.[127]

Thus, the existence of multiple jurisdictional options to engage with the Convention has increased its chances of application.

6.4.2.4 The level of jurisprudential development of the CRC and the rights of children

This factor has an ambivalent nature which plays up differently in different legal systems. A developed CRC jurisprudence may encourage its further development. In France, the more accepted direct application has become the more willing have been the courts to apply article 3 and to extend its ambit. It is also possible that the more judicially developed legal norms are, the less likely it is for them to be perceived as imperfect, imprecise or incomplete. This would enhance the CRC's chances to be seen as meeting the objective criterion of direct application. Conversely, the absence of case law may enable the application of the CRC. In Australia, for

[122] In France, for example, the jurisprudence of the Council of State has been credited with influencing the change in the Court of Cassation's own approach to the direct application of the CRC.
[123] Part 3.6.2.3.
[124] Couzens 2016 note 20.
[125] To paraphrase Scheinin 1996 note 41 at 17.
[126] *GPAO*; *MIMIA v B*.
[127] *Benjamin* and the application of article 7 of the CRC.

example, the limited application of the CRC by the High Court allowed other courts to develop their Convention jurisprudence.

Developed autochthonous or regional child-related jurisprudence may interfere with the application of the CRC. In Australia, the well-developed jurisprudence in relation to the welfare and *parens patriae* jurisdictions has made it difficult successfully to rely on the CRC in order to displace or to develop the traditional views on the best interests of the child along the lines of article 3(1) of the CRC.[128] In South Africa, there is a thriving children's rights jurisprudence, whose driver has been section 28 of the Constitution. The existence of a developed autochthonous children's rights jurisprudence may reduce the importance of the CRC for the courts and lead to inconsistent reliance on it. The jurisprudence of the ECtHR has indirectly encouraged French courts to consider and accept the CRC.[129] The first case in which the Court of Cassation applied the CRC directly is said to have been so influenced, and the same court changed its approach to surrogacy under the influence of the ECtHR. There is, however, a risk that if ECtHR (or ECJ) case law acts as a filter for the CRC, courts will not analyse the Convention independently from its relationship with the ECHR or European Community law. Thus, if the reference point for the application of the CRC and the rights of children more generally remains the domestic or supra-national jurisprudence there is the risk that alternative legal views in relation to the Convention (such as those of the CRC Committee) will be ignored.

6.5 Conclusion

The formal rules of reception which permit a distinction between monist, dualist and hybrid systems and direct or indirect application cannot capture or fully explain how domestic courts apply the CRC. They remain useful as a starting point, but ultimately prove their own insufficiency. The interaction between domestic courts and the CRC is complex, and no framework of reception is inherently more effective than the other. The monist approach with the possibility of direct application and domestic supremacy of the CRC has sometimes been less effective than dualist-like indirect forms of application. That is because of the complexity of factors which inform the judicial application of the CRC,[130] which go well beyond terse constitutional or legal statements about the domestic status of the Convention.

[128] *MIMIA v B* and *Re Woolley*.
[129] This is valid for other European jurisdictions too. See Couzens 2016 note 20, in relation to Romania.
[130] This work has identified the structure of reception, social and political context, diversity of courts and the development of the children's rights jurisprudence in a given state.