AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: LA Greeff 'The non-ratification of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: South Africa and Australia in perspective' (2025) 25 *African Human Rights Law Journal* 332-357
http://dx.doi.org/10.17159/1996-2096/2025/v25n1a13

The non-ratification of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: South Africa and Australia in perspective

*Laetitia-Ann Greeff**
Research Associate, Faculty of Law, Nelson Mandela University, Gqeberha, South Africa
https://orcid.org/0000-0003-1669-7538

Summary: *The year 2024 marked the tenth anniversary of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC or Optional Protocol). Initially, the Convention on the Rights of the Child did not have an individual communications procedure that allowed children, groups of children or their representatives to submit communications to the Committee on the Rights of the Child for alleged rights violations. It took more than two decades for the United Nations General Assembly to adopt a communications procedure for CRC. Despite incorporating CRC into a very progressive Bill of Rights and having a very good relationship with human rights law, neither South Africa nor Australia has ratified the Optional Protocol. South Africa is of the view that its domestic legal framework is more than adequate to deal with children's rights violations and that, therefore, it does not need to ratify the Optional Protocol. Australia, on the other hand, has a strained relationship with international law and has been slow to incorporate the*

* BProc LLB (Pretoria) GradDip Legal Practice (College of Law, Australia) LLM (New England, Australia) LLD (South Africa); laetitia-ann.greeff@mandela.ac.za

provisions of CRC into domestic legislation. It is also disinclined to accept and implement the views of international treaty bodies. Despite these challenges, both jurisdictions ought to consider ratifying the Optional Protocol to increase its reach and impact. The CRC Committee dedicated the forthcoming General Comment 27 to the right of access to justice and effective remedies. Therefore, accession to OPIC is crucial for South Africa and Australia and would put these jurisdictions in lockstep with the CRC Committee concerning access to justice for children.

Key words: *access to justice; children's rights; communications procedure; CRC; international law; OPIC*

1 Introduction

The year 2024 marked the tenth anniversary of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC or Optional Protocol).[1] Initially, the United Nations (UN) Convention on the Rights of the Child (CRC)[2] did not have an individual communications procedure that allowed children, groups of children or their representatives to submit communications to the Committee on the Rights of the Child (CRC Committee) for alleged rights violations. The CRC Committee is the body responsible for monitoring the implementation of CRC and Optional Protocols by state parties and making determinations on individual communications submitted to it for alleged children's rights violations. Although the inclusion of a communications procedure was considered during the drafting of CRC, the idea did not receive sufficient support from international stakeholders.[3] The drafting process took ten years and involved many compromises over various articles, so much so that when it came to including a communications procedure, the international community indicated that it was just not ready to do so at that time.[4] One of the sticking points was the inclusion of

1 Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC) adopted by General Assembly Resolution A/RES/66/138 on 19 December 2011 and entered into force on 14 April 2014.

2 Convention on the Rights of the Child (CRC) adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 on 20 November 1989 and entered into force on 2 September 1990. Notably, Australia was one of the first countries to ratify the Convention on 17 December 1990, and South Africa followed suit on 16 June 1995.

3 Y Lee 'Communications procedure under the Convention on the Rights of the Child: 3rd Optional Protocol' (2010) 18 *International Journal of Children's Rights* 568.

4 As above.

economic, social and cultural rights, which were considered non-justiciable, in CRC.[5]

Despite not having a communications procedure, children's rights were further strengthened when the UN General Assembly (UNGA) adopted the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC) and the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict (OPAC).[6] For the next two decades, CRC operated without a communications procedure. Eventually, the UNGA adopted the Third Optional Protocol on the Rights of the Child on a Communications Procedure in 2011, which came into force in 2014. This Optional Protocol finally brought CRC in line with all the other human rights instruments since it was the last human rights treaty to adopt a communications procedure.[7] Ironically, even though CRC is the most ratified international treaty with 196 states party to it, it is disappointing to note that, in comparison, just over 50 states have thus far ratified OPIC, while a little more than 50 states are signatories. Approximately 130 states have taken no action.[8] South Africa and Australia fall into the last category.

This article is a doctrinal study that gives an overview of the procedural aspects of OPIC and discusses the reasons for Australia's and South Africa's reluctance to ratify the Optional Protocol. This contribution starts in part 2 by giving a short overview of the creation of the Optional Protocol and a brief discussion relating to the theoretical aspects of access to justice for children. Furthermore, this part proceeds to list the fundamental rights that underscore the Optional Protocol as set out in the Preamble. It continues by giving an overview of the procedural aspects of the complaints mechanism. Although this part of the article is primarily descriptive, it is essential for readers unfamiliar with the Optional Protocol's structures and procedures.

5 G de Beco 'The Optional Protocol to the Convention on the Rights of the Child on a communications procedure: Good news?' (2013) 13 *Human Rights Law Review* 368; Lee (n 3) 569; S Pinheiro 'Reasons and timing to elaborate a communications procedure under the Convention on the Rights of the Child' 10 December 2009 UN Doc A/HRC/WG.7/1/CRP.4 2. Interestingly, the drafters of the African Charter on the Rights and Welfare of the Child had no such reservations and included a built-in communications procedure in art 44.

6 Adopted by the General Assembly Resolution A/RES/54/263 in May 2000 and entered into force on 12 February 2002 (OPAC) and 18 January 2002 (OPSC).

7 RC Akhtar & C Nyamutata *International child law* (2020) 111.

8 https://treaties.un.org/Pages/ (accessed 27 September 2024).

In part 3 the article discusses children's access to justice in South Africa, the impressive body of children's rights jurisprudence accumulated since 1994 and South Africa's engagement with international law. This part interrogates why South Africa is reluctant to ratify the Optional Protocol. It is then argued that as a human rights leader on the African continent, it is appropriate for South Africa to ratify OPIC as the accession to the Optional Protocol strengthens the right to access to justice and effective remedies. In part 4 the article examines Australia's strained relationship with international law and treaty bodies and the slow rate of incorporation of CRC into domestic legislation. Additionally, this article interrogates the influence that the respective systems of government, constitutional and parliamentary supremacy, have on South Africa and Australia's decisions not to accede to the Optional Protocol. Moreover, this contribution examines some domestic challenges the Australian government faces and argues that these challenges impede Australia's accession to OPIC. Finally, in part 5 the article concludes that South Africa and Australia should accede to OPIC because having access to justice at the domestic and international levels is in the best interests of all children and, as Liefaard points out, it is their right.[9]

2 Communications procedure

Individual communications contribute to raising awareness of human rights breaches at the national and international levels. They have the advantage of highlighting issues of civil society campaigns and shining a spotlight on human rights violations that would otherwise go unnoticed and unreported. The UN High Commissioner for Human Rights defined 'access to justice' as 'the ability to obtain a just and timely remedy for rights violations as set out in national and international norms and standards, including the Convention on the Rights of the Child'.[10] Access to justice has a vital role in holding duty bearers to account for upholding their obligations to children, challenging discrimination, and providing the necessary remedies. The UN set out 17 Sustainable Development Goals (SDGs) for 2030 in its Agenda for Sustainable Development. Target 16.3 aims to promote the rule of law on the domestic and international levels and ensure equal access to justice for all.[11] Access to justice is transitioning from a legal concept to a recognised children's right, so much so that the CRC Committee dedicated its 27th General Comment to children's

9 T Liefaard 'Access to justice for children: Towards a specific research and implementation agenda' (2019) 27 *International Journal of Children's Rights* 198.
10 https://www.ohchr.org/sites/Session25/ (accessed 29 September 2024).
11 https://sdgs.un.org/goals/goal16 (accessed 29 September 2024).

rights to access to justice and effective remedies.[12] Nevertheless, CRC does not explicitly mention the child's right to an effective remedy.[13] However, the CRC Committee has implied such a right in General Comment 5, stating that '[f]or rights to have meaning, effective remedies must be available'.[14] The CRC Committee realised that the '[l]ack of effective mechanisms at the national, regional and international level that enable children and their representatives to challenge violations and seek remedies weaken the enforcement of all the provisions of the CRC'.[15] Consequently, the UNGA adopted the Optional Protocol in 2011, which came into force in 2014. OPIC aims to encourage state parties to make the legal process more accessible to children at the domestic level.[16] The Optional Protocol, therefore, is a valuable mechanism to provide children with access to justice at the international level but also to promote the development of access to justice at the domestic level.

The Preamble to the Optional Protocol highlights that OPIC is based on certain fundamental children's rights principles that form the foundation of children's rights in international human rights law. These principles include universality, indivisibility, interdependence and interrelatedness of all human rights and freedoms; the status of a child as a rights holder, as a human being with dignity and with evolving capacities; the special and dependent status of children and their right to pursue remedies when there has been a breach of their rights; the principle of the best interests of the child should be a primary consideration in pursuing remedies for rights breaches; and that such remedies should reflect the need for child-sensitive procedures.[17]

Initial discussions of the Open-Ended Working Group, which was established by the Human Rights Council in June 2009 for the purposes of formulating an Optional Protocol for CRC, were about the outcomes a communications mechanism might create. The view was that a communications procedure 'may generate soft and persuasive legal influence' and 'could assist in better definition of children's rights and affect regional and national courts and tribunals in their interpretations in particular cases'.[18] However, at that time,

12 Draft General Comment 27 on children's rights to access to justice and effective remedies | OHCHR (accessed 29 September 2024).
13 Liefaard (n 9) 199; M Langford & S Clark 'The new kid on the block' (2010) 28 *Nordic Journal of Human Rights* 379.
14 CRC Committee General Comment 5: General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42 & 44 para 6) para 24.
15 Lee (n 3) 568.
16 Preamble OPIC (n 1).
17 As above.
18 Langford & Clark (n 13) 390.

Langford and Clark cautioned about having 'excessive expectations' and noted that the non-binding orders of a future optional protocol would only have a 'modest impact in practice'.[19] A concern was whether quasi-judicial orders could have measurable outcomes.[20] Of course, as these scholars pointed out, the answer is that they can, as can be seen in the case of Australia, where they lost a case in the Human Rights Committee (UNHR Committee), which led to a systemic change in human rights legislation for minorities in that jurisdiction.[21] As we now know, the eventual Optional Protocol established a quasi-judicial mechanism that allows children, groups of children or their representatives to bring a communication or complaint directly to the CRC Committee. Liefaard explains the quasi-judicial function as follows:[22]

> It should be noted that the case law or jurisprudence of the CRC Committee is, as such, not legally binding – its views serve as recommendations to state parties. As a UN treaty body under the CRC, the CRC Committee is not a judicial authority but, like the Human Rights Committee (HRC), its views 'are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions'.

While it is true that some states might not implement the views of the CRC Committee, even though the CRC Committee does undertake follow-up procedures, there are no significant sanctions against states that choose to ignore the CRC Committee's recommendations. Yet, Skelton, the former Chairperson of the CRC Committee, notes that up to 1 February 2024, 238 cases had been registered, decisions had been made in 137 cases and rights violations found in 45 of those.[23] The fact that the views of the CRC Committee are non-binding does not seem to have a negative impact on its workload. It is, therefore, encouraging to see that the Optional Protocol is being used for precisely the reason it was intended for. Specifically, the aim of OPIC is three-fold: (a) to protect the full range of children's rights under CRC; (b) to ensure that children have access to justice and effective remedies available to redress rights violations; and (c) to strengthen the effective implementation of CRC and the accountability of state parties.

19 As above.
20 As above.
21 See the discussion below on *Toonen v Australia* Communication 488/1992, UNHR Committee (31 March 1994), UN Doc CCPR/C/50/D/488/1992 (1992).
22 T Liefaard 'Children's rights remedies under international human rights law: How to secure children's rights compliant outcomes in access to justice?' (2023) 56 *De Jure Law Journal* fn 4.
23 A Skelton 'Children's rights to access to justice and remedy: Recent developments' (2024) 24 *Youth Justice* 4, https://doi.org/10.1177/14732254241238515 (accessed 29 September 2024).

The following is a general discussion of the outline of the framework of the Optional Protocol. The Optional Protocol consists of four parts and 24 articles: Part I (articles 1-4) contains the general provisions. Article 2 affirms that the CRC Committee, in fulfilling its functions under the Optional Protocol, shall be guided by the principle of the best interests of the child. The CRC Committee must also have regard to the rights and views of the child and give them due weight in accordance with the age and maturity of the child. Part II (articles 5-12) includes the communications procedure; part III (articles 13 and 14) contains the inquiry procedure; and part IV (articles 15-24) consists of the final provisions.

OPIC contains three complaint procedures: article 5 – individual communications; article 12 – inter-state communication; and article 13 – the inquiry procedure.[24]

Part II of OPIC comprises the communications procedure, which is included in articles 5-12. The CRC Committee derives its authority to consider communications from the Optional Protocol rather than from CRC.[25] Complaints may be made by or on behalf of an individual or a group of individuals within the jurisdiction of the state party that has ratified OPIC. Furthermore, the rights violation must have breached any of the rights set out in CRC or any of the first two Optional Protocols, OPSC or OPAC.[26]

In 2013, and subsequent to the provisions found in article 3, the CRC Committee adopted the Rules of Procedure under the Optional Protocols to the Convention on the Rights of the Child on a communications procedure (RoP),[27] which were later updated with amendments and inclusions. In 2015 the CRC Committee adopted working methods to deal with individual communications received under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (working methods) based on the OPIC RoP, which were updated in 2017 and again in 2021.[28] In addition, under Rule 6(1) of the RoP, the CRC Committee has the

24 Akhtar & Nyamutata (n 7) 112.

25 Art 1 OPIC (n 1).

26 Art 5(1) OPIC (n 1).

27 Rules of Procedure (RoP) under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, adopted by the CRC Committee at its 62nd session (14 January-1 February 2013) CRC/C/62/3. The present document (containing amendments and additions) was adopted by the CRC Committee at its 88th session (6-24 September 2021) CRC/C/158 4 November 2021.

28 Working methods to deal with individual communications received under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, adopted by the CRC Committee on 2 October 2015 and revised on 2 June 2017 and 4 June 2021.

authority to establish a working group(s) and designate rapporteur(s) to assist the CRC Committee with making recommendations and processing complaints. The working group comprises nine members, with four or five rotating biannually.[29] The Chairperson, elected by the working group members every two years, appoints one member of the working group per case as rapporteur. The Chairperson coordinates working group meetings and represents the working group at OPIC activities.[30] The Petitions Unit/Secretariat acts in a record-keeping capacity for reference and consultation by the CRC Committee. The Petitions Unit/Secretariat receives all communications submitted by an individual or individuals to the CRC Committee under OPIC. All communications received under the Optional Protocol submitted by children are forwarded without delay to the CRC Committee's Working Group on Communications, including those that are *prima facie* inadmissible.[31] The rapporteur examines all correspondence received by the CRC Committee and makes recommendations. Thereafter, drafts on admissibility and merits approved by the rapporteur are sent to the Working Group for information and comments.[32] Once the comments are received, the rapporteur prepares a consolidated draft decision on the admissibility and merits and forwards it to the Working Group.[33]

Where a complaint is made to the CRC Committee on behalf of an individual or group of individuals, this should be with the consent of the individual or group unless the author of the complaint can justify the absence of consent.[34] After the Petitions Unit receives a communication from a child or children, it will be forwarded to the working group for consideration, including those that seem to be *prima facie* inadmissible.[35] However, when the Petitions Unit receives communications from adults, including those who act as representatives of children, the communications will be screened for admissibility. Those that are found to be *prima facie* inadmissible are rejected.[36] However, Rule 20(4) of the RoP confuses the issue somewhat in that it states that when the CRC Committee receives a communication on behalf of a child or group of children without evidence of the necessary consent, and *after* considering the particular circumstances and information of the case, the CRC

29 Working methods (n 28) B.4-5.
30 Working methods (n 28) B.6.
31 Working methods (n 28) D.10.
32 J Doek 'Individual communications submitted under the Optional Protocol to the CRC on a communications procedure and admissibility' (April 2024) 51, https://hdl.handle.net/1887/4034998 (accessed 22 March 2025).
33 As above.
34 Art 5(2) OPIC (n 1).
35 Working methods (n 28) D.10.
36 Working methods (n 28) E.14.

Committee may then decide that it is not in the best interests of the child or children to examine the communication. It is argued that the rule 'suggests the Committee may choose to review a communication lacking consent if it is deemed in the best interests of the child'.[37] This rule contradicts the explicit nature of the words in article 5(2) of OPIC, which clearly states that when a communication is submitted on behalf of a child or group of children, it shall be with their consent unless the author can justify the absence of consent. Therefore, if the communication is *prima facie* inadmissible, it ought to be rejected without considering the particular circumstances of the case and whether it is in the best interests of the child to examine the communication.[38] For now, the CRC Committee will examine all communications submitted on behalf of an individual or group of individuals without consent unless it is not in the best interests of the child or children to do so.[39] However, if the CRC Committee decides not to examine a communication, it is argued that in those circumstances, it needs to explain the nature of its decision and under what interpretation of the best interests of the child principle such a decision is made.[40]

In 2019 the CRC Committee adopted Guidelines for Interim Measures under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (Guidelines).[41] These Guidelines help to facilitate and implement the necessary interim measures under article 6(1) of OPIC, which states that at any time during the process, but before a determination on the merits of a communication, the CRC Committee has the discretion to request that the state party take the necessary interim measures to prevent irreparable damage to the victim or victims of the alleged rights violation.[42] However, this discretion should not be seen as a determination on either the admissibility or merits of the complaint.[43] According to the Guidelines, 'interim measures have a dual nature, precautionary and protective'.[44] The protective nature aims 'to avoid

37 Doek (n 32) 12.
38 As above.
39 As above. See, eg, *JSHR and LHL and AHL v Spain* Communication 13/2017, CRC Committee (15 May 2019), UN Doc CRC/C/84/D/13/2017 (2016); *YF and FF and EF v Panama* Communication 48/2018, CRC Committee (3 February 2020), UN Doc CRC/C/83/D/48/2018 (2018); *LH & Others v France* Communication 79/2019, CRC Committee (30 September 2020), UN Doc CRC/C/85/D/79/2019 (2019); and *AF v France* Communication 109/2019, CRC Committee (30 September 2020), UN Doc CRC/C/86/D/109/2019 (2019).
40 Doek (n 32) 12.
41 Guidelines for interim measures under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, adopted by the CRC Committee at its 80th session (14 January-1 February 2019).
42 Art 6(1) OPIC (n 1); Rule 7(1) RoP (n 27); Guidelines (n 41) (1).
43 Art 6(2) OPIC (n 1); Rule 7(3) RoP (n 27); Guidelines (n 41) (6).
44 Guidelines (n 41) (2).

irreparable harm and preserve the exercise of human rights', while the precautionary nature aims at 'preserving a legal situation under consideration' by the CRC Committee.[45]

When the working group decides to declare a communication admissible, the decision must be unanimous.[46] Article 7 sets out the circumstances in which the working group may consider a communication to be inadmissible and, therefore, will not be considered by the CRC Committee.[47] The decision to declare a communication inadmissible must also be unanimous.[48] A communication to the CRC Committee must be in writing by an identified individual rather than a state. The RoP provide for an exception to this requirement where the non-written materials are supplementary to the written submissions.[49] The Petitions Unit can reject cases for inadmissibility at the pre-registration stage, and cases that are, however, potentially registrable are then forwarded to the working group for a decision on registration.[50]

Where the communication is an abuse of the right of submission or is incompatible with the provisions set out in CRC or Optional Protocols, such as an unreasonable delay in submitting the communication, it will be inadmissible.[51] Matters that have already been examined by the CRC Committee or are currently being considered by the CRC Committee or another forum are also inadmissible.[52] Crucially, authors must have exhausted all domestic remedies before submitting a communication to the CRC Committee.[53] The current OPIC case law suggests that the CRC Committee is unwilling to admit communications where domestic remedies have not been exhausted.[54] State parties are encouraged to develop domestic mechanisms to enable just and equitable access

45 As above.
46 Working methods (n 28) H.22.
47 Working methods (n 28) H.23; See, also, J Doek 'Communications with the Committee on the Rights of the Child under the Optional Protocol to the CRC on a Communications Procedure and Admissibility – Report on the Decisions of the Committee on Admissibility: Summary and Comments' 22 October 2020, https://www.childrensrightsobservatory.org/images/papers/Jaap-Doek-Report-on-Admissibility-under-CRC-OP3-2020.pdf (accessed 3 October 2024).
48 Working methods (n 28) H.23.
49 Rule 16(3)(d) RoP (n 27).
50 Doek (n 32) 51.
51 Art 7(c) OPIC and Rule 16(3)(e) RoP.
52 Art 7(d) OPIC and Rule 16(3)(f) RoP.
53 Art 7(e) OPIC and Rule 16(3)(g) RoP.
54 See, eg, T Bulto 'Exception as norm: The local remedies rule in the context of socio-economic rights in the African human rights system' (2012) 16 *International Journal of Human Rights* 561 for a comprehensive discussion on the reasons why international treaty bodies require that local remedies be exhausted before a communication would be considered admissible.

to justice and timely remedies.[55] Liefaard points out that the CRC Committee's views show that it has taken a cautious approach to assessing the admissibility of communications under the criteria set out in article 7(e).[56] This requirement, which is also found in other communications mechanisms, such as the Optional Protocol to the International Covenant on Civil and Political Rights (OP-ICCPR) and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), 'supports the sovereignty of states and particularly their ability to resolve matters at a domestic level before international redress is available'.[57] The reason for this requirement is found in the OPIC Preamble, which requires state parties 'to develop appropriate national mechanisms to enable a child whose rights have been violated to have access to effective remedies at the domestic level'.[58] However, where there are no domestic remedies available, the communication will not fail the admissibility test in article 7(e), as was the case for many children of foreign fighters stranded in Syria.[59] The exception to this rule is where the domestic remedies are unduly prolonged or are unlikely to bring effective relief.[60] Where the communication is manifestly ill-founded or not sufficiently substantiated, and the violation of the right occurred before the date of entry into force of the Optional Protocol, unless the violation continues after that date, the communication will be inadmissible.[61] Finally, a communication would be inadmissible if submitted more than one year after the author has exhausted all domestic remedies unless the author can prove that it was impossible to submit the communication within the stipulated time limit.[62]

The CRC Committee will inform the state party when it receives a communication under OPIC as soon as possible and confidentially unless the communication is deemed inadmissible.[63] On receipt of this information, the state party shall provide the CRC Committee with written explanations clarifying the matter and the remedy, if any, that it may have provided to the author. Such explanations shall be provided as soon as possible and within six months.[64] To

55 Preamble OPIC (n 1).
56 Liefaard (n 22) 487.
57 B Swannie 'Individual communications: Can they provide effective redress for human rights violations?' (2023) 48 *Alternative Law Journal* 260.
58 Liefaard (n 22) 487.
59 *LH & Others v France* (n 39) and *AF v France* (n 39); *FB & Others v France* Communication 77/2019, CRC Committee 8 February 2022, UN Doc CRC/C/89/D/77/2019 (2019).
60 Doek (n 47) 12; Doek (n 32) 32.
61 Arts 7(f)-(g); Doek (n 47) 14.
62 Art 7(h) OPIC (n 1).
63 Art 8(1) OPIC (n 1).
64 Art 8(2) OPIC (n 1).

facilitate a friendly settlement, the CRC Committee will make available appropriate office space where the parties can meet based on respect for the obligations under CRC and/or OPIC.[65] Once a settlement is reached, the matter under consideration in response to a communication with the CRC Committee is closed.[66]

The CRC Committee shall consider communications under OPIC as swiftly as possible, based on all the documentation submitted, provided that these documents have been forwarded to all parties concerned.[67] Meetings will be closed, and where the CRC Committee has requested interim measures, it will expedite its considerations.[68] When examining alleged economic, social and cultural rights, the CRC Committee shall consider the reasonableness of any steps taken by the state party, bearing in mind a possible range of policy measures for implementing these rights.[69] The CRC Committee shall deliver its views and recommendations, if any, without delay to the parties concerned.[70]

Article 11 contains the follow-up procedure, which 'provides a mechanism to track the effectiveness of OPIC'. The follow-up progress report used agreed assessment criteria: 'compliance', 'partial compliance', 'non-compliance' and 'no reply'.[71] Article 12 contains provisions relating to communications between state parties. Part III consists of the inquiry procedure, which includes articles 13 and 14. Article 13 includes the inquiry procedure on grave and systematic violations of state parties under CRC and the two other Optional Protocols on the sale of children, child prostitution and child pornography or on the involvement of children in armed conflict. Article 14 contains the follow-up to the inquiry procedure. Finally, part IV contains the final provisions, which are found in articles 15 to 24.

65 Art 9(1) OPIC (n 1).
66 Art 9(2) OPIC (n 1).
67 Art 10(1) OPIC (n 1).
68 Arts 10(2)-(3) OPIC (n 1).
69 Art 10(4) OPIC (n 1).
70 Art 10(5) OPIC (n 1).
71 Akhtar & Nyamutata (n 7) 116.

3 Argument for accepting OPIC by South Africa

3.1 Access to justice in South Africa

South Africa is a constitutional democracy. The South African Constitution[72] comprises civil, political, social and economic rights and enshrines one of the world's most progressive bills of rights. Furthermore, Skelton asserts that international scholars have proclaimed the Bill of Rights as an exemplary constitution for protecting and furthering children's rights.[73] Section 28 contains a robust children's rights clause modelled on the provisions of CRC, and its influence is evident throughout the clause.[74] Legal scholars have even posited that since South Africa ratified CRC and incorporated it into domestic law, it has moved from a dualist to a monist state as far as children's rights are concerned.[75]

However, South Africa has not always had such an impressive legal framework concerning children's rights. After the first democratic elections in 1994, the focus shifted from an oppressive regime to a jurisdiction with a child rights-focused legal framework and progressive system of government. South Africa set out on a legislative and policy path that established a formidable children's rights foundation and produced a plethora of litigation and law reform over the next three decades.[76] This epochal shift is not surprising given the abject poverty and deplorable conditions present then and still now in many areas of the country. The need to lift the most vulnerable from poverty and despair could no longer be ignored. It is a credit to the judiciary at that time that children's rights were given due regard in the Constitutional Court.[77]

The robust jurisprudence encapsulating children's rights is due to the work done by children's rights organisations such as the Centre for Child Law at the University of Pretoria, for example. Strategic

72 The Constitution of the Republic of South Africa, 1996.
73 A Skelton 'South Africa' in T Liefaard & JE Doek (eds) *Litigating the rights of the child: The UN Convention on the Rights of the Child in domestic and international jurisprudence* (2015) 14.
74 As above.
75 J Sloth-Nielsen & 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* 671.
76 J Sloth-Nielsen 'Children's rights jurisprudence in South Africa – A 20 year retrospective' (2019) 52 *De Jure* 501.
77 See, eg, *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), where the Court discussed the child's right to be heard, and *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC), where the Court addressed the paramount importance of the child's best interests.

litigation forms a significant part of the jurisprudence in children's rights matters, primarily as a result of the impact these organisations have in the protection of children's rights under CRC.[78] Moreover, to ensure that the provisions in the Bill of Rights in chapter 2 of the Constitution[79] are legally applied and enforced throughout its nine provinces, South Africa has a dedicated Constitutional Court, further cementing its status as a pioneer, both on the African continent and throughout the world, in the promotion of human rights, in general, and children's rights, in particular.[80] To illustrate, Skelton[81] and Sloth-Nielsen and others[82] have written extensively on the ever-expanding case law on children's rights in South Africa. The underscoring principle here is the child's right to access to justice and effective remedies. To this end, the South African Constitution[83] in section 28(1)(h) provides that every child has the right to legal representation at the state's expense. Moreover, section 34 states that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. These sections, therefore, underscore the child's right to access justice and effective remedies at the domestic level but, however, should not be seen as a justification not to ratify OPIC.

Indeed, even if the South African government sees little added value in ratifying OPIC because of adequate domestic remedies, Viljoen and Orago argued that acceding to OP-ICESCR will 're-affirm South Africa's commitment to a continued constructive engagement with treaty monitoring bodies at the regional and international level'.[84] The same argument can be made for ratifying the Optional Protocol, which should not be seen as an unnecessary formality by the South African government. Even if children in South Africa already have a well-developed legal framework to deal with rights violations, accession to OPIC should be considered a meaningful gesture to show leadership on the African continent to increase the

78 Skelton (n 73) 17-28; See Sloth-Nielsen (n 76) for a comprehensive overview of children's rights jurisprudence up to 2019.
79 The Constitution of the Republic of South Africa, 1996.
80 Secs 166(a) and 167 of the Constitution of the Republic of South Africa, 1996.
81 Skelton (n 73) 13.
82 Sloth-Nielsen (n 76) 501; Sloth-Nielsen & Kruuse (n 75) 671; J Sloth-Nielsen & BD 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; 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.
83 The Constitution of the Republic of South Africa, 1996.
84 F Viljoen & N Orago 'An argument for South Africa's accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the light of its importance and implications' (2014) 17 *Potchefstroom Electronic Law Journal* 2586.

impact and reach of the Optional Protocol to jurisdictions that may lack the sophistication of the South African legal framework, but where access to justice and effective remedies at the domestic level are not sufficient to address rights violations; where children need the help of the international treaty body and look to leaders such as South Africa to provide that assurance that OPIC can fill the gap where their domestic legal avenues are inadequate. South Africa's accession to the Optional Protocol will go a long way towards enhancing children's rights in South Africa and on the African continent by contributing to the development of jurisprudence on the implementation of the Convention.[85] The more states that ratify OPIC, the more robust the jurisprudence becomes and that, ultimately, benefits children in the long run.

3.2 South Africa's engagement with international law

It is argued that South Africa desires to maintain good standing among the international community, which has sometimes motivated the state to comply with its obligations under the UN human rights treaties.[86] To this end, South Africa has a good relationship with the international human rights structures and has played an active role in human rights institutions.[87] Furthermore, South Africa is regarded as a leader in international children's rights. Specifically, in addition to CRC, it also ratified the African Charter on the Rights and Welfare of the Child (African Children's Charter) on 7 January 2000.[88] Moreover, South Africa arguably has the world's most progressive Bill of Rights enshrined in chapter 2 of the Constitution.[89] Furthermore, section 28 contains provisions for protecting the rights of the child, similar to those found in CRC. Insofar as the implementation of CRC is concerned, it has even been argued that South Africa, for all intents and purposes, is a monist state since several provisions of CRC have been incorporated into domestic legislation.[90] As a direct result of this legal framework, children in South Africa have enjoyed greater access to and successes in the courts over the last three decades.[91] However,

85 De Beco (n 5) 369.
86 F Adegalu & T Mitchell 'The impact of the United Nations human rights treaties on the domestic level in South Africa' in C Heyns, F Viljoen & R Murray (eds) *The impact of the United Nations human rights treaties on the domestic level: Twenty years on* (2024) 1144.
87 Adegalu & Mitchell (n 86) 1079.
88 African Charter on the Rights and Welfare of the Child adopted by the Organisation of African Unity on 11 July 1990 and entered into force on 29 November 1990.
89 The Constitution of the Republic of South Africa, 1996.
90 Sloth-Nielsen & Kruuse (n 75) 671.
91 The Constitutional Court has handed down decisions pertaining to the rights of the child in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* 2020 (1) SA 1 (CC) about corporal punishment in the home; in *Du*

South Africa has come in for some scrutiny by international treaty bodies, with the CRC Committee, in its Concluding Observations on its second periodic review of South Africa, recommending that South Africa ratify the Optional Protocol in order to further strengthen the fulfilment of children's rights.[92] This recommendation was reiterated in the CRC Committee's Concluding Observations to the combined third to sixth periodic reports on South Africa in March 2024.[93] In addition to the recommendation by the CRC Committee, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) noted with concern the non-ratification of the Optional Protocol, to which the South African delegation responded in defiant language that South Africa does not need to ratify OPIC since it already has an adequate domestic legal framework to deal with children's rights violations.[94]

However, the success of the South African legal system in addressing children's rights violations may be the reason why the South African government and potential child claimants see little added value in having a complaints procedure. This may be the reason why communications procedures are underutilised in other international instruments to which South Africa is a party.[95] This could indicate that the government does not recognise the views of treaty bodies as they are not legally binding and will not implement them.[96] South Africa also questions the legitimacy of the complaints mechanism in international law.[97] There is a belief that treaty bodies lack the necessary competence to understand South African society and its culture. Furthermore, the Constitutional Court

Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as amicus curiae) 2003 (2) SA 198 (CC) about adoption by same-sex couples; in *AD v DW (Centre for Child Law as amicus curiae, Department for Social Development as intervening party)* 2008 (3) SA 183 (CC) about adoption by foreign couples; in *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as amicus curiae)* 2005 (1) SA 480 (CC) about inheritance under customary law; in *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) about the right to access antiretroviral medicines; and *Governing Body of the Juma Musjid Primary School v Essay NO (Centre for Child Law and Another as amici curiae)* 2011 (8) BCLR 761 (CC) about the right to a basic education, to name but a few.

92 Concluding Observations on the second periodic review of South Africa, CRC Committee 27 October 2016 UN Doc CRC/C/ZAF/CO/2 (2016) para 75.

93 Concluding Observations on the combined third to sixth periodic review of South Africa, CRC Committee 11 March 2024 UN Doc CRC/C/ZAF/CO/3-6 (2024) para 48.

94 African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) Report of the 32nd session 12-20 November 2018 21-22.

95 Adegalu & Mitchell (n 86) 1095.

96 See, eg, *McCallum v South Africa* Communication 1818/2008, UNHR Committee 25 October 2010, UN Doc CCPR/C/100/D/1818/2008 (2008), in which the South African government took no steps to implement the views of the UNHR Committee.

97 Adegalu & Mitchell (n 86) 1095.

(as well as other South African courts) is viewed as the best forum for addressing human rights violations and providing effective and just remedies.[98] To illustrate, one has only to look at the accessibility of the courts to child litigants and their representatives and the various children's rights organisations willing to institute legal proceedings for perceived children's rights violations, such as the Centre for Child Law and Section 27. Furthermore, the binding nature of judicial orders gives children immediate relief, which is crucial for children whose sense of time is quite different to that of adults and for which there is no guarantee of relief under the Optional Protocol. Therefore, it is hardly surprising that some child litigants might choose domestic avenues over OPIC. This paradox suggests that South Africa has become a victim of its own success with regard to remedies available to children at the international level. However, the government's attitude is troubling and seems to disregard the impact that OPIC has on strengthening South Africa's relationship with international treaty bodies in the promotion of human rights at the domestic level and on the African continent. Acceding to OPIC cannot be seen as a binary: It is not a case of whether one chooses to proceed in the Constitutional Court *or* make submissions under OPIC. The rules of admissibility prevent this kind of reasoning.[99]

In their article, where they advocate accession to OP-ICESCR, Viljoen and Orago make a convincing argument, which is worth repeating here. References to CRC, the CRC Committee, OPIC and children's rights have been added so that it is relevant to this article. They submit:[100]

> Accession to the Optional Protocol is likely to enhance the overall understanding of [children's rights] among South Africans, as the Optional Protocol obliges states to widely distribute and disseminate the [CRC] and the Optional Protocol itself, as well as the views and recommendations emanating from the [CRC Committee] under its individual communications procedure.[101] Widespread knowledge of the [CRC], [OPIC] and other materials emanating from the [CRC Committee] at the national level would enhance domestic advocacy for the improved realisation of [children's rights] by individuals, groups as well as civil society organisations, with the effect that the national dialogue would be more inclusive and comprehensive. It would also improve the national civic monitoring and evaluation of the government's legislative, policy and programmatic framework for the realisation of [children's rights] using international standards, with the result that the government's accountability for the domestic

98 Adegalu & Mitchell (n 86) fn 80.
99 See the discussion in part 2 of this article.
100 Viljoen & Orago (n 84) 2857 (footnote omitted for the last sentence).
101 Art 17 OPIC (n 1).

implementation of [children's rights] in South Africa would be enhanced.

South Africa's incorporation of international law into domestic legislation over the last three decades, specifically as it relates to CRC, forms an impressive legal standard against which to assess the challenges faced by Australia and its engagement with international law. The sheer volume of case law in which the courts have decided children's rights matters has put South Africa at the forefront of children's rights litigation.[102] Against this backdrop, the question remains as to why, given the enthusiastic engagement with international law, South Africa is so reluctant to ratify OPIC. It is argued here that non-accession of the Optional Protocol is not in children's best interests. The potential positive impact internationally of accession to the Optional Protocol cannot be overstated. At the domestic level, OPIC is meant to enhance and supplement the legal remedies.[103] It will not only lift the credibility of both jurisdictions but also set a good example for those jurisdictions that look up to South Africa (such as those on the African continent) and Australia (such as those in the Pacific region) by showing a willingness to engage with international human rights bodies.

4 Argument for accepting OPIC by Australia

4.1 Human rights in Australia

Australia stands in stark contrast to the South African approach to international human rights law. Williams and Reynolds contend that Australia's relationship with international treaty bodies became strained after a series of UN bodies criticised Australia for its poor human rights performance in 2000.[104] Consequently, and as a result of these criticisms, the then foreign minister stated that '[i]f a United Nations committee wants to play domestic politics here in Australia, then it will end up with a bloody nose'.[105] Since then, Australia has had a tenuous relationship with international law, particularly when it comes to the incorporation of international treaties into domestic legislation and accepting and implementing treaty bodies' views. Williams and Reynolds lament that 'Australia is happy to set down standards for other nations, but bristles when these same rules are

102 Skelton (n 73) 17.
103 Liefaard (n 22) 493.
104 G Williams & D Reynolds *A charter of rights for Australia* (2017) 84.
105 As quoted in Williams & Reynolds (n 104) 84; S Joseph, A Fletcher & A Lochhead-Sperling 'The impact of the United Nations human rights treaties on the domestic level in Australia' in Heyns and others (n 86) fn 29.

applied to us. Our politicians often respond by rejecting interference from outside, and argue stridently that UN bodies not pass judgment on us.'[106]

The Commonwealth of Australia is made up of six autonomous states and two self-governing territories. As a former British colony, much of Australia's constitutional values are based on principles inherited from English law. As such, Australia adheres to the doctrine of parliamentary supremacy and responsible government, whereby the legislature retains the final say regarding any new legislation. Because of this, Australia has sometimes had a strained relationship with international law, particularly when it comes to the incorporation of international treaties into domestic legislation and accepting and implementing treaty bodies' views. International law is seen as rather pervasive and vague which, if allowed, will sweep away carefully constructed local norms and legal development.[107] International law provisions are seen as aspirational rather than normative and are ill-adapted to the Australian context and, as a result, are not considered relevant.[108] Therefore, CRC has only sparingly been incorporated into domestic legislation on the national level and only with regard to the Family Law Act 1975.[109]

Even though Australia has not ratified OPIC, it should be noted that where ratification of individual communication mechanisms did take place in other treaties, such as ICCPR,[110] they are not the panacea for all human rights violations.[111] In 1991 Australia ratified OP-ICCPR, which contains the communications procedure for ICCPR.[112] The first individual communication against Australia under OP-ICCPR was the case of Nicholas Toonen.[113] This case was the exception to the rule and brought about systemic change to the

106 Williams & Reynolds (n 104) 85; See, also, A Twomey '*Minister for Immigration and Ethnic Affairs v Theo*' (1995) 350 where the author quotes McHugh J on his views that treaty ratification is an international matter and should not have any domestic consequences; Joseph, Fletcher & Lochhead-Sperling (n 105) 38.

107 D Hovell & G Williams 'A tale of two systems: The use of international law in constitutional interpretation in Australia and South Africa' (2005) *Melbourne University Law Review* 110.

108 As above.

109 See J Tobin 'The development of children's rights' in L Young, MA Kenny & G Monahan (eds) *Children and the law in Australia* (2017) 31-35 for other ways in which CRC plays a crucial role in Australia, such as judicial interpretation.

110 International Covenant on Civil and Political Rights (ICCPR) opened for signature on 19 December 1966 and entered into force on 23 March 1976.

111 Swannie (n 57) 262.

112 Optional Protocol to the International Covenant on Civil and Political Rights (OP-ICCPR) opened for signature on 16 December 1966 and entered into force on 23 March 1976.

113 *Toonen v Australia* (n 21); See *Horvath v Australia* Communication 1885/2009, UNHR Committee 19 Augustus 2008 UN Doc CCPR/C/110/D/1885/2009 (2009) for a subsequent case where Australia accepted the UNHR Committee's views; see also *Kwok v Australia* Communication 1442/2005, UNHR Committee

protection of the sexual rights of minorities.[114] Tasmanian criminal law had criminalised a range of sexual activities between adult men in breach of the right to privacy in article 17. Nicholas Toonen, a homosexual man, complained to the UNHR Committee, which found the Commonwealth in breach of its international obligations under ICCPR.[115] The Commonwealth accepted the views of the UNHR Committee in which the Tasmanian law was found to violate ICCPR. As a result, the Commonwealth government passed the Human Rights (Sexual Conduct) Act 1994, overriding the Tasmanian Criminal Code Act 1924,[116] specifically sections 122 and 123, which prohibited both 'unnatural' intercourse and indecent practices between males. However, as Swannie points out in his examination of the efficacy of the communication procedures of ICCPR, Australia generally is not inclined to accept the views of the HRC.[117] Williams and Reynolds are of the following view:[118]

> The *Toonen* case demonstrates the possibilities and limits of the international legal protection of human rights. On the one hand, it offers another avenue for drawing attention to breaches of rights. On the other, such protection is only effective in Australia if the federal or relevant state parliament responds by changing the law, which happens rarely.

The question then is, what would make Australia more inclined to accept the views of the CRC Committee as opposed to those of the UNHR Committee? The answer lies in a comment made in 2015 by the then Prime Minister in response to a report by the UN Special Rapporteur on Torture, which was critical of Australia's border policies, that 'Australians are sick of being lectured to by the United Nations'.[119]

4.2 Parliamentary supremacy in Australia

Compare the two systems of constitutional supremacy in South Africa with the administrative arrangements in Australia. The Westminster system of government recognises the separation of powers between the executive, legislative and judicial arms of government and the

23 October 2009 UN Doc CCPR/C/97/D/1442/2005 (2005) for a case where Australia only partially accepted the views of the UNHR Committee.

114 Swannie (n 57) 260.

115 *Toonen v Australia* (n 21).

116 Joseph and others (n 105) 65; P Crofts *Criminal law elements* (2018) 1; Williams & Reynolds (n 104) 83.

117 Swannie (n 57) 260. See also K Eastman 'Australia's engagement with the United Nations' in P Gerber & M Castan (eds) *Critical perspectives on human rights law in Australia* (2021) 121.

118 As quoted in Williams & Reynolds (n 104) 84.

119 As above; Joseph and others (n 105) fn 31, 40.

various superior courts, which do not have the authority to strike down offending legislation for human rights violations.[120] This is so because Australia adheres to the doctrine of parliamentary supremacy and responsible government, where the legislature retains the final say when passing new laws.[121] This is in contrast to the principle of constitutional supremacy that is followed in South Africa, where the Constitution is the supreme law of the land, and the Constitutional Court is tasked with enforcing the provisions of the Constitution and the Bill of Rights in chapter 2. The Constitutional Court has the authority to strike down any legislation that violates the South African Constitution[122] or to develop the common law in such a way that it is human rights compliant.[123]

Parliamentary supremacy does not mean that all laws passed in fact are human rights compliant. The opposite is true, as the Australian Parliament *can* and *does* pass laws that breach human rights treaty obligations.[124] A perfect example of a law that violates international obligations is section 61AA of the New South Wales Crimes Act 1900, which replaced the common law defence of reasonable chastisement. Section 61AA created the new statutory defence of lawful correction. Lawful correction is a defence to a charge of common assault for parents or those *in loco parentis* who physically punish their children. This section of the criminal law breaches the rights set out in article 19(1) of CRC, which reads that state parties should take the necessary steps to protect children from all forms of physical or mental violence while in the care of their parents or persons *in loco parentis*. Furthermore, section 61AA also breaches article 37(a) of CRC, which reads that no child should be forced to endure torture or cruel, inhuman or degrading treatment or punishment. Ironically, the amendment to the Crimes Act 1900 was passed some 12 years after the Australian government had ratified CRC. Despite the fact that these breaches are found in state legislation, decentralisation of

120 R Solomon 'Reviewing Victoria's Charter of Rights and the limits to our democracy' (2017) 42 *Alternative Law Journal* 195.

121 S Joseph 'Australia's exceptionalism: Antipathy towards human rights?' in Gerber & Castan (n 117) 604; Joseph and others (n 105) 33; B Chen 'The quite demise of declarations of inconsistency under the Victorian Charter' (2021) 44 *Melbourne University Law Review* 931; Solomon (n 120) 197; G Williams 'The Victorian Charter of Human Rights and Responsibilities: Origins and scope' (2006) 30 *Melbourne University Law Review* 887.

122 The Constitution of the Republic of South Africa, 1996.

123 See, eg, *Freedom of Religion South Africa v Minister of Justice and Constitutional Development & Others* 2020 (1) SA 1 (CC), where the Constitutional Court, on appeal, upheld the decision of the South Gauteng High Court. The Court declared the common law defence of moderate and reasonable chastisement to a charge of common assault incompatible with the Bill of Rights and, therefore, unconstitutional, which resulted in corporal punishment being made unlawful in the home.

124 Williams & Reynolds (n 104) 21.

power does not reduce the responsibility of the federal government to all children within its jurisdiction to comply with its obligations under CRC.[125]

4.3 Domestic challenges for Australia

Because Australia is a dualist state where domestic legislation runs concurrently with international law, any international obligations must be incorporated into domestic legislation before they become enforceable in Australian courts.[126] However, Australian governments are reluctant to incorporate treaties into domestic legislation because of the perception that international law is not law 'but a discretionary set of norms that states could neglect at will'.[127] Leading Australian human rights scholars believe that another reason for the Commonwealth government's reluctance to ratify OPIC is because of migrant and asylum-seeker children held in both onshore and offshore detention centres.[128] Since the 1970s, thousands of asylum seekers have arrived unauthorised by boat on Australian shores. In 1992 new federal laws mandated the detention of these asylum seekers until their claims were processed or until they left Australia. These mandatory detention measures became more severe in 2013 when asylum seekers were sent to Papua New Guinea and Nauru for their claims to be processed.[129] In 2016 the Nauru Regional Processing Centre reported widespread sexual and physical abuse of detainees, including women and children.[130] In the last few years, a large body of evidence has been compiled that shows that asylum seekers on these islands have been denied their fundamental human rights.[131] Using the Leiden University Children's Rights Observatory[132] to examine the case law regarding individual communications brought to the CRC Committee under OPIC provisions shows that the majority of these cases, until recently, were migrant-related.[133] Similar case law can also be found in the jurisprudence of OP-ICCPR.[134] The large volume

125 General Comment 5 (n 14) paras 20 & 40.
126 Joseph and others (n 105) 37; Joseph (n 121) 602.
127 Hovell and Williams (n 107) 107.
128 Joseph and others (n 105) 51.
129 Joseph and others (n 105) 35.
130 Williams & Reynolds (n 104) 32.
131 As above.
132 https://www.childrensrightsobservatory.org/ (accessed 29 September 2024).
133 See *OM v Denmark* Communication 145/2021, CRC Committee 16 October 2023, UN Doc CRC/C/94/D/145/2021 (2021); *KK v Switzerland* Communication 110/2020, CRC Committee 25 January 2023, UN Doc CRC/C/D/110/2020 (2020); *HK v Denmark* Communication 99/2019, CRC Committee 1 June 2022, UN Doc CRC/C/90/D/99/2019 (2019); *IAM on behalf of KYM v Denmark* Communication 3/2016, CRC Committee 25 January 2018, UN Doc CRC/C/77/D/3/2016 (2016).
134 See, eg, *Shafiq v Australia* Communication 1324/2004, UNHR Committee 31 October 2006, UN Doc CCPR/C/88/D/1324/2004 (2004).

of case law related to migrant issues will likely dissuade the Australian government from ratifying OPIC. It does not want to be embarrassed any further or have its mandatory detention policy questioned by a treaty body with whose views it does not agree.

In addition, the CRC Committee has also considered cases regarding the repatriation of wives and children of foreign fighters.[135] This will only add to Australia's reluctance to accede to OPIC since Australia still has approximately 40 women and children housed in camps in North-East Syria.[136] In September 2024 the Federal Court in *Save the Children Australia v Minister for Home Affairs* and *Save the Children v Minister of Home Affairs (No 2)* dismissed an application by Save the Children Australia for a *habeas corpus* order, finding that the Minister of Home Affairs and the Commonwealth of Australia lacked control over the detainment of these women and children.[137] Further issues to consider, which will likely affect the prospects of ratification, are the low age of criminal responsibility in Australian jurisdictions[138] and the lawfulness of corporal punishment in the home.[139] It is unlikely that the Commonwealth government will ratify OPIC any time soon for fear of being embarrassed even more in the international arena for failing to respect and protect the fundamental human rights of all Australian citizens, especially children. Although ratifying OPIC would go a long way towards repairing Australia's international reputation, the author acknowledges that this is unlikely to happen until Australia addresses these domestic issues.

Over the years, UN treaty bodies have voiced their concerns about Australia's human rights record, specifically concerning the issues mentioned above. For example, in 2012 the CRC Committee, in its Concluding Observations on its fourth periodic report on Australia, reiterated a previous recommendation that Australia take all appropriate measures to explicitly prohibit corporal punishment in all settings and in all states and territories.[140] In addition, the CRC Committee recommended that the defence of 'reasonable

---

135 See *LH & Others v France* (n 39) and *AF v France* (n 56); *FB & Others v France* (n 56); *PN & Others v Finland* Communication 100/2019, CRC Committee 12 September 2022, UN Doc CRC/C/91/D/100/2019 (2019).

136 D Gavshon 'Government fails to bring Australians from Syrian camps home: Families prepare legal action to secure repatriation as camp security deteriorates' Human Rights Watch 10 May 2023, https://www.hrw.org/news/2023/05/10/government-fails-bring-australians-syrian-camps-home (accessed 28 September 2024).

137 [2023] FCA 1343; [2023] FCA 1542.

138 https://humanrights.gov.au/ (accessed 28 September 2024).

139 LA Greeff 'The normative nature of corporal punishment in Australia' (2023) 59 *Australian Journal of Social Issues* 620.

140 Concluding Observations on the fourth periodic report of Australia, CRC Committee 28 August 2012 UN Doc CRC/C/AUS/CO/4 (2012) para 44(a).

chastisement' not be used as a defence to a charge of assault on a child.[141] As mentioned before, Australia has not incorporated the Convention to any significant degree and, in this regard, the CRC Committee, in its Concluding Observations on the combined fifth and sixth periodic reports of Australia, recommended that Australia enact a comprehensive national child rights act that fully incorporates CRC.[142] With regard to corporal punishment, the CRC Committee again urged Australia to explicitly prohibit corporal punishment in all settings and to repeal the defence of 'reasonable chastisement'.[143] With regard to the ratification of the Optional Protocol, the CRC Committee recommended that Australia, 'in order to strengthen the fulfilment of children's rights, ratify the Optional Protocol to the Convention on the Rights of the Child on a communications procedure'.[144] The Committee against Torture (CAT Committee), in its Concluding Observations on its sixth periodic report of Australia, recommended with regard to mandatory immigration detention, including of children, that Australia take the necessary measures to repeal the legal provisions establishing the mandatory detention of any person entering Australia,[145] and to ensure 'that individuals held in immigration detention can bring complaints to an effective, independent, confidential and accessible mechanism'.[146] The CAT Committee further indicated that Australia should raise the age of criminal responsibility to align with international standards since the age in some jurisdictions is as low as ten years.[147] Furthermore, with regard to corporal punishment, the CAT Committee urged Australia to explicitly prohibit corporal punishment in all settings and repeal the defence of 'reasonable chastisement'.[148]

It is often argued that governments see international treaty bodies as interfering with the sovereignty of the state.[149] However, treaty bodies, specifically the CRC Committee, should be seen as a highly informed group of experts who authoritatively interpret CRC as an advocate for children's rights.[150]

141 CRC Committee (n 140) para 45(a).
142 Concluding Observations on the combined fifth and sixth periodic reports of Australia, CRC Committee 1 November 2019 UN Doc CRC/C/AUS/CO/5-6 (2019) para 7(a).
143 CRC Committee (n 142) para 28(a).
144 CRC Committee (n 142) para 52.
145 Concluding Observations on the sixth periodic report of Australia, CAT Committee 5 December 2022 UN Doc CAT/C/AUS/CO/6 (2022) para 28(a).
146 CAT Committee (n 145) para 28(h).
147 CAT Committee (n 145) para 38(a).
148 CAT Committee (n 142) para 48.
149 Swannie (n 57) 263; Williams & Reynolds (n 104) 84.
150 Swannie (n 57) 263.

5 Conclusion

April 2024 marked the tenth anniversary of OPIC. As a human rights instrument that facilitates the right to access to justice and effective remedies under CRC, it is disappointing that states have been slow to ratify OPIC. Neither South Africa nor Australia has ratified the Optional Protocol. Therefore, neither children in South Africa nor Australia, groups of children or their representatives can submit a communication or complaint to the CRC Committee for alleged rights violations under CRC or under its first two optional protocols, OPSC or OPAC. The South African government argued that the current legal framework provides an adequate mechanism to address children's rights violations or to enforce children's rights. It did not believe that ratifying OPIC would add any value to the South African legal framework for children in South Africa.[151] Since the Commonwealth government of Australia has a highly complex relationship with international law and treaty bodies, primarily because of the attachment to the doctrine of parliamentary supremacy and responsible government, it remains a dualist state where international law runs concurrently with domestic legislation. Yet, despite its extensive constitutional powers, the Australian government is reluctant to incorporate human rights treaties into domestic legislation. The exception is the partial incorporation of CRC into the Family Law Act 1975.

Since the Commonwealth government is unwilling to accept recommendations from treaty bodies and even less likely to implement them, it seems prudent that rights legislation be passed at the national level to bring Australia in line with other liberal democracies. However, a national human rights act does not negate the need for Australia to ratify OPIC. Indeed, a national human rights act, in addition to the ratification of OPIC, will undoubtedly strengthen the human rights approach in Australia. Such an approach is much needed in light of its current lack of leadership in relation to treaties and treaty bodies' views and the outright human rights law breaches that are perpetrated in the name of national security, such as the mandatory detention of asylum seekers and the non-repatriation of the wives and children of foreign fighters in Syria.

No matter how well-developed and sophisticated a domestic legal system is and no matter how effective the remedies under such a legal system are, state parties to CRC owe it to the international community, in general, and to children, in particular, to ratify the

151 Adegalu & Mitchell (n 86) 1086.

communications procedure. The CRC Committee is committed to giving children the appropriate mechanisms to access justice and to get the appropriate remedies that are effective, just and timely. During its 95th session, the CRC Committee dedicated the forthcoming General Comment 27 to the right to access to justice and effective remedies.[152] Therefore, accession to OPIC is crucial for South Africa and Australia and would put these jurisdictions in lockstep with the CRC Committee in relation to access to justice for children. Like adults, *all* children deserve and are entitled to have access to justice and effective remedies at the domestic and international levels to address perceived rights violations.

152 https://www.ohchr.org/en/documents/general-comments-and-recommendations/draft-general-comment-no-27-childrens-rights-access (accessed 28 September 2024).