

The Convention for the Rights of Children Before the UN Treaty Bodies and the ICJ: 'Taking into Account' or Ignoring?

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1. An Overview

The United Nations Convention on the Rights of the Child (CRC)¹ is the last fruit of the long multilateral efforts to codify human rights typical of the second half of the past Century². Notwithstanding the fact that the CRC was one of the last conventions to appear in the international human rights legal framework (although, with an old lineage)³, it is also the most popular: it reached a remarkable number of 196 parties (at the moment the UN has *just* 193 State Parties), the only notable exception being the United States of America.

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¹ Approved by the United Nations General Assembly on 20 November 1989, entered into force on 2 September 1990; at the moment (1 September 2019; all the websites in this chapter were verified on this day), has been signed by 196 States. On the CRC in general, see *The UN Convention on the Rights of the Child: A Commentary*, J. TOBIN (ed.), Oxford etc. completare rimuovendo etc., 2019.

² A. CASSESE, "Progressive Transnational Promotion of Human Rights", in *Human Rights: Thirty Years after the Universal Declaration*, B. G. RAMCHARAN (ed.), Dordrecht, 1979, p. 249 ff.; see also the provoking essay by S. MOYN, *The Last Utopia: Human Rights in History*, Cambridge, 2010, and *Revisiting the Origins of Human Rights*, P. SLOTTE, M. HALME-TUOMISAARI (eds.), Cambridge etc. completare rimuovendo etc., *idem infra*, 2015.

³ Notwithstanding that the origin of the issue can be traced to the fact that violations of the rights of children were among the first to be recognized in international law, in instruments such as the 1921 Convention Prohibiting Trafficking of Women and Children, the 1926 Convention on Slavery and the Slave Trade on the initiative of the International Labour Organization, and the 1924 Declaration of the Rights of the Child, H.-J. HEINTZE, "Children's Rights within Human Rights Protection", in *The Ideologies of Children's Rights*, M. FREEMAN, P. VEERMAN (eds.), Dordrecht, 1992, pp. 73-74.

Like the other treaties protecting core human rights, the CRC also establishes a monitoring body, the CRC Committee⁴. Originally, the CRC, at Article 43, established a ten-member committee, with the role of implementing a reporting procedure (Article 44)⁵. Today the CRC Committee is composed of eighteen independent experts, appointed for a four-year term, and monitors both the Parties' implementation of the CRC and the implementation of the two optional protocols⁶. They are, as Article 43 requires, "experts of high moral standing and recognized competence in the field covered by this Convention", therefore not necessarily lawyers, judges, or law professors. The composition of the CRC Committee, however, includes 14 members with very strong legal backgrounds and four experts in children's policies, without a previous profession related to law⁷. This reflects the need to broaden the monitoring activity beyond the simply legal approach, and it explains why States intended not to establish a court and not be bound by the CRC Committee pronouncements⁸.

Starting in 2001, the CRC Committee, similarly to the Human Rights Council (HRC), began to issue general comments providing views and interpretations of the contents of CRC provisions. Today, the CRC Committee has released twenty-four general comments, and, quite interestingly, two of them were recently issued jointly with the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families⁹. Such joint comments are not common, but given that children, while deserving of special status and protection, are also protected by other rights as members of the human family, such cooperation makes sense.

⁴ Today there are nine core international human rights treaties. The most recent one is dedicated to enforced disappearance and entered into force on 23 December 2010. Since the adoption of the UDHR, all UN Member States have ratified at least one core international human rights treaty. Each of these treaties sets up a committee of independent experts (CERD; CESCR; CCPR; CEDAW; CAT; CRC; CMW; CRPD; CED), while another Treaty Body is established under the Optional Protocol to the Convention against Torture (Subcommittee on Prevention of Torture, or SPT).

⁵ G. LANDSDOWN, "The Reporting Process under the Convention on the Rights of the Child", in *The Future of UN Human Rights Treaty Monitoring*, P. ALSTON, J. CRAWFORD (eds.), Cambridge etc., 2000, pp. 113-114; M. O'FLAHERTY, *Human Rights and the UN: Practice Before the Treaty Bodies*, The Hague/London/New York, 2002², pp. 161-175.

⁶ Protocol on involvement of children in armed conflict (OPAC) and Protocol on sale of children, child prostitution and child pornography (OPSC).

⁷ They are S. Aho Assouma (Togo), A.S. Aldoseri (Bahrain), H. Ayouby Idrissi (Morocco), B. Gudbrandsson (Iceland); P. Jaffe (Switzerland) O. Khazova (Russian Federation), C. Lumina (Zambia), G. Madi (Egypt), F. Mashall-Harris (Barbados), B.D. Mezmur (Ethiopia), C. Nelson (Samoa); M. Otani (Japan), L.E. Pedernera Reyna (Chair; Uruguay), J.A. Rodriguez Reyes (Venezuela), A. Alassane Sidiku (Niger), A.M. Skelton (South Africa), V. Todorova (Bulgaria), R. Winter (Austria).

⁸ G. ULFSTEIN, "Treaty Bodies and Regimes", in *The Oxford Guide to Treaties*, D.B. HOLLINS (ed.), Oxford etc. 2012, p. 428; A. AUST, *Modern Treaty Law and Practice*, Cambridge etc., 2013³, pp. 355-7.

⁹ Joint General Comment No. 3 of the CMW and No. 22 of the CRC in the context of International Migration: General principles, CRC/C/GC/22. Joint General Comment No. 4 of the CMW and No. 23 of the CRC in the context of International Migration: States parties' obligations in particular with respect to countries of transit and destination, CRC/C/GC/23.

Since the entry into force of the third protocol on the communication procedure, in April 2014 (OPIC), the CRC has also heard direct submissions concerning specific individual or groups of children. With the ratification of the Maldives, in September 2019, at the moment forty-six States have ratified the OPIC, and eighteen have signed but not yet ratified it¹⁰.

This paper focuses mainly on the relevance and impact of the CRC and of the CRC Committee pronouncements and general comments in the systems of protection of human rights coordinated under the Office of the High Commissioner for Human Rights (OHCHR), in particular before the so called 'Treaty Bodies' and the HRC. Those are not the only entities – agencies, organs, bodies – of the United Nations implementing human rights. The analysis of the relevance of the CRC in the political work of the UN agencies (it is enough to mention UNICEF among them)¹¹ goes beyond the focus of the present contribution, which looks at the impact on UN judicial or quasi-judicial institutions. For this reason, although the ICJ does not belong to the OHCHR constellation of Treaty Bodies, it is the most important jurisdictional entity applying the law within the UN system. Therefore, a short section will also be dedicated to the CRC in the decisions of the International Court of Justice.

These analyses will then be positioned within a broader reflection on the place of the CRC and the other Treaty Bodies in the legal discourse on human rights, in particular reflecting whether UN bodies take into consideration the interpretive activity of another UN body and whether there is such a thing as a UN regime of human rights, or not.

2. The CRC Committee, the UN, and Other Treaties

The CRC belongs to the «complex and often confusing set of institutional arrangements that make up the United Nations Human Rights Council»¹². All these different levels of protection of human rights have been established to guard the effective implementation of a specific area of human rights, or of a specific underlying treaty.

The overall UN protection of human rights can count on two kinds of institutional arrangements protecting human rights. First, the charter-based bodies, that

¹⁰ Approved by the UN General Assembly on 19 December 2011, entered into force in 2014. Aside from the Communications Procedure, the OPIC also established an Inquiry Procedure allowing systematic violations.

¹¹ The UN also has many other agencies and entities promoting and protecting human rights, such as the General Assembly, its Third Committee, and the Economic and Social Council. Moreover, there are nineteen United Nations agencies dealing with human rights, such as the High Commissioner for Refugees (UNHCR), the World Health Organization (WHO), the Food and Agriculture Organization (FAO), and many others that are less well known. Among them is the United Nations Children's Fund, or UNICEF, established on 11 December 1946, with a Resolution of the United Nations General Assembly. UNICEF Promoted and organized the drafting of the CRC.

¹² P. ALSTON, R. GOODMAN, *International Human Rights*, Oxford etc., 2013, p. 685.

is, the bodies for the protection of human rights that have their origin in the provisions of the UN Charter¹³. All UN Member States participate in the work of these bodies. Second, the treaty-based bodies, which have their origin in the wording of a specific treaty. Only the State Parties to a specific treaty would take part in the work of the treaty body connected with it, and in some cases they must specifically opt-in in order to participate. An example of a UN charter-based body is the Human Rights Council. Examples of Treaty based bodies include the CEDAW Committee, the CERD Committee, the CAT Committee, and others¹⁴. These bodies were conceived not as courts, but as committees for monitoring the correct implementation of their respective treaties¹⁵.

Notwithstanding the commonality of this framework, legally framed by the UN Charter¹⁶ and normatively oriented by the Universal Declaration of Human Rights¹⁷, there are neither procedures nor schemes of coordination among the different bodies implementing it. The chief purpose of the CRC Committee is to maintain oversight concerning the CRC itself, so it looks principally at the CRC to decide the disputes brought before it – and so do the other UN Treaty Bodies look chiefly at their treaties. They represent a set of distinct institutional arrangements, with different provisions and different State Parties, rather than a defined legal system. Nor was it conceived of at a single given time, but rather build up in different moments¹⁸. No provision in the CRC establishes its special place in the UN for a dealing with human rights, nor do the conventions establishing other UN Treaty Bodies and their rules do this.

Moreover, this framework does establish a prominent place for the pronouncements of the Treaty Bodies in providing the ‘authentic’ interpretation of their underlying treaties. The work of the CRC Committee, like that of all other treaty bodies, does not have a *judicial* function. It applies the law, it interprets the law, and it is bound by the law, but its pronouncements are not binding upon States, as their title suggests: they are called ‘communications’, and they express ‘views’. While the status of precedent is still subject to debate in international law¹⁹, it

¹³ Charter of the United Nations, 24 October 1945, 1 UNTS XVI, see in particular Articles 1 and 55.

¹⁴ M. SHAW, *International Law*, Cambridge etc., 2014⁷, pp. 224-247 and pp. 260-3.

¹⁵ L. BORLINI, L. CREMA, “The Legal Status of Decisions by Human Rights Treaty Bodies: Authoritative Interpretations or *Mission Éducatrice*?” in *Global Community Yearbook of International Law and Jurisprudence*, forthcoming in 2020, Sect. III.

¹⁶ At the moment 193 States are Parties to the UN Charter, three less than the CRC. On the relationship between the CRC and the UN Charter see M. PAPPAS, *Law and the Status of the Child*, New York, 1983, p. xxx.

¹⁷ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217A (III).

¹⁸ M. PAYANDEH, “Fragmentation within International Human Rights Law”, in *A Farewell to Fragmentation*, M. ANDENAS, E. BJORGE (eds.), Cambridge etc., 2015, p. 297, pp. 300-303.

¹⁹ A. VON BOGDANDY, I. VENZKE, “Beyond Dispute: International Judicial Institutions as Law-makers”, *German Law Journal* 2011, p. 979 ff. R. KOLB, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public*, Bruxelles,

would be harder to establish a theory of sources which includes a specific role for this kind of decisions, separate and apart from the influence of state practice implementing these treaties, and of the formation of general customary international law²⁰.

3. A Possible Network of Quotes – Any Special Status for Human Rights Within the UN?

Over the past thirty years, international law scholars have been dealing with the issue of the huge amount of rules and obligations that have proliferated, both as hard, written law and as legal judgments or soft law documents. Already in 1998, before the International Law Commission (ILC) works on fragmentation had started, Philip Sands suggested that customary international law, including human rights, should be considered by the World Trade Organization, through the link offered by Art. 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT)²¹. Then, the ILC explored the topic, with its well-known 2006 Conclusions on the fragmentation of international law²². Notwithstanding these theoretical efforts, today international law remains fragmented into many areas, and, most importantly, the jurisdiction of those who oversee the resolution of disputes is tightly bound to the jurisdiction conferred by the parties with their consent.

How isolated is the CRC? How relevant is it for the work of other UN Treaty Bodies? Since it is the most ratified treaty, is it more common to see it referred to by other Treaty Bodies? To answer these questions, three potential scenarios will be considered.

First, each Treaty Body applies only its own treaty, even when the object of the dispute relates to the CRC or has been previously addressed in the work of the CRC Committee. This would comply with the mandate received, but might go against the «presumption of normative unity» of international human rights law «stemming from its shared commitment to the Universal Declaration on Human Rights»²³, and end up in normative conflicts²⁴.

2006, p. 261 ff.; F. ZARBIYEV, *Le discours interprétatif en droit international contemporain*, Bruxelles, 2015, pp. 152-153.

²⁰ L. BORLINI, L. CREMA, “The Legal Status of Decisions by Human Rights Treaty Bodies: Authoritative Interpretations or *Mission Éducatrice*?”, cit., Sect. III.C.

²¹ “Treaty, Custom and the Cross-fertilization of International Law”, in *Yale Human Rights & Development Law Journal* 1998, p. 87; Vienna Convention on the Law of Treaties, 23 May 1969, United Nations Treaty Series, 331, p. 1155, entered into force on 27 January 1980.

²² Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, *Yearbook of the ILC*, 2016, vol. II, Part. 2, pp. 177-184.

²³ M. AJEVSKI, “Fragmentation in International Human Rights Law – Beyond Conflict of Laws”, in *Nordic Journal of International Law* 2014, p. 90.


²⁴ *Multi-Sourced Equivalent Norms in International Law (Studies in International Law)*, T. BROUDE, Y SHANY (eds), Oxford/Portland, 2011, p. 5: «Two or more norms which are (1) binding upon the same international legal subjects; (2) similar or identical in their normative content; and (3)

Second, the CRC and the work of the Committee play a role in other Treaty Bodies' pronouncements and these committees demonstrate a sort of deference for the work of the UN entities protecting human rights. This approach would be deferential to the institutional framework of the core human rights treaties and of the Treaty Bodies as a self-contained regime, given the common support offered by the OHCHR, and its role in harmonizing their procedures and reporting requirements²⁵. Moreover, this would emphasize the specialized approach that each Treaty Body can give in interpreting and defining its underlying human rights treaty. In this scenario it is possible that other UN Treaty Bodies *borrow*, or pay deference to the work of the CRC as far as the rights of children are concerned, as, for example, the ECtHR did in the *Mangouras* case with the work of the ITLOS, in defining specific terms of the law of the sea²⁶. This is what, for example, the European Committee of Social Rights has often done in defining the content of the European Social Charter when it refers to children²⁷, or what the International Criminal Court has done in adjudicating on child soldiers²⁸. Similarly, the rights of women *and their children* enshrined in the CEDAW seem like a good candidate for cross-pollination with what is set out by the CRC.


Notwithstanding the complexity of the international legal framework(s) dedicated to human rights, the 2006 Report on Fragmentation considers human rights only to be a distinct body of law, as opposed to trade law, investment law or others, but does not deepen the possible issue of fragmentation *inside* the human rights

have been established through different international instruments or 'legislative' procedures or are applicable in different substantive areas of the law». P. WEBB, *International Judicial Integration and Fragmentation*, Oxford etc., 2013; PAYANDEH, "Fragmentation within International Human Rights Law", cit., pp. 305-12.

²⁵ Self-contained regime is a term which, in international law, can hardly fit into a single definition, as the ILC puts it: «Three types of special regimes may be distinguished: Sometimes violation of a particular group of (primary) rules is accompanied by a special set of (secondary) rules concerning breach and reactions to breach. [...] Sometimes [...] a special regime is formed by a set of special rules, including rights and obligations, relating to a special subject matter. Such rules may concern a geographical area [...] or some substantive matter [...]. Such a special regime may emerge on the basis of a single treaty, several treaties, or treaty and treaties plus non-treaty developments (subsequent practice or customary law). Finally, sometimes all the rules and principles that regulate a certain problem area are collected together so as to express a 'special regime'. Expressions such as 'law of the sea', 'humanitarian law', 'human rights law', 'environmental law' and 'trade law', etc. give expression to some such regimes», internal references omitted, *ILC Yearbook*, 2006, vol. II, part two, p. 179.

²⁶ , *Mangouras v. Spain* [GC], Application no. 12050/04, Judgment of 28 September 2010, para. 46.

²⁷ See F. IPPOLITO, "The Convention of the Rights of the Child in Litigation Before the European Social Charter Committee and the European Court of Human Rights: «Why Then, Can One Desire Too Much of a Good Thing?»", in this *Journal* 2020, sections 2, 3 and 6.

²⁸ See B. VARESANO, "The Controversial Condition of Child-soldiers: The Quest for Consistency Through the Lens of the Child's Best Interests in the Light of the Convention on the Rights of the Child", [quale anno fa ?], sections 3 and 4.

law²⁹. Therefore, a third scenario can be taken into consideration: Treaty Bodies do not give much consideration to the work of other Treaty Bodies, but they do take an open attitude toward other human rights entities in general, such as the regional courts, not privileging the UN system of protection of human rights³⁰. This would be more consonant with the generic reference to «human rights law» adopted by the ILC Working Group on fragmentation, looking at all the institutions implementing human rights law as belonging to the same sub-field of international law.

In order to look at these three possible scenarios – that every UN Treaty Body only applies its underlying treaty; that UN Treaty Bodies harmonize their interpretation to the CRC Committee, conceiving the UN systems of protection of human rights as a specific regime; or that UN Treaty Bodies look at all human rights law, beyond the UN system – e, the following sections will take a look at several decisions in which the CRC and the CRC Committee decisions have been touched upon by other Treaty Bodies; at certain general comments in which the CRC played a major role; and at the cases before the ICJ in which the CRC was applied.


4. Practice and Analysis

Few pronouncements by Treaty Bodies other than the CRC Committee mention the CRC. The CRC has, in some cases before such bodies, been invoked by the referring party, along with other sources, in support of a generic violation of human rights. States usually contest the inadmissible *ratione materiae*, and the Treaty Body ultimately does not address the reference to the CRC. For example, in one case, *Y.G.H. et al v. Australia*, the CRC was invoked before the CAT, the Committee Against Torture, but the Committee did not reply on the point³¹.

The CRC has been invoked and used very frequently before the CEDAW Committee, in part because the CEDAW itself contains several obligations involving the protection of maternity and of women's children, such as Article 16 (*adequate measures in matters relating to marriage and family relations*). This article affirms, among other things, «[t]he same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children...» (letter

²⁹ On the many ways human rights obligations and institutions can conflict and overlap see PAYANDEH, "Fragmentation within International Human Rights Law", cit., pp. 305-12, and the thorough analysis by L. MCGREGOR, "The relationship of the UN treaty bodies and regional systems", in *Routledge Handbook of International Human Rights Law*, S. SHEERAN, N. S. RODLEY (eds.), London, 2013, pp. 505-521.

³⁰ M. EVANS, "The Future(s) of Regional Courts on Human Rights", in *Realizing Utopia: The Future of International Law*, A. CASSESE (ed.), Oxford etc., 2012, p. 261 ff.

³¹  *letare*, *Y.G.H. et al v. Australia*, CAT/C/51/D/434/2010, Views of 14 November 2013, para. 4.7.

d)³². In addition, Article 16(1)(d) and (f) adopt the same yardstick, the best interests of the child, adopted by the CRC for evaluating the concrete definition of a given right³³.

As for the CAT, the CRC has been invoked before the CEDAW Committee in many cases by applicants, but the CEDAW Committee has not made any comment on it³⁴. Moreover, in two cases (*M.W. v. Denmark* and *Angela González Carreño v. Spain*) the CEDAW Committee dealt with situations heavily involving notions developed under the CRC, but it did not rely explicitly on the CRC definitions or on the Work of the CRC Committee, even though it did not take views in contrast with them³⁵.

Sometimes, on the contrary, it has been the respondent States to refer to the CRC, using it as an aid in interpreting the aforementioned Article 16 of the CEDAW, although without framing this approach within the rules of interpretation of treaties of the 1969 VCLT. In *Groupe d'Intérêt pour le Matronyme v. France*, the Respondent State relied on the paramount importance of the best interests of the child, «as guaranteed by the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child»³⁶. Also, in *Dayras et al.*, France argued that women's right not to be victims of discrimination in the transmission of their family name under the CEDAW needed to be reconciled with «the right of their children to stability in respect of their civil status», and explained that, under «article 24, paragraph 2, of the International Covenant on Civil and Political Rights and article 8 of the Convention on the Rights of the Child, [...] States parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations, as recognized by law, without unlawful interference...»³⁷. Lastly, in a more recent case, *N.M. v. Turkey*³⁸, the Respondent State observed that Turkish law and judgments granting custody

³² See also letter (e): «The same rights to decide freely and responsibly on the number and spacing of their children...»; letter (f): «The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation...»; paragraph 2: «The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory».

³³ Both provisions state that «in all cases the interests of the children shall be paramount»; on the best interests of the child see *The Best Interests of the Child*, P. ALSTON (ed.), Clarendon, Oxford, 1994.

³⁴ [redacted] complete, *Lourdes da Silva Pimentel v. Brazil*, CEDAW/C/49/D/17/2008, Views of 25 July 2011, para. 5.4; *Szijjarto v. Hungary*, CEDAW/C/36/D/4/2004, Views of 14 August 2006, para. 9.2; *M. N. N. v. Denmark*, CEDAW/C/55/D/33/2011, Decision of 15 July 2013, para. 7.4.

³⁵ [redacted] complete, *M. W. v. Denmark*, CEDAW/C/63/D/46/2012, Views of 22 February 2016; *Angela González Carreño v. Spain*, CEDAW/C/58/D/47/2012, Views of 16 July 2014.

³⁶ [redacted] complete, *Groupe d'Intérêt pour le Matronyme v. France*, CEDAW/C/44/D/12/2007, Decision of 4 August 2009, para. 6.4.

³⁷ [redacted] complete, *Dayras et al. v. France*, CEDAW/C/44/D/13/2007, Decision of 4 August 2009, para. 6.2.

³⁸ [redacted] complete, CEDAW/C/70/D/92/2015, 092/2015, 9 July 2018, para. 6.3.

of a child to the father were adopted in light of the best interests of the child, as requested by the CRC. As in the previous cases, the Committee did not draw any conclusion on this reasoning.

Finally, the CESCR Committee has shown the same hesitancy to refer to the CRC, even in cases centred on minors³⁹. The Treaty Bodies of the CCPR, the CED, and of the CERD, curiously, never mention or reference the CRC.

However, in one case, another Treaty Body did explicitly refer to the CRC in construing the conclusion of its pronouncement. In *Salgado v. United Kingdom*, the CEDAW Committee addressed an issue relating the transmission of citizenship from a father to his children, and a change in the law that had occurred since 1948. In order to determine the critical date for falling under the new law, the CEDAW Committee referred, among other things, to the CRC, and explained:


Reference to the child's date of birth [...] is also clearly in line with the wording of article 9 (2) of the Convention, which expressly relates to equal rights for women in relation to the nationality of their children. This reference to "children" must be read in line with the use of the term in other relevant international (human rights) instruments, such as article 24 (3) of the International Covenant on Civil and Political Rights; article 7 (1) of the United Nations Convention on the Rights of the Child; and articles 6 (1) and (2) of the European Convention on Nationality [...]⁴⁰.

The *Salgado v. United Kingdom* decision on inadmissibility, adopted more than ten years ago, stands out in isolation compared to the previously analysed pronouncements of other Treaty Bodies. Remarkably, it drew on the CRC to define those provisions of the CEDAW which refer to children. Notwithstanding this isolated exception, it is undeniable that UN Treaty Bodies had so far shown a marked reluctance to pick up the arguments of both claimants and respondents grounded on the CRC. So, it seems that, of the three possible scenarios, it is first, entailing deference to a Treaty Body's own underlying treaty only, which prevails.

The reason for this attitude might lie in the structural framework described above, and the fact that, notwithstanding the common framework under the OHCHR, each human rights treaty has different State Parties, and each Treaty Body has considerably different Member States. On paper, the common, overall institutional framework should favour an integrated approach in applying and interpreting the core human rights treaties. But, as a matter of fact, UN Treaty Bodies at the moment appear to assign more importance to the differences among the underlying treaties and avoid relying on the CRC.

Breaking with this inward-looking approach, in many cases, UN Treaty Bodies show that they are familiar with the work of the European Court of Human Rights.

³⁹ See among many  *Ben Djazia et al. v. Spain*, E/C.12/61/D/5/2015, CESCR-11-1, 005/2015, Views of 20 June 2017;  *James Noble v. Australia*, CRPD/C/16/D/7/2012, Views of 2 September 2016.

⁴⁰  *Salgado v. United Kingdom*, CEDAW/C/37/D/11/2006, Decision of 22 January 2007, para. 4.10.

It is common, especially in cases involving members of the Council of Europe, to see Treaty Bodies referring to ECtHR precedent to define the precise contents of a right⁴¹. This may be because of the fact that the ECtHR is a court, and not an expert committee such as the Treaty Bodies, and its work is perceived as highly authoritative. However, it is probably also due to an accidental fact, that is, the accessibility of the respective decisions. The ECtHR adopted a detailed search engine for its decisions several years ago, while the online database of the pronouncements of UN Treaty Bodies is of recent constitution⁴². This usage of the ECtHR cases tends to suggest that the third scenario, openness to the existence of an international human rights law, is a better fit for understanding the work of UN Treaty Bodies, rather than the self-contained model.

5. Another Kind of *Special Issue*: The CRC in General Comments, in Particular in Two Joint General Comments

Turning now to the other function of UN Treaty Bodies, that of publishing general comments, we find some relevant cases. This analysis also includes the work of the HRC.

The Human Rights Council's General comment on children and enforced disappearances is an exercise of coordination and interpretation of the 1992 Declaration on the Protection of All Persons from Enforced Disappearance⁴³ and the CRC. This General Comment, starting with the preamble, takes the CRC as the axiological point of reference of the rights of children⁴⁴. Then, throughout the comment, it recalls the CRC in several places, making the notable statement that the CRC recognizes «children as rights holders, rather than objects of protection», and spelling out the founding principles underlying the CRC: «non-discrimination; the best interests of the child; the right to life, survival and development; and child participation»⁴⁵.

⁴¹ See for example [\[redacted\] comp \[redacted\]](#), *X and Y v. Georgia*, CEDAW/C/61/D/24/2009, Views of 13 July 2015; *Groupe d'Intérêt pour le Matronyme v. France*, CEDAW/C/44/D/12/2007, Decision of 4 August 2009, para. 6.4, on the 'margin of appreciation' doctrine; *Benon Pjetri v. Switzerland*, CERD/C/91/D/53/2013, Opinion of 5 December 2016, para. 5.9.

⁴² On the key role of accessibility to the work of the UN Treaty Bodies for their effectiveness see P. ALSTON, "Beyond 'Them' And 'Us': Putting Treaty Body Reform into Perspective", in *The Future of UN Human Rights Treaty Monitoring*, P. ALSTON, J. CRAWFORD (eds.), cit., pp. 505-9.

⁴³ Adopted by General Assembly resolution 47/133 of 18 December 1992.

⁴⁴ Adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth session (31 October – 9 November 2012), UN Doc. A/HRC/WGEID/98/1, 14 February 2013: «The Working Group recognizes that children must be afforded special protections and acknowledges the salience of relevant instruments that specifically address violence against children. These include the Convention on the Rights of the Child (CRC) and its three Optional Protocols [...]».

⁴⁵ *Ibid.*, para. 12.

The importance of the rights of children, at the crossroads with other human rights, was the origin of two joint general comments on migrant workers and members of their families⁴⁶. General Comment 3/22 explains this choice by stating that, «children may be in a situation of double vulnerability as children and as children affected by migration»⁴⁷, and clarified the legal framework shaping the General Comments, anticipating any possible objection of jurisdictional nature, or of methodological weakness:

While the present comment is based on the provisions of both Conventions, it is important to underline that the human rights norms clarified herein are built on the provisions and principles of the Convention on the Rights of the Child. Therefore, the authoritative guidance contained in the present joint general comment is equally applicable to all States parties to the Convention on the Rights of the Child and/or the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁴⁸.

The two general comments then develop, in parallel, both the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the CRC⁴⁹, stressing the key normative role of the principle of the best interests of the child and of the *right to be heard* enshrined in the CRC⁵⁰.

6. The CRC in the Work of the ICJ

On two occasions the CRC has been considered by the ICJ. In the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the Hague Court affirmed the applicability of three human rights treaties, to which Israel is party, in the Occupied Palestinian Territories, including the CRC, which Israel ratified in 1991. The ICJ observed:

the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory [and] also impede the exercise

⁴⁶ Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, UN Doc. CMW/C/GC/3-CRC/C/GC/22, 16 November 2017; Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, UN Doc. CMW/C/GC/4-CRC/C/GC/23, 16 November 2017.

⁴⁷ General comment 3/22, *cit.*, para. 3.

⁴⁸ *Ibid.*, para. 4.

⁴⁹ See, for example, *ibid.*, paras. 19-20, and 49 ff. The whole general comment 4/23 is structured in a joint analysis of the two conventions.

⁵⁰ *Ibid.*, paras. 27-33, and 34-39 respectively.

by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child⁵¹.

In particular, the affected rights were: Articles 16 (right to not be subject to arbitrary or unlawful interference with their privacy, family, home or correspondence); 24 (right to health), 27 (right to an adequate standard of living), and 28 (right to education).

In the case *Armed Activities on the Territory of the Congo*⁵², the Hague Court was asked to adjudicate on violations of international human rights and humanitarian law attributed to Uganda⁵³. The Democratic Republic of the Congo claimed that, «several hundred Congolese children were forcibly recruited by the UPDF and taken to Uganda for ideological and military training in the year 2000»⁵⁴. The Court did not rule that a deliberate policy of terror by the Ugandan Government was proven, but attributed a series of violations to the African State, including Articles 38.2 and 3 of the CRC (prohibition of recruitment of children under the age of 15)⁵⁵, and Articles 1, 2, 3(3), 4, 5, and 6 of the Optional Protocol on the involvement of children in an armed conflict⁵⁶, concluding that there was «convincing evidence of the training in UPDF training camps of child soldiers and of the UPDF's failure to prevent the recruitment of child soldiers in areas under its control»⁵⁷.

In other cases that could extend a bridge towards the CRC, such as the 2007 Judgment on the genocide in Bosnia, the ICJ dealt with the forced transfer of children moving only within the 1948 Convention on the Prevention and Punishment of the Crime of Genocide⁵⁸, and did not investigate the possibility of getting any interpretive aid from the CRC⁵⁹.

⁵¹ [redacted] complete, Advisory Opinion of 9 July 2004, para. 134.

⁵² [redacted] complete, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005.

⁵³ *Ibid.*, paras. 205-221.

⁵⁴ *Ibid.*, para. 185.

⁵⁵ Art. 38: «(2) States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. (3) States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest».

⁵⁶ *Ibid.*, para. 219. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted by General Assembly resolution A/RES/54/263, 25 May 2000, and entered into force 12 February 2002: both the Democratic Republic of the Congo and Uganda became parties to the Protocol in 2001.

⁵⁷ *Ibid.*, para. 210; see also para. 211.

⁵⁸ Adopted by the General Assembly of the United Nations on 9 December 1948.

⁵⁹ [redacted] complete, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, paras. 362-367.

7. Conclusions on the Relevance of the CRC and the CRC Committee Pronouncements in the Work of the ICJ, HRC, and Other UN Treaty Bodies

Notwithstanding the paramount importance of the CRC, and its universal adoption among states, it is unusual to find it used as a basis for the legal reasoning of jurisdictions and Treaty Bodies other than the CRC Committee. The work of other Treaty Bodies has not paid much attention to rights as described by the CRC and its committee, even in situations in which the underlying treaty, such as the CEDAW for the CEDAW Committee, enshrines rights and obligations relating to children. This practice shows that the UN Treaty Bodies do not look at themselves as a coordinated regime, or do not attempt to establish coordination among themselves, but rather prefer to stick to their mandates under an underlying treaty, or to look to other, authoritative – or, simply, more easily accessible – sources such as the ECtHR (section 4).

On the contrary, in the work of preparing General comments, Treaty Bodies have been more willing to cross-pollinate their reasoning. This may seem obvious, given the fact that children are not a category completely isolated from the work of other Treaty Bodies, but fall under situations for which other core human rights treaties were established.

Finally, on two occasions, the ICJ took the CRC into consideration. While, in the advisory opinion on the construction of a wall in Palestine, the reference to the CRC was quite brief and circumscribed by its applicability within the occupied territories⁶⁰, in the armed activity case between Congo and Uganda, the CRC was at the heart of the Court's reasoning on the prohibition of recruiting child soldiers⁶¹.

Overall, references to the CRC are not very common. This is surprising, given the fact that, since it was universally accepted, it would not be difficult to argue that the CRC applies to the states involved in a given proceeding. Reasoning based on Article 31(3)(c) of the Vienna Convention on the Law of Treaties could open up toward the applicability of such a widely accepted treaty, by which two given parties to proceedings before a UN Treaty Body are surely also bound. Probably a conservative approach, limited to the given jurisdiction of an underlying treaty, has worked against openness to its broader applicability.

ABSTRACT. The Convention for the Rights of Children Before the UN Treaty Bodies and the ICJ: 'Taking into Account' or Ignoring?

Today there are several entities – agencies, organs, bodies – of the United Nations implementing human rights. The purpose of this paper is to take stock and reflect on the presence and impact of the Convention on the Rights of the Child in the work of the systems of protection of human rights coordinated under the Office of the High Commissioner for Human Rights, in particular before the

⁶⁰ [redacted] con [redacted] [redacted] are, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004; for further comments, see *above*.

⁶¹ [redacted] completa [redacted] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, paras. 219-20; for further comments, see *above*.

so-called 'Treaty Bodies' and the Human Rights Council. A further section – given its general jurisdiction – is dedicated to the most important judicial organ of the UN: the International Court of Justice. This practice, notwithstanding some notable exceptions, shows that the Convention on the Rights of the Child is not taken into consideration in applying other treaties, even when rights of children are at stake. Twenty years after the work of the International Law Commission on fragmentation, a move toward coordinating the activities of the several bodies of the Office of the High Commissioner for Human Rights has yet to be started.

Parole chiave: frammentazione del diritto internazionale; diritti del fanciullo; CRC; Comitati delle Nazioni Unite; diritti umani; dialogo tra Corti.

Keywords: fragmentation of International Law; rights of children; CRC; UN Treaty Bodies; Human Rights; Judicial Dialogue.

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