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

Couzens, M.M.

Chapter 7:

Conclusions and Recommendations

7.1 Concluding remarks

Early studies and early judicial practice gave limited consideration to the CRC as a legal instrument. Many gaps were left in understanding what was and could be the role of the courts in giving it effect. The current context has changed considerably, and although limited to three jurisdictions, this study shows that courts apply the CRC and do so widely, proving the legal versatility of the Convention and its domestic relevance. Judicial application of the CRC – as the ultimate confirmation of its *legal* dimensions – refutes concerns about its unenforceable nature due to its alleged aspirational character.

In taking a cosmopolitan perspective, this study attempted to capture the diversity of interactions between the CRC and domestic courts in legal systems with a variety of formal rules of reception. This cosmopolitan perspective was analytical rather than normative, in that it was accepted that there is a common aim to give effect to the CRC but there are many ways in which this can be achieved, including in relation to judicial application. The novelty of the CRC and the global challenge that its standards have posed to all legal systems created the premise that domestic experiences, however disparate, hold lessons that are useful for other jurisdictions. This cosmopolitan premise is further strengthened in this study by the similarities which exist even between these very different legal systems. Institutionally, this perspective is supported by the Committee, whose most comprehensive output – the general comments – are undifferentiated between legal systems, and that regards courts generally as important players in giving effect to the Convention. It is concerning that so far the courts have given only limited attention to the Committee's output, depriving their reasoning of an important reference point in relation to the rights of children. However, the judicial engagement with the CRC has been dynamic, and generally in a favourable direction. The factors which have determined this dynamic differ between jurisdictions,[1] but they include the output of international bodies such as the ECtHR (in France) or the CRC Committee (for the Victoria Supreme Court). This creates hope that the expanding Committee output (including in relation to individual communications) would not be ignored by the courts, and would be able to influence their engagement with the Convention.

With a weak general implementation provision in article 4, much depends on what domestic law permits or enables the courts to do to give effect to the CRC. The traditional entry point for analysing that domestic law has been the methods of reception of international treaties, and primarily the dichotomy between direct and indirect application. In the three jurisdictions

[1] Varying from (limited) legislative endorsement in Australia; increased familiarity with the CRC and its direct application in France; and constitutional endorsement in South Africa.

analysed here the formal reception framework was a predictor of the method of engagement (direct/indirect) and of the potential consequences of application (whether the CRC is a rule of decision or an aid in the interpretation of domestic instruments). Paradoxically, this formal framework was both underutilised and surpassed by the courts. Thus, some possibilities of giving judicial effect to the CRC have not been used,[2] while in some cases courts went beyond the formal framework in their method of engagement and the consequences of their application.[3]

Although direct application is *prima facie* the most far-reaching and effective way to give effect to the CRC, the reality contradicts this assumption, and restrictive approaches to direct application have frustrated these expectations. Instead, this study shows that regardless of the rules of reception, all legal systems may provide opportunities for meaningful engagement with the Convention. To appreciate this meaningful impact it is necessary to acknowledge that this is not an issue of 'full effect' versus 'no effect'. In all systems there are degrees of effect or even diffuse effects that cannot be captured in conventional legal terms. With the exception of France, where CRC provisions have sometimes been the rule of decision, it is rare to see the Convention being the dominant reason for a judgment. The CRC is rather interwoven with other relevant domestic or international norms, making it difficult to distil its independent impact. This is not surprising considering that the Convention operates in a rich normative space, but it suggests that to retain its relevance it has to offer *something,* an added value which other relevant instruments do not. For example, as the ECHR offers limited protection to socio-economic rights and has less detailed provisions applicable to children, the CRC remains useful despite the more developed implementation mechanisms of the former.[4] In South Africa, the Constitutional Court found support in article 12 of the CRC for an interpretation of section 28(2) of the Constitution so as to include the right of the child to be heard throughout the criminal process.[5] The Victoria Supreme Court found it useful to refer to the CRC and the Committee's jurisprudence to give content to the comparatively sparse provisions in the Victoria Charter.[6] For effectiveness reasons,[7] however, it is desirable that this added value does not conflict with domestic law and can be accommodated by domestic law.

In the jurisdictions analysed here, article 3(1) was popular. Courts have recognised its independent normative value, sometimes as a right in itself. It was used as a gateway for the protection of other rights in the Convention, and has facilitated the lifting of the best interests from its habitual sphere of application. It has been a core justification for a special legal treatment to be applied to children when compared to adults. The jurisprudence of the courts

[2] For example, by not applying the CRC directly even if they are entitled to do so, by shying away from asserting the prevalence of the Convention over domestic norms, by not considering the CRC consistently, by not developing the common law under the influence of the CRC, etc.
[3] Illustrated in the Australian and South African case law.
[4] This is illustrated, for example, in the Court of Cassation assessment of legislation concerning child support against article 3(1) (part 3.5.2), and the Council of State's child-centred decisions (part 3.5.3.2).
[5] *J v National Director of Public Prosecutions and another (Childline South Africa and others as amici curiae)* 2014 (7) BCLR 764 (CC).
[6] Part 4.4.7.3.
[7] In case of conflict, based on this study, it would be unusual for the CRC norms to be preferred even when that option is theoretically open to the courts.

resembles closely the position of the CRC Committee in terms of the nature of article 3(1) and the content of equivalent domestic norms. This is a boost for the legal status of article 3(1) and a clear rebuttal of critical views about its normative force. The opportunities opened by this reality are explored below.

7.2 Conceptualising the role of the courts in giving effect to the CRC

The work on this thesis started with the observation that the role of the domestic courts in giving effect to the CRC is insufficiently understood and conceptualised despite the popularity of the Convention.[8] 'To conceptualise' is understood here as an operation which enables one to extract general ideas from particular experiences. In the context of the courts' application of the CRC, this concerns issues such as the interaction of the CRC with the legal reasoning, the factors which affect that interaction and the impact of the Convention on the reasoning of the courts.

The overall aim of the thesis became therefore to assist in conceptualising the role of the courts in giving effect to the CRC in a context where states have almost universally pledged respect for the Convention but retain a sovereign right to decide how to give effect to it, and, implicitly, what role to assign to domestic courts in this process. The cosmopolitan vision of the Convention comes, therefore, face-to-face with the particularism of domestic legal systems, co-existing and informing how the role of the courts vis-à-vis the CRC is understood.

While international and domestic perspectives may converge in some points, it is clear that the CRC Committee (the driver of the cosmopolitan vision) holds a maximalist view in relation to the courts' contribution to the implementation and the enforcement of the Convention, while domestic courts are more reserved in this regard. There are good reasons to support the view of the Committee, but a legally sound view rests on acknowledging the different institutional positions from which the Committee and the courts approach the latter's relationship with the Convention: the Committee engages with the CRC from the international vantage point of a supra-national institution concerned with the compliance by states (as unitary subjects of international law) with treaty obligations; while the courts engage with the CRC from a domestic vantage point, as one of the three branches of the state (judiciary, executive and legislatures), with responsibilities to respect the domain of the other branches.

An illustration of this dynamic is the application of the Convention in Australia,[9] where there is a compartmentalisation of laws concerning children, and no unifying children's rights standard that applies across all areas of law. Cases such as *GPAO, MIMIA v B* and *Re Woolley* show the vulnerability of this approach in that it prevents the application of best interests standards in all areas of law, as required by article 3(1). Thus, as desirable as the position of

[8] See part 1.2 above.
[9] These are provisions which are addressed or are relevant for the entire state apparatus, such as the general principles.

the Committee, grounded in the CRC, may be to ensure the effectiveness of the Convention, it cannot be automatically embraced domestically without some reckoning.

Positively, the Convention has been accepted by courts as a reference framework in relation to the rights of children. The practical implications of this acceptance as a 'set of meta-norms'[10] are, however, more difficult to unpack. The basis and the basics in conceptualising the role of the courts remain the formal legal framework of reception.

In highly normative systems (such as France) or those where the engagement with international law is controversial (such as Australia) judges pay close attention to legal status. Concerns arising therefrom result in the application of the Convention being rejected on grounds connected to status (i.e., not directly applicable or not incorporated). In mildly normative systems or where there is evidence of convergence between the CRC and with legislative/constitutional will, the application is easier and courts do not address status issues to any great extent if at all (see South Africa or the Family Court in Australia).

The Convention is a complex legal instrument, the implementation of which depends on numerous domestic actors. The courts will find some CRC provisions easier to engage with than others primarily because they are closer to the functions traditionally performed by judges. This means that it may not be possible to have an all-encompassing approach to the role of the courts, applicable to all substantial CRC provisions, but that some differentiation may be necessary according to the direct relevance of specific provisions in relation to court functions.

However, the conceptualisation of the role of the courts needs to move further to respond to litigation reality, as suggested below. Courts give effect to the CRC in ways which do not fit neatly into what they are positively authorised to do under the reception framework. A distinction may therefore be necessary between *within-framework* (normative) and *beyond-framework* (non-normative) methods of engagement. While this terminology is perfectible, it is submitted that the two categories reflect the reality of courts' interaction with the Convention. The normative means are clearly legitimate, being authorised by the reception framework, but the non-normative ways require some more debate about their legitimacy. They have clearly facilitated the domestic effect of the CRC, but they should not become escape routes for courts unwilling to tackle difficult questions about its relationship with domestic law.

The identification of the non-normative methods and their corresponding impact show that taking a forensic approach to understanding the application of the CRC is unlikely to capture the sometimes subtle ways in which the Convention has influenced judges. It is not always easy to establish a causal link between a court engaging with the CRC and a positive outcome in a case, but is possible that the Convention has influenced the way in which a judge has approached a matter and the factors that it found relevant for the resolution of the case. This type of impact is difficult to prove with mathematic precision, but it may have a more sustainable impact than, say, a decision in which the CRC was directly applied.

[10] Term used by W Vandenhole 'The Convention of the Rights of the Child in Belgian Case Law' in T Liefaard and J Doek (eds) *Litigating the Rights of the Child*: *The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 105 at 118.

Domestic systems have autochthonous legal resources or institutions outside of the formal reception framework which can be of significant assistance in facilitating the effect of the CRC. There may be, for example, domestic institutions or legal concepts which can act as 'carriers' for CRC values even if incorporation or transformation has not technically taken place. The smaller the gap between the CRC and the domestic standard, the likelier it is that the courts would give effect to the former. The multitude of courts entitled to engage with the Convention operates as a judicial safety net and creates opportunities for its multiple legal dimensions to be discovered. It may also generate, if not a dialogue between courts, at least judicial introspection regarding the application of the CRC.

When applied by courts, the CRC may be in competition with other relevant sources of law, or, on the contrary, it may benefit from the convergence with other norms, which pull the CRC into the legal reasoning, giving it some visibility and credit for a decision. A principled approach to this issue is not present in any of the systems in which this practice is used, and calls for more focused attention.

In this researcher's view, a proper understanding of the role of the courts in giving effect to the CRC in specific systems starts with the formal rules of reception, but needs to consider many other factors, such as the structure of reception (including the general compatibility between the domestic framework and the CRC; and the legal tradition which may allow the courts to innovate in terms of giving effect to the CRC); the level of connection between various CRC provisions and the domestic functions of the courts; the multitude of courts engaging with the Convention and the potential consequences of this jurisprudential fragmentation; and the consequences of norms inflation for the application of the CRC. It is also necessary to consider that factors which impact on domestic judicial application can have an ambivalent effect (facilitating or obstructive), depending on the context. Thus, caution must be exercised and *in abstracto* generalisation of the role or effect of such factors must be avoided. It must be stressed that these are not exhaustive factors, and that studies of other legal systems may reveal the relevance of other issues which must be taken into consideration for a more comprehensive understanding of what courts have done and can do to give effect to the CRC.[11]

Domestic courts and the development of the CRC

The contribution of domestic law to the development of international law has become a separate field of enquiry, and this thesis has not focused purposefully on it. However, there are some connected aspects raised by this research that should not go unnoticed.

The domestic application and development of the Convention are essential for its existence, and this study has shown that the CRC has an intense domestic life. The CRC has been drawn into many disputes, including contentious and politicised legal issues such as immigration, surrogacy and corporal punishment. While other domestic developments contribute to keeping the Convention alive, it is the application by the courts that captures its essence of *being*

[11] In a study of Romanian courts, the current researcher showed the impact of historical context, judicial and political inertia, and lack of judicial independence as factors with impact on the judicial application of the CRC (M Couzens 'Romanian courts and the UN Convention on the Rights of the Child: A case study' 2016 (24) *International Journal of Children's Rights* 851).

(understood as being what one is meant to be/what was created or intended for) – its struggle to fit in and deliver benefits to children, to find a place in an environment where there are friends and enemies, and where it has to accept competing with others. The domestic vibrancy of the CRC transcends, however, the domestic sphere in that it instils life in the Convention more generally. The international existence of the CRC is virtual,[12] reactive and filtered, being primarily based on information supplied from the domestic sphere. This is illustrated in the work of the Committee: it reacts to domestic developments and it distils domestic experiences in universally-relevant material, which it then makes available for domestic use around the world. Thus, domestic developments should be encouraged and made known so as to contribute to the CRC reaching its potential.

Beyond the abstract reflections above, there are concrete ways in which domestic case law contributes to the development of the CRC. The judicial application of the Convention gives credibility to the CRC as a legal instrument, suitable for adjudication. Domestic courts have found it particularly relevant where they sought legal grounds to treat children differently from adults on account of their immaturity and vulnerability. This is an important insight relevant especially for the Committee and its future work.

Domestic courts may assist in discovering the yet-uncovered CRC potential and limitations. As mentioned above, courts have preceded the Committee in declaring a right to have the best interests of the child given a primary consideration,[13] and could do so in the future. The Victoria Supreme Court has relied on an equal protection under the law provision in the Victoria Charter to justify a distinct legal treatment for children.[14] Article 2 of the CRC could therefore provide an alternative legal reasoning to the over-use of article 3(1) for the purpose of giving children special treatment.

Further, courts may assist in developing the CRC by interpreting its norms. The unpacking of article 3(1) (in terms of its scope, weight and balancing against competing norms) illustrates the potential for this. The judgment of Gaudron J in *Teoh* is a precursor of the CRC Committee's identification of article 3(1) as one of its fundamental principles.[15] Together with the above judgment, the *Fitzpatrick* judgment of the South African Constitutional Court is at the forefront of approaching the best interests of the child as a right in itself. Cases across the three jurisdictions 'lift' the best interests of the child from its traditional sphere of application (family law and child protection), making it relevant even for decisions in contentious and politicised legal contexts such as immigration.

Domestic judgments may expose vulnerabilities in the CRC and children's rights arguments, encouraging therefore a search for solutions. For example, concerns about the aspirational

[12] In the international sphere, the CRC exists in something similar to laboratory conditions – separate from the environment in which is supposed to operate. The purpose of 'lifting' the CRC to the international sphere is primarily to study the Convention, to understand its meaning, and its functioning in domestic jurisdictions, with the aim of returning that knowledge to the CRC's normal, domestic, habitat in order to make its workings more efficient.

[13] It is not claimed here that the courts have determined or influenced the position of the Committee.

[14] See part 4.4.7.2.

[15] A Twomey 'Minister for Immigration and Ethnic Affairs v Teoh' 1995 (23) *Federal Law Review* 348 at 357-358.

nature of the CRC, or the suitability of an increasingly wide scope of the best interests of the child, or in relation to the cogency of CRC-based arguments should be considered by the Committee in engaging with the Convention.

7.3 Recommendations

Arising from this research, a few suggestions can be made to improve the application of the CRC by domestic courts. Consistent with the non-normative cosmopolitanism embraced in this work, no uniform approach is advocated for. The version of cosmopolitanism employed here is respectful of legal diversity and the creativity and richness of domestic systems which, it is submitted, can be harnessed for the benefit of the Convention. It is also based on the understanding that strengths in some systems could perhaps never be 'imported' into others, and domestic vulnerabilities of the CRC in some jurisdictions are non-issues in other jurisdictions.

This, however, does not prevent the formulation of suggestions with some degree of generality and chance of replication beyond the systems considered here. These suggestions are aimed primarily at the courts, the Committee and the research community.

1. The current under-utilisation of the formal framework of engagement calls for its fuller consideration. In parallel, there is a need to acknowledge the diversification of methods of engagement, and their positive impact on increasing the chances of the Convention to be applied. Exclusive reliance on one engagement method is likely to result in a limited application of the Convention. However, the development by courts of any additional means of engagement should be accompanied by transparent judicial reasoning (and academic analysis) in order to ensure their legally principled development. This work has drawn attention to what has been called non-normative engagement methods, and called on for them to be acknowledged and critically analysed, in order to ensure that judicial engagement with the Convention occurs in a legally correct way, which has a lasting impact on the case law in any given jurisdiction.

2. It is necessary to acknowledge that the type of legal system (monist, dualist, hybrid) and the formal rules of domestic reception of the Convention constitute only the starting point of an enquiry into what informs the role of courts in giving effect to the CRC. The discussion needs to move further, and each legal system (through their courts or research community) needs to reflect on factors beyond the rules of reception which affect how the courts give effect to the Convention. The factors suggested in part 6.4 were only indicative, albeit probably common to many systems, and many other factors can be uncovered and addressed if their significance is acknowledged.

3. Regardless of the type of legal system, courts should give closer attention to the CRC provisions and reflect that in their judgments. The meaning of the CRC is far from being self-evident and requires careful unpacking. Also, it should not be easily assumed,

based on a general correspondence in terminology and without careful analysis, that domestic law is compatible with the Convention. Skipping these important steps robs the CRC of a meaningful application, which the current framework of reception allows in all systems. Instead, the courts should spell out more carefully their interpretation of the Convention and how it articulates with their reasoning. This would make judgments more transparent and explain what the courts find the CRC useful for.

4. Court judgments, and especially those that are critical or cautious, are useful tools for reflection in relation to the interaction between the CRC and domestic law, and as sounding boards for children's rights arguments. Ultimately, they are self-learning tools for children's rights proponents, who can use them to understand the potential reluctance of some judges to apply the CRC. Many topics for such reflection arise from this study: Is the Convention aspirational? Why do some courts consider its norms incomplete? Do all the substantive CRC articles create rights, and does this matter? Is the best interests of the child suitable for an *in abstracto* application? Are child-focused judgments seen as biased by other judges? Is there a critical discourse on the rights of children and is there a need for such? Would its potential development persuade more judges that applying the rights of children needs not be an activist position but can instead be integrated in the mainstream legal reasoning? Etc.

5. More attention needs to be given to situations in which a potential overlap exists between the CRC and other legal instruments, domestic and international. A first suggestion is that, however apparently close such norms are, an overlap should not be assumed without being verified. In fact, considering the special features of the Convention (and especially its general principles) and its capacity to introduce child-focused aspects into the legal enquiry, it can be doubted that complete overlap can exist. These special features of the Convention must be preserved by resisting the engulfment of the Convention by other legal instruments.

   To face 'normative competition' and retain its imprint on legal reasoning, the Convention should be developed independently. The concrete importance of the Convention in a norm-rich environment inhabited by more developed and accepted norms, comes from what it offers in addition to those norms, or, what has been termed in this work 'the added value of the CRC'. Identifying the added value of the CRC stresses the utility of the Convention and may present the courts with an incentive to apply it. This approach (which encourages the application of the Convention when it has something special to offer, rather than every time it may be relevant) is not inimical to the CRC itself. Article 41 recognises the priority application of more protective domestic or international standards, and is an implicit recognition that the CRC applies when it improves on the existing legal standards.

   It is submitted that this added value should be given more focused attention by courts, academia and the CRC Committee. Academia, for example, can analyse more carefully the relationship between the CRC and similar norms, which are considered in tandem

with the Convention. The Committee can further develop the content of the general principles, especially articles 2 and 6, as the essence of what distinguishes it from other international instruments. The openness of the courts to article 3(1) and the determination with which they turned a much-criticised provision into an effective legal tool and one of the most influential features of the Convention, support this suggestion. While none of the other principles come close to the popularity of article 3(1), there is no inherent reason for them not to develop in similar ways.

This emphasis on the added value ought not be taken to suggest that the CRC should be dissociated from other legal instruments. In some cases, this would be impossible and disadvantageous for the CRC.[16] What is pleaded for here is a realistic and balanced approach,[17] in which application with other instruments enhances the effect of the CRC rather than submerging its child-centred features.

6. More usage of the Committee's output by the courts is desirable. Its under-utilisation so far deprives the courts of an alternative reference discourse to that of powerful although not child-focused poles of legal authority or opinion (domestic or international). As members of the CRC 'interpretive community',[18] there is scope for communication between the courts and the Committee. The development of a 'vertical'[19] communication can take place on both axes: courts-to-Committee and Committee-to-courts.[20] The Committee is clearly important in giving meaning to the CRC, but so are the courts, as discussed in part 7.2. The Committee can operate as a nodal point for good judicial practices, which it can distil into internationally-appealing legal terms, absorbed into the Committee's output and thereafter communicated to domestic audiences, including the courts. As showed in part 6.3.1, there is convergence between the courts' approach to article 3(1) or domestic best interests provisions, which shows that a communication of this nature is not impossible or unrealistic.

   For meaningful communication to take place changes may be needed on both sides – courts and the Committee. For example, the judgments of the French Court of Cassation are impenetrable to an outsider, without literature guidance. However valuable these judgments are, the Committee may find it difficult to extract meaning therefrom. A too advocacy-oriented output could make the views of the Committee less valuable for the courts that may instead seek guidance from bodies which employ a conventional legal reasoning.

[16] For example, in South Africa or Australia, the CRC can only be applied together with domestic norms (save when a CRC provision may be found self-executing by a South African court).
[17] Sometimes a detailed consideration of CRC provisions may not be necessary when, for example, the CRC has already influenced the development of relevant domestic precedent.
[18] J Tobin 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' 2010 (23) *Harvard Human Rights Journal* 1 at 4.
[19] As used here, this term has no hierarchical connotations, and does not suggest any subordination between the courts and the Committee.
[20] For the reasons explained above, this work does not advocate for a harmonisation of the courts and Committee's approaches.

7. With some caution, there is scope for the courts to learn from each other. Article 3 jurisprudence discussed here showed some convergence of views between courts operating in very different legal systems. Multiple implications emerge. For example, this jurisprudence constitutes state practice and invites an investigation into the customary international law status of this provision.[21] Further, it shows that a 'horizontal' judicial communication between domestic courts operating in vastly different systems is not impossible. Children's rights have a short history, and their judicial development is in its early stages. Novel issues are constantly raised before domestic courts, and in the absence of domestic precedents or insights, courts may find it useful to look elsewhere.

The final thought of this work is that the CRC is ultimately what those who engage with it make it to be. The more legal engagement, the more meaning it develops. The CRC came into effect at a time of good international will and universal sympathy for human rights. The time was then suitable for the Convention to be utilized primarily as a persuasion tool or as a guiding beacon for the states. The context has changed, and not only is state support for human rights under some doubt, but there is also an expectation that human rights treaties deliver tangible outcomes for individuals and increase state accountability in relation to the treatment of their subjects. Shifting attention to the legal dimensions of the CRC is appropriate since legal obligations and rights lock in benefits when political commitment fluctuates. The courts are central to this process of uncovering and strengthening the legal dimensions of the CRC, and ultimately securing the sustainability of the Convention's ideals.

[21] This is not necessarily a new idea. Provost wrote (with no elaboration) that 'it is difficult to imagine better candidates for customary status' than article 3(1) of the CRC and the prohibition against torture (R Provost 'Judging in Splendid Isolation' 2008 (56) *American Journal of Comparative Law* 125 at 137).