

## Optional Protocol on a Communications Procedure

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### ABSTRACT

The *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (hereinafter OPIC) was adopted on December 19, 2011,<sup>1</sup> and entered into force on April 14, 2014.<sup>2</sup> It opened the possibility for individual complaints to be brought to the Committee on the Rights of the Child (hereinafter CRC Committee or Committee) whenever domestic remedies were exhausted, in cases of the occurrence of an *alleged violation* to the provisions of the United Nations (UN) Convention on the Rights of the Child (CRC) or its two Optional Protocols,<sup>3</sup> by state parties to any of these international instruments, as well as when for an *unreasonably long time no step was taken* by the given state to address the alleged violation. The main aim of the OPIC was to enhance children's access to their rights, especially to effective remedy at an international level. The OPIC was also the last piece of the puzzle<sup>4</sup> in the UN treaty body system, as its adoption led all UN treaty bodies to have the competence to receive individual communications procedures. Nevertheless, although the CRC itself is the most widely ratified human rights treaty<sup>5</sup> and the other two Optional Protocols have a very wide acceptance, the OPIC has a low rate of signatory states and an even lower ratification rate.<sup>6</sup>

### KEYWORDS

United Nations Convention on the Rights of the Child, children's rights, Optional Protocols, OPIC, CRC Committee, State Party, remedy, interim measures, individual communications, Inter-State complaint, inquiry procedure, legal capacity of a child

1 Adopted by General Assembly resolution A/RES/66/138.

2 The first country that became party to ratify the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (OPIC) was the Kingdom of Thailand, having deposited the ratification during the 67th Session of the United Nations General Assembly on September 25, 2012.

3 Optional Protocol to the Convention on the sale of children, child prostitution and child pornography and Optional Protocol to the Convention on the involvement of children in armed conflicts.

4 Beco, 2013, p. 367.

5 All countries in the world have ratified the CRC, except for the United States of America.

6 As of July 3, 2023, 66 states have signed the OPIC, of which 50 also ratified it. Among the Central European Countries (i.e. Croatia, Czech Republic, Hungary, Poland, Romania, Serbia, Slovakia, and Slovenia), Croatia, the Czech Republic, Slovakia and Slovenia are state parties, while Poland, Romania, and Serbia have only signed the OPIC, and Hungary made no actions so far.

## 1. History of Optional Protocol to the Convention on the Rights of the Child on a communications procedure

The need for a communications procedure appeared during the United Nations (UN) Convention on the Rights of the Child (CRC) negotiations from 1978 until its adoption in 1989. However, the idea was dropped because of the comprehensiveness of the CRC itself and because it was widely argued by state parties that the CRC contained economic, social, and cultural rights that were considered to be non-justiciable.<sup>7</sup> In addition, the Committee on the Rights of the Child (hereinafter CRC Committee or just Committee) is not a judicial body, and state parties to the CRC did not consider to provide the CRC Committee with the competence of receiving and deciding on national, internal child rights violations.<sup>8</sup>

The idea of the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (hereinafter OPIC) became relevant again in late 2007, when the CRC became the only core international human rights treaty that had no corresponding communications procedure. It was also emphasised that the monitoring mechanism envisaged in the CRC was allegedly incomplete, ineffective, and fraught with defects.<sup>9</sup> The discussion about the OPIC was initiated by the Chairperson<sup>10</sup> of the CRC Committee and non-governmental organisation groups, and the first proposal was presented in January 2008 at the 47th Session of the CRC Committee. At this session, the Committee had not yet endorsed the procedure but started an in-depth study on the need for it and how to make it child-friendly and effective. The proposal was eventually endorsed at the 48th Session of the CRC Committee, and officially announced<sup>11</sup> by the Chairperson of the CRC at an event organised by non-governmental organisations.<sup>12</sup> Then, on June 17, 2009, the UN Human Rights Council decided<sup>13</sup> to establish an Open-ended Working Group to explore the possibility of an optional protocol on communications procedures, leading to the beginning of a drafting process that would go on for approximately one and a half years.

During the drafting process, member states of the Human Rights Council raised various concerns that prevented them from fully backing the idea of the OPIC,<sup>14</sup> with one major concern being whether the OPIC had overall added value. The states also questioned the following: whether the CRC Committee could handle such an extra

7 Reasons and Timing to Elaborate a Communications Procedure under the Convention on the Rights of the Child, December 10, 2009, A/HRC/WG.7/1/CRP.4 at 2.

8 It is one of the reasons for non-ratification until today.

9 Woldemichael, 2015, p. 80.

10 At that time, the position was filled by Yanghee Lee, who served from 2007 to 2011.

11 The Chairperson said: 'Time has come (...), we are now inviting all stakeholders to come forth and seriously work together on a drafting process'. For details please see: <http://www.crin.org/recources/infoDetails.asp?ID=17602&flag=news>.

12 The event was attended by approximately 30 government representatives.

13 Resolution A/HRC/RES/11/1.

14 Lee, 2010, pp. 573 – 576.

burden of work; the lack of legal expertise<sup>15</sup> in the OPIC; the scope of the protocol, namely whether the OPIC should cover only the CRC or should extend to cover the first two Optional Protocols to the CRC; whether all provisions of the preceding documents should be under the scope of the third Protocol or some (e.g. the best interest of the child, which is very difficult to define) should be left out; the issue of the legal capacity of children and whether children would be able to pursue communication either on their own behalf or through representatives;<sup>16</sup> the duration of the procedure, which connects closely to the status of the child and the question of how the individual child will benefit if the case takes a long time for a decision (e.g. the decision is made after the child is no longer a child).<sup>17</sup> Meanwhile, a core point during the drafting process was the national sovereignty of states, which remains until today one of the main reasons for opting out.

The OPIC was approved by the Human Rights Council<sup>18</sup> in June 2011, and subsequently adopted by the UN General Assembly in December 2011.<sup>19</sup> On February 28, 2012, the Human Rights Council held an official signing ceremony during which 20 countries signed the third Optional Protocol.<sup>20</sup> The OPIC came into force three months after the deposit of the tenth instrument of ratification,<sup>21</sup> and is currently open to signatures,<sup>22</sup> ratifications,<sup>23</sup> and accession<sup>24</sup> for states that have ratified or acceded to the CRC or to either of the first two Optional Protocols. For each state party that was or is ratifying or acceding to the OPIC after its initial entry into force, the OPIC shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.<sup>25</sup>

15 Legal expertise is not a criterion for election to the CRC Committee. From the committees, the monitoring of human rights treaties, such as the International Covenant on Civil and Political Rights and the Committee Against Torture, should consider 'the usefulness of the participation of some persons having legal experience'. Like in other conventions, Art. 43 of the CRC only declares that 'the members of the Committee shall be elected by states parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems'.

16 This issue was really a core point, taking into consideration the fact that Article 1 of the CRC defines children as everyone under 18 (unless majority attained earlier). This means that the beginning of childhood is defined in national legal systems.

17 Lee, 2010, p. 575.

18 UN General Assembly, A/HRC/RES/17/18, July 14, 2011.

19 UN General Assembly, GA/11198, December 19, 2011.

20 Phillips, p. 6.

21 Art. 19, para 1 of the OPIC.

22 Art. 18, para 1 of the OPIC.

23 Art. 18, para 2 of the OPIC.

24 Art. 18, para 3 of the OPIC.

25 Art. 19, para 2 of the OPIC.

## 2. Structure and content

The OPIC consists of a *Preamble* and *four separate parts*, namely the *General Provisions* (Arts. 1–4), *Communications Procedure* (Arts. 5–12), *Inquiry Procedure* (Arts. 13–14), and *Final Provisions* (Arts. 15–22). The General Provisions and Final Provisions describe principles and key elements governing the procedures of the OPIC, complemented by the Preamble. The Communications Procedure and Inquiry Procedure deal with three key procedures that can be brought to or dealt with in front of the CRC Committee, which are (I) the *Individual Communications Procedure*, (II) the *Inter-State Complaint Mechanism* and (III) the *Inquiry Procedure*.<sup>26</sup>

### 2.1. Preamble of the OPIC

The legal nature of the preamble is to guide stakeholders in applying and enforcing the law through the application of the binding provisions of the law. The same applies to the OPIC, in that its preamble has no binding effect but provides an interpretative framework to the CRC Committee and to the state parties when applying and enforcing its statutory part. The preamble was inspired by the preambles of similar human rights instruments,<sup>27</sup> and thus recognises the inherent dignity and equal and inalienable rights of humans, and reaffirms the universality, indivisibility, interdependence, and interrelatedness of all human rights and fundamental freedoms.

In addition to these general guiding principles, the preamble underlines specificities unique to children's human rights, and draws attention to the fact that the CRC applies to all children without discrimination,<sup>28</sup> reaffirming the status of the child as a subject of rights with evolving capacity and full human dignity and not merely an object of protection. It also underlines that children are particularly vulnerable and that their dependent status may create difficulties in pursuing remedies for violations of their rights. Furthermore, the preamble stresses the principle of the best interests of the child, the importance of child-sensitive procedures at all levels,<sup>29</sup> and recalls the important role of national human rights institutions and other relevant specialised institutions, which are mandated to promote and protect the rights of the child. Moreover, it highlights the importance of providing domestic remedies and complementarity with national and regional mechanisms to protect children's rights.

26 There was extensive lobbying by non-governmental organisations to add a fourth type of procedure to the OPIC, which would be the collective complaint mechanism, but at the end no such mechanism was included. This collective complaint mechanism would open a way to non-governmental organisations to bring a complaint on behalf of unnamed individuals in front of the CRC Committee.

27 Beco, 2013, p. 373.

28 Art. 2 of the CRC.

29 The importance of the best interests of the child and child-sensitive procedures in strengthened also by the statutory part of the OPIC.

## 2.2. Guiding principles, key aspects, and working methods of the CRC Committee

Similar to the CRC, the main principles that should govern the application of the OPIC and the actions of the CRC Committee are the *best interest of the child* and the *respect for the rights and views of the child*, which shall be given due weight in accordance with the age and maturity of the child.<sup>30</sup> According to the OPIC, to ease and accommodate the effectiveness of the procedures, the CRC Committee shall adopt *rules of procedure* which need to be *child-sensitive* and should put safeguards in place to prevent the manipulation of a child.<sup>31</sup> State parties shall take all steps to ensure that individuals under their jurisdiction are not subject to any human rights violation, ill treatment, or intimidation as a consequence of communication or cooperation with the CRC Committee pursuant to the OPIC.<sup>32</sup> Procedures under the OPIC shall be *confidential* unless there is the express consent of the individual or group of individuals that initiate the procedure.<sup>33</sup> It is also emphasised in the OPIC the need for providing international assistance and cooperation for states in the implementation of the views and recommendations of the Committee.<sup>34</sup>

The CRC Committee adopted the Rules of Procedure under the OPIC<sup>35</sup> on April 8, 2013. The Rules of Procedure strengthen and complement the provisions of the OPIC,<sup>36</sup> define the methods of work of the CRC Committee, and reinforce the principles of the best interests of the child and the due weight of the view of the child.<sup>37</sup> It also lays down the principle of expeditiousness<sup>38</sup> and privacy<sup>39</sup> and details the rules of protection measures.<sup>40</sup> In the framework of the rules governing the methods of work, the Rules of Procedure impose an obligation on the Secretary-General of the UN to maintain a permanent record of all procedures initiated under the OPIC, and make all information available to any member of the Committee in the language of the submission.<sup>41</sup> The Committee bears the possibility of establishing working groups and designating rapporteurs to obtain adequate support for its work – these entities shall all work in line with the Rules of Procedure –<sup>42</sup> and to consult experts on its own initiative.<sup>43</sup> Furthermore, the Rules of Procedures detail conflict of interest

30 Art. 2 of the OPIC.

31 Art. 3 of the OPIC.

32 Art. 4, para. 1 of the OPIC.

33 Art. 4, para. 2 of the OPIC.

34 Art. 15 of the OPIC.

35 CRC/C/62/3.

36 The Rules of Procedure are not discussed at this point in its entirety. Respective provisions of the Rules of Procedure are discussed at the respective parts of this chapter.

37 Rules of Procedure, Rule 1.

38 Rules of Procedure, Rule 2.

39 Rules of Procedure, Rule 3.

40 Rules of Procedure, Rule 4, describing the possibility of the CRC Committee to request the state party to adopt and take appropriate measures urgently to stop the alleged breach in cases where the state party has not complied with its obligation under Art. 4, para. 1 of the OPIC.

41 Rules of Procedure, Rule 5.

42 Rules of Procedure, Rule 6.

43 Rules of Procedure, Rule 10.

rules, according to which a member of the CRC Committee shall not participate in, be present, or influence the procedure in any way if (I) the procedure is against a state of which he/she is a national, (II) he/she as a member of the Committee has a personal or professional interest in the case or any other conflict of interest, (III) he/she has participated, in any capacity, in making and adopting any decision on the communication other than those under the procedures applicable to the OPIC, the CRC itself, or the other two substantive Protocols.<sup>44</sup> Moreover, if, at any time, a member considers that he/she should not take part in the procedure, the member shall withdraw and parallelly inform the Committee of the withdrawal.<sup>45</sup> As for financial resources, the Secretary-General provides the budget for the Committee to undertake the activities under the OPIC.<sup>46</sup>

Every two years, the CRC Committee submits a report to the General Assembly on its activity under the OPIC,<sup>47</sup> which is based on Art. 44, para. 5 of the CRC, and part of the report is made in accordance with this article. The state parties to the OPIC also undertake to disseminate information about the Protocol and facilitate access to information about the CRC Committee and its documents, particularly those concerning the state party. This information shall be easily accessible to both children and adults, including those living with disabilities.<sup>48</sup> In addition, state parties to the OPIC have the right to denounce<sup>49</sup> it at any time through a written notification to the Secretary-General of the UN, which shall take effect one year after the date of receipt.<sup>50</sup>

### **2.3. Three key procedures of the OPIC**

Currently, the OPIC comprises three key procedures, two of which are discussed under the umbrella of *communications procedures* and one which is an *inquiry procedure*. These communications procedures, in general, are established to monitor the implementation of international instruments, and mainly refer to procedures that allow individuals, groups of individuals, or their representatives who claim that their rights have been violated by a state that is party to a human rights convention to bring a complaint before the relevant Committee established under one of the treaties.<sup>51</sup>

44 Rules of Procedure, Rule 8.

45 Rules of Procedure, Rule 9.

46 Rules of Procedure, Rule 11.

47 Art. 16 of the OPIC.

48 Art. 17 of the OPIC.

49 Denunciation shall be without prejudice to the continued application of the provisions of the OPIC to any communications submitted under Art. 5 or 12 or any inquiry initiated under Art. 13 before the effective date of denunciation. (OPIC Art. 22, para. 2)

50 OPIC Art. 22, para. 1.

51 Woldemichael, 2015, p. 81.

In general, communications procedures may be either individual<sup>52</sup> or collective<sup>53</sup>, but the OPIC recognises only individual communications procedures.

## **2.4. Individual communications procedures**

### *2.4.1. Submitting individuals*

An *Individual communications procedure* may be initiated by individuals or groups of individuals within the jurisdiction of a state party claiming to be victims of a violation by the state party of any of the rights set forth in the CRC – or its two substantive Protocols.<sup>54</sup> The term individual refers to children (and the representatives acting on their behalf) and those individuals who are not children (and the representatives acting on their behalf) at the time of submission but were victims of violation of their rights by the time they were children.<sup>55</sup> If the submission is made by representatives, it shall be accompanied by the express consent of the alleged victim unless a submission is required in the best interest of the child and thus can be evaluated without express consent.<sup>56</sup> Both individuals and representatives have the right to correspond directly with the Committee throughout the procedure.<sup>57</sup>

### *2.4.2. Interim measures*

Any time after the receipt of the communication and before a determination of the merits has been reached,<sup>58</sup> in case of a presumption that there is a possible, *irreparable damage* to the victim(s) of the alleged violation of the rights of the child, there is the possibility for the Committee, the working group, or the rapporteur (with the guidance of the Committee) to request, in *exceptional circumstances*, the state to take *interim measures* to avoid the irreparable damage.<sup>59</sup> The CRC Committee considers that *exceptional circumstances* refer to a grave impact that an action or omission by a state party can have on protected rights or on the eventual effect of a pending decision in a case or petition before the Committee.<sup>60</sup> Irreparable damage refers to a violation of rights which, owing to their nature, would not be susceptible to reparation, restoration, or adequate compensation.<sup>61</sup> Compliance with the interim measure shall be monitored by the Committee, working group, or rapporteur,<sup>62</sup> and the state party may

52 Individual communications procedures means that only individual victims or groups of victims are given an opportunity to present communications to the respective committee.

53 Collective communications allow other entities such as non-governmental organisations and/or national human rights institutions to bring communications on behalf of a group.

54 Art. 5 of the OPIC.

55 Woldemichael, 2015, p. 82.

56 Rules of Procedure, Rule 13.

57 Rules of Procedure, Rule 12.

58 Art. 6 of the OPIC.

59 Rules of Procedure, Rule 7, para. 1–2.

60 Guidelines for Interim measures under the OPIC para. 2.

61 *Ibid.*, para. 2.

62 Rules of Procedure, Rule 7, para. 4.

at any time request for the interim measure to be lifted if the state considers that it is no longer justified.<sup>63</sup> Furthermore, interim measures are two-sided because they are concomitantly *precautionary* and *protective*,<sup>64</sup> as their aim is to avoid irreparable harm and preserve the exercise of human rights (i.e. protective nature) and preserve the legal situation under consideration by the Committee (i.e. precautionary nature).

### 2.4.3. Admissibility

Following the receipt of the communication, the State Party *examines the admissibility* of the communication and decides on its inadmissibility according to the following criteria: if the communication is (I) anonymous; (II) not in writing; (III) constitutes an abuse of the rights of submission of such communications or is incompatible with the provisions of the CRC or its two substantive Protocols; (IV) the same matter has been or is being examined under another procedure or international investigation or settlement; (V) not all domestic remedies have been exhausted;<sup>65</sup> (VI) the communication is manifestly ill-founded or not sufficiently substantiated; (VII) the facts subject to the communication occurred prior to the entry into force of the OPIC for the state party concerned, unless those facts continued after that date; (VIII) the communication is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit.<sup>66</sup>

The Committee shall decide on the admissibility by a simple majority as quickly as possible,<sup>67</sup> and whenever the Committee decides that communication is inadmissible, it shall, without delay, communicate the reasoned decision to the state party concerned through the Secretary-General.<sup>68</sup> The Committee may review the decision on inadmissibility whenever it receives a submission indicating that the reasons for inadmissibility no longer apply.<sup>69</sup> As soon as the decision on admissibility is adopted, the Committee is obliged to confidentially transmit the communication to the concerned state party.<sup>70</sup> Afterwards, the state party has six months to submit a written explanation, clarification of the matter, and remedy (if any).<sup>71</sup>

63 Rules of Procedure, Rule 7, para. 5.

64 Guidelines for Interim measures under the OPIC para. 2.

65 This shall not be a rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief.

66 Art. 7 of the OPIC.

67 Rules of Procedure, Rule 20.

68 Rules of Procedure, Rule 21, para. 1.

69 Rules of Procedure, Rule 21, para. 2.

70 Art. 8, para. 1 of the OPIC.

71 Art. 8, para. 2 of the OPIC.



#### 2.4.4. *Transmission of communication: Friendly settlement and continuation of the procedure towards a decision on the merits*

After the transmission of the communication, there are two ways to continue the procedure, namely *friendly settlement*<sup>72</sup> or *the continuation of the procedure* in a direction in which the CRC Committee provides recommendations on the merits of the case, that is, consideration of the communication. A *Friendly settlement* shall be initiated at any time after the receipt of a communication and before reaching a determination on the merits on the basis of the consent of the parties, in a confidential manner, and without prejudice to the parties' submissions to the Committee.<sup>73</sup> The Committee shall make available its offices and designate one or more of its members to facilitate the negotiations.<sup>74</sup> The facilitation may be terminated at any time whenever the Committee concludes that the matter is not susceptible to reaching a resolution, or if any of the parties does not consent to its application, decides to discontinue it, or does not display the requisite will to reach a friendly settlement based on respect for the obligations set forth in the CRC or its two substantive Protocols.<sup>75</sup> A friendly settlement is reached when the parties expressly agree on its merits. After ascertaining the consent of the parties, the CRC Committee adopts the decision with a statement of the facts and of the solution.<sup>76</sup> If no friendly settlement is reached, the Committee continues with further examination of the communication.<sup>77</sup>

If there is no friendly settlement or the parties have no intention of starting a friendly settlement procedure, the Committee starts as soon as possible the *continuation of the procedure*, which involves the consideration and examination of the communication in light of all the documentation.<sup>78</sup> In the frame of this examination, the Committee shall at any time – before reaching a determination on the merits – consult or receive documentation from all other UN organs, bodies, specialised agencies, funds, programmes, and mechanisms, other treaty bodies instituted by international instruments and special procedures of the UN, other international organisations (e.g. from regional human rights systems), non-governmental organisations, national human rights institutions, other relevant specialised institutions mandated to promote and protect the rights of the child, and all relevant state institutions, agencies, or offices that may assist in the examination process.<sup>79</sup> The provision of documents and information does not mean that these parties would become parties to the proceedings. Whenever the reasons for submission for consideration

72 Art. 8 of the OPIC.

73 Rules of Procedure, Rule 25.

74 Art. 9 of the OPIC, and Rules of Procedure, Rule 25, paras. 2–3.

75 Rules of Procedure, Rule 25, para. 5.

76 Rules of Procedure, Rule 25, para. 6.

77 Rules of Procedure, Rule 25, para. 7.

78 Art. 10 of the OPIC.

79 Rules of Procedure, Rule 23, para. 1.

of the communication become moot under the CRC or its two substantive Protocols, the Committee may discontinue the consideration.<sup>80</sup>

After closing the examination phase, the Committee shall, without delay, transmit its views on the communication, together with the recommendations, to the parties concerned.<sup>81</sup> In the event that the Committee finds that a state party has violated its obligations under the CRC or its two substantive Protocols, it shall make recommendations on remedies for the alleged victims(s), such as, *inter alia*, rehabilitation, reparation, financial compensation, guarantee of non-repetition, request to prosecute the perpetrator(s), and indicate the time limit for their application. The Committee may also recommend that the state party take legislative, institutional, or any other kind of general measures to avoid the repetition of such violations.<sup>82</sup> Committee members who participated in the decision-making may request that the text of his/her individual opinion be appended to the Committee's views.<sup>83</sup>

#### 2.4.5. Decisions in individual communications procedures

*In summary, a submission of a communication may result in one of the following decisions:* (I) decision on inadmissibility; (II) decision closing the consideration of communication following a friendly settlement; (III) the Committee's view on the merits. Any decision of the Committee shall be written in accessible language and adapted, to the extent possible, to the age and maturity of individuals whose rights were violated.<sup>84</sup> No decision on the merits shall be concluded unless a real consideration of applicability and admissibility.

#### 2.4.6. Follow-up on individual communications procedures

In the follow-up phase, the views and recommendations adopted by the Committee shall be given due consideration by the state party, and the state party shall submit, within six months, a written response with information on any action taken and envisaged in light of the views and recommendations received.<sup>85</sup> After six months, the Committee may require the state party to submit information on the steps taken to remedy a breach of the rights of the child. The Committee also issues a follow-up progress report, with the first one ever having been issued on October 4, 2019,<sup>86</sup> and the latest one on February 29, 2024.<sup>87</sup> These reports examine the communications procedures submitted to the CRC Committee and evaluate them as follows:

80 Rules of Procedure, Rule 26.

81 Art. 10, para. 5 of the OPIC.

82 Rules of Procedure, Rule 27.

83 Rules of Procedure, Rule 24. It is important to note that the Committee may fix time limits for the submission of such individual opinions.

84 Rules of procedure, Rule 27, para. 1.

85 Art. 11 of the OPIC.

86 CRC/C/82/1.

87 CRC/C/95/2, CRC Committee: Follow-up Progress Report on Individual Communications Procedure.

- Compliant: The measures taken are satisfactory or largely satisfactory.
- Partial compliance: The measures taken are partially satisfactory and require additional information or actions.
- Noncompliance: The reply was received but the measures taken are not satisfactory, do not implement the views, or are irrelevant to the views.
- No reply: No cooperation or no reply was received.

### 2.5. *Inter-state complaint mechanism*

The inter-state complaint mechanism serves as a procedure for states to report to the CRC Committee alleged violations of children's rights committed by other states. This is a procedure in which state parties to the OPIC have considerable room for opt out, that is, the state parties are given the liberty to either accept or decline recognition of the competence of the CRC Committee to receive and consider *inter-state communications* with respect to the CRC or its two substantive Protocols.<sup>88</sup> The declaration can also be withdrawn at any time,<sup>89</sup> And the Committee shall not receive communications concerning a state party that has not made such a declaration, nor communications from a state party that has not made such a declaration.<sup>90</sup> The provisions of the OPIC concerning interstate communications also do not refer to the jurisdiction of the state parties, implying that such communication can be used to address extraterritorial violations of children's rights.<sup>91</sup>

To date, no inter-state communication has been initiated under the CRC. In theory, a government may initiate an inter-state communications against any other government that has given the Committee permission to receive and review these types of complaints. This permission shall be given when ratifying the OPIC, meaning that countries that have not ratified the OPIC do not have such opportunity. In the complaint, it must be specified which rights are being violated, which government is responsible, and the facts and circumstances around these violations. As with individual communications, governments can only be held responsible for failing to fulfil the obligations they have already accepted by ratifying the CRC or its two substantive Protocols.

### 2.6. *Inquiry procedure*

Unlike the inter-state complaint mechanism, where an express statement of the state party concerned is required to consider the complaint, an inquiry procedure is accepted upon a state party's ratification. The exception is if, at the time of signature or ratification of the OPIC, a state party declares that it does not recognise the competence of the Committee provided for initiating the inquiry procedure.<sup>92</sup>

<sup>88</sup> Woldemichael, 2015, p. 89–100; Art. 12, para. 1 of the OPIC.

<sup>89</sup> Art. 12, para. 2 of the OPIC.

<sup>90</sup> Art. 12, para. 3 of the OPIC.

<sup>91</sup> Woldemichael, 2015, p. 101.

<sup>92</sup> Art. 13, para. 7 of the OPIC.

Moreover, any state party that has made such a declaration has the opportunity to withdraw it by notifying the Secretary-General of the UN.

The *inquiry procedure for grave or systematic violation* is initiated when the CRC Committee receives reliable information indicating a grave and systematic violation of the rights set forth in the CRC or its two substantive Protocols.<sup>93</sup> The Secretary-General shall bring to the attention of the Committee any information that falls under an alleged grave or systematic violation.<sup>94</sup> Meanwhile, the Committee may preliminarily consider the reliability of the information brought to its attention under the inquiry procedure, and seek to obtain additional relevant information substantiating the facts of the situation.<sup>95</sup> The Committee then invites the concerned state party to cooperate in the examination of the information, and to submit observations without delay, and until the end of the examination process, with regards to the information that suggests the grave and systematic violation.<sup>96</sup> The Committee may decide to obtain additional information from the following: (I) representatives of the state parties concerned; (II) governmental organisations; (III) UN bodies, specialised agencies, funds, programmes, and mechanisms; (IV) international organisations, including from regional human rights systems; (V) national human rights institutions and other relevant specialised institutions mandated to promote and protect the rights of the child; (VI) non-governmental organisations; (VII) individuals, including children.<sup>97</sup> Based on the information received, the Committee is entitled to initiate an inquiry on its own initiative,<sup>98</sup> which may happen in a form of designating one or more of its members to conduct an inquiry and report urgently to the CRC Committee.

If necessary, the inquiry may include a visit to the concerned state party<sup>99</sup> and shall be conducted confidentially with a cooperative attitude.<sup>100</sup> During the visits, the designated member(s) of the Committee may conduct hearings to determine the facts or issues relevant to the inquiry.<sup>101</sup> If a child or children are heard, the members of the Committee shall guarantee child-sensitive procedures at hearings, and shall particularly ensure that the child(ren) is heard separately, that her/his/their views are given due weight in accordance with age and maturity,<sup>102</sup> and that her/his/their best interests are taken into paramount consideration every time. After examining the findings, the Committee shall transmit them through the Secretary-General to the concerned state party together with any comments or recommendations. The state party shall then submit its observations on the findings, comments, and recommendations as soon as

93 Art. 13 of the OPIC.

94 Rules of procedure, Rule 31, para. 1.

95 Rules of Procedure, Rule 34, para. 1.

96 Art 13, para. 1 of the OPIC.

97 Rules of Procedure, Rule 35, para. 3.

98 Rules of procedure, Rule 31, para. 2.

99 Art. 13, para. 2 of the OPIC.

100 Art. 13, para. 3 of the OPIC; Rules of Procedure, Rule 33.

101 Rules of Procedure, Rule 39, para. 1.

102 Rules of Procedure, Rule 39, para. 3.

possible, and not later than six months after receipt.<sup>103</sup> In frame of a follow-up to the comments and recommendations, the Committee may – if necessary and after the end of the six months waiting compliance period – invite the state party concerned to inform the Committee about the measures taken<sup>104</sup> and envisaged in response to the inquiry procedure.<sup>105</sup>

### **3. Legal representation and legal capacity of a child during procedures**

Currently, there is no provision in the OPIC that deals with the issue of legal representation or the legal capacity of a child in the procedures. Nevertheless, this question is essential, especially when considering individual communications procedures. During the drafting process of the OPIC,<sup>106</sup> state parties considered several options.<sup>107</sup> Some proposals put forward the restriction of legal representation,<sup>108</sup> while others suggested limiting access to the communications procedure for either children or their legal representatives, and some argued that a reference to national legislation should be made. The limitation of access to legal representatives would not consider the possibility of a conflict of interest between a child and a parent (legal guardian), and direct reference to national legislation would also raise further questions, as most jurisdictions limit the legal capacity of children to act and, as such, their individual access to domestic or international remedies. This could result in differential access for children under different jurisdictions which does not correspond to the aims of the CRC or the OPIC.

As of now, the OPIC merely requires the consent of individuals on whose behalf the complaint is submitted.<sup>109</sup> Meanwhile, the role of the Rules of Procedure is to prevent the manipulation of the child by those acting on his/her behalf,<sup>110</sup> and they do not deal separately with the legal representation or legal capacity of children; instead, and as just mentioned, the Rules only address the manipulation of children by declaring that the CRC Committee shall take all measures to ensure that children are not subject to improper pressure of inducement by those acting on their behalf.<sup>111</sup> Moreover, apart from the fact that the Rules of Procedure emphasise child-sensitive procedures and the views of children being given due weight in accordance with age and maturity, manipulation is not addressed otherwise. The proper participation or

103 Art. 13, para. 5 of the OPIC; Rules of Procedure, Rule 41, para 3.

104 If necessary, it may request further information regarding the measures taken.

105 Art. 14 of the OPIC.

106 See the part on the history of OPIC as well.

107 Beco, 2013, p. 380.

108 These proposals represented the lack of trust especially in the non-governmental organisations.

109 Art. 5, para. 3 of the OPIC.

110 Art. 3, para. 2 of the OPIC.

111 Rules of Procedure, Rule 1, para. 2.

representation of children remains an open question that requires (and shall give space to) an individual assessment and a case-by-case analysis to ensure proper and genuine representation and participation of children.

#### **4. Conclusions: pros and cons of the OPIC and possible amendments**

Some argue that the OPIC was a huge step towards promoting children's rights<sup>112</sup> and a success in making the UN treaty body system more complete and child-sensitive.<sup>113</sup> Countries that were more involved in the drafting and adoption of the OPIC ratified the instrument quickly, such as Thailand in 2012 and Slovakia in 2013.<sup>114</sup> The proposition and adoption of the OPIC served indeed as a symbolic step considering the international recognition of the rights of the child. Despite the relatively quick ratification by some countries, the ratification rate is still very low compared to the ratification rates of the CRC and its two substantive Protocols.

Considering this, one may argue that the OPIC did not live up to the expectations. Surely, the OPIC addressed the issue of access to remedy for children at an international level; however, when taking a closer look, one may also observe several questions that arise and may serve as a justification for the observed lower ratification rate. One of the main questions is whether the CRC Committee can be seen as a judicial body and, as such, entitled to interpret the provisions of the CRC and its two substantive Protocols as a court of the last instance. There is also the question of whether children are capable of bringing complaints on their own behalf and whether the safeguards that are in place are enough to guarantee that their participation is real and genuine and that their manipulation is excluded to a sufficient level, as is required by the CRC. It is also uncertain whether, at the international level, the presence of a conflict of interest between a child and its representative (i.e. parents, legal guardians, or anyone acting on their behalf) can be well-assessed, and whether the possibility of manipulation is excluded to a sufficient level. It also arises the question as to whether the OPIC is a meaningful advancement in acknowledging the special nature of children.<sup>115</sup> Despite the efforts and intentions to do so, the drafters of the

112 Fact Sheet No.7/Rev.1 (OHCHR, 2002) argues that it is through individual complaints that human rights are given concrete meaning. In the adjudication of individual cases, international norms that may otherwise seem general and abstract are put into practical effect. When applied to a personal real-life situation, the standards contained in international human rights treaties find their most direct application. The resulting body decisions may guide states, non-governmental organisations, and individuals in interpreting the contemporary meaning of the texts concerned.

113 The communication procedures established under other optional protocols are open to all individuals, including children. Nevertheless, none of these procedures were developed with the eyes for the special status of children, which was considered under the OPIC.

114 Key findings of the Roundtable discussion: Toward better implementation of the UNCRC through its third Optional Protocol on Communications Procedure, 2019, p. 7.

115 Woldemichael, 2015, p. 108.

OPIC were not entirely successful in creating a communications procedure adapted to the specificities of children and their rights.<sup>116</sup> This question can be further developed to determine whether every step of the entire procedure is designed to serve the best interests of a child. Indeed, there are a few references in the text to the best interests of the child, but little has been done to genuinely achieve this.<sup>117</sup>

Art. 21 of the OPIC leaves the possibility for amendments to state parties, which also suggests the dissatisfaction of drafters with its character tailored to children and the intention to offer space for improvement. Moreover, Art. 21 provides that any state party may propose an amendment to the OPIC and submit it to the Secretary-General of the UN, who shall then communicate any proposed amendments to state parties with a request to be notified whether they favour a meeting of state parties for the purpose of considering and deciding upon the proposal. In the event that, within four months of the date of such communication, at least one-third of the state parties favour such a meeting, the Secretary-General shall convene the meeting under the auspices of the UN. Any amendment adopted by a majority of the two-thirds of the state parties present and voting shall be submitted by the Secretary-General to the General Assembly for approval and, thereafter, to all state parties for acceptance. The amendment shall enter into force on the 30th day after the number of instruments of acceptance deposited reaches two-thirds of the number of state parties on the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any state party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only to those state parties that have accepted it.

From the nature of the implementation of children's rights, there is the need to consider characteristics such as child-sensitivity, interdisciplinarity, thorough understanding of the child's best interests in the given cultural environment, case-by-case analysis, genuine child participation, child-centred procedures, and so on. These characteristics are more likely to be met on a level that is closer to the child's everyday life, meaning that *the OPIC cannot be a substitute for a well-functioning, child-friendly remedy system on a national level*. Art. 4 of the CRC requires state parties to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the CRC, which also includes a remedy system accessible to children and that considers the speciality of their rights at the national level. This is an aim that many state parties should approach, and an implementation gap that shall be narrowed down step-by-step, first by strengthening the inner remedy mechanisms.

116 Beco, 2013, p. 386.

117 *Ibid.*

## Bibliography

- Beco, G. (2013) 'The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: Good News', *Human Rights Law Review*, 2013/2, pp. 367-387.
- Child Rights Connect: Key Findings of the Roundtable Discussion: Towards Better Implementation of the UN CRC through its Third Optional Protocol on a Communications Procedure, 30 April 2019, Palais des Nations, Geneva Switzerland. Available at: [https://www.childrightsconnect.org/wp-content/uploads/2019/08/report\\_opic\\_roundtable\\_discussion.pdf](https://www.childrightsconnect.org/wp-content/uploads/2019/08/report_opic_roundtable_discussion.pdf) (Accessed: January 30, 2023).
- CRC/C/62/3, CRC Committee: Rules of Procedure under the Optional protocol to the Convention on the Rights of the Child on a communications procedure. Available at: <https://www.ohchr.org/en/treaty-bodies/crc/rules-procedure-and-working-methods> (Accessed: January 2024).
- Fact Sheet No.7/Rev.1 (OHCHR, 2002), Complaints Procedure. Available at: <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet7Rev.1en.pdf>.
- Guidelines for Interim measures under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, adopted by the Committee on the Rights of the Child at its 80th session (January 14 to February 1, 2019).
- Hrabar, D. (2017), 'Bridging the Non-Protection of Children's Rights Through the Optional Protocol to the CRC on Communications Procedure and a Future European Court', *Croatian Academy of Legal Science Yearbook* 8, no. Special Issue, pp. 13-34.
- Johansson, L. (2015) 'The Third Optional Protocol to the International Convention on the Rights of the Child: A Success or a Failure for the Enforcement of Children's Right?', *Human Rights Law Review*, QMHRR 2(1), pp. 54-83.
- Key Findings of the Roundtable Discussion Towards Better Implementation of the UN CRC through its Third Optional Protocol on a Communications Procedure Tuesday, 30 April 2019, Palais des Nations, Geneva, Switzerland. Available at: [https://opic.childrightsconnect.org/wp-content/uploads/2019/09/REPORT\\_OPIC\\_Roundtable\\_Discussion.pdf](https://opic.childrightsconnect.org/wp-content/uploads/2019/09/REPORT_OPIC_Roundtable_Discussion.pdf). (Accessed: 10 March 2024).
- Kilkelly, U. and Liefwaard, T. (eds.) (2019) *International Human Rights of Children*, Springer.
- Lee, Y. (2010), 'Communications procedure under the Convention on the Rights of the Child: 3<sup>rd</sup> Optional Protocol', *International Journal of Children's Rights*, 2018/4, pp.567-584.
- Liefwaard, T. and Doek, J.E. (eds.) (2015) *Litigating the Rights of the Child. The UN Convention on the Rights of the Child in Domestic and International Jurisprudence*, Springer.



- Optional Protocol to the Convention on the Rights of the Child on Communications Procedure, adopted 19 December 2011, General Assembly Resolution of 66/138. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-communications> (Accessed: 10 March 2024).
- Phillips, C. (2013), *Optional Protocol to the CRC on a communications procedure*, International Association of Youth and Family Judges. [www.aimjf.org](http://www.aimjf.org).
- Verheyde M. and Goerdertier G. (2006) 'Commentary on the United Nations Convention on the Rights of the Child: Article 43-45, the UN Committee on the Rights of the Child', Martinus Nijhoff Publishers.
- Woldemichael, Z.S. (2015) 'Communications Procedure under the 3<sup>rd</sup> Optional Protocol to the Convention on the Rights of the Child: A Critical Assessment', *Jimma University Journal of Law*, pp.78-109.