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### The Child's Path to International Justice

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#### ABSTRACT

This paper examines key issues and challenges in the development of a complaint procedure for children, that has resulted in the 3<sup>rd</sup> Optional Protocol to the CRC on a Communications Procedure, in a historical context. The ultimate objective is to advance the application of the OP3 as an essential instrument for consolidation of fundamental rights of children under international law. A literature review on the emergence of the right of petition in the context of international human rights law was undertaken showing the link to the development of the new CRC complaints procedure. Reports of the Working Group tasked with drafting the OP were reviewed along with other literature and analysis related to OP3. The nascent jurisprudence under the OP3, namely published observations and decisions of the CRC Committee on early cases, was examined.

Early use of the OP3 validates some of the concerns expressed in the drafting of the Protocol, such as the possibility of limited access by children and the use of the mechanism by adults to represent their own interests. While evidence shows that in situations indicative of the latter, these were countered through the rigorous interpretation of the CRC provisions, in the case of the former, early experience shows that the level of access and participation of children or use of child specific measures is no different than other communication procedures not specific to children. Analysis of the first cases also reveals a lack knowledge for submission of petitions with negative impact on admissibility.

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## Introduction

A new milestone in the advancement of children's human rights has been achieved with the adoption of the third Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (United Nations General Assembly (U.N.G.A.), 2011a) (hereafter the OP3). The OP3 solidifies children's right of individual petition under international law for redress of violations of their rights. The establishment of a specific quasi-judicial body to examine children's complaints of breaches of their rights forms part of the historical struggle of the individual for recognition of fundamental human rights under international law. (Trindade, 2011). It magnifies the continued relevance and need to ensure measures for claim and delivery of justice for all groups of humanity. Prior to adoption of the OP3, the Convention on the Rights of the Child (CRC) (United Nations (U.N.), 1989) was the only core human rights treaty without a petition measure through which the subjects of the rights enshrined, (i.e., children), could access justice at international level.

The OP3 is the first UN level mechanism specifically aimed at receiving children's communications, even while such a mechanism was available at the African regional level. (Organization of African Unity (OAU), 1999) The campaign for its development was years in the making, spearheaded by *Kindernothilfe*, the Working Group of the NGO Group for the CRC, the Committee on the Rights of the Child, and the Office of the High Commissioner of Human Rights among other children's rights advocates within and outside the UN and civil society.<sup>2</sup> Working through an Open-Ended Working Group (WG) of States and other experts, established by the Human Rights Council in 2009, the third OP to the CRC was elaborated and adopted by the UN General Assembly in December 2011. (U.N.G.A., 2011a) It opened for signature on 28 February 2012 and came into force on April 14, 2014. To date, 44 States Parties have ratified the Protocol and the Committee has begun to examine and publish decisions on communications received, signaling that, the exercise of the right of petition, by children and or their representatives under the OP3, is well underway (U.N.G.A., 2012).

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<sup>2</sup> Founding organizations included Save the Children, World Vision, World Organization Against Torture, SOS Kinderdorf, The Global Initiative to End All Corporal Punishment of Children and Child Rights International Network. See: (NGO Group for the CRC, 2008)

## **Purpose and Objective**

This paper draws on other research by the author on exhaustion of remedy (Madriñán, 2012) to set the discussion, on a communication procedure for children, in the historical context of the pursuit of the individual to the right of petition for rights under international law. It then examines key issues and obstacles in the development of a complaint procedure for children that has resulted in the 3<sup>rd</sup> Optional Protocol to the Convention of the Rights of the Child on a Communications Procedure. It discusses key debates of the Working Group established by the Human Rights Council and other contributing experts (Newell, 2009) regarding OP3 provisions and the expectations that the instrument would push normative boundaries to maximize effective reach for children and their representatives to file complaints at international level for State acts or omissions of CRC rights. Considering early apprehensions, it reviews the nascent jurisprudence relative to petitions filed under the OP3 mechanism; namely the observations and decisions of the CRC Committee on early cases, for which the Committee has published its views and recommendations. (U.N.G.A., 2012) The ultimate objective of the paper is to advance the application of the OP3 as an essential instrument for consolidation of fundamental rights of children under international law, based on learning from adjudicated petitions.

## **Materials and Methods**

An in-depth review was conducted of documents related to the rise of the right of individual petition in international law from which those relevant to human rights petitions were selected. A literature review was undertaken of the reports and submissions of the Working Group (WG) tasked with drafting the OP3 over the period 2009 to 2012. Commentary from other organizations and child advocates on drafts prepared by the WG and other key documents with analysis related to OP3 provisions and observations, were reviewed. Analysis was made of the nascent jurisprudence relative to 13 cases filed under the OP3 mechanism to the CRC (at time of writing) and the published observations, decisions and recommendations of the CRC Committee on these early cases.

## **Key Findings and Discussion**

### **Precedents to recognition of the child as a subject of international law**

The trajectory of the consolidation of the protection of fundamental rights of the human person is punctuated by major shifts in the theoretical concepts that govern the moral and legal foundations of human society. Notions regarding the primary organization and authority of the institutions of society have changed over centuries, gradually shifting from a grounding in theistic and natural law concepts (Neff, 2006) to recognition of the State as the sovereign legal entity around which the global community is organized (Hampton, 1986).

Until the eighteenth century it was widely held that the sovereign state was the only international legal entity with rights and obligations under international law. Its authority to exercise permanent and effective control over designated territory and the population within it meant that individuals were recognized to be within the jurisdiction of the State, solely governed by and subject to its laws (Hampton, 1986). The ability to use its authority to create internal legal order gave the State exclusive standing to assert rights and confer and incur obligations through external international relations (Cassese, 2005). The legal personality of the State was thus founded on meeting the conditions of statehood, territorial control and legal sovereign authority over its subjects.

Within this order, males of higher social classes were the sole conduits through whom the order and security provided by sovereigns was established, dispensed and upheld. Children in this regard were the legal property of and subject to authority of parents (male). They received extremely harsh and often cruel treatment as prior to the 17<sup>th</sup> century the concept of childhood was nonexistent and understanding about the nature of childhood lacking (Aries, 1962). Through the 18<sup>th</sup> century, even where signs of parental care and concern for children's welfare began to grow, instances of concern for the child were at first limited to infancy from where children emerged to strict discipline and the expectation that they would contribute to adult work (Pollock, 1983).

The rapid economic, political and social changes that took place over the nineteenth century consolidated State powers. Industrialization injected an impetus for movement and exchange across countries which gave rise to a multitude of international arrangements and pacts and further strengthened the position of States and their relationships (Neff, 2006). For example, States established criteria for recognizing each other's claims of territory as they expanded imperial power and forged new agreements and conventions to regulate their

relations, including in war (Craven, 2015). Economic changes also precipitated demographic growth, greater urbanization and the rise of new social and religious structures that introduced a steady transformation and social change, including in concepts of childhood. While less repressive modes of child rearing and education were evident in the 18<sup>th</sup> century and the period of enlightenment, the rise of industrialization brought children, particularly children of the poor, out from farms and homes into deplorable work conditions in the expanding mills, quarries and factories (Pollock, 1983).

Despite the development of new pacts and alliances and the rapid shifts in social and economic structures, aggressive acts between States grew, culminating in World War I. The conduct of World War I, with little regard for the human condition and aided by the use of new weapons of war, resulted in unprecedented suffering and the death of an estimated 40 million people (Mougel, 2011). The war (where hundreds of thousands of children took part), highlighted the urgent need for establishing global negotiation mechanisms for coordination and the maintenance of peace and world order.<sup>3</sup> Following the end of World War I, as an outcome of the Paris Peace Conference, the League of Nations (LoN) was established as a mechanism to “promote international co-operation and to achieve international peace and security” (The Covenant of the League of Nations, 1924). Although intended to prevent worldwide conflict, the League was unable to contain the growing expansionist nationalism<sup>4</sup> that within decades led to World War II and provided further evidence of man’s capacity for self-annihilation.

As the atrocities of the Second World War unfolded, efforts accelerated to create a successor organization to the LoN, more effective at restraining belligerent expressions of State sovereignty (Cassese, 2005). This was accompanied by a rising level of concern to protect the dignity and freedom of the individual as a direct subject of international law with a concomitant interest in ensuring the codification of universal human rights and freedoms (Sohn, 1982). A concern for the plight of children was embedded visibly in the social reform movements spurred by a public outcry against the suffering, misery and social injustice that accompanied industrialization as well as the ravages of war. Numerous reforms were achieved in the 19<sup>th</sup> century, including an impactful 1833 Factory Law in Great Britain that regulated the age and working hours of children for example (Cunningham & Viazso, 1996).

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<sup>3</sup> For example, 250,000 British boy children took part

<sup>4</sup> The 1931 Japanese invasion of Manchuria and China

In the context of growing calls for social reform States agreed to the creation of the United Nations. which explicitly set out in its Charter(U.N., 1945) “the respect for human rights and fundamental freedoms for all without distinction” (U.N., 1945). In its Charter, the promotion and protection of human rights was a key principle and purpose (Morsink, 1999). In this regard, the moral outrage generated by the treatment of human beings in the World Wars increased the disposition of many States (Morsink, 1999) to recognize individuals, and not only other States, as subjects under International law. The UN Charter mandated the promotion of human rights (Art. 68), paving the way for the articulation of fundamental rights and freedoms and their proclamation in the Universal Declaration of Human Rights (UDHR) (U.N.G.A., 1948) and in the creation of international law from that time forward (Oppenheim, 1955).

### **Right to claim rights at international level: some individuals first**

International law was radically changed with recognition of the inherent rights of human beings and the focus on protection of the dignity of the human being. Following WWII, the “...[r]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world” was broadly asserted (U.N.G.A., 1948). The international community declared that the treatment of the human person was a matter of legitimate concern beyond the boundaries of the State. At the same time, it was evident that to protect the fundamental rights of human beings, States must recognize the legal personality and procedural capacity of the individual to exercise and claim rights under international law. (Trindade, 2008) Thus, setting out the rights incumbent on all human beings, stipulating the responsibility of the State, and elaborating the means and processes for the claim of human rights in international law have been at the core of the struggle to empower the individual in her relationship with the State.

Since early international peace-building initiatives, the work to codify and give legal force to human rights has continued. Nine core human rights instruments (OHCHR, 2014) and scores of other international instruments exist to promote and protect human rights. Human rights treaties and conventions generally include provisions that establish monitoring and enforcement mechanisms (Steiner, Alston, & Goodman, 2007). Treaties may specifically provide communication procedures that recognize the individual’s right of petition for rights violated through direct acts or omissions of the State, where access to local remedy is not

available (Tomuschat, 2003). Through the elaboration of international human rights standards in law and the creation of mechanisms for individual petition for their implementation and enforcement,

*The individual recovered his presence, for the vindication of his rights, at international level, presence which had been denied to him in the historical process of formation of the modern State...* (Trindade, 2011)

Complaints procedures relevant to the rights recognized under a specific treaty may be included in the text at the time of drafting and States must expressly agree to be bound to these upon ratification of the treaty (Harrington, 2012). Alternatively, a procedure for individual communication on violations of rights set out in the treaty may be established by means of a separate Optional Protocol. Both have a common outcome: to enhance recognition of the individual's claim to rights through monitoring and enforcement through the international justice system (Trindade, 2011).

As described above, the body of international human rights law, which codifies rights and creates methods for international enforcement, is a product of recent history arising after WWII. The development of core human rights instruments represent decades of intense deliberations, controversy and opposition surmounted through international law-making processes (International Network for Economic, Social & Cultural Rights (ESCR-Net), 2017). However, today, as in the past, the international community continues to identify the need for further articulation of those rights in law for persons and groups not fully protected by existing human rights instruments. Thus international human rights mechanisms have continued to grow. New measures for promotion and enforcement of rights have evolved since the adoption of the two Covenants that emanated separately from the UDHR to codify civil and political rights, and economic, social and cultural rights.(U.N.G.A., 1966);<sup>5</sup> the relevant example for this paper being the Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure

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<sup>5</sup> For example, the Convention on the Elimination of All Forms of Discrimination against Women (U.N.G.A., 1979), the Convention on the Rights of Persons with Disabilities (U.N.G.A., 2007), and its Optional Protocol (U.N.G.A., 2007), the Convention on the Rights of All Migrant Workers and member of their Families (U.N.G.A., 1990) and the Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (U.N.G.A., 2011a)

(U.N.G.A., 2011a).

While the international legal doctrine conferring rights directly on the individual continues to evolve increasing the protection of individual rights and freedoms for all the groups of humanity, the path to realization of rights is fraught with obstacles. Records of treaty ratifications and the reservations of States Parties (Schabas, 1995, 1996) as well as case-law arising from human rights enforcement mechanisms (“Jurisprudence,” 2019) attest that the full recognition of the legal status of the individual and her claim to inherent rights at international level is by no means widely accepted. As this platform for redress of rights violations was historically available exclusively to States and international organizations, not unexpectedly, the claim of the individual in this space is often contested (Cassese, 2005). That is, enforcement measures that examine State acts alleged to infringe on individual rights and freedoms as accorded by international law, are often considered to be at odds with classic notions of sovereign authority of the State, despite the fact that these mechanisms bestowing such a capacity on the individual are based on treaties concluded and ratified by States themselves (Cassese, 2005).

Sohn observes,

*[...] human rights.... deprived the sovereign States of the lordly privilege of being the sole possessors of rights under international law. States had to concede to ordinary human beings the status of subjects of international law to concede that individuals are no longer objects, mere pawns in the hands of States. (Sohn, 1982)*

The recognition of the legal personality and inherent rights and freedoms of all human beings in international human rights law brought two fundamental shifts in international society: (i) by obligating the State to promote and respect the rights of the individual, and (ii) by creating avenues for redress for individuals whose rights had been violated without domestic remedy. As Shelton notes, “[...] International human rights law has reduced the content of the reserved domain of state sovereignty. Today, no state can credibly claim that its treatment of those within its territory or jurisdiction is exclusively an internal matter” (Shelton, 2015)



### **The child as a subject of international law**

As seen above, changes in the concepts of childhood moved from indifference to greater concern with child welfare and development, with some scholars observing that it has resulted in an “obsessive love” manifested in increased surveillance and control of children in the adult world (Aries, 1962). Reflecting a new understanding of childhood, the growing social reform movements of the 19<sup>th</sup> and early 20<sup>th</sup> centuries provided for the welfare of the child in early covenants including the UDHR (U.N.G.A., 1948). Yet, it is only toward the end of the twentieth century that this is transformed and articulated as specific rights of the child, set out in the Convention on the Rights of the Child (CRC). In the CRC, the status of the legal personality of the child and the rights that attach to that status are recognized in international law (U.N., 1989).

As the most comprehensive human rights treaty, the CRC integrates and adapts the broad range of rights stipulated more generally in the other international human rights instruments, while also uniquely setting out rights specifically relevant for the child such as the right of play (Art. 31) and care (Art. 18) (Kilkelly, 2010). The Convention also introduces to international law the concept of consideration for the evolving capacity of the child (Art. 5) (Lansdown, 2005). The CRC thus attests the autonomous rights of the child, and affirms the relationship between human rights norms and the indivisibility of children’s rights (Van Bueren, 1998). The CRC, like other specialized human rights treaties that address social, economic and political disadvantages that particular groups of society sustain due to their status, (e.g., disabilities, minorities, women), underscores that universal rights accorded by international human rights law do not translate automatically to benefit the most vulnerable.

As we have learned over time, the inequitable status of groups in society is often structurally buttressed by socio-legal and economic regimes. Children, due to their dependent status, have traditionally been conceived of as wards of the State, family and/or institutions of society; sheltered in what has been called a ‘tutelary’ relationship (Van Bueren, 1998; Bourgogue-Larsen & De Torres, 2011). The Convention’s recognition of the independent legal status of the child requires State Parties and society to accept a new relationship with the child that this legal status portends. It challenges entrenched constructs in the social order, such as the norms, practices and structural relationships that have upheld the unequal status of the child in society and obstructed realization of the child’s rights (Van Bueren, 1998).

Embedded in the movement for recognition of human rights that gained traction in the mid twentieth century, the elaboration of international human rights law had a reinforcing effect toward recognizing the autonomy of the child as a rights holder (Buck, 2011). Yet, while the rapid and near universal ratification of the CRC was unprecedented in the treaty adoption processes of the international community, the Convention was the only core international human rights treaty that did not provide for a communications procedure for children to have their rights vindicated. It is reported that the working group drafting the Convention, which worked on the basis of consensus, (Doek & Cantwell, 1992) was concerned that inclusion of such a procedure was controversial. They feared it would jeopardize adoption of the CRC, which was already ten years in the making (Lee, 2010; Payandeh, 2014).

The promotion and monitoring of the implementation of the Convention is thus undertaken solely by the Committee on the Rights of the Child, which was established by the Convention (Art. 43) and is composed of 18 independent experts. The Committee receives Periodic Reports that States Parties are required to submit every 5 years (Art. 44) after their initial report. It engages in dialogue with delegations of States Parties and issues guidance and recommendations in the form of concluding observations (Doek, 2003). It also develops General Comments interpreting the CRC treaty provisions and appoints Special Rapporteurs for development and promotion of CRC norms. These are the measures through which the rights of the child are promoted and the implementation by States Parties is supported and monitored.

A study conducted by the UNICEF Innocenti Research Center on progress in implementation of the Convention by States Parties, reported on the extensive and substantial legislative and institutional reforms that give effect to Convention rights among a group of States Parties, as well as the increased awareness and participation of civil society and children in promotion of child rights.(Innocenti Research Center, 2007) Similarly others have noted the far-reaching impact of the Convention through the incorporation of its principles in a wide range of national and regional judicial, administrative and policy realms, which provide a supplementary force for realization of children's CRC rights (Kilkelly, 2011).

Despite these achievements, evidence of wide spread breaches of children's rights (The International NGO Council on Violence against Children, 2016), weak-compliance with reporting obligations ("Jurisprudence," 2019; Bayefsky, 2001), and in harmonization of national structures for application of the Convention result in inadequate or lack of national remedies

(Child Rights International Network (CRIN), 2018b)<sup>6</sup> for children. This attests the need for a form of external appeal for vindication of children's rights, as provided for by other core international human rights treaties. Child advocates have noted that establishing an international mechanism for children to bring complaints about violations of their CRC rights could indeed encourage States to improve or develop appropriate national remedies for children (Simmons, 2009). Indeed theorists who have studied the dynamic of international norm adoption and compliance by States have proposed a spiral model of activation through the process of: domestic complaints, concession through adoption of treaties to assuage criticism, and gradual internalization of treaty norms through their persistent use as referents (Risse-Kappen, Ropp, & Sikkink, 1999). Others postulate that human rights practices do not improve on their own but rather through tangible enforcement efforts of the international community such as, for example, the reward of preferential trade agreements (Hafner-Burton & Tsutsui, 2005).

Evidence shows the overall number of cases related to breaches of children's rights filed under other international human rights mechanisms is as low as two percent (Langford & Clark, 2010a). This suggests a limited use on behalf of children of existing UN treaty body communications procedures for complaint and vindication of children's rights at international level.

### **Giving effect to CRC rights: developing a communications procedure for children**

In its General Comment No 5, the CRC Committee noted that "for rights to have meaning, effective remedies must be available to redress violations".(Committee on the Rights of the Child (CRC), 2003) However, a look at the record of reservations introduced by States at the time of CRC ratification (Schabas, 1997), indicates some of the challenges that have impeded implementation of the Convention from the start. They have hindered establishment of national procedures to remedy violations of children's rights and generally delayed consideration of a CRC petition procedure. For example, in the negotiations leading to the drafting the OP3, some States opined that a new petition mechanism for children would be a duplication of mechanisms already existing and accessible to them under other HR treaties, while others proposed that children should be represented by parents (De Beco, 2013).

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<sup>6</sup> (CRIN, 2018b) shows globally the CRC has not always fared well in legal decisions

By authorizing the establishment of an open-ended working group ‘to explore the possibility’ of a mechanism for children to petition to the CRC Committee, the Human Rights Council (HRC) signaled its recognition of the possible need for a communications procedure under the CRC, but initially only as a possibility (Doek, 2016). A working group (WG) first met in December 2009. A large number of States participated as well as the Chair and Vice Chair of the CRC Committee, the NGO Group for the CRC and representatives of the Office of the High Commissioner for Human Rights, all of which made favorable representations. (Working Group on an Optional Protocol to the Convention on the Rights of the Child, 2011)<sup>7</sup>

In its report to the HR Council, the WG indicated its disposition to draft a communications protocol to the CRC, following which the HRC tasked the ‘Working Group on an optional protocol to the CRC’ to provide a communication procedure, and prepare a proposal for a draft optional protocol. The first articulation of the key elements that would be relevant to the new communications procedure to the CRC were presented by the Chair of the WG at an experts’ meeting, following which the first proposal for a communications procedure was made in September 2010. (U.N.G.A., 2010) After a detailed review, with involvement from the High Commissioner for Human Rights, detailed revisions were proposed to the WG for further development of the draft protocol. (U.N.G.A., 2011)

### **Same but different: provisions favorable for children**

The ensuing process exposed diverse views among the group and a lack of consensus on various key issues. This generated a sense of urgency for moving forward, as the stipulated timeframe and mandate of the Working Group approached. (U.N.G.A., 2011b) This imminent deadline drove the Group toward compromises on a number of key provisions that some representatives had vigorously sought to secure.

From the onset of the initial stages of the drafting process, the Chair of the Working Group noted that the OP3 would be aligned with the rules, procedures and common standards for communications to international treaty bodies. (U.N.G.A., 2011b) While acknowledging the importance of adherence to human rights standards, this position disappointed experts, NGOs and others who had advocated for inclusion of provisions uniquely relevant to the status of the child that would have maximized the effectiveness of

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<sup>7</sup> For the full records of the negotiations see (Working Group on an Optional Protocol to the Convention on the Rights of the Child, 2011) Sessions 1 and 2

the complaint mechanism for children. (NGO Group for the CRC, 2010)

Working on a consensus basis, the Working Group thus agreed to a draft optional protocol that reflected innovative elements but also resulted in significant compromises (Lee, 2010; Langford & Clark, 2011). A final draft was presented and adopted by the Human Rights Council on June 9, 2011 (U.N.G.A., 2011a) and opened for signature following adoption by the General Assembly on December 19 of that same year (U.N.G.A., 2012).

Detailed discussions of the final provisions have been undertaken by various authors (Langford & Clark, 2010b) (nb., a full summary of some of key debates is presented in **Annex 3**) but three contentious issues are mentioned here:

- i. A provision for collective communications was omitted. This provision would have eliminated the requirement for identification of an individual child victim and would have enabled the Committee to also receive accumulated victim evidence, such as in cases of victims of child pornography where identification of individual children may not be possible; (U.N.G.A., 2011b), (Newell, 2010)
- ii. The option for States to declare at the time of signature or ratification whether they recognize the competence of the Committee to examine and inquire regarding information of grave and systematic child rights violations Art 13(7) was included;
- iii. The option for children and/or their representatives to submit verbal communications was removed in the final negotiations of the OP3 drafting process, (U.N.G.A., 2011b).

As noted, the rules and regulations applicable to the CRC Committee's review of OP3 petitions adhere to normative standards of international human rights law and manifest those found in other treaty communications procedures. (International Commission of Jurists (ICJ), 2018) While several much anticipated child specific provisions were excluded, comparisons of the norms applicable to complaint mechanisms of core international human rights treaties with the CRC petition mechanism, also highlight differences aimed at making the procedure more effective for children. (CRIN, 2018a)

Importantly, for example, the OP3 requires application of the principle of 'best interest of the child' (art.2); it provides for the child's views to be given due weight and consideration according to the child's age and maturity (art.2), and guarantees the use of child sensitive Rules of Procedures by the Committee (art.3). As a result, children who at national level are unsuccessful in obtaining remedies for violations of their rights can petition for their cases to

be heard by the international quasi-judicial body specialized in child rights through processes and procedures that are both normative and specific to their needs.

The CRC Committee, as stipulated in the law of treaties, may only receive petitions from children and/or their representatives once the State becomes party to the OP3 through formal accession or ratification, at which time it becomes binding (CRIN, 2018). After the State has accepted the competence of the Committee to receive petitions from its citizens, a petitioner may file a complaint to the CRC Committee for breaches of CRC rights, ensuring it meets the conditions set out for exercising the right of individual complaint under the Protocol.

Historically the concern noted with regard to the extension of international legal protection for individuals has been that could threaten the integrity of national legal systems and authority of the State by encouraging aggrieved citizens to take recourse externally rather than to seek redress within the jurisdiction of their own State. This has been partly allayed through the established principles, standards and rules and procedures (OHCHR, 2013) applicable to quasi-judicial and judicial individual petitions and frame consideration of individual claims.

Despite such conditions, studies of the international treaty system indicate a continued reluctance by States to recognize the individual right of petition at international level, as a large number of States ratify human rights treaties without ratifying the complaints procedures associated with them (Bayefsky, 2001). For example, this is the case for 66% of states who have ratified the Convention Against Torture (U.N., 1984) (CAT) and 92% for the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (U.N.G.A., 1979; Bayefsky, 2001).

In the case of the OP3, since coming into force in 2014, the pace of ratification has been slow although a few select States, such as Thailand (25 September 2012), were on the forefront of ratification. Forty four of 196 States Party to the Convention on the Rights of the Child, (U.N.G.A., 2012) (i.e., only 22%), have ratified or acceded to the CRC protocol on a communication procedure, although the CRC is otherwise the most widely ratified human rights treaty in history, adopted by all nations except the United States.

States Parties to the OP3 legally recognize the competence of the CRC Committee to examine 'communications by or on behalf of an individual or group of individuals within their jurisdiction alleged to be victims of a violation by that State Party of any of the rights set forth'

(Art 5.1) in the CRC and Optional Protocols. In fulfilling the functions thus conferred, the Committee is guided by the principles, rules and measures provided for by the OP3. As a *quasi-judicial* human rights body, it ascertains facts, draws conclusions and makes recommendations as a base for action, but does not have the power to make legally binding decisions (ICJ, 2018). Thus in interpreting the rights and obligations under the CRC, the Committee makes use of legal methods of interpretation to achieve legitimate and reproducible views upon which arguments are based and in this way contributes to extend the body of jurisprudence on the application of child rights and the rule of law for children at national, regional and international level (Mechlem, 2009).

Although significant advances have been made by States to harmonize domestic legislation with the CRC, many gaps still exist that leave children legally unprotected (Lundy, Kilkelly, & Byrne, 2013). All rights enshrined in the Convention may not be recognized in national law. or other impediments may exist to justiciability or administrative solution at national level for violations against children. Of note in this regard, is that children's access to domestic administrative and legislative organs of the State are often limited, reflecting the social construction of child protection which recognizes the family as the basic unit of society and the natural environment for the wellbeing of the child (Van Bueren, 1998). Thus States may situate decisions regarding the child's welfare almost exclusively in the hands of parents (Van Bueren, 1998).

This structure is reflected in legislative approaches where children and women's issues, seen as coterminous, are placed together within a separate part of the judicial structure and addressed as pertaining to the sphere of personal relationships and private life and thus under family law, rather than as a legal concern bearing on the whole of society (Van Bueren, 1998). The historical bifurcation of social life between the private sphere (revolving around domestic life) and the public sphere (the realm engaging broader social concerns that is reflected in the legal structure,) results in marginalizing children issues narrowly to within the family and the sphere of private family law (Van Bueren, 1998). In instances where the State deems the family unable to protect the child it can act as *in loco parentis* making decisions regarding the child as subject of state protective intervention (Van Bueren, 1998).

Carney explains the triangle as follows:

*Children's law necessarily balances the interests (social claims) of three stakeholders: the independent interest of the child (in a safe, supportive environment which respects appropriate 'choice rights'), the family (through deference towards its autonomy in childrearing), and the state (with its historic parens patriae role of being the parent of last resort and protector of dependent vulnerable people. Not all these interests, are appropriately recognized by law...(Carney, 1995)*

The constructs of the legal and administrative systems of many States limit realization of child rights, (CRIN, 2016) to an extent mirroring the historical juridical position of the individual under tutelage of the State. That is, often the child has no direct access to the law since by virtue of her relative state of dependence she is represented by family or the sovereign State as the primary protectors of her rights and interests, much as the individual was under classical international law (Van Bueren, 1998). Therefore, while international human rights law and more specifically the CRC recognizes the child as a subject of international law, the legal and administrative structures of many State Parties do not fully reflect this (CRIN, 2016). As can be seen, the path that child petitioners and or their representatives travel to move a grievance from the labyrinth of domestic legal systems to reach international human rights enforcement structures such as the OP3 is a long and complex one as the integration by States to incorporate and interpret international child rights law varies and is reflected to different degrees and in different ways<sup>8</sup> (Grover, 2010).

### **International justice at work: learning from initial cases**

On having reached the CRC Committee but prior to examination on the merits of the communications, the procedural task in relation to such a petition is for this organ to assess if the various requirements relevant to the OP3 have been met or can be met given the status of the child in the law of the State. Protocol requirements set out in the Rules of Procedure (CRC, 2013) include those noted in the comparison table above. These are, among others, a determination of (i) whether the petition is in the best interest of the child or brought under improper pressure (Rule 13.2), (ii) if the communication is sufficiently substantiated (Rule

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<sup>8</sup> For seminal and illustrative cases see: (Grover, 2010)



16.3(f)), (iii) if submission is by a permissible author (Rule 12), and (iv) if the time limit has been observed (Rule 16.3(j)).

A particularly important aspect at the procedural stage relates to the availability of and access to domestic remedies in light of the rights guaranteed by the CRC, and whether or not the remedies are appropriate and effective considering the specific conditions that require special protection of the child (Bourgorgue-Larsen & De Torres, 2011). The requirement for exhaustion of domestic remedies is fundamental to determination of admissibility of a complaint and is based on the general principle of international law that holds that the State must be allowed to provide remedy through its internal laws and systems prior to answering before an international body (International Justice Resource Center, 2017). The lack of exhaustion of domestic remedies is one of the most common causes of inadmissibility of petitions that come before all the international supervisory bodies (Udombana, 2003).

To understand the Committee's interpretation of the provisions, it is important to examine the cases reviewed by the CRC Committee since the OP3 came into force, focusing on procedural issues that have been a focus of attention since the drafting of the OP3. These petitions brought under the OP3 represent a range of situations where rights violations against children are alleged to have occurred. Like other international instruments, the OP3 provisions are broadly framed to provide for diverse systems to be compliant with the standards (Cohen & Kilbourne, 1998). The Committee's interpretations of the concrete contexts put forth by petitioners at the procedural stage is where the right of petition for CRC rights is initially given effect at the international level.

The record of petitions filed with the CRC Committee under the OP3 shows a gradual increase in use of the mechanism to seek redress for violations against children: from one petition in each of the years 2014 and 2015, to 27 and 28 in the years 2017 and 2018 respectively. In these initial years, nine of the 13 petitions that were decided and published by the Committee were struck down on clear formal technical grounds. A summary drawn from the Committee's published records of case decisions (see Annex 1) provides an overview of petitions that were discontinued or found inadmissible.<sup>9</sup> (U.N.G.A., 2012)

The cases referenced were not considered in regard to their merit as these were discontinued or determined inadmissible prior to entering the next stage of review. Thus the processes that the petitioners undertook to bring their complaints on alleged child rights

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<sup>9</sup> For the full record of Committee decisions of petitions filed under the OP3 see (U.N.G.A., 2012)

violations before the international enforcement mechanism of the CRC were unsuccessful.

Recognizing the arduous path to this level of rights claim and the long struggle of the individual (i.e., adult and child) for the right of petition, it is important to learn from these early decisions and the ongoing jurisprudence of the Committee to identify measures to increase effectiveness and outcomes for children who engage the international human rights enforcement mechanisms to vindicate rights.

In this regard, the published records of 13 initial decisions highlight a number of elements, some of which were raised as concerns during the drafting of the OP3. For example, regarding children's participation in the petition process, the published records of case decisions show that three petitions (CRC, 2017; CRC, 2018a; CRC, 2018c) were submitted by victims themselves, ostensibly with support of representatives. These petitions were withdrawn at early stages at the request of representatives of the actors and thus were discontinued from further consideration. Published decisions show that the other complaints were submitted on behalf of children by family members and or counsel with no indication that children themselves participated in any part of the proceedings. In this connection, the Committee notes the incompatibility of some appeals with provisions of the Convention and reminds representatives acting on behalf of children that, under the OP3 petition process, CRC provisions are invoked to protect the rights of children and not adults (CRC, 2018e; CRC, 2016). There is also evidence of a lack of knowledge by petitioners and their representatives of basic admissibility requirements of the OP3. For example, in the case of *S.C.S vs France* (CRC, 2018d) and in *A.H.A. vs Spain*, (CRC, 2015) all the facts presented occurred prior to the date of entry into force of the OP3 for these State parties and thus the complaint was declared inadmissible *ratione temporis* under article 7 (g) of the OP3. In other cases, petitioners and their representatives lack of crucial documentation required to substantiate their claims (CRC, 2017; CRC, 2018c), impacted on their capacity to move their complaint forward.

The Committee published views on three communications that were admitted under the OP3. The decisions on these complaints elucidate the Committee's interpretation of relevant articles of the Convention against the facts that constituted the alleged rights violations by the State against individual children. The overview (see Annex 2 for details) isolates some key elements from these case decisions to highlight how the Committee, through the complaints system of the OP3, applies the international human rights law of the CRC to enforce the rights of child victims of violations.

Having declared the remaining communications admissible, the Committee examined information and observations provided by all the parties on its merits. As the table in Annex 2 indicates, the reasonings and conclusions of the Committee address the facts and elaborate whether or not in relation to the facts, the State has violated any its obligations under the CRC. In the case of *YB and N.S. vs Belgium* (CRC, 2018g) the Committee focused crucially on the best interest of the child (art 3) and the child's right to be heard (CRC, arts. 12) contesting that they were not upheld during State immigration procedures and noting that the failure to do so deprived the child of the possibility to influence the decision regarding his best interest (Para 8.7). The Committee also elaborated the meaning and interpretation of 'family' as found in the Convention considering particularly the preservation of family and the maintenance of family ties; underscoring these as factors that need to be taken into account when considering the child's best interest (Para. 8.11).

Similarly, in determining the individual complaints relating to non-fulfillment or violations of rights, such as in *I.A.M. vs Denmark* (CRC, 2018f), the Committee again focused on the best interests of the child. In this context, it observed that it should be a primary consideration in States' decisions concerning the deportation of a child, and that such decisions should ensure proper safeguards, safety and proper care and enjoyment of rights (Para. 11.8(b)). Furthermore, it noted that the rights of the child to protection as set under article 19 of the Convention cannot be made dependent on the mother's ability to resist external pressures, and that State parties should take measures to protect children from all forms of violence, injury or abuse (Para. 3.3). Finally in *M.B. vs Spain* (CRC, 2018b), the committee observed that the best interest of the child should be a primary consideration throughout the age-determination process and elaborated on the comprehensive measures that should be undertaken to make an informed estimate of age such as assessment of the child's physical and psychological development conducted by a skilled specialist and undertaken in a prompt, child-friendly, gender-sensitive and culturally appropriate manner (Para 12.4). It also observed as per the CRC General Comment 4 (Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) & Committee on the Rights of the Child (CRC), 2017) that provision of a representative for such persons during the age-determination process is equivalent to giving them the benefit of the doubt and is an essential guarantee of respect for their best interests and their right to be heard (Para 12.8)

## Conclusions

The right of individual petition has been called “ the most luminous star in the universe of human rights” (Trindade, 2011)<sup>10</sup> It is through the exercise of the right to bring individual complaint at international level that human rights are given concrete effect and are applied to the individual's direct life situation. Through the new communications procedure of the CRC, children, too now have the means for redressing violations of their rights enshrined in their Convention. As we have seen, the significance of the right of petition for children is momentous when we consider the trajectory of the process within the history of international human rights law and the rise from the near invisibility of children to the recognition of the child as subject of rights with claim at international level.

The development of the OP3 was fraught with expectations, debates, compromises and also disappointments (Annex 3). However, decisions on the first cases filed under the OP3 are now available for public review and these offer the opportunity to engage with the Committee's work and examine the functioning of the procedure to maximize its effectiveness, especially in areas where obstacles were anticipated. This overview has provided such an opportunity and allowed for some relevant observations.

First, it is evident that the number of petitions has risen as State ratifications have increased. Nevertheless, the overall percentage of unsuccessful petitions is also high. The pattern of high numbers of inadmissible cases is not uncommon among the human rights enforcement mechanisms. (Pasqualucci, 2003) However, this is of particular relevance in the context of the new children's complaints procedure, as children already start with the disadvantage of having less information on and access to human rights mechanisms at national and international level. Thus the pattern of failed petitions underscores the need for a proactive and purposeful effort by actors working with children to disseminate information and support to children and their representatives to prepare successful petitions to the CRC under the OP3. Similarly support is needed for national organizations pursuing legal measures to justice and to independent human rights structures so that they will promote use and assist to advance cases eligible for filing at international level.

Second, evidence of limited knowledge on the basic requirements for filing petitions under the OP3 among children's representatives, parents, counsel, and NGOs indicates that

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<sup>10</sup> Trindade was president of the Inter-American Court of Human Rights and judge of the International Court of Justice.

similar public education efforts are required for these groups.

Third, some concerns were expressed among those involved in the drafting of the OP3 regarding obstacles that could arise that would compromise application of the principle of best interest of the child (Buck & Wabwile, 2013). Committee decisions on the various communications received thus far, indicate consistent reference to this principle (i.e., Art 3, CRC), including interpretation of its application in contexts arising from the claims received and also in weighing of the Committee's decisions. Similarly, in regard to, the right of the child to be heard and have her views taken into consideration, (Art 12, CRC) the Committee provides its interpretation in relation to different and unique contexts relevant to the petitions. For example in (CRC, 2018g), a case involving a petition for a child to remain in-country on humanitarian grounds, the committee observed that young age does not deprive a child of the right to express views, nor reduce the weight given to those views, particularly in the situation of the case, where the decision could separate her from her caregivers.

Likewise, several States and child advocates had also expressed concern that, due to age and their dependent status, children could be manipulated in the context of the OP3, indicating that it would be difficult to know if the rights claimed in an individual petition were for primary benefit of the child or an interested adult. The records of OP3 decisions to date show these to be valid concerns. At the same time, there are several related observations wherein the Committee unequivocally invokes CRC provisions to assert child rights over the interests of adult representatives. For example, in (CRC, 2018e) a case relating to an alleged unaccompanied minor the Committee ruled it inadmissible, finding official documents incompatible with the petitioners claim that he was a child at the time of the violations claimed.

The long struggle toward recognition of the child's right of petition at international level, along with other groups of humanity, has opened the door for children to bring their complaints and seek justice at international level for violations of their CRC rights. On the 20<sup>th</sup> November 2019, the Convention on the Rights of the Child will commemorate its 30<sup>th</sup> anniversary. On this occasion, the CRC will be widely celebrated for its place among other core human rights treaties possessed of all the mechanisms needed to promote, monitor and enforce the rights of children.

While the full force of the OP3 to vindicate injustices that, through commission or omission, States have committed against individual children is yet to be witnessed, we have

begun to see the potential value of the OP3 mechanism to address such violations through the Committee's early jurisprudence. In interpreting the meaning of child rights in concrete situations that aggrieved children face, and adjudicating to enforce their claim to rights denied, it offers a channel for advancing realization of their human rights. Still, in the years ahead the challenge will be to build on lessons learned and surmount barriers that presently constrain the ability of the OP (see table 3) to bring its full power to bear for children whose rights have been violated.

As a priority, the experience with early petitions indicates that there is a need to strengthen the participation of child applicants in the petition process. While it is likely that very young and adolescent children alike will need support of representatives to file their complaints, the Committee must establish specific measures to be used to engage directly with the child at critical junctures of the petition process, ensuring that they are heard and their views are taken into consideration, including through oral hearings as already provided for in the rules of procedure (Rule 19).

Similarly, although an individual or groups of individual victims or their designated representatives are the actors recognized to submit petitions, the disproportionate number of withdrawn and inadmissible cases indicate that independent structures are needed to support the participation of children and ensure their primary agency throughout the maze of administrative and legal processes at all levels. Building on the global network that the CRC Committee already has through its other work, it could strengthen the base of support that child victims of rights violations have, beyond immediate interested parties. The aim should be to strengthen the autonomy and voice of children in the litigative processes.

In this regard, the case records filed since ratification of the OP3 also show a large number of violations arising for children in situations of migration. The concurrence of such cases with socio-political shifts at global level demonstrate how these can swiftly impact the conditions of vast numbers of children and severely compromise enjoyment of their rights. In this regard, using its global reach, the Committee must actively monitor and assess global trends to craft a strategic approach to prevention and protection of child rights, by strengthening and building new collaborations with groups working with children in situations most vulnerable to rights violations (e.g., children in border facilities, children in emergency settings, in care, residential facilities, and juvenile institutions).

Moving forward to build on the substantial achievements in promotion of child rights

since the adoption of the CRC, children now have a channel at international level for complaint and redress of rights violations committed against them. The reach and effectiveness of this new mechanism will depend on broadening its ratification by more States, as the number remains small. For this purpose, increased awareness of the value of the OP3 for defense of children's human rights is needed, revitalizing the momentum and pressure on more States that led to adoption of the Optional Protocol. Critically, in States parties to the OP3, coordination across organizations and actors to mobilize support for reforms at national level could prove to be the most catalytic action for strengthening children's access to justice. The act of ratification of the OP3 signals a unique moment of recognition and receptivity by the State to concretizing the right of the child to channels of redress. As such, it can be a pivotal time to call for reforms in national systems to allow justice to be delivered at domestic level, precluding the need for cases to rise to the international level. At the same time, the lessons from the jurisprudence of the Committee must serve to strengthen the effectiveness of the OP3 so it will bring to bear its full force as a vehicle for child victims who fail to receive justice and concrete remedies domestically.

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## ANNEXES

### Annex 1: Inadmissible decisions on the OP3 to the CRC on a communication procedure

Case	Year	Type Decision	Considerations
A.H.A.	2014	Inadmissibility	Committee observes that all the facts referred to in the communication occurred prior to the entry into force of the Optional Protocol for the State party.
M.A.A.	2015	Inadmissibility	...(on) rights under article 39 of the Convention, the Committee considers that this and the other articles of the Convention protect the rights of children and not the rights of adults.
J.A.B.S.	2016	Inadmissibility	Committee considers that the author has not presented convincing arguments.
M.E.B.	2017	Discontinuance	...considered the author's representative's request for discontinuance, decided to discontinue the consideration of communication
S.C.S.	2017	Inadmissibility	...occurred prior to the date of entry into force of the Optional Protocol for the State party
R.L.	2017	Discontinuance	...considered the request for discontinuance made by the representative of the author and by the State party, decided to discontinue the consideration of communication
Z.Y. and J.Y.	2016	Inadmissibility	Committee considers that the authors have failed to justify a personal risk of a serious violation of author A.Y.'s rights upon return to Afghanistan.
Y.M.	2016	Inadmissibility	Committee finds that the complaint is incompatible with the provisions of the Convention, which protects the rights of children, and inadmissible under article 7 (c) of the Optional Protocol.
K.A.B.	2017	Discontinuance	...having considered the request by the author's representative for discontinuance, decided to discontinue the consideration of communication

## Annex 2: Decisions on admitted petitions to the OP3

Communication	Articles of the CRC	Subject Matter	Consideration of Merits
Y.B and N.S. <sup>11</sup>	2, 3, 10, 12 and 20	Denial of humanitarian visa to child taken in under <i>kafalah</i> (fostering arrangement) by a Belgian-Moroccan couple	The Committee points out that “article 12 imposes no age limit on the right of the child to express her or his views and discourages States parties from introducing age limits either in law or in practice.” (8.7)
			The Committee notes that, in assessing the preservation of the family environment and the maintenance of ties as factors that need taking into account when considering the child’s best interests, “the term ‘family’ must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided by local law or custom. (art. 5)” (8.11)
<b>Decision</b>	The State party is under an obligation to urgently reconsider the application for a visa for C.E. in a positive spirit, while ensuring that the best interests of the child are a primary consideration and that C.E.’s views are heard. In considering the best interests of the child, the State party should take account of the family ties that have been forged de facto between C.E. and the authors. (9)		
I.A.M. <sup>12</sup>	1, 2, 3 and 19	Deportation of a girl to Somalia, where she would allegedly risk being forcefully subjected to female genital mutilation	The Committee recalls that the best interests of the child should be a primary consideration in decisions concerning the deportation of a child and that such decisions should ensure — within a procedure with proper safeguards — that the child will be safe and provided with proper care and enjoyment of rights. 11.8 (b)

<sup>11</sup> (CRC, 2018g)<sup>12</sup> (CRC, 2018f)



			<p>The evaluation of the risk that a child may be subjected to an irreversible harmful practice such as female genital mutilation in the country to which he or she is being deported should be carried out following the principle of precaution and, where reasonable doubts exist that the receiving State cannot protect the child against such practices, State parties should refrain from deporting the child.</p> <p>11.8 (c)</p>
<b>Decision</b>	<p>The State party is under an obligation to refrain from deporting the author and her daughter to Puntland. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. (12)</p>		
<b>N.B.F.</b> <sup>13</sup>	3, 8, 12, 18(2), 20, 27 and 29	Determination of the age of an alleged unaccompanied minor	<p>The Committee considers that the determination of the age of a young person who claims to be a minor is of fundamental importance, as the outcome determines whether that person will be entitled to or excluded from national protection as a child. Similarly, and this point is of vital importance to the Committee, the enjoyment of the rights contained in the Convention flows from that determination. It is therefore imperative that there be due process to determine a person's age, as well as the opportunity to challenge the outcome through an appeals process. While that process is under way, the person should be given the benefit of the doubt and treated as a child (12.3)</p>
			<p>In the light of the foregoing, the Committee considers that the age-determination procedure undergone by the author, who claimed to be a child, was not accompanied by the safeguards needed to protect his rights under the Convention (12.9)</p>
<b>Decision</b>	<p>The State party is under an obligation to prevent similar violations in the future, in particular by ensuring that all procedures for determining the age of possible unaccompanied children are carried out in a manner</p>		

<sup>13</sup> (CRC, 2019)

	consistent with the Convention and that, in the course of such procedures, the persons subjected to them are promptly assigned a qualified legal or other representative free of charge.
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**Annex 3:** Summary of debates arising in drafting the OP3<sup>14</sup>

Issue	Position 1	Alternate Position	Consensus
Value added of a new OP (1)	May duplicate other HR mechanisms accessible to children	Adds value covering all child rights; provides child sensitive procedures	Drafting proceeded
Reservations to OP3	States have option to declare reservations to the protocol	Include provision denying option to make reservations	OP3 does not include text prohibiting States to make reservations
Accessible form of petition for children	Include child sensitive measures in rules of Procedure Hearings not mandatory	Allow for all form and modes for petition that facilitate access by children i.e. (oral tape/video/ other communication)	Only written communications are accepted and non-written as supplements (Rule 16 (3)(d))
Workload of the Committee	Overburdens & requires added Committee resources	Manageable	CRC -conferred OP3 Committee calls for external experts as needed (Rule 6)
Child sensitive procedures	Functionally established in OP3 rules of procedure	Elaborate specific child sensitive procedures for making complaints of violations	OP3 rules of procedure generally call for use of child sensitive methods (Articles 3, 3(2))
Submission of communications	An individual child or groups of children alleging to be victims and their representatives	Include communications from human rights institutions, other specialized agencies and NGOs on behalf of unnamed victims (collective communications)	An individual child or group of children alleging to be victims; designated representatives and others on behalf of the child with the express consent of the child (Rule 12)

<sup>14</sup> Non-exhaustive summary of issues from Working Group Sessions: (Open-ended WG, 2010); (U.N.G.A., 2011b)

Issue	Position 1	Alternate Position	Consensus
Timeline for filing petition following exhaustion of domestic remedy (2)	Standard timelines	Extend timeline to allow for child sensitive processes	One-year limit (as per several other HR petition mechanisms) (Rule 16 3(j))
Complaints for violations occurring prior to or continuing from time prior to OP3 entry into force for the State	State accountability under the OP3 applies solely to violations occurring after it has ratified the protocol and it has come into force for the State	Allow for complaints occurring prior to or continuing from time prior to OP3 entry into force for the State (as child disclosure of violations may occur years after occurrence)	Committee has competence only in respect of post-entry into force violations (Rule 16 (i))
Inquiry of grave or systematic violations	All parties to the OP3 are within the jurisdiction of this procedure	States have the option to opt-out through express declaration	The Committee may on its own initiative in case of reliable information on the existence of grave and systematic violations against children in a State party initiate an inquiry. (Rule 31(2))