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Children's rights remedies under international human rights law: How to secure children's rights compliant outcomes in access to justice?

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SUMMARY

This article explores access to justice for children on the international stage, with a specific focus on the outcomes of remedies. It sheds light on the concept of effective remedies for children, which has to be examined through different lenses – the most relevant for the purposes of this discussion being whether remedies are in themselves respectful of the rights of the child and whether they meet the expectations of the child. On the basis of an analysis of access to justice for children under international human rights law and a comprehensive study of the remedies provided by the United Nations Committee on the Rights of the Child in its views between 2018 and 2022, this article identifies four critical elements that should be taken into account for remedies to be compliant with children's rights. These four elements could be considered part of a framework for children's rights remedies, which not only helps to conceptualise children's rights remedies but also promotes their implementation in practice, both internationally and domestically.

1 Introduction

Access to justice revolves around the right to an effective remedy for rights violations.¹ For children, the international access to justice agenda has emerged during the past fifteen years and its significance for the enforcement of children's rights is increasing. There is a growing amount of attention on children's access to justice, in practice and in academic research, internationally and domestically. The Optional Protocol to the United Nations (UN) Convention on the Rights of the Child (CRC) on a communications procedure (OPIC) serves as a catalyst for children's access to justice and for the recognition that children have the right to access to justice.² It provides children with the right to lodge an individual

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1 Liefwaard "Access to Justice for Children: Towards a Specific Research and Implementation Agenda" 2019 *The International Journal of Children's Rights* 196.

2 Liefwaard 2019 *The International Journal of Children's Rights* 196.

communication before the UN Committee on the Rights of the Child (CRC Committee or Committee).³ The views adopted by the CRC Committee not only give guidance to states parties to the CRC on how to protect children's rights in specific situations and contexts, but the emerging "case law"⁴ under OPIC also provides important insights in children's access to justice at the international level. The views adopted up until now show, among others, that CRC Committee carefully assesses the admissibility criteria laid down in article 7 of OPIC⁵ and, for example, does not easily assume jurisdiction over domestic instances,⁶ underscoring the significance of article 71 of OPIC's criterion that available domestic remedies must be exhausted first and acknowledging that states-parties are encouraged "to develop appropriate national mechanisms to enable a child whose rights have been violated to have access to effective remedies at the domestic level."⁷

Despite the growing recognition of children's right to access to justice, with attention to the specific barriers and challenges children face and to the significance of child-sensitive (or child-friendly) proceedings,⁸ there is much less attention to the outcomes of remedies for children. Hence, critical questions remain unanswered, including the essential question of to what extent remedies are effective in terms of their outcomes. The effectiveness of remedies can be seen in multiple ways,⁹ but for children, there are two critical questions. First, to what extent do remedies deliver

3 On 26 June 2022, 48 states parties to the CRC (i.e., 196 states) had ratified OPIC, mainly from Europe and Latin America. In addition, OPIC provides for an inquiry procedure for grave or systematic violations (art 13; an opt-out procedure applies) and inter-state communications (art 12; an opt-in procedure applies).

4 It should be noted that the case law or jurisprudence of the CRC Committee is as such not legally binding – its views serve as recommendations to states parties. As a UN treaty body under the CRC, the CRC Committee is not a judicial authority but, like the Human Rights Committee (HRC), its views "are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions." See also the HRC's General Comment No. 33 on the "Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights" CCPR/C/GC 33 para 11. For more on the legal nature and effect of treaty bodies' output see Rodley "The role and impact of treaty bodies" in Shelton (ed) *The Oxford Handbook of International Human Rights Law* (2013) 639–641.

5 Doek "Individual communications submitted under the Optional Protocol to the CRC on a Communications Procedure and admissibility: Updated report on the decisions of the Committee on admissibility: Summary and comments" Leiden Children's Rights Observatory (2022) <https://childrensrightsobservatory.nlhttps://childrensrightsobservatory.nl> (last accessed 2022-11-25).

6 See also Kilkelly "Children's Rights to Access Justice at the International Level" in Paré et al (eds) *Children's Access to Justice. A Critical Assessment* (2022) 151.

7 Preamble of the OPIC.

8 UN Human Rights Council Access to justice for children "Report of the United Nations High Commissioner for Human Rights" UN Doc. A/HRC/25/35; Liefwaard (2019) *The International Journal of Children's Rights* 195–227.

outcomes that are in itself respectful of children's rights, at an individual level (i.e., for the child in question) and/or at a more general or systemic level (i.e., for children as a group, for communities or society at large and/or for the prevention of future violations)? And second, to what extent do outcomes of remedies meet children's expectations? The first critical question regarding remedies that deliver equitable outcomes and respect for children's rights, requires a more conceptual scrutiny of what is meant by remedies that are children's rights compliant, not so much in terms of the substantive findings concerning children's rights violations, but in terms of the remedies provided in response to rights violations. The second critical question requires – above all – a genuine interest in what children expect and hope to get out of a certain remedy and raises follow-up questions, including what do we know about children's expectations in this regard and how can we know what children expect and want in a specific case?¹⁰ This article primarily focuses on the first critical question and aims to contribute to clarity on this point by working towards a theoretical and practical framework on the basis of which the CRC Committee could define outcomes for children that comply with children's rights. The second critical question requires additional dedicated research with children involved in or affected by litigation, an important task that should be undertaken, but which falls outside of the scope of this article. The study into the OPIC case law presented in this article has, however, explored the Committee's engagement with children's expectations so far and the ways for the Committee to become informed about children's expectations, for the purpose of the development of the framework for children's rights remedies.

The heart of this article is formed by a comprehensive study of the outcomes of the cases brought to the CRC Committee under OPIC since the adoption of the first substantive views in 2018 (i.e., more or less four years after OPIC's entry into force). It sheds light on how the Committee has approached remedies so far under OPIC (para 3). The article starts with a reflection on the functions and meaning of access to justice for children under international human rights law, including a reflection on how outcomes of remedies are regulated internationally (para 2). It closes with a reflection on the lessons learned so far under OPIC and on how these can assist in identifying the key elements of a (conceptual and practical) framework for remedies that are children's rights compliant (i.e., children's rights remedies; para 4). The article concludes with some observations underscoring the significance of involving children

9 See for example De Schutter *International Human Rights Law. Cases, Materials, Commentary* (2010); Shelton *Remedies in International Human Rights Law* (2015); and Roach *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (2021).

10 It should be acknowledged that in practice the majority of the cases brought to courts or other instances at the domestic and international level result from action taken by adults, including children's legal representatives or civil society organisations, which is an issue in itself; see e.g., Fenton-Glynn *Children and the European Court of Human Rights* (2021); and Fortin *Children's Rights and the Developing Law* (2009) 234.

themselves in access to justice, both as part of the conceptual framework and in specific cases (para 5).

From the outset it is important to underscore that the term “remedies” has a dual meaning, that is: remedies as “processes by which arguable claims of human rights violations are heard and decided, whether by courts, administrative agencies, or other competent bodies”, and as “the outcome of the proceedings, the relief afforded to the successful claimant”.¹¹ This article focuses primarily on the second meaning of remedies, that is: on the outcomes of remedies for children. It is acknowledged, however, that the procedural meaning of access to justice bears direct relevance for the fairness and effectiveness of its outcomes, which is why the following part of this article provides an international human rights law perspective on children's access to justice encompassing both meanings. In addition, this article speaks of children's rights remedies referring to remedies that are children's rights compliant in that they are cognisant of the need for remedies that are specifically tailored towards children's rights, interests, and expectations. It is, moreover, important to acknowledge the limitations of this article in the sense that it focuses exclusively on the views adopted by the CRC Committee, while there are many other avenues, both internationally and domestically, which deliver remedies for children, but which fall outside of the scope of this contribution.¹²

2 Access to justice for children – an international human rights law perspective

Access to justice can be defined as “the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards, including the [CRC]”.¹³ Although the CRC provides children neither with the right to access to justice¹⁴ nor with the right to

11 Shelton (2015) 16; Roach (2021) 12 refers to remedies' dual function, i.e., remedies “responding to and sometimes preventing an unjust past and shaping a more just future”.

12 One could, for example, point at the work of the other UN treaty bodies, regional human rights tribunals or treaty bodies in Africa, the Americas and Europe, and (constitutional) courts and other bodies in domestic jurisdictions – see Skelton “International Children's Rights Law: Complaints and Remedies” in Kilkelly and Liefwaard (eds) *International Human Rights of Children* (2019); Sloth-Nielsen *Children's Rights Litigation in the African Region: Lessons from the Communications Procedure Under the ACRWC* in Liefwaard and Doek (eds) *Litigating the Rights of the Child* (2015); Kilkelly (2022). See also Valentine *Adding Value Through OPIC And to Whom? Applying Lessons Learned by the HRC to Maximise Potential Impact of OPIC for Children* (Adv LLM thesis 2019 Leiden University).

13 UN Human Rights Council “Access to justice for children. Report of the United Nations High Commissioner for Human Rights” UN Doc. A/HRC/25/35 2008 para 4, with reference to UNICEF “UN Common Approach to Justice for Children” (2008) 4.

14 Cf for example art 13 of the Convention on the Rights of Persons with Disabilities (CRPD).

an effective remedy, it can be assumed that under international human rights law, children, like all other human beings,¹⁵ possess these rights. According to the CRC Committee, “[f]or rights to have meaning, effective remedies must be available to redress violations”.¹⁶ Therefore, it is assumed that children have the right to seek justice to address violations under the CRC and related legal instruments. For example, the right to have the child’s best interests taken into account as a primary consideration (art 3(1) of the CRC) and the child’s right to be heard (art 12 of the CRC) implicitly provide a legal ground for children’s access to justice. The same is true for the right to be protected against torture or other cruel, inhuman or degrading treatment (art 37(a) of the CRC) or the right not to be separated from parents (art 9 of the CRC).

In some specific matters, the CRC does provide for the right to seek remedies or to access justice mechanisms.¹⁷ Article 40(2)(b)(v) of the CRC provides every child in the context of child justice with the right to appeal before “a higher competent, independent and impartial authority or judicial body according to law” and article 37(d) of the CRC stipulates that a child deprived of liberty has the right to challenge the legality of the deprivation of liberty before a judicial or other competent, independent or impartial body. Moreover, article 25 of the CRC embodies the right to a periodic review for every child placed out of home by the competent authorities for the purposes of care, protection or (physical or mental health) treatment. The Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (OPSC) provides in article 9(4) that “States Parties shall ensure that all child victims of the offences described in [OPSC] have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible”. The latter provision secures access to justice for victims of rights violations as protected under OPSC and should be seen in light of the right of victims to receive “all appropriate assistance ... including their full social reintegration and their full physical and psychological recovery”.¹⁸ The CRC provisions are examples of specific rights of children to access justice, which can be used to challenge decisions affecting them¹⁹ (e.g., a conviction, an order that deprives a child of his liberty or an out-of-home placement), to assess services

15 See art 8 of the Universal Declaration of Human Rights (UDHR) and art 2(3) of the International Covenant on Civil and Political Rights (ICCPR), among others. See also UN HRC General Comment 31 [80] “The nature of the general legal obligation imposed on States Parties to the Covenant” (2004) CCPR/C/21/ Rev.1/Add.13 para 15 and Shelton (2005) 432 which refers to “the right of access to judicial remedies ... as part of the corpus of the customary international law of human rights” providing “avenues of complaint for private citizens against oppressive action by government agents and agencies and affording remedies when violations are found”.

16 UN Committee on the Rights of the Child, General Comment 5 “General measures of implementation of the Convention on the Rights of the Child” CRC/GC/2003/5 (2003) para 24; see also UN HRC “General Comment 31 [80] (2004).

17 Liefwaard (2019) *International Journal of Children’s Rights* 199.

18 Art 9(3) of the OPSC; cf art 39 of the CRC.

provided to them (e.g., the quality of treatment, including the absence of treatment) or to seek protection against specific rights violations.²⁰

In general terms, the CRC Committee points out that “[w]here rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39 [CRC].”²¹ In its Rules of procedure under OPIC, the Committee elaborates on the remedies that it can recommend to states-parties in case of violation of rights under the CRC or its Optional Protocols.²²

In the event that the Committee finds that the State party has violated its obligations under the Convention or its substantive Optional Protocols to which the State is party, it will make recommendations on the remedies for the alleged victim(s), such as, inter alia, rehabilitation, reparation, financial compensation, guarantee of non-repetition, requests to prosecute the perpetrator(s), as well as 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.²³

According to the Human Rights Committee (HRC), article 2(3) ICCPR on the right to an effective remedy “requires that States Parties make reparation to individuals whose ‘... rights have been violated’” without which “the obligation to provide an effective remedy ... is not discharged.”²⁴ Reparation “generally entails appropriate compensation” and can involve “where appropriate ... restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”²⁵ Effective remedies also encompass investigations into allegations of rights violations and “[c]essation of an ongoing violation”, which “is an essential element of the right to an effective remedy”,

19 This article refers to he/him. If not stated otherwise, this also refers to she/her or they/them.

20 It needs no explanation that there may be different reasons for children being in need of exercising their right to access to justice and, in light of this, the (kinds of) remedies that flow from accessing justice differ as well. Moreover, it should be noted that there are different kinds of mechanisms that could be appropriate here, including courts and other judicial bodies, administrative mechanisms, and national human rights institutions, among others; see also UN HRC, General Comment 31 [80](2004) para 15.

21 UN Committee on the Rights of the Child “General Comment 5 (2003): General measures of implementation of the Convention on the Rights of the Child” (2003) CRC/GC/2003/5 para 24.

22 In addition to OPSC and OPIC, there is also the Optional Protocol to the [CRC] on the Involvement of Children in Armed Conflict (OPAC).

23 Rule 27(4) of the Rules of Procedure under the Optional Protocol to the Convention on the Rights of the Child on a Communications procedure (2013) UN Doc CRC/C/62/3 (Rules of procedure under OPIC).

24 UN HRC General Comment No 31 [80] (2004) para 16.

25 *Ibid.*

according to the HRC.²⁶ Moreover, the HRC notes that “the purposes of the Covenant would be defeated without an obligation ... to take measures to prevent a recurrence of a violation”, which is an incentive to call upon states parties to take measures “beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question.”²⁷ The guidance provided by the CRC Committee and the HRC makes clear that remedies can result in reparation, compensation and/or mental or physical support with the aim of recovering, rehabilitating or reintegrating victims. In addition, remedies could provide immediate relief (e.g., through the provision of interim measures²⁸ or through an order to change one’s legal or administrative status),²⁹ lead to investigation of human rights violations and/or hold perpetrators to account. In addition to individual remedies for victims, access to justice could also deliver more general remedies aimed at restoration (e.g., through public apologies or memorials),³⁰ the protection of certain groups or classes in society or systemic changes, for example through the challenging of laws and policies. Although not recognised as such by the CRC Committee and HRC, remedies can also support the interpretation and clarification of international (and domestic) law, which may ultimately contribute to the prevention of rights violations in the future.³¹ The different kinds of remedies reveal the various functions of access to justice and confirm that access to justice essentially revolves around the effective protection of human rights and fundamental freedoms and that “the notion of remedial justice, of wiping out the consequences of the wrong, is a general principle of law on which there is broad

26 *Ibid* para 15.

27 *Ibid* para 17.

28 See art 6 OPIC; and UN HRC General Comment No 31 [80] (2004) para 20.

29 UN HRC General Comment No 31 [80] (2004) para 3.

30 See also the jurisprudence of the Inter-American Court of Human Rights; see further Ferial Tinta “The CRC as a Litigation Tool Before the Inter-American System of Protection of Human Rights” in Liefwaard and Doek (eds) *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) 231–248.

31 The added value of this is dependent on the authority providing remedies and its legal powers; where courts may issue legally binding interpretations, a treaty body like the CRC Committee may be less impactful. It may nevertheless support the work of domestic civil society organisations as well as legal professionals on the implementation and enforcement of children’s rights. As De Schutter observes the effectiveness of the international human rights framework and its impact at the national level is dependent on domestic institutions, including courts, the legislator and the executive power, using it. In addition, civil society as well as national monitoring mechanisms secure “pressure from below”, De Schutter (2010) 729. It can be argued that the work of the CRC Committee also has an impact through the jurisprudence of the regional human rights courts; see e.g., the judgment of the European Court of Human Rights in the case *HF v France* (2022) Applications No 24384/19 and 44234/20, in which it referred to the Committee’s views in the case *FB et al & DA et al v France* Communication 77/2019, 79/2019, and 109/2019, (2022) on the same matter (i.e., the request for repatriation of French children and their mothers from the camp in north-eastern Syria).

consensus.”³² Under international human rights law, access to justice means much more than mere *access* to justice mechanisms, such as courts, administrative authorities, and national human rights institutions. It “more broadly encompasses equitable and just remedies.”³³ Access to justice is both a procedural right as well as a substantive right,³⁴ which includes the right to access remedies that are just and equitable, not only for the individual seeking remedies but also beyond that. If applied effectively, remedies can have real meaning for individuals and can also serve the collective with a lasting impact on legal systems and/or practice, both domestically and internationally. Yet, it must also be acknowledged that international human rights law provides little specific guidance on effective remedies for children, apart from some procedural guidance underscoring the significance of the provision of adequate information on the remedies and the significance of a speedy enforcement of judicial decisions affecting children.³⁵ The following part of the article addresses how the CRC Committee has so far engaged with remedies in its views under OPIC.

3 Remedies under OPIC

The entry into force of the OPIC in 2014 can be seen as an international recognition of children's right to access to justice. As mentioned earlier, OPIC is meant to supplement remedies at the domestic level, hence the requirement to exhaust domestic remedies before a communication brought to the CRC Committee can be admissible (art 7(e) of the OPIC). The Committee issued its first views on the merits of a case against Denmark in January 2018.³⁶ In this case, which concerned the deportation of a girl with her mother to Somalia, where she would face the risk of being subjected to female genital mutilation, the Committee did not pay much specific attention to the remedies. Although it found a violation of the CRC and held that Denmark was

under an obligation to refrain from returning the author and her daughter to the Puntland State of Somalia' and 'to prevent similar violations in the future' (para 12), it merely provided that it 'wishes to receive from the State party as soon as possible and within 180 days, information about the measures

32 Shelton (2015) 432; see also 285ff for an overview of remedies used at the national and international level.

33 UNICEF *Children's Equitable Access to Justice, Central and Eastern Europe and Central Asia* Geneva (2015) 8 which finds support in legal doctrine; see Shelton (2015) 16–7. See furthermore UNDP, *Access to Justice: Practice Note* (9 March 2004) 6; see also more broadly UN Secretary-General (UNSG) *Guidance Note of the Secretary-General: UN Approach to Justice for Children* (September 2008).

34 Liefwaard 2019 *The International Journal of Children's Rights* 202.

35 Liefwaard 2019 *The International Journal of Children's Rights* 202 with reference to the Council of Europe's Guidelines on child-friendly justice, Part iv, E, para 76. See also Rule 27(4) of the Rules of Procedure under OPIC as referred to earlier in this section.

36 Communication 3/2016, *IAM (on behalf of KYM) v Denmark* 25 (2018) UN Doc CRC/C/77/D/3/2016.

undertaken to give effect to the Committee's views' (para 14). As Sloth-Nielsen observed, this case 'may suggest ... that the CRC Committee still [had] to find its way in finding the right tone.'³⁷

Since this rather cautious start, the CRC Committee has gone through a significant development as far as remedies offered to children are concerned. The case law³⁸ shows that the committee offers both individual remedies (i.e., remedies that offer specific relief or reparation to the child or children concerned) as well as collective or more systemic remedies to protect other children or to prevent future violations of rights.³⁹ In the case against France concerning the repatriation of children from North-East Syria, the Committee provided an elaborated set of remedies to the children who were the subjects of the case.⁴⁰ After finding violations of articles 3(1), 6(1), 37(a) and 6 of the CRC,⁴¹ the Committee concluded that France "is ... under the obligation to provide the authors and the child victims with effective reparation of the violations suffered' and 'to prevent similar violations from occurring in the future'.⁴² More specifically the CRC Committee recommended France to:

- 37 Sloth-Nielsen "Communication 3/2016: *I.A.M. (on behalf of K.Y.M.) v Denmark*" Case Note (2018) *Leiden Children's Rights Observatory* 2018/1. She warned that "[i]t seems that the value of the communications procedure may in future be limited to the "jurisprudence of violations", rather than the innovation of remedies unless bolder steps are taken" and she pointed at more innovative approaches by the Inter-American Court of Human Rights and the African Committee of Experts on the Rights and Welfare of the Child.
- 38 For case-by-case analyses of the case law under OPIC see the Leiden Children's Rights Observatory <https://childrensrightsobservatory.org> <https://childrensrightsobservatory.nl> (last accessed 2023-09-06).
- 39 The narrative that follows sheds light on the way the Committee has engaged with remedies in its views since the 2018 case against Denmark. The findings presented here result from a comprehensive analysis of all cases, until February 2022, in which the Committee adopted views on the merits of the individual communications lodged under OPIC and which were published on the Committee's website. This analysis did not include the admissibility decisions, friendly settlements (art. 9 OPIC), the Committee's requested interim measures under art 6 of the OPIC (since these are not made publicly available) and the Committee's report after an inquiry procedure (art 13 of the OPIC). Up until now, the CRC Committee has published one report based on an inquiry; see Report of the investigation in Chile under art 13 of the Optional Protocol to the Convention on the Rights of the Child on a Communications procedure (2018) UN Doc CRC/C/CHL/INQ/1; see also Espejo Yaksic "Report of the investigation in Chile under article 13 of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure" (2018) Case Note 2018/2 *Leiden Children's Rights Observatory*.
- 40 Communications 77/2019, 79/2019 and 109/2019 *FB et al and DA et al v France* (2022) UN Docs CRC/C/89/D/77/2019; CRC/C/89/D/79/2019; and CRC/C/89/D/109/2019.
- 41 The CRC Committee did not consider if the facts of the case constitute violations of arts 26(2), 19, 20, 24, and 37(b) of the CRC; cf The Joint Concurring Opinion of Committee Members Kiladze, Pedernera Reyna and Van Keirsbilck elaborates on the violations of arts 6(2) and 37(b) of the CRC.
- 42 *FB et al and DA et al v France* (2022) para 8.

- a Provide, as a matter of urgency, an official response to each request for repatriation submitted by the authors on behalf of the child victims;
- (b) Ensure that all procedures for the examination of these requests and the implementation of any decisions taken are in accordance with the Convention, taking into account the best interests of the child as a primary consideration and the importance of preventing further violations of the rights of the child;
- (c) Take urgent positive measures to repatriate the child victims, acting in good faith;
- (d) Support the reintegration and resettlement of each child who has been repatriated or resettled;
- (e) Take additional measures, in the meantime, to mitigate the risks to the lives, survival and development of the child victims while they remain in the north-east of the Syrian Arab Republic.⁴³

These remedies are specific in nature and are geared towards the protection of the children in this case, while they are in the north-east of Syria and after their repatriation or resettlement. The recommended remedies are meant to offer immediate relief through repatriation (which goes to the very heart of the communications), to mitigate the risks to the lives, survival and development of the children while they remain in Syria and to offer support for reintegration and resettlement, after repatriation. In addition, the remedies are meant to prevent “future” and “further” violations of the rights of the child, among others through insisting on urgent responses to requests for repatriation and on decisions taken in accordance with the CRC (i.e., with the best interests of the child taken into account as a primary consideration). Although it did not elaborate much further on France’s obligation to provide “effective reparation for the violations suffered”, the Committee clearly had various objectives with the recommended remedies, with implications for similar cases in other states parties.⁴⁴

In earlier cases, particularly in migration-related matters, the Committee recommended (or instructed more firmly)⁴⁵ a variety of individual and systemic remedies. In the case *YB and NS v Belgium*,⁴⁶ which concerned the refusal of a visa on humanitarian grounds to a child entrusted to a Belgian-Moroccan couple in the context of kafala,⁴⁷ the

⁴³ *Ibid.*

⁴⁴ This is relevant because children with ties to other states parties are facing similar challenges; see Sandelowsky-Bosman and Liefwaard “Children Trapped in Camps in Syria, Iraq and Turkey: Reflections on Jurisdiction and State Obligations under the United Nations Convention on the Rights of the Child” 2020 *Nordic Journal of Human Rights* 141–158; Bagheri and Bisset “International Legal Issues Arising from Repatriation of the Children of Islamic State” 2022 *Journal of Conflict and Security Law* 363–385; and Duffy “Communication 79/2019 and 109/2019; Duffy “Communications No. 79/2019 and 109/2019 *L.H. et al v. France* and *F.B. et al v. France* 2021/3” 2021 *Leiden Children’s Rights Observatory* Case Note 77/2019.

⁴⁵ It is questionable to what extent the Committee can instruct given the nature of a communications procedure before a UN treaty body.

⁴⁶ Communication No. 12/2017, *YB and NS v Belgium*, 27 September 2018, UN Doc CRC/C/79/D/12/2017.

Committee concluded in rather firm wording that Belgium was “under an obligation to urgently reconsider the application for a visa for [the child called CE] in a positive spirit, while ensuring that the child’s best interests are a primary consideration and that C.E.’s views are heard”.⁴⁸ In doing so, the Committee offered a remedy to the child and the foster parents with whom she had developed family ties, by instructing the Belgian authorities to take a new decision which is more respectful of the CRC. Although the Committee did not want to take a decision that would imply the Committee becoming a “substitute for the national authorities of Belgium in interpreting domestic law and in appraising the facts of the case”,⁴⁹ it did find that the authorities had failed to assess the application on the basis of the specific circumstances of the cases. In addition, it directed the Belgian authorities to take into account “the family ties that have been forged de facto between CE and the authors”.⁵⁰ The Committee furthermore repeated its common general remedy that Belgium “is also under an obligation to do everything necessary to prevent similar violations from occurring in the future”.⁵¹

The Committee’s views in a series of cases against Spain reveal that the Committee has embraced more concrete remedies offering relief and reparation to individual children and/or steering states parties into the direction of systemic changes with the aim to prevent similar cases in the future. In *NBF v Spain*,⁵² a case on age determination of an (alleged) unaccompanied minor, the Committee offered no individual remedies, but found that Spain was under the obligation to prevent similar violations “in particular by ensuring that all procedures for determining the age of possible unaccompanied children are carried out in a manner 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”.⁵³ In this particular case, it is interesting to note that Committee member Otani pointed out in her dissenting opinion that because the Committee focused on the question ‘whether the age-determination process used by the State party violated its obligation under the Convention’ and recommended “only

47 According to para 2.3 of the communication *YB and NS v Belgium*, *Kafalah* is a form of alternative care in Islamic countries, like foster care. Under Moroccan law, “*kafalah* is a commitment to take responsibility for the protection, education and maintenance of an abandoned child”.

48 *YB and NS v Belgium* (2018) para 9.

49 Türkelli and Vandenhoele “Communication 12/2017: *Y.B. and N.S. v Belgium*” Case Note 2018/3 (2018) *Leiden Children’s Rights Observatory*; (para 8.4 of the communication *YB and NS v Belgium*).

According to para 8.4 of the communication *YB and NS v Belgium*, the Committee’s role is “to ensure that [the authorities’] assessment was not arbitrary or tantamount to a denial of justice and that the best interests of the child were a primary consideration in that assessment”.

50 *YB and NS v Belgium* (2018) para 9.

51 *Ibid.*

52 Communication No 11/2017 *NBF v Spain* (2018) UN Doc CRC/C/79/D/11/2017.

53 *NBF v Spain* (2018) para 13.

general measures to prevent similar violations in the future without making any recommendations on the remedies for the author", it disregarded "the purpose of the individual communications" that is "to provide a remedy to the individual whose rights under the Convention were violated".⁵⁴

This dissenting opinion may have had an impact on the Committee's engagement with remedies since in all the following cases the Committee provided individual remedies (albeit sometimes still in rather general terms without further specifying what "effective reparation" means),⁵⁵ seconded by general remedies to stimulate systemic reform and to prevent similar violations in the future.⁵⁶ Individual remedies include, for example, "effective reparation, including adequate compensation for the non-pecuniary damages, specialized psychological counselling appropriate for victims of sexual abuse and the rectification of the date of birth that appears in ... identity and other documents"⁵⁷ or "adequate reparation" in the form of financial compensation and rehabilitation for harm suffered."⁵⁸ In other cases, the Committee insisted on "effective reparation" by providing the opportunity for the author to regularise his administrative situation⁵⁹ or it gave an instruction (or recommendation) to take a new decision in accordance with the CRC's general principles and respecting relevant rights,⁶⁰ to reconsider decisions or to refrain from executing decisions (for example to deport a child,⁶¹ or to reject a

54 *NBF v Spain* (2018) Individual dissenting opinion of Committee member Mikiko Otani para 5.

55 See for example Communication 74/2019 *ZS and ZS (on behalf of KS and MS) v Switzerland* 2022; UN Doc. CRC/C/89/D/74/2019 and Communication 73/2019 *KK and RH (on behalf of AMK and SK) v Belgium* (2022) UN Doc CRC/C/89/D/73/2019; see also Communication No 16/2017 *AL v Spain* (2019) UN Doc CRC/C/81/D/16/2017; Communication No 27/2017 *RK v Spain* 18 (2019) UN Doc CRC/C/82/D/27/2017; Communication No 40/2018 *SMA v Spain* (2020) UN Doc CRC/C/85/D/40/2018; Communication No 26/2017, *MBS v Spain* (2020) UN Doc CRC/C/85/D/26/2017; Communication No 28/2017 *MB v Spain* (2020) UN Doc CRC/C/85/D/28/2017; Communication No 25/2017 *HB v Spain* (2020) UN Doc CRC/C/83/D/25/2017 and Communication No 63/2018 *COC v Spain* (2021) UN Doc CRC/C/86/D/63/2018; see also Communication No 24/2017 *AB v Finland* (2020) UN Doc CRC/C/83/D/24/2017.

56 In some cases, the general remedies were formulated in general terms, like in Communication No 3/2016 *IAM v Denmark* (2018) UN Doc CRC/C/77/D/3/2016 and Communication No 12/2017 *YB and NS on behalf of CE v Belgium* (2018) UN Doc CRC/C/79/D/12/2017 mentioned earlier; see for example, Communication No 4/2016 *DD v Spain* (2019) UN Doc CRC/C/80/D/4/2016 and Communication No 31/2017 *WMC v Denmark* (2020) UN Doc CRC/C/85/D/31/2017.

57 Communication No 76/2019 *RYS v Spain* (2021) UN Doc CRC/C/86/D/76/2019 9. See also para 12(d) of Communication No 95/2019 *AM (on behalf of MKAH) v Switzerland* (2021) UN Doc CRC/C/88/D/95/2019 in which the committee found that Switzerland should ensure that MKAH receives psychological assistance to facilitate his rehabilitation.

58 Communication No 4/2016 *DD v Spain* (2019) UN Doc CRC/C/80/D/4/2016.

59 Communication No 22/2017 *JAB v Spain* (2019) UN Doc CRC/C/81/D/22/2017; see also Communication No 17/2017 *MT v Spain* (2019) UN Doc CRC/C/82/D/17/2017.

request under article 17 of the Dublin III regulation),⁶² or to adopt effective measures to ensure the enforcement of the final (domestic) judgment and in doing so to ensure “effective relief for violations”.⁶³ In a 2021 case against Spain, the CRC Committee concluded that the state party should “provide [the child] effective reparation for the violations suffered, which includes adequate compensation as well as taking proactive steps to help him to catch up at school and reach the same level as his peers as soon as possible.”⁶⁴

General remedies recommended by the Committee in the various cases since the initial ones in 2018 focus on training judges, administrative staff, immigration officers, police officers and other professionals on the best interests of the child, on specific general comments⁶⁵ and on specific children’s rights.⁶⁶ Remedies of a general nature also concern measures to ensure the immediate and effective execution of judicial decisions in a child-friendly manner,⁶⁷ and the establishment of procedures that are consistent with the CRC in which children are routinely given the right to be heard and receive information on this (and on the context and consequences of the hearings) in a language they understand.⁶⁸ Such remedies also aim to secure

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- 60 See Communication 74/2019 *ZS and ZS on behalf of KS and M v Switzerland* (2022) UN Doc CRC/C/89/D/74/2019; *AMK and SK v Belgium*; *MKAH v Switzerland*. It must be noted that sometimes the committee is comprehensive or very specific in its reference to various rights and general principles (see e.g., Communication No 74/2019, *KS & MS v Switzerland*, (2022) UN Doc CRC/C/89/D/74/2019 and sometimes more limited in its focus on the best interests of the child (see, e.g., *KK and RH (on behalf of AMK and SK) v Belgium* (2022) UN Doc CRC/C/89/D/73/2019 and Communications No 77/2019; 109/2019 *FB et al and DA et al v France* (2022) UN Docs CRC/C/89/D/77/2019, CRC/C/89/D/79/2019, and CRC/C/89/D/109/2019).
- 61 Communication No 95/2019 *A.M on behalf of MKAH v Switzerland* (2021) UN Doc CRC/C/88/D/95/2019; Communication No 31/2017 *WMC v Denmark* (2020) UN Doc CRC/C/85/D/31/2017.
- 62 Communication No 56/2018 *VA v Switzerland* (2020) UN Doc CRC/C/85/D/56/2018.
- 63 Communication No 30/2017 *NR (on behalf of CR) v Paraguay* (2020) UN Doc CRC/C/83/D/30/2017. This case concerned a claim against Paraguay for non-enforcement of the order of a domestic court that established visitation arrangements and other forms of contact between father and daughter. See Espejo Yaksic “Communication 30/2017 *N.R on behalf of C.R v Paraguay* Case Note 2020/3” (2020) *Leiden Children’s Rights Observatory*;
- 64 Communication No 115/2020 *HM (on behalf of AEA) v Spain* (2021) UN Doc CRC/C/87/D/115/2020.
- 65 See, e.g., Communication No 76/2019 *RYS v Spain* (2021) UN Doc. CRC/C/86/D/76/2019.
- 66 Communication 30/2017 *NR (on behalf of CR) v Paraguay* 3 (2020) UN Doc CRC/C/83/D/30/2017; see also Communication No 115/2020 *HM (on behalf of AE) v Spain* (2021) UN Doc CRC/C/87/D/115/2020 and various other migration cases against Spain (incl Communication No 76/2019 *RYS v Spain* (2021) UN Doc CRC/C/86/D/76/2019 and Communication No 40/2018 *SMA v Spain* 2020 UN Doc CRC/C/85/D/40/2018).
- 67 Communication No 115/2020 *HM (on behalf of AEA) v Spain* (2021) UN Doc CRC/C/87/D/115/2020.

procedures in which the children's best interests of the child are taken into account as a primary consideration,⁶⁹ documents submitted by children are taken into consideration and accepted as genuine (if issued or authenticated by the relevant State authority),⁷⁰ children have access to legal representation, free of charge and without delay,⁷¹ and young unaccompanied asylum seekers are assigned a competent guardian (even if the age determination process is still ongoing).⁷² In addition, the Committee has insisted on the provision of qualified psychological counselling for (alleged) victims of violence to facilitate rehabilitation,⁷³ the development of national protocols that secure the return of children in a manner that is in accordance with the CRC⁷⁴ and to develop effective and accessible redress mechanisms for children to challenge decisions affecting them,⁷⁵ including the removal of legal, administrative and financial obstacles.⁷⁶ In the case *HM (on behalf of AEA) v Spain*, the Committee recommended that in order to prevent future violations, Spain should ensure that, if children reside in their jurisdiction and request to be enrolled in school, steps are taken to enable the child's access to education, through "effective and expeditious steps to confirm the child's residence", the immediate enrolment of the child by the local administrative authorities and the availability of an effective and accessible remedy in case of a dispute over a child's right to education.⁷⁷

In conclusion, the Committee has evolved its approach concerning remedies for children, although it must be acknowledged that many of the cases had a migration context and were lodged against a limited

68 Communication No 74/2019 *ZS and ZS (on behalf of KS and MS) v Switzerland* (2022) UN Doc CRC/C/89/D/74/2019 – in this case the Committee also found that Switzerland should "ensure that consideration of children's asylum applications based on the need for medical treatment necessary for a child's development includes an assessment of the availability and practical accessibility of such treatment in the State to which the child is returned" (para 8). See also Communication No 95/2019 *AM (on behalf of MKAH) v Switzerland* (2021) UN Doc CRC/C/88/D/95/2019 and Communication No 56/2018 *VA v Switzerland* (2020) UN Doc CRC/C/85/D/56/2018 in which the Committee underscored the importance of the systematic hearing of children in asylum procedures.

69 Communication No 73/2019 *KK and RH (on behalf of AMK and SK) v Belgium* (2022) UN Doc CRC/C/89/D/73/2019; Communication No 24/2017 *AB v Finland* (2020) UN Doc CRC/C/83/D/24/2017.

70 Communication No 76/2019 *RYS v Spain* (2021) UN Doc CRC/C/86/D/76/2019; see also *SMA v Spain* and a number of similar cases against Spain.

71 As above.

72 As above.

73 Communication No 76/2019 *RYS v Spain* (2021) UN Doc CRC/C/86/D/76/2019.

74 Communication No 95/2019 *AM (on behalf of MKAH) v Switzerland* (2021) UN Doc CRC/C/88/D/95/2019.

75 See Communication No 76/2019 *RYS v Spain* (2021) UN Doc CRC/C/86/D/76/2019.

76 Communication No 95/2019 *AM (on behalf of MKAH) v Switzerland* (2021) UN Doc CRC/C/88/D/95/2019.

77 Communication No 115/2020 *HM (on behalf of AEA) v Spain* (2021) UN Doc CRC/C/87/D/115/2020 para 13.

number of countries, mainly Europe. Despite this reality and despite its cautious start, the Committee is now using a wider array of individual and general remedies, some of which expressly reflect the child-specific nature of OPIC. The remedies provided by the Committee have both a substantive and a procedural character, ranging from guidance on how to offer support to child victims or enable children to enjoy their rights (e.g. the right to education), to procedural instructions to take a new or different decision and to do that in a way that better respects the CRC's general principles and rights, in particular the best interests of the child principle, the right to be heard and the right to effective and accessible remedies. The Committee is not only in the process of developing individual and general remedies specifically for children, but it also confirms children's right to access to justice at the domestic level as an important remedy to shield children against future rights violations.

4 Reflections – towards a framework for children's rights remedies

The Committee's engagement with remedies reflects a development embracing the general assumption in international human rights law that access to justice is more than access to processes in which human rights violations can be addressed and remedied. The case law under OPIC reflects the Committee's growing engagement with just and timely remedies for children who find themselves in very difficult and dependent situations. The Committee has also focused on general or systemic recommendations to states parties to prevent future violations. As far as the latter is concerned, the Committee has done so with a children's rights lens, which brings something new to the field of international human rights law,⁷⁸ in the absence of substantive guidance on effective remedies for children in international instruments, apart from some procedural direction concerning information to children and the need for speedy decision-making.⁷⁹ In addition, the Committee seems rather comfortable with providing systemic remedies, formulated more specifically than many of its individual remedies, which could very well be explained by the Committee's primary role as a treaty body focusing on the implementation of the CRC and its Optional Protocols through a constructive dialogue with states parties (see also art 4 of the CRC). The review of the case law under OPIC furthermore shows that the Committee does not seem to engage specifically with children's wishes and expectations, at least none of the views explicitly refers to children's views on the expected outcomes of the communications. Only after the admissibility decision in *Sacchi et al v Argentina et al*, the Committee

78 See also Skelton "UN Human Rights Committee: *Denny Zhao v. The Netherlands* Case Note 2021/8" (2021) *Leiden Children's Rights Observatory*.

79 Time is one of the weakest links of the OPIC system, being a rather time-consuming avenue to access justice, also considering the requirement to exhaust domestic remedies first. One way for OPIC to deliver immediate relief is through interim measures (art 6 of the OPIC).

wrote an open letter to the children who had lodged the communications, providing a “simplified explanation of the case”.⁸⁰

The CRC Committee's case law affirms that remedies such as reparation, including compensation (financial and otherwise), (psychological) support to recover and reintegrate, and immediate protection through recommendations not to execute or to reconsider certain administrative decisions or to enforce judicial decisions of domestic courts are equally relevant and appropriate for children. The Committee has additionally targeted remedies specifically to the enjoyment of specific children's rights, including the right to education (art 28 of the CRC), the right to remain in contact with parents (art 9 of the CRC), the right to health (art 24 of the CRC), the right to acquire or preserve a nationality (arts 7 and 8 of the CRC)⁸¹ and the right to be protected against violence (i.e., female genital mutilation). Moreover, the Committee has, in a growing number of cases, requested remedies to better secure a children's rights-compliant decision-making process, including the systematic hearing of children, access to quality legal representation and the provision of information to children in a language they understand. As part of this, the CRC Committee also acknowledges that children need and have the right to remedy decisions affecting them, independently from others, including legal representatives.

Based on this emerging case law, the following elements of what could be regarded as a *framework for children's rights remedies* can be distinguished, with relevance for access to justice proceedings at the domestic as well as the international level. The first element is that children, like all other human beings, are entitled to effective remedies that deliver reparation, compensation, restoration and means to recover, rehabilitate, and reintegrate, building in the notion that children are citizens of their societies, more specifically their communities, which may prompt remedies that focus on the community rather than on the individual child only. In relation to this, it can be argued that children are also entitled to be protected against the impunity of offenders of human rights violations, although under OPIC the CRC Committee has not yet engaged with this (apart from reference to it in its OPIC Rules of Procedure; see para 3). Above all, this first element underscores that children are to be seen as rights bearers with an *equal entitlement to appropriate and effective remedies*.

80 *Sacchi et al v Argentina et al* (Communication No 104/2019 (Argentina) Communication No 105/2019 (Brazil), Communication No 106/2019 (France) Communication No 107/2019 (Germany), Communication No 108/2019 (Turkey)); see also Liefwaard Open Letter on Climate Change, Discussion Leiden Children's Rights Observatory, Discussion 20 October 2021. It was in this case that the Committee decided, for the first time, to hear children; see further below.

81 See, e.g., Communication No 95/2019 *AM (on behalf of MKAH) v Switzerland* (2021) UN Doc CRC/C/88/D/95/2019 in which the child ran the risk of remaining stateless in Bulgaria.

In addition, children's rights remedies should acknowledge the specific position children are entitled to under international human rights law, which implies that the remedies are tailored to children's specific rights and needs. This second element of *child-specificity* implies that the best interests of the child ought to be considered (art 3(1) of the CRC) when recommending or ordering certain remedies, and it may prompt different and child-specific remedies (e.g., more pedagogically oriented),⁸² to be enforced speedily.

The third element relates to the procedure that should be adhered to when deciding on remedies. This procedure must in itself be children's rights compliant. It should be child-sensitive⁸³ and provide adequate information (before, during and after the proceedings), and it must accommodate the child's right to be heard (art 12 of the CRC). Moreover, it should, where relevant and appropriate, provide the child with information on effective remedies, also in case remedies are *de facto* not provided. This third element of the framework for children's rights remedies essentially revolves around the recognition of children as active participants in justice proceedings, who are entitled to submit documents, to have their requests and submissions considered diligently and in good faith, to challenge or appeal decisions and to benefit from specialised legal and other assistance, including access to support services (e.g., to cope with trauma). As part of *children's rights-compliant procedures*, it must furthermore be acknowledged that children are strongly in need of timely decisions and that they should be given notice of the outcomes of the remedy in a manner they understand.⁸⁴

The fourth and final element builds on the previous one and entails that remedies consider and explicitly engage with *children's expectations*, something which should be actively sought, for example at the time of lodging a communication or during the hearing of the parties involved.⁸⁵ This underscores, also for the procedures under OPIC, the need for practical tools to invite and enable children to express their requests, demands and expectations, such as child-specific application tools (e.g. a (digital) child-specific form)⁸⁶ through which children are requested to indicate what they expect from the remedy, and children's hearings (in person or remotely) through which they can clarify their complaints as well as their expectations. So far, the Committee has not yet explicitly engaged with children's expectations, at least not in its views.⁸⁷ This may

82 Liefwaard (2019) para 5.3.3.

83 See further Liefwaard (2019) 213.

84 See rule 14.1 of the OPIC Rules of Procedure which provides that the Committee "shall provide prompt and adequate information to author(s) ... on the decision regarding their case" and that this information "will be provided in an appropriate and accessible format for adults and children alike, adapted, to the extent possible, to the age and maturity of the author(s)."

85 See e.g., the Inter-American Court which has highlighted the importance of incorporating the voice of girls and children in formulating public prevention policies (Inter-American Court of Human Rights in the case of *Guzmán Albarracín et al v Ecuador*, judgement of 24 June 2020 para 245).

be related to the fact that children rarely submit communications themselves and that most of the cases brought to the Committee are submitted by others on behalf of children, which challenges the Committee's possibilities to engage directly with children and make inquiries about their expectations. In addition, the Committee only recently started to hear children under OPIC.⁸⁸

The framework for children's rights remedies, consisting of the four elements presented in this paragraph, should be seen as an attempt to further specify the international human rights framework on remedies for children and to develop a conceptual and practical frame of reference for the provision of effective remedies to children. It bears relevance for domestic as well as international justice proceedings available to children. Moreover, it can be applied to both individual and general or systemic remedies, particularly because children may very well be (equally) concerned about the rights and interests of other children, including children from future generations. Again, the input of children themselves here is critical, which would require further research.

5 Concluding reflections and observations

The right of access to justice for children is no longer disputed under international human rights law. Children, however, face particular challenges when it comes to access to effective remedies for rights violations. This article has provided further insight into the concept of remedies for children, particularly in terms of outcomes and their children's rights compliance. Although children's rights remedies build on the remedies available to any other human being, OPIC has the potential to guide states in the required child-specific direction. The case law under OPIC has so far delivered both individual and general or systemic remedies for children,⁸⁹ cognisant of children's often precarious situations and using a children's rights lens. The four elements of children's rights remedies presented in part 4 of this article build on

86 It should be noted that the individual complaints form as well as the guidance note available on the UN's website is not child specific and does not require to clarify the author's expectations; see OHCHR "Form and guidance for submitting an individual communication to treaty bodies" <https://www.ohchr.org/en/documents/tools-and-resources/form-and-guidance-submitting-individual-communication-treaty-bodies> (last accessed 2022-11-28).

87 An exception may be its inadmissibility decision in *Sacchi et al v Argentina et al* and the open letter to the children who had submitted the communication (and to other children who are concerned about climate change); see n 74 above.

88 See also Bolscher 2022 Rules of Procedure under CRC OP3 revised after the climate change case, Leiden Children's Rights Observatory, Discussion 31 January 2022.

89 With more or less concrete impact – see for example the follow-up reports of the Committee as well as some news items published by the Committee itself via <https://www.ohchr.org/en/treaty-bodies/crc/individual-communications> (last accessed 2022-11-27).

the recognition of children as holders of human rights, who have additional entitlements revolving around a child-specific approach respectful of human rights that are particularly important for children as human beings in development. The elements also reflect the notion that children themselves are best placed to inform decision-makers, including the CRC Committee, about their expectations when it comes to access to justice. The Committee, legal and other professionals, civil society organisations as well as researchers working on access to justice for children should actively solicit children's views and expectations. Otherwise, one runs the risk of missing the point entirely, which undermines the whole access to justice agenda for children and its critical meaning for children as rights holders.