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# Access to justice for children at the international level

Reflecting on 10 years of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure

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## 1 INTRODUCTION – 10 YEARS OF OPIC

This contribution to the Festschrift honouring Professor Kirsten Sandberg's academic career and global leadership in the field of children's rights focuses on the emerging field of access to justice for children. More specifically, it zooms in on the Optional Protocol to the Convention on the Rights of the Child (CRC) on a communications procedure<sup>2</sup>, also known as OPIC, which entered into force in April 2014 and provides children access to justice at the international level. The 10th anniversary of OPIC, in April 2024, gives reason to reflect on its meaning for children's access to justice and for the protection and promotion of children's rights. Should the 10th anniversary be marked with celebration, or is there cause for reservation? Reflecting on the initial decade of children's rights jurisprudence as articulated by the United Nations (UN) Committee on the Rights of the Child (CRC Committee), what valuable insights have been gained? Additionally, what pressing issues and concerns have surfaced, demanding the focus of both the international scholarly children's rights community and the key stakeholders involved in the practical implementation of access to justice for children?

This chapter starts with a brief explanation of access to justice for children as a crucial legal concept for children's rights protection, followed by some general remarks concerning

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2 United Nations General Assembly, *Resolution 66/138, Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, A/RES/66/138 (19 December 2011). <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/467/10/PDF/N1146710.pdf?OpenElement>

OPIC. The subsequent section presents some reflections into the last decade of OPIC jurisprudence, leading to further analysis of three critical issues requiring consideration. This contribution recognizes that discussing OPIC would not be possible without the tireless work of children's rights leaders like Kirsten Sandberg. Their efforts have played a crucial role in ensuring that children can now access justice internationally.

## 2 ACCESS TO JUSTICE FOR CHILDREN – A CRUCIAL LEGAL CONCEPT, WITH SPECIFIC BARRIERS FOR CHILDREN

Access to justice has been 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]”.<sup>3</sup> Also for children, access to justice can be considered a crucial legal concept and a critical element in the protection of children's human rights and fundamental freedoms. Without access to justice for children, children's rights would merely be symbolic.<sup>4</sup> The CRC Committee rightfully points out that “[f]or rights to have meaning, effective remedies must be available to redress violations”<sup>5</sup> and children's access to justice enshrines the right to an effective remedy.<sup>6</sup> Although the CRC does not provide explicit references to either the right to an effective remedy or the right to access justice,<sup>7</sup> it can be assumed that

- 3 UN Human Rights Council, *Access to Justice for Children, Report of the United Nations High Commissioner for Human Rights, A/HRC/25/35* (16 December 2013) para. 4, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/189/80/PDF/G1318980.pdf?OpenElement> with reference to UNICEF, *UN Common Approach to Justice for Children* (March 2008), p. 4. [https://resourcehub01.blob.core.windows.net/training-files/Training%20Materials/034%20RTP-CP\\_Police/034-020%20UN%20Common%20Approach%20to%20Justice%20for%20Children%202008.pdf](https://resourcehub01.blob.core.windows.net/training-files/Training%20Materials/034%20RTP-CP_Police/034-020%20UN%20Common%20Approach%20to%20Justice%20for%20Children%202008.pdf)
- 4 Michael Freeman (2007), “Why It Remains Important to Take Children's Rights Seriously”, *International Journal of Children's Rights*, Vol. 15, Issue 1, 2007 pp. 5–23 on p. 8. <https://doi.org/10.1163/092755607X181711>.
- 5 UN Committee on the Rights of the Child, *General Comment No. 5, General Measures of Implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5 (27 November 2003) para. 24. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/455/14/PDF/G0345514.pdf?OpenElement>. See also UN Human Rights Committee, *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (26 May 2004) para. 15. [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CCPR%2FC%2F21%2FRev.1%2FAdd.13&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CCPR%2FC%2F21%2FRev.1%2FAdd.13&Lang=en)
- 6 See, further, Ton Liefwaard, “Access to Justice for Children: Towards a Specific Research and Implementation Agenda”, *International Journal of Children's Rights*, Vol. 27, Issue 2, 2019 pp. 195–227 on p. 200. <https://doi.org/10.1163/15718182-02702002>
- 7 Cf., e.g., Art. 13 of the Convention on the Rights of Persons with Disabilities (CRPD). The CRC does provide for specific avenues to access justice in specific children's rights matters, see, e.g., Article 37 (d) CRC; Liefwaard, *op. cit.* p. 199.

children have such a right like any other human being<sup>8</sup> and that they therefore have the right to seek justice to address violations under the CRC and related legal instruments.<sup>9</sup>

Under international human rights law, access to justice means much more than the mere *access* to justice mechanisms, such as courts, national human rights institutions, and administrative authorities. It “more broadly encompasses equitable and just remedies”.<sup>10</sup> Access to justice is both a procedural and a substantive right,<sup>11</sup> which includes the right to access remedies that are just and equitable, not only for the individual seeking remedies, but also beyond that. It could “serve the collective with lasting impact on legal systems and/or practice, both domestically and internationally”.<sup>12</sup> The term “remedies” has dual meaning. It refers to “processes by which arguable claims of human rights violations are heard and decided, whether by courts, administrative agencies, or other competent bodies”.<sup>13</sup> It also refers to “the outcome of the proceedings, the relief afforded to the successful claimant”.<sup>14</sup>

Despite access to justice being a crucial legal concept for and right of every child, in practice there are specific “barriers”<sup>15</sup> that block children from effectively accessing justice and remedies. These barriers include the complexity of justice systems and the lack of child sensitivity, which make justice avenues incomprehensible and inaccessible for children. Children often lack legal empowerment, and justice systems may also be intimidating or even dangerous, particularly in systems where children are at risk of reprisals for lodging com-

8 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), which are relevant for children as well (cf. Art. 41 CRC).

9 See also Ton Liefwaard, “Children’s Rights Remedies under International Human Rights Law: How to Secure Children’s Rights Compliant Outcomes in Access to Justice?”, *De Jure Law Journal*, vol. 56, 2023, pp. 486–504, available at [http://www.dejure.up.ac.za/images/files/vol56-2023/Special\\_2\\_1\\_Liefwaard.pdf](http://www.dejure.up.ac.za/images/files/vol56-2023/Special_2_1_Liefwaard.pdf)

10 UNICEF, *Children’s Equitable Access to Justice, Central and Eastern Europe and Central Asia*, Geneva: 2015, [https://www.unicef.org/media/50996/file/Equitable\\_access\\_to\\_justice\\_for\\_children\\_in\\_Central\\_and\\_Eastern\\_Europe\\_and\\_Central\\_Asia\\_-\\_v2\\_1.pdf](https://www.unicef.org/media/50996/file/Equitable_access_to_justice_for_children_in_Central_and_Eastern_Europe_and_Central_Asia_-_v2_1.pdf), which finds support in legal doctrine; see Dinah Shelton, *Remedies in International Human Rights Law*, 3rd edition, Oxford University Press 2015, pp. 16–17; United Nations Development Programme, *Access to Justice: Practice Note* (9 March 2004), [https://www.undp.org/sites/g/files/zskgke326/files/publications/Justice\\_PN\\_En.pdf](https://www.undp.org/sites/g/files/zskgke326/files/publications/Justice_PN_En.pdf); UN Secretary-General (UNSG), *Guidance Note of the Secretary-General: UN Approach to Justice for Children* (September 2008), available at <https://www.refworld.org/docid/4a54bbf70.html>

11 Liefwaard 2019, p. 202.

12 For more on this, see Liefwaard 2023.

13 Shelton 2015, p. 16.

14 Ibid.

15 UN Human Rights Council 2013, *op. cit.* para. 13ff.

plaints or claims. Justice systems can be insensitive, making them inaccessible for certain groups of children, especially the most disadvantaged or marginalized. This insensitivity can lead to a denial of the right to access justice or the absence of support mechanisms, including legal assistance and legal aid. Another common issue in legal systems worldwide is the limited legal capacity or standing of children. This dependence on legal representatives often overlooks that children may independently have a significant interest in accessing justice. It fails to recognize that children have rights in their own accord that warrant protection through access to justice.<sup>16</sup>

### 3 OPIC – INTERNATIONAL RECOGNITION OF CHILDREN'S ACCESS TO JUSTICE

The adoption and entry into force of OPIC in 2011 and 2014, respectively, can be seen as an international recognition of children's right to access justice. It establishes a communications procedure for children concerning alleged violations of their rights under the CRC and its two substantive Optional Protocols.<sup>17</sup> It allows individual children or groups of children to bring communications before the CRC Committee.<sup>18</sup> OPIC has been welcomed as an important milestone in recognizing children's rights, affirming the child as a "subject of rights"<sup>19</sup> and providing access to justice for children at the international level.<sup>20</sup> Up until 2011, the CRC was the only UN human rights instrument that lacked a communications procedure, and the protection of children's rights was therefore considered "incomplete."<sup>21</sup> OPIC includes procedural provisions similar to other UN communication procedures, ensuring its alignment with these procedures. It also provides that the CRC Committee

16 UN Human Rights Council 2013, *op. cit.* para. 13ff.; see also UNICEF 2015.

17 UN General Assembly, *Resolution 54/263, Optional protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography*, A/RES/54/263 (25 May 2000). <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/625/67/PDF/N0062567.pdf?OpenElement>

18 Art. 5 OPIC.

19 Preamble OPIC.

20 Sarah Ida Spronk-Van der Meer, *The Right to Health of the Child, An Analytical Exploration of the International Normative Framework*, Intersentia 2014, pp. 268–269; see also Sevda Clark, "Child Rights and the Movement from Status to Agency: Human Rights and the Removal of the Legal Disabilities of Vulnerability", *Nordic Journal of International Law*, Vol. 84, Issue 2, 2015, p. 217, who observes that with the adoption of the Third Optional Protocol "any remaining objections to the legal capacities of children at the international level have since been eviscerated". <https://doi.org/10.1163/15718107-08402003>

21 Human Rights Council, *Joint Written Statement by International Save the Children Alliance et al.*, A/HRC/8/NGO/6 (26 May 2008). <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/137/25/PDF/G0813725.pdf?OpenElement>

must adopt rules of procedure that among others “guarantee child-sensitive procedures”<sup>22</sup> and prevents “the manipulation of the child by those acting on his or her behalf”.<sup>23</sup> In addition, the CRC Committee “may decline to examine any communication that it considers not to be in the child’s best interests”.<sup>24</sup> In providing this, OPIC seems sensitive to children’s specific rights, needs and vulnerabilities.

OPIC is furthermore meant to supplement remedies at the domestic level, hence includes the requirement to exhaust domestic remedies before a communication brought to the CRC Committee can be admissible (Article 7 (e) OPIC), a requirement that the CRC Committee strictly adheres to.<sup>25</sup> Moreover, the CRC Committee is instructed to facilitate a friendly settlement regarding each communication, which if successful closes consideration of the communication.<sup>26</sup> The CRC Committee can also request interim measures “in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations”.<sup>27</sup>

In addition to individual communications by or on behalf of children, the CRC Committee can receive inter-state communications. This is only applicable to states that have explicitly opted in.<sup>28</sup> The CRC Committee has not received any inter-state communications up until today. OPIC also gives the CRC Committee the mandate to conduct inquiry procedures upon receipt of information indicating “grave or systematic violations” of the CRC or its optional protocols by a state party. Up until now, the CRC Committee has published one report following an inquiry procedure in Chile.<sup>29</sup>

22 UN General Assembly, *Report of the Open-Ended Working Group on an Optional Protocol to the Convention on the Rights of the Child to Provide a Communications Procedure*, A/HRC/17/36 (25 May 2011), para. 29. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/134/72/PDF/G1113472.pdf?OpenElement>

23 Art. 3 (1) OPIC.

24 Art. 3 (2) OPIC.

25 See, e.g., Danielle Zlotnik Raz, *Communication 60/2018: D.C. v. Germany*, Leiden Children’s Rights Observatory, Case Note 2020/4 (15 September 2020), available at <https://www.childrensrightsobservatory.org/case-notes/casenote2020-4>; Margaretha Wewerinke-Singh, *Communication 104/2019 Chiara Sacchi et al v. Argentina et al.*, Leiden Children’s Rights Observatory, Case Note 2021/10 (28 October 2021), available at <https://www.childrensrightsobservatory.org/case-notes/casenote2021-10>

26 Art. 9 OPIC.

27 Art. 6 OPIC.

28 Art. 12 (1) OPIC. Only 13 states have explicitly recognized the CRC Committee’s competence under this provision.

29 See Nicolás 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*, Leiden Children’s Rights Observatory, Case Note 2018/2 (13 November 2018), available at <https://www.childrensrightsobservatory.org/case-notes/casenote2018-2>

## 4 SOME OBSERVATIONS AND REFLECTIONS AFTER 10 YEARS OF OPIC

### 4.1 Overall impression

At the time of writing, 51 states have ratified or acceded OPIC and 16 more have signed the protocol.<sup>30</sup> This means that 130 states have taken no action, making the ratification status significantly lower than the CRC, which has 196 states parties. The majority of the states that have embraced OPIC come from Europe and Latin America. Africa, Asia, North America and Australia/Pacific are far behind with only a handful of countries being states parties to the OPIC. The CRC Committee has been receiving individual communications since 2014. As of September 2023, the Committee had registered 235 individual communications, issuing 122 decisions on these communications.<sup>31</sup> In roughly one-third of the cases, the Committee has decided on the merits of the case, resulting in adoption of views. In almost all of these cases, the CRC Committee found one or more violations of the CRC. Two-thirds of the cases submitted to the CRC Committee were either discontinued or declared inadmissible.

A significant number of cases brought to the CRC Committee have dealt with migration-related matters and concerned complaints about the protection of children seeking asylum or being under the threat of deportation. The case in which the CRC Committee adopted its first views on the merits concerned a case against Denmark concerning the deportation of a girl from Denmark to Somalia, where she would face an alleged risk of being forcefully subjected to female genital mutilation.<sup>32</sup> The CRC Committee concluded that deportation would violate her right to be protected against violence and the right to have her best interests given primary consideration,<sup>33</sup> and it requested Denmark to stay the deportation order.<sup>34</sup> Since then the CRC Committee has decided on many migration-related cases, many of which concerned Spain, but also other European countries, including Belgium, Denmark, Finland and Switzerland, ranging from matters related to age verification, deportation and various children's rights risks, and immigration detention to rights regarding medical care, an adequate standard of living and education.<sup>35</sup>

30 See [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-d&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&clang=_en) (last visited 8 January 2023).

31 Information provided by the Office of the High Commissioner of Human Rights upon request.

32 UN Committee on the Rights of the Child, *I.A.M. V Denmark*, CRC/C/77/D/3/2016 (25 January 2018). [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CRC%2FC%2F77%2FD%2F3%2F2016&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CRC%2FC%2F77%2FD%2F3%2F2016&Lang=en)

33 Art. 19 and 3(1) CRC, respectively.

34 See Julia Sloth-Nielsen, *Communication 3/2016: I.A.M. on behalf of K.Y.M. v Denmark*, Leiden Children's Rights Observatory, Case Note 2018/1 (18 July 2018), available at <https://www.childrensrightsobservatory.org/case-notes/casenote2018-1>

35 See for analyses of the OPIC jurisprudence the Leiden Children's Rights Observatory, <https://www.childrensrightsobservatory.org/> (last visited 8 January 2024).

In the past couple of years, the diversity of cases decided on by the Committee has increased and now includes a wide range of other children's rights issues. Among others, the CRC Committee has adopted views in cases concerning visiting and custody rights in cross-border situations, international child abduction, violence against children and youth justice. Some prolific cases concerned cases against France<sup>36</sup> (and later also Finland<sup>37</sup>) on the repatriation of children from foreign fighters, which first resulted in a ground-breaking admissibility decision in which the CRC Committee assumed that the children in the camps in Northern Syria fell within the jurisdiction of France,<sup>38</sup> followed by views on the merits resulting in a list of remedies that France ought to provide to the children concerned and whose rights were found to be seriously at risk.<sup>39</sup> Another prolific case concerns *Chiara Sacchi et al. v. Argentina et al.*,<sup>40</sup> which also became known as the children's climate case. The CRC Committee concluded that this case was inadmissible because of the non-exhaustion of domestic remedies. Yet the CRC Committee offered substantive reflections on the merits of the case, resulting in a standpoint regarding the responsibility of states parties for its actions impacting children's rights beyond their borders.<sup>41</sup> This was also the first case in which children were invited by the CRC Committee to attend an oral hearing

36 UN Committee on the Rights of the Child, *L.H. et al v. France*, CRC/C/85/D/79/2019–CRC/C/85/D/109/2019 (2 November 2020). [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2F85%2FD%2F79%2F2019&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2F85%2FD%2F79%2F2019&Lang=en). UN Committee on the Rights of the Child, *F.B. et al v. France*, CRC/C/89/D/77/2019–CRC/C/89/D/79/2019–CRC/C/89/D/109/2019 (9 March 2022).

37 UN Committee on the Rights of the Child, *P.N. et al. v. Finland*, CRC/C/91/D/100/2019 (20 October 2022). [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2F91%2FD%2F100%2F2019&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2F91%2FD%2F100%2F2019&Lang=en)

38 See Helen Duffy, *Communication 79/2019 and 109/2019 et. al.*, Leiden Children's Rights Observatory, Case Note 2021/3 (18 February 2021), available at <https://www.childrensrightsobservatory.org/case-notes/casenote2021-3>

39 See Chrisje Sandelowsky-Bosman & Ton Liefwaard, *Communication 77/2019, 79/2019 and 109/2019: F.B. et al & D.A. et al v. France*, Leiden Children's Rights Observatory, Case Note 2022/05 (15 November 2022), available at <https://www.childrensrightsobservatory.org/case-notes/f.b.-et-al-d.a.-et-al-v.-france>

40 UN Committee on the Rights of the Child, *Chiara Sacchi et al. v Argentina et al.*, CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019 and CRC/C/88/D/108/2019 (22 September 2021), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/322/87/PDF/G2132287.pdf?OpenElement>

41 Wewerinke-Singh 2021.



(online)<sup>42</sup> and in which the Committee published an open letter to the sixteen claimants to clarify its decision.<sup>43</sup>

#### 4.2 Active CRC Committee

The CRC Committee has become very active under OPIC, a development which is, of course, very much stimulated by the communications brought to the Committee. When following closely how the CRC Committee operates under OPIC and when analyzing the views adopted and decisions made under OPIC, one sees a committee that learns fast and seems to reflect continuously on its own decisions. It has also shown courage in cases concerning legally challenging issues and sometimes highly sensitive matters. Examples include the legal cases involving children in camps in Northern Syria against France and Finland, as mentioned earlier. In these cases, there was an expansion of the concept of extraterritorial jurisdiction. Despite facing criticism, this decision was acknowledged by the European Court of Human Rights in a similar case.<sup>44</sup> Notably, it contributed to a higher number of children being repatriated. Another example of a rather sensitive and very much welcomed decision concerned the more recent case on the decriminalization of abortion against Peru.<sup>45</sup>

The Committee's contribution to and through OPIC is evolving and will continue to evolve. This has already resulted in a better understanding of the value of OPIC, as an instrument of access to justice for children, to guide the interpretation of specific children's rights matters and to flag specific children's rights challenges. It is also evident that the CRC Committee strictly upholds the admissibility criteria of Article 7 OPIC. This highlights the

42 After which it changed its *Rules of Procedure under the Optional Protocol to the CRC on a Communications Procedure* embedding rule 19 concerning oral hearings; see, further, Apollonia Bolscher, *Rules of Procedure under CRC OP3 Revised after the Climate Change Case*, Leiden Children's Rights Observatory, Discussion (31 January 2022), available at <https://www.childrensrightsobservatory.org/discussions/rules-of-procedure-under-crc-op3-revised-after-the-climate-change-case>

43 Ton Liefwaard, *Open Letter on Climate Change*, Leiden Children's Rights Observatory, Discussion (20 October 2021), available at <https://www.childrensrightsobservatory.org/discussions/open-letter-on-climate-change>

44 European Court of Human Rights, *Case of H.F. and Others v. France* (Applications nos. 24384/19 and 44234/20) (14 September 2022) at para. 269, available at <https://hudoc.echr.coe.int/fre#{%22item-id%22:%22001-219333%22}>

45 UN Committee on the Rights of the Child, *Camila v Peru*, CRC/C/93/D/136/2021 (15 June 2023); see Godfrey Kangaude, *Communication No. 136/2021 Camila V Peru*, Leiden Children's Rights Observatory, Case Note 2023/05 (12 September 2023), available at <https://www.childrensrightsobservatory.org/case-notes/camilla-v-peru>

importance of these criteria in preventing the CRC Committee from allocating valuable time to communications that are ill-founded or not sufficiently substantiated or on cases brought by adults (e.g., parents) claiming a violation of their rights.<sup>46</sup>

The evolving jurisprudence also reveals that the decisions of the CRC Committee can have real impact. The cases against Spain have indeed resulted in legislative reform to better protect the rights of refugee children, in particular concerning age determination,<sup>47</sup> and Denmark also took decisions favourable to children in the context of migration, also through the CRC Committee's requests for interim measures.<sup>48</sup> As mentioned before, France has increased the number of repatriations of children in Northern Syria after the Committee adopted its views. In another pending case, a girl who had lodged a complaint about not being admitted to school because of being an irregular resident was admitted after the Committee invited the state party to respond to the complaint, a decision that was very much welcomed by the Committee.<sup>49</sup>

Finally, it needs to be mentioned that the Committee has proven to be creative in exploring ways to inform children as well as the wider audience about decisions and/or follow-up, through video messages and an open letter.<sup>50</sup>

Despite these rather positive overall impressions and observations, the follow-up reports published by the CRC Committee over the years indicate that the follow-up with states parties is challenging. There is reason to reflect further on some issues that require the attention of the CRC Committee, other stakeholders and children's rights scholars.<sup>51</sup>

46 J. E. Doek, *Individual Communications Submitted under the Optional Protocol to the CRC on a Communications Procedure and Admissibility*, Leiden Law School 2022, pp. 1–50.

47 See the fourth follow-up progress report on individual communications by the CRC Committee, CRC/C/90/R.1 (26 July 2022). [https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/2022-11-17/CRC-C-90-R.1\\_UV.pdf](https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/2022-11-17/CRC-C-90-R.1_UV.pdf)

48 Lisanne van Dijk, *An effective Reparation by the Danish Government*, Leiden Children's Rights Observatory, Discussion 19 May 2020, available at <https://www.childrensrightsobservatory.org/discussions/un-committee-welcomes-danish-asylum-for-syrian-mother-of-six>

49 Ton Liefwaard & Lisanne van Dijk, *Irregular Migrant Children and the Right to Education*, Leiden Children's Rights Observatory, Discussion 8 September 2020, available at <https://www.childrensrightsobservatory.org/discussions/irregular-migrant-children-and-the-right-to-education>

50 Moreover, the CRC Committee has developed an interest in child-friendly summaries of its views. Child Rights Connect and Leiden University have developed a concept for child-friendly summaries of OPIC decisions, on the basis of which Leiden University students have developed examples of such summaries in 2022 and 2023 and presented these to the Committee.

51 Paragraph 4.3 does not present an exhaustive list of issues that require attention, among others in children's rights scholarship.

### 4.3 *Some further reflections*

#### 4.3.1 Accessibility of OPIC for children

Considering the barriers children encounter when it comes to access to justice, the accessibility of OPIC is crucial for children's access to justice internationally. One may wonder to what extent OPIC is truly accessible for children, for example, because the procedure is held in Geneva, where the CRC Committee convenes. Of course, the physical distance and costs involved in travelling to Geneva impose real challenges, and despite the rules of procedure under OPIC providing for the possibility of hearing "by way of video or teleconference",<sup>52</sup> the CRC Committee has heard children only in a limited number of cases. Furthermore, the accessibility of OPIC is formally dependent on the issue of legal standing. In many domestic jurisdictions, children lack (fully or to a certain degree) legal capacity to take legal action and to initiate complaints against the state. The argument posits that the absence of legal capacity affects the admissibility of children's cases under OPIC. It suggests that before utilising the communication procedure, domestic remedies must be exhausted. Furthermore, it raises concern that children might face exclusion from domestic remedies due to their legal incapacity.<sup>53</sup> Legal standing for children, however, does not seem to be an issue at the international level and is not dependent on children's legal capacity in their domestic jurisdiction. Children do have legal standing before the CRC Committee, like they have legal standing before regional human rights courts,<sup>54</sup> and the "*de jure* and *de facto* access [of minors] to international human rights bodies is not necessarily determined by domestic laws".<sup>55</sup> This also means that if a child's legal representative is not willing to represent a child in seeking domestic remedies, he or she could be admitted under OPIC. The question is how this relates to the requirement of exhaustion of domestic remedies, a question that has not yet been raised before the CRC Committee. It could be argued that Article 7 (5) OPIC, which allows for admitting a communication if the application of remedies is "unreasonably prolonged or unlikely to bring effective relief", could be interpreted

52 See Art. 19(1) Rules of Procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, 16 April 2013, CRC/C/62/3 (OPIC Rules of Procedure), which provides that the oral hearing can take place "by way of video or teleconference".

53 Rhona Smith, "The Third Optional Protocol to the UN Convention on the Rights of the Child? – Challenges Arising Transforming the Rhetoric into Reality", *International Journal of Children's Rights*, Vol. 21, Issue 2, 2013, pp. 305–322 on pp. 315–316. <https://doi.org/10.1163/15718182-5680020>

54 See Art. 34 of the European Convention on Human Rights; see also, e.g., Claire Fenton-Glynn, *Children and the European Court of Human Rights*, Oxford University Press 2020, p. 256. <https://doi.org/10.1093/oso/9780198787518.001.0001>. See also Martin Scheinin, "Access to Justice before International Human Rights Bodies", in Francesco Francioni (Ed.), *Access to Justice as a Human Right*, Oxford University Press 2007, pp. 135–152 on pp. 142ff. <https://doi.org/10.1093/acprof:oso/9780199233083.003.0004>

55 Scheinin 2007, p. 144.

in such a way that children are allowed to submit a communication to the CRC Committee immediately, despite the lack of legal capacity under domestic law and their legal representatives not being willing to access remedies domestically.

It must be acknowledged that the vast majority of the communications brought to the CRC Committee are brought by other representatives and not by children themselves.<sup>56</sup> OPIC allows for this in Article 5 (2), even without the consent of the child, if justified and if the Committee deems it in the child's best interests.<sup>57</sup> The CRC Committee has, for example, accepted a lack of consent in the cases against France and Finland on children in Northern Syria brought before the Committee by family members and relatives.<sup>58</sup> In the case against Finland, however, the Committee declared the communications against certain children inadmissible because they were lodged by adults who were not relatives of the child.<sup>59</sup> In another case, the CRC Committee accepted a communication submitted by a mother, who shared joint custody of her 10-year-old child.<sup>60</sup> The assumption of implied consent was made, raising a potential challenge. It can be argued that assuming a parent acts on behalf of the child without confirmation of the child's views or consent could be problematic. This is particularly relevant when the child might be capable of expressing views or providing consent, and it remains uncertain whether the child supports the sub-

56 This is not unique for OPIC. See Fenton-Glynn 2020 in which she observes a similar phenomenon regarding the European Court of Human Rights; Jane Fortin, *Children's Rights and the Developing Law*, Cambridge University Press 2009, and M. R. Bruning et al., *Kind in proces: van communicatie naar effectieve participatie. Het hoorrecht en de procespositie van minderjarigen in familie- en jeugdzaken*, Wolf Legal Publishers 2020, concerning access to justice domestically.

57 See also Art. 2 and 3 (2) OPIC and Rule 20(4) OPIC Rules of Procedure. See also Rule 13(3) OPIC Rules of Procedure, which states that "[...] communications may be submitted on behalf of the alleged victim(s) without such express consent, provided that the author(s) can justify her/his/their action and the Committee deems it to be in the best interests of the child" and adds that "[i]f possible, the alleged victim(s) on whose behalf the communication is presented may be informed of the communication and her/his/their views shall be given due weight in accordance with her/his/their age and maturity". For more on this element of the child's best interests in relation to admissibility, see Doek's critical reflections in Doek 2022.

58 See Communications *L.H. et al v. France*, CRC/C/85/D/79/2019–CRC/C/85/D/109/2019 (2 November 2020). <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/276/67/PDF/G2027667.pdf?OpenElement>; *F.B. et al v. France*, CRC/C/89/D/77/2019–CRC/C/89/D/79/2019–CRC/C/89/D/109/2019 (9 March 2022) and *P.N. et al. v. Finland*, CRC/C/91/D/100/2019 (20 October 2022). [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2F91%2FD%2F100%2F2019&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2F91%2FD%2F100%2F2019&Lang=en)

59 *P.N. et al. v. Finland*, CRC/C/91/D/100/2019, para. 10.4.

60 *R.N. v Finland*, CRC/C/85/D/98/2019 (12 October 2020). <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/274/61/PDF/G2027461.pdf?OpenElement>

mission of the communication.<sup>61</sup> In relation to this, it remains remarkable that OPIC does not provide for the appointment of an *ad hoc* and neutral representative by the CRC Committee, *ex officio* or upon request.<sup>62</sup>

#### 4.3.2 Child-sensitive proceedings

An issue related to accessibility is the adaptability of the OPIC proceedings to children, which concerns the child-sensitive nature of the proceedings. OPIC requires the CRC Committee to develop “child-sensitive procedures”.<sup>63</sup> This resonates with OPIC’s recognition of children’s specific vulnerabilities and needs, mentioned earlier, calling for special protective considerations and measures. For example, Article 4 (2) OPIC provides that the identity of any individual or group of individuals concerned shall not be disclosed without their express consent.<sup>64</sup> Article 4 (1) OPIC also stipulates that states parties to OPIC are expected to “take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to any human rights violation, ill-treatment or intimidation as a consequence of communications or cooperation with the Committee pursuant to [OPIC]”.<sup>65</sup> Child-sensitive procedures should also acknowledge children’s participation rights, as referred to in Article 2 OPIC on the “General principles guiding the functions of the Committee”. According to this provision, the CRC Committee shall “have regard for the rights and views of the child, the views of the child being given due weight in accordance with the age and maturity of the child”.<sup>66</sup> The rules of procedure establish several safeguards for children’s

61 This seems on strained terms with Art. 12 and 5 CRC and with the broad support for child participation during the drafting of OPIC; see Spronk-Van der Meer 2014, p. 277, with reference to Sara Lembrechts, “Wiens klachtrecht? Het kind-concept in het derde Facultatief Protocol bij het Verdrag inzake de Rechten van het Kind betreffende de instelling van een communicatieprocedure”, *Tijdschrift voor Jeugd en Kinderrechten*, Vol. 2, 2012, pp. 96–113.

62 See also Smith 2013, p. 315.

63 Art 3(1) jo. Art. 2 OPIC.

64 See also Rule 29 OPIC Rules of Procedure.

65 Rule 4 OPIC Rules of Procedure provides in light of this: “When the Committee receives reliable information that a State party has not complied with its obligations under article 4 (1) of the Optional Protocol to take all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any human rights violations, ill-treatment or intimidation as a consequence of communications or cooperation with the Committee, it may request the State party to adopt and take all appropriate measures urgently to stop the breach reported and submit written explanations and clarifications thereon to the Committee. Compliance with this request shall be monitored. The Committee may also issue public statements in this regard and take such action as may be appropriate.”

66 Art. 2 OPIC.

effective participation, including adapted information,<sup>67</sup> expeditious handling of communications without “unnecessary delay”<sup>68</sup>, and the communication of decisions and reasoning in an adapted and accessible format “to the extent possible”.<sup>69</sup> In the case of an oral hearing concerning the admissibility or the merits of the case, it will be conducted in a closed meeting and not in the presence of state representatives, “unless both parties agree to a public meeting and the CRC Committee deems it to be in the best interests”.<sup>70</sup>

Whether children can effectively access and participate in OPIC proceedings, and moreover understand the outcomes of the case, is very much dependent on how the CRC Committee enforces its own rules of procedure. It would require more in-depth analysis of the OPIC procedures, for example, on how children have experienced their direct or, more likely, indirect involvement. It is clear, however, that the realisation of child-sensitive proceedings is not without challenges. Up until now, not much can be said about oral hearings, because the CRC Committee has not engaged with that much. The presentation of the CRC Committee’s formal decisions in a child-friendly format has not been developed yet, although the Committee has made some efforts in this regard, as was mentioned earlier. The CRC Committee has become more active over the years in providing information on OPIC on its website, which quite prominently presents a special section with information for children on the CRC and the Committee’s work, including a small section on individual complaints. This part of the website links to a dedicated page developed for children by Child Rights Connect.<sup>71</sup> There is no information on how effective the provision of information through these channels has been so far.

The inadmissibility of non-written communications may further pose an obstacle to the participation of children. This specific admissibility requirement has met with criticism, also because the communications under the Convention on Persons with Disabilities do not require submission in writing.<sup>72</sup> Moreover, OPIC as well as the CRC Committee’s Rules of Procedure on OPIC are not very clear on the procedural adjustments in place to best

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67 According to Rule 14(1) OPIC Rules of Procedure, the CRC Committee provides authors with information on the progress of the proceedings and on any decisions in an “appropriate and accessible format for adults and children alike, adapted, to the extent possible, to the age and maturity of the authors(s)”.

68 Rule 2 OPIC Rules of Procedure.

69 Rule 21 OPIC Rules of Procedure.

70 Rule 19(1) OPIC Rules of Procedure. Before the revision of its rules in November 2021, a public hearing could only be requested by the child and could not be held regarding admissibility decisions. This was changed after the *Sacchi et al.* case; see Bolscher 2022.

71 See <https://www.ohchr.org/en/treaty-bodies/crc/information-children> and <https://opic.childrightsconnect.org/resources-for-children/> (both last accessed on 17 November 2023).

72 See Art. 7 (b) OPIC; see also Doek 2022, p. 19.

accommodate children during the procedures, particularly regarding their direct engagement with the CRC Committee or the Petitions Unit of the Office for the Human Commissioner for Human Rights. A final point of concern is that it is questionable to what extent the dissemination of OPIC is taken up by states parties, despite OPIC requiring its dissemination in accessible formats to adults and children, including those with disabilities.<sup>73</sup>

#### 4.3.3 Remedies – connecting OPIC with domestic remedies for children

The impact of OPIC for the effective protection of children's rights is, among others, dependent on the effectiveness of the remedies provided. So far little specific attention in children's rights scholarship has been devoted to the analysis of the remedies provided by the CRC Committee in the case of rights violations. The OPIC Rules of Procedure provide that the CRC Committee can make recommendations to states parties, which may include rehabilitation, reparation, financial compensation, guarantee of non-repetition, and requests to prosecute the perpetrator(s). The Committee can also make recommendations to adopt legislative, institutional or other kinds of general measures to avoid repetition.<sup>74</sup> Neither OPIC nor the OPIC Rules of Procedure provide further guidance on specific remedies for children. Other international standards provide some procedural guidance underscoring the significance of the provision of adequate information on the remedies to children and the significance of a speedy enforcement of (judicial) decisions affecting children.<sup>75</sup>

A recent analysis of the remedies provided in OPIC cases shows that the CRC Committee has significantly developed its approach towards remedies.<sup>76</sup> After a cautious start, it now uses a wide array of individual and general remedies, some of which expressly reflect the child-specific nature of OPIC. The remedies provided by the Committee have substantive and procedural elements, 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. In addition, the Committee provides both individual remedies as well as general or systemic remedies to prevent future violations. It remains unclear, however, to what extent the CRC Com-

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73 Art. 17 OPIC.

74 Rule 27(4) OPIC Rules of Procedure.

75 Liefwaard 2019, p. 202, with reference to the Council of Europe's *Guidelines on Child-Friendly Justice*, Part iv, E, para. 76.

76 Liefwaard 2023.

mittee actively engages with children's wishes and expectations in defining the remedies. In none of the views has the CRC Committee explicitly referred to children's views on the expected outcomes of the communications, and children are not explicitly invited to share their expectations when lodging a communication.<sup>77</sup>

The CRC Committee does confirm children's right to access to justice at the domestic level as an important remedy to shield children against future rights violations.<sup>78</sup> In doing so, the CRC Committee underscores OPIC's encouragement of states parties to develop "appropriate national mechanisms"<sup>79</sup> to enable children to have access to effective remedies at the domestic level. As mentioned earlier, OPIC allows children, in the absence of effective domestic remedies, to bring a communication directly to the CRC Committee. This could very well serve as an incentive for states parties to develop national remedies and ensure children's access to justice at the domestic level. The CRC Committee can guide the states on how to do that in a legally empowering and child-friendly manner.

## 5 CONCLUDING OBSERVATIONS

OPIC stands above all else as a confirmation for children's right to access justice. Approaching the 10th anniversary of OPIC, it remains challenging to assess the real meaning of OPIC. Yet, a lot has happened since 2014, and the CRC Committee's active engagement with OPIC is promising. It cannot be denied, however, that OPIC has put an additional burden on the CRC Committee and without additional support the efficacy of the OPIC mandate does not seem to be guaranteed. This, together with the challenges children face in accessing OPIC, some of which were addressed in this contribution, underscores the significance of investing in domestic remedies above anything else. To what extent OPIC will have a positive impact on domestic remedies that are both accessible for children and effective for children's rights protection remains to be seen and requires, as a minimum, an active interest from children's rights scholars. The CRC Committee's engagement with OPIC does, however, send out a strong signal: every child has the right to access justice, and every domestic legal system should revisit how it can best secure this fundamental right, crucial for the effective protection and realization of all other children's rights.

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<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Preamble of OPIC.