

COMMUNICATIONS PROCEDURE UNDER THE 3RD OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD: A CRITICAL ASSESSMENT

*Zelalem shiferaw Woldemichael**

Until very recently, the Convention on the Rights of the Child (the CRC) was devoid of an international Complaints Mechanism. Consequently, children were not entitled to present claims alleging violations of their rights at an international level and get remedy. Analyzing the detrimental impact that absence of international Complaints Mechanism under the CRC may pose on children, the General Assembly of the UN adopted the 3rd Optional Protocol (OP) of the CRC on 19 December 2011. The instrument entered in to force on 14 April 2014.

Admittedly, children are vulnerable groups of the society. Accordingly, an international Complaints System devised for children is expected to take in to account the special nature of children. This article will assess the 3rd OP of the CRC adopted by the UN and examine whether the key Procedures introduced in it (i.e., Individual Communications Procedure, Inter-State Communications Procedure and Inquiry Procedure) incorporate provisions that take in to account the special status and vulnerabilities of children. The article will also scrutinize other provisions of the OP having important implication on the application of the key Procedures of the OP.

INTRODUCTION

The Convention on the Rights of the Child (the CRC) is an innovative international instrument that deals solely with the rights of children.¹ It was adopted in response to appalling atrocities perpetrated against children in the form of abuse, violence, neglect

* Lecturer, College of Law and Governance, Jimma University.

¹The CRC was adopted by the UN General Assembly Resolution 44/25 of 20 November 1989. It entered into force on 2 September 1990

and exploitation.² There was also a need to ameliorate serious violations of rights inflicted on children as a consequence of deficient health care, limited opportunity for basic education, sexual exploitation and involvement in armed conflicts.³ The CRC is augmented by two Optional Protocols: the Optional Protocol to the Convention on the Rights of the Child on the sale of Children, Child Prostitution and Child Pornography (OPSC) and the Optional protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (OPAC), designed to address sexual exploitation and recruitment and use of children in armed conflicts respectively.⁴

Even if the adoption of the CRC may signify a step forward in the recognition of the rights of children, it is not an end in itself. In order to make children beneficiaries of the rights guaranteed under the instrument, it is quite indispensable to complement it with a well established monitoring system. Monitoring mechanisms generally play significant role in developing a meaningful international human rights system. Without effective monitoring mechanisms, countries that ratify or accede to specific human rights instruments will not be in a better position to assess their own performance in promoting effective realization of the enumerated rights.⁵ It will also become difficult to hold States accountable for failing to implement the rights guaranteed in the instruments.⁶ From the very outset, many States do not have an independent internal mechanism to guarantee adherence to standards that govern the treatment of individuals.⁷ International monitoring, hence, is central to ensure that human

²UNICEF, 'Hand Book on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography',(UNICEF, 2009),p.1

³ OHCHR, Fact Sheet No.7/Rev.1,'Complaints Procedure ' p.1

⁴ Both instruments were adopted by the UN on May 25,2000 and entered in to force in 2002

⁵Andrey Chapman, 'A "violation Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights'(1996), *18 Human Rights Quarterly*1 pp.23-26,at.23

⁶ ibid

⁷Patricia Watt, 'Monitoring Human Rights Treaties',p.215,Available at <[http:// www.edocfind.com](http://www.edocfind.com).> accessed on 09/04/2011

rights are fully realized in the domestic spheres of such States.

Until very recently, the monitoring mechanism of the CRC did not employ Communications Procedure. Hence, individuals / groups of individuals were denied the opportunity to present their claims at times when violations of their rights guaranteed in the CRC and its Optional Protocols are perpetrated against them. Consequently, the monitoring mechanism envisaged in the CRC was criticized for being incomplete and ineffective.⁸ Findings of researches have disclosed that the existing monitoring mechanism of the CRC is fraught with defects.⁹ Given this shortcoming, introducing communications Procedure under the CRC appears to be quite indispensable.

It is interesting to note that the possible challenge the absence of Complaint Procedures may pose on the enjoyment of children's rights guaranteed under CRC has been critically considered by the UN. Through the Resolution it adopted in June 2009 (A/HRC/RES/11/1), the Human Rights Council (HRC) of the UN decided to establish an Open Ended Working Group (OEWG) to explore the possibility of elaborating OP to the CRC to provide a Communications Procedure.¹⁰ After successive deliberations, the OEWG came up with a document incorporating procedures for bringing communications before the CRC Committee. The document was adopted by the HRC and presented to the General assembly of the UN for final approval.¹¹ On 19 December 2011, the document was adopted and opened for signature and ratification by the General Assembly resolution 66/138. After the fulfillment of the minimum number of

⁸The Cradle-The Children Foundation, Available at <<http://www.edocfind.com>> accessed on 09/04/2011, p.2 see also Ursula Kilkelly above, p.311'

⁹Mieke Verheyde and Geert Goedertier, 'Commentary on the United Nations Convention on the Rights of the Child: Articles 43-45, the UN Committee on the Rights of the Child', (Martinus Nijhoff Publishers, 2006),p.44

¹⁰For the full account of the substance of the Resolution, visit <<http://www2.ohchr.org/english/bodies/hrcouncil/OEWG/index.htm>>

¹¹Visit <http://www.crin.org/NGOGroup/childrightsissues/ComplaintsMechanism>

instrument of ratification set out in it,¹² the OP to the CRC providing communications Procedure for the CRC entered in to force on 14 April 2014.¹³

I. DEFINING COMMUNICATIONS PROCEDURE

Communications Procedures established to monitor the implementation of international instruments refers to those procedures that allow individuals, groups or their representatives who claim that their rights have been violated by a State that is party to an international human rights Convention to bring a complaint before the relevant Committee' established under the treaties.¹⁴ The complaint procedures, in general, deal with issues like: who may bring communications? Against whom can communications be brought? What type of information should a communication address? When can a communication be filed? And so on. The procedures, moreover, provide the steps that are normally involved in considering communications.

Complaints Procedures may be either 'individual' or 'collective'. Under Individual Complaints Procedures, only individual victims or group of victims are given an opportunity to present communications to the Committees. Collective Complaints Procedures, on the other hand, allow others such as Non Governmental Organizations (NGOs), National Human Rights Institutions (NHRIs) and Ombudsman Institutions to bring communications on behalf of a group. Such procedures are particularly relevant where there are large group of victims, systemic issues are at stake or the victim group lacks organizing capacity. Unlike Individual Communications, Collective Communications do not involve disclosure of the identity of victims, since, from the very beginning, no victim requirement is

¹² See Article 19 of the instrument

¹³ Visit

<http://www.crin.org/NGOGroup/childrightsissues/ComplaintsMechanism>

¹⁴ NGO group for the CRC, 'Campaign for a new Optional Protocol to the CRC establishing a Communications procedure' (November 2010), p.7, Available at <<http://www.edocfind.com>> accessed on 34/04/2011

set out under the Procedures.¹⁵

II. KEY PROCEDURES OF THE OPTIONAL PROTOCOL

The OP in its current form comprises three key Procedures: Individual Communications Procedure, Inter-State Communications Procedure and Inquiry Procedure. The following discussion will critically examine whether these Procedures are framed in a way that promotes the rights of children.

A. Individual Communications Procedure

1. *Standing and scope of the Procedure.* Pursuant to Article 5 of the OP, communications may be brought by or on behalf of an individual or group of individuals within the jurisdiction of a State Party to the Optional Protocol claiming to be victims of a violation by the State Party of any of the rights set forth in the CRC, OPAC or OPSC.¹⁶ The term ‘individual’ referred under the Article was inserted to denote that in addition to ‘children’, ‘individuals’ who are not children at the time of submission of communications but had been victims of violations of their rights by the time they were children can bring communications to the CRC Committee.¹⁷

The OP also allows submission of communications on behalf of children.¹⁸ However, the potential risk that may transpire

¹⁵Holly Cullen, ‘The Collective Communications Procedure of the European Social Charter: Interpretative Methods of the European Committee of Social Right’ (2009), *Human Rights Law Review*, p.64

¹⁶ Among the core UN treaties, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) and the International Convention for the Protection of All Persons from Enforced Disappearance (CED) entitle only ‘individuals’ to lodge petitions to the respective Committees. The remaining instruments authorize ‘individuals’ and ‘Group of individuals’ to bring communications to the respective Committees.

¹⁷ visit http://www.crin.org/law/CRC_complaints/

¹⁸The issue as to who can represent the child/children was debated. China wanted to limit representatives to adults with close connection to the child.

during representation is that representatives may manipulate children and promote their own interest through bringing the Communication. Analyzing this, many delegations during the initial drafting stages expressed concern that the Optional Protocol should envisage mechanisms that help to avoid the potential manipulation of children by their representatives.¹⁹ The first and second drafts responded to this potential danger through explicitly requiring the CRC Committee to determine whether considering communications brought on behalf of child/children is in the ‘best interests’ of the child/children. Article 6(5) of the second draft, for example, provides: “Where the author of a communication is acting on behalf of a child...the Committee shall determine whether it is in the best interests of the child or group of children concerned to consider the communication.”²⁰In the current Optional protocol, this provision is omitted.

In the opinion of the present writer, the OP has minimized the safeguard envisaged in the earlier drafts. The CRC Committee, as per the Optional Protocol, is merely required to ascertain whether communications on behalf of a child (children) is brought with their consent. Article 5(2) reads: “Where a communication is submitted on behalf of an individual or group of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.” Under Article 3 of the Optional Protocol, it is provided that “The Committee shall include in its rules of Procedure safeguards to prevent the manipulation of the child by those acting on his/her behalf and may decline to examine any communication that it considers not to be in the child’s best interests.”

Other States such as Slovenia and organizations like **UNICEF**, the **European Disability Forum**, **National Human Rights Institutions** and **NGO Group for the CRC**, however, **argued against** placing any further limitations on the representation of children in bringing complaints. The Chair-person explained that the issue can be determined by the Committee’s Rules of Procedure (Visit http://www.crin.org/law/CRC_complaints/)

¹⁹ Visit http://www.crin.org/law/CRC_complaints/

²⁰ Visit <http://www.crin.org>

As can be noted, the straight forward language imposing a duty on the CRC Committee to determine whether considering communications is in the best interests of the child/children is now excluded. The provision seems to reflect the opinion of some groups such as the NGO group for the CRC and the CRC Committee which suggested during the drafting process that the best interests principle should be applied in situations when the consent of the child/children concerned has not been clearly established.²¹ In other words, the Committee, pursuant to this view, will apply the best interests principle when the author of the communication represents a child victim without satisfying the Committee that the child/children concerned have given a valid consent.²²

This mode of application of the best interests principle contradicts the CRC. It is clearly stated under Article 3(1) of the CRC that: “in all actions concerning children...the best interests of the child shall be a primary consideration.” The phrase ‘a primary consideration’ denotes that decisions should at least incorporate an understanding of their effect on children’s best interests.²³ The relevance of applying the principle is further anchored by the phrase ‘in all actions concerning children’ implying the application of the principle to encompass any action that directly or indirectly affects children.²⁴

Furthermore, there is no authoritative ground which justifies the CRC Committee to give primacy to the child/children’s right to

²¹Comments by the Committee on the Rights of the Child, supra note 28, p.6 the CRC Committee has elaborated that the principle of ‘best interests’ of the child would be construed necessarily as being a matter of general application by the Committee in its consideration of communications under the Optional Protocol.

²²*Joint Submission presented by International Catholic Child Bureau (ICCB), International Save the Children Alliance and et al,* (U.N.Doc. A/HRC/WG.7/1/CRP.5),p.6

²³ UNICEF, Handbook on Legislative Reform: Realizing Children’s Rights,(Vol.1,2008),p.80

²⁴ J. Todres ‘Emerging limitations on the rights of the child: The UN Convention on the Rights of the Child and its early case law’ (1998) 30 *Columbia Human Rights Law Review* 159.p.170

be heard and apply the best interests principle in limited cases when the child/children's valid consent is not established.²⁵ To create conformity with the CRC, the Optional Protocol should have been framed to impose a duty on the CRC Committee to determine whether considering communication is in the best interests of the child/children concerned. The Committee should do this whether the child consents or not. Nevertheless, this should not be construed to undermine the importance of the views of the child. In determining the best interests of the child/children, the Committee should give paramount consideration to the views of the child/children involved in accordance with their age and maturity. As the CRC Committee in its General Comment emphasized, the two rights (i.e., the right of the child to have his/her best interest be a primary consideration and the right of the child to be heard) are complementary to each other.²⁶ The Committee will be greatly assisted in determining what is in the child's/children's best interests if it gives due weight to the views of the child/children in accordance with their age and maturity.²⁷

The scope of the OP in relation to Individual Communications is comprehensive. No distinction is made by the OP in imposing obligation on States with respect to the three instruments (i.e., the CRC, OPAC and OPSC). If a State is a party

²⁵ This is against the extreme position hold by some scholars such as Michael Freeman who concede that recognition of the child's best interests underpins all the other provisions in the Convention (For further information read Michael Freeman, 'A Commentary on the United Nations Convention on the Rights of the Child: Article 3 The Best Interests of the Child', (Martinus Nijhoff,2007))

²⁶CRC Committee, General Comment No. 12 (2009):'The Right of the Child to be Heard' U.N Doc.CRC/C/GC/12,para 74

²⁷The laws of many States also provide that the views of the child should be taken in to account in determining the best interests of the child. The Ecuadorian children's code of 2002, for example, provides:"...the best interest principle "may not be invoked ... without previously listening to the opinion of any child who is able to express one". (see UNICEF, " The Right of Children To Be Heard: Children's Right To Have Their Views Taken In To Account And To Participate In Legal And Administrative Proceedings'(2009),p.8)

to the CRC, OPAC or OPSC, ratifying the OP will entail an obligation on it to receive communications alleging breach of the rights guaranteed in to the instrument (instruments) to which it is a party. Earlier drafts contained opt-out options in relation to Individual Communications.²⁸ Even though States may be parties to the OPAC and/or OPSC, at the time of signing, ratifying or acceding to the OP, they were granted the possibility of limiting the competence of the Committee to receive and consider communications which relate to the OPAC and /or the OPSC. In the OP, such option is dropped.

Under the OP, moreover, States cannot select certain rights from the CRC, OPAC or OPSC and limit the competence of the Committee to receive and consider communications alleging breach of such rights. This comprehensive approach in general is advantageous since it enables children to enforce civil, political, economic, social and cultural rights guaranteed under the CRC. On top of this, such approach helps to avoid hierarchy among the rights guaranteed under the three instruments (i.e., the CRC, OPAC and OPSC) and reinforce the indivisibility, interdependence and interrelatedness of the rights reaffirmed in the Preamble.²⁹

2. Admissibility.-In order for the merits of a communication to be considered by the CRC Committee, the communication is expected to pass through an admissibility test. The provisions of the OP on admissibility mainly replicated the existing precedent in other Complaint Procedures. The admissibility requirements enumerated in the OP are discussed below.

As with other Complaint Procedures, it is provided in the OP that a communication will not be rendered admissible if it is anonymous.³⁰ This requirement makes possible for the CRC Committee to know the particulars of the communication (i.e., name, age, profession and other information relating to the complainant). Furthermore, it is provided in the OP that communications will not be declared admissible if they are not

²⁸ See Article 2(2) of the first draft and Articles 6(2) of the second draft

²⁹ See Para 3 of the Preamble to the OP

³⁰ Article 7(1)(a) of the OP

made in writing.³¹ Clearly, this provision will not promote the effective use of the Communications Procedure by children. It may be daunting for children to adequately express their real feeling through a written communication. Bearing this in mind, the OP should have envisaged other forms of submissions such as video or oral submissions.

Exhausting domestic remedies is also required before submitting complaints to the CRC Committee. Unless communications satisfy the Committee as to the exhaustion of local remedies, they will not be declared admissible.³² This rule, nevertheless, will not apply where the application of the remedies is *unreasonably prolonged* or *unlikely to bring effective relief*. The OP, like other international Complaint Procedures, does not prescribe the yardstick to be employed in determining whether the application of domestic remedies is unreasonably prolonged.

The writer, however, holds the view that the best interests principle should guide the CRC Committee in determining whether domestic remedies are unreasonably prolonged or not. As demonstrated in the findings of scientific researches, violations of children's rights entail detrimental effect on children physically, mentally and emotionally often extending well in to old age.³³ To address such serious consequence, children should be offered prompt remedies for violations inflicted on them in the domestic spheres of States Parties. Applying the best interests principle will enable the Committee to take in to account the detrimental impact that delays may entail on children. Important experience may be drawn from the jurisprudence of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) in this regard. In its first decision, the Committee ruled that a Court process which lasted for more than six years without considering the merits of a suit submitted by Center for Minority Rights Development on behalf of children of Nubian descent in Kenya cannot be

³¹ Article 7(1)(b) of the OP

³² Article 7(1)(e) of the OP

³³ Malcolm Langford and Sevda Clark, 'The New Kid on the Block: A Complaints Procedure for the Convention on the Rights of the Child' (2010), 28 Nordic Journal of Human Rights 2, p.395

considered to be in the best interests of children of Nubian descent.³⁴

In the drafting process of the OP, some delegations opposed the non-application of the rule at times when domestic remedies are ‘unlikely to bring effective relief’ as the CRC Committee could not be in a position to prejudge on the outcome of any internal remedy.³⁵ This proposal, nonetheless, did not get approval by the majority of delegations and, as a result, was not included in the OP. As it stands, the position of the majority of delegations seems to be plausible. There are instances which enable prejudging the outcome of domestic remedies. In some circumstances, pursuing cases of a certain nature before domestic Courts may be found to bear no effective remedies. Subjecting children to exhaust domestic remedies involving such types of cases may lead children to suffer and incur unnecessary wastage of time and resource thereby weakening their ability of defending their case before the CRC Committee. The African Commission has expounded that complainants will not be required to exhaust local remedies if they prove to the satisfaction of the Commission that local remedies do not offer prospect of success (i.e., are ineffective).³⁶

It is also worthy to note that the OP does not clarify whether the exhaustion of domestic remedies rule will apply whenever local remedies are not available. Many treaty bodies exempt the application of it whenever there are no such remedies.³⁷ If children are relieved from pursuing domestic remedies in such cases, it will help them to directly access the CRC Committee

³⁴*Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian descent in Kenya) v. The government of Kenya*, (Communication: No. Com/002/ 2009, Para 32)

³⁵*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*, U.N. Doc.A/HRC/17/36, p.14

³⁶*Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000), Para 32

³⁷OHCHR, ‘Frequently asked Questions about Treaty Body Complaints Procedure’ Available at http://www.2ohchr.org/english/bodies/petition/docs/23_faq_pdf, accessed on 23/03/2011.

without wasting their time and resources. Accordingly, the CRC Committee should in its Rules of Procedure or future practice exempt the application of domestic remedies rule in such cases.

As pointed out under Article 7(1) (h) of the OP, a communication will not be rendered admissible if it is not submitted within one year after the exhaustion of domestic remedies except in cases where it is demonstrated by the author that it had not been possible to submit the communication within this time limit. The one year period set forth in this provision was subject to heated debate in the drafting process. Poland expressed support to either six months or one year following the exhaustion of domestic remedies.³⁸ France and Greece favored a one year provided safeguards to be included for cases where this is not possible while Czech Republic and Sweden preferred a six months period.³⁹ Brazil and other groups including the **ICJ** totally opposed the fixing of time limit. Brazil, for example sternly argued that imposing a time limit would weaken access to justice and make the Complaints Procedure less child friendly.⁴⁰ In the end, the precedent in the Optional Protocol to the International Covenant on Economic Social and Cultural Rights (ICESCR) (Article 3(2) (a)) which prescribes one year was adopted.⁴¹

The present writer believes that fixing time frame will not promote the interest of children. It should be analyzed that fixing time frame may entail far reaching consequence on children, in particular, on those found in rural areas or poor countries.⁴² It goes

³⁸ NGO Working Group for the CRC Complaints Mechanism, 'Complaints Mechanism: Reaction to Chairs Proposal' Available at http://www.crin.org/law/CRC_complaints/ accessed on 2/06/2011

³⁹ *ibid*

⁴⁰ *ibid*, The NGO Coalition for a CRC Complaints Mechanism, elaborating on its position explained that setting a time limit for submitting a communication would particularly disadvantage children who are often not aware of such limits until the deadline has passed.

⁴¹ Pursuant to Rule 91(f) of the Rules of Procedure of the Committee on ICRD, moreover, complainants are required to submit communications six-months after exhausting the available domestic remedies.

⁴² Malcolm Langford and Sevda Clark, 'A Complaints Procedure for the Convention on the Rights of the Child: Commentary on the Second Draft'

without saying that bringing communications at international level, among others, demands knowledge about the Procedures of international Complaints Mechanisms and financial resource. Children located in rural areas or poor countries, on the other hand, lack the necessary knowledge and resource to vindicate their rights by the instrumentality of international Complaints Procedures. Hence, it would be quite unreasonable to expect children affected by such constraints or any one representing them to bring communications to the CRC Committee within one year after the exhaustion of domestic remedies. Ostensibly, this provision is particularly detrimental to children located in Africa, where there is poor practice of utilizing International Complaint Procedures which might have resulted from lack of awareness, financial constraints and other related factors.⁴³

Under the Preamble, States Parties have emphasized on the importance of establishing Complaint System that responds to the real difficulties children suffer in pursuing remedies for violations of their rights.⁴⁴ Fixing time limit for bringing communications after the exhaustion of domestic remedies, on the other hand, contradicts with this commitment since it undermines the effective use of the Complaint Procedure by children.

It is also worth noting that the potential danger becomes even higher whenever domestic remedies are unavailable to children. As noted above, the OP is not clear whether the exhaustion of domestic remedies rule will apply in cases where domestic remedies are not available to children. And it is yet to be seen in the jurisprudence or Rules of Procedure of the CRC Committee how the one year period will apply in such instances. Presumably, the one year period in the CRC Committee's jurisprudence will be considered to start running as of the time the

(2011), p.6

⁴³ Peter Newell indicated that of communications declared admissible by the African Commission, an incomplete review suggests only one submitted by/on behalf of children.(see Peter Newell, *supra* note 217,p.8). Moreover, there is inadequate use of the Communications Procedure established under the ACERWC since, up until now, only two cases are brought to the ACERWC.

⁴⁴ See Paragraph 5 of the Preamble to the OP

facts that gave rise to the complaint arose.⁴⁵ Undoubtedly, the potential risk that may materialize as a consequence of time fixing will exacerbate in such occasions. This is because, in common parlance, victims or their legal representatives who exhaust domestic remedies are more likely to be aware of the existence of international remedies.⁴⁶ It follows, therefore, that the probability for an individual victim or his/her legal representative who has not accessed local remedies (owing to their non-existence) to know the availability of international legal options is low. Consequently, the one year period prescribed for submitting complaints after the exhaustion of domestic remedies will more likely lapse without being used by the individual victim. This will, in effect, lead to discriminating children located in States where there are no domestic remedies against those children located in States where there are such remedies.

It is, perhaps, provided under the OP that if the author presents good cause demonstrating that it was impossible for him/her to submit a complaint within one year after the exhaustion of domestic remedies, the CRC Committee may admit it. However, this is not an appropriate safeguard to the potential risk envisaged above since, for obvious reasons, the Committee will not accept communications that delayed as a consequence of lack of awareness as to the existence of international Communications Procedures. The other core UN treaties, except that of the

⁴⁵ The European Court of Human Rights has approached the issue in similar fashion. The Court, in line with interpreting Article 35(1) of the ECHR, which requires communications to be submitted within six months after the exhaustion of domestic remedies explained: "... where no domestic remedies are available, the six-month period runs from the date of the act alleged to constitute the violation of the Convention (see Malcolm Langford, 'Closing the Gap? An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2009), 27 *Nordic Journal of Human Rights* 1, p. 23). Under the Rule of Procedure of the Inter-American Commission (Article 32), it is provided that in cases where domestic remedies can not be pursued, the deadline for bringing Communications after the exhaustion of domestic remedies will start to run as of the alleged violation of rights occurred.

⁴⁶ *ibid*

Optional Protocol to the ICESCR and the International Convention on the Elimination of All Forms of Racial Discrimination (ICRD), do not fix time limit for submitting communications after exhausting domestic remedies.⁴⁷ It is unfortunate that although delegations were observed to oppose new innovations on the ground that they are not practiced in the Communications Procedures of the existing UN treaties, they were not found to object the inclusion of this new detrimental element in to the OP.

The OP has also outlined other admissibility requirements. It is, for instance, provided that a communication will not be considered on its merits if it constitutes an abuse of the right of submission of communications or is incompatible with the provisions of the CRC and/or the OP thereto.⁴⁸ What really constitutes an abuse of the right of submission of communications is not mentioned in the instrument. However, the CRC Committee can deal with this rule by drawing a lesson from the experience of other treaty bodies like the Human Rights Committee. Incompatible communications, as can be deduced from the trend in other international instruments, are communications that do not allege violations of rights guaranteed under the CRC or its OPs.⁴⁹

According to the OP, the CRC Committee may also decline to consider communications if it finds communications to be manifestly ill founded or not sufficiently substantiated⁵⁰ or the facts

⁴⁷ The regional human rights instruments, nevertheless, stipulate time period for submitting complaints after the exhaustion of local remedies. The ECHR and the ACHR under Articles 35 and 46 respectively provide six months. The Guidelines of the ACERWC (under Chapter Two Part III) and the ACHPR (Article 56(6)) require communications to be submitted within 'reasonable time' after the exhaustion of local remedies. Some authorities have commented that the phrase 'reasonable time' may entail the effect of prejudicing valid claims since what is reasonable for one commissioner may not be necessarily so to the other. (See Sabelo Gumeddze, *supra* note 55 p.134 The UN 1503 Procedure likewise adopts reasonable time period.

⁴⁸ Article 7(1)(c) of the OP

⁴⁹ See, for example, Article 56(2) of the African Charter on Human and Peoples 'Rights

⁵⁰ Article 7(1)(f) of the OP

that are the subject of communication occurred prior to the entry in to force of the OP for the State Party concerned except in cases when it is proved that the facts that are the subject of communication continued after that date.⁵¹ In dealing with admissibility criteria the OP has overlooked some important issues. There is, for example, no explicit mention made in the OP addressing whether communications should be considered if they are exclusively based on information disseminated through the mass media. Under the admissibility rule of the Complaint System of the African Charter on the Rights and Welfare of the Child (CRWC), communications that are based exclusively on media will not be admitted.⁵² The ACHPR in the same manner unequivocally states under Article 56(4) that communications will not be rendered admissible if they are based on news disseminated through the mass media.

As can be gathered from the elaboration made by the African Commission on Human and Peoples' Rights, it appears to be that the requirement is set to enhance the credibility of communications. The Commission in *Jawara v. The Gambia* held: "...There is no doubt that the media remains the most important if not the only source of information...the issue therefore should not be whether the information was given from the media, but whether the information is correct."⁵³ The fate of communications written in disparaging or insulting language is not also settled. Such issues are dealt with under the ACHPR and the UN 1503 Procedure.⁵⁴

⁵¹ Article 7(1) (g) of the OP

⁵² See Chapter Two, Part III of the Guidelines for the Consideration of Communications Provided for in Article 44 of the African Charter on the Rights and Welfare of the Child (ACERWC 8/4)

⁵³ *Jawara v. The Gambia*, supra note 276, Para 26

⁵⁴ Under Article 56(3) of the ACHPR, it is provided that communications should not be written in disparaging or insulting language directed against the State concerned and its institutions or to the organization of African Unity. If they are found to be written as such, they will be declared inadmissible. Similar requirement is stipulated under the 1503 Procedure (ECOSOC.Res.1503 [X]VIII] revised by ECOSOC Res.2000/3 of June 2000)

This rule helps to ensure respect for State Parties and their institutions.⁵⁵

3. Interim Measures .-The OP has incorporated provisions on Interim Measures (also called Provisional Measures) that help to avoid irreparable harm to the victim/ victims of alleged violations.⁵⁶ Article 6 (1) of the OP provides

At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations..

Some individual experts in the drafting process argued that the phrase ‘in exceptional circumstances’ contained in the provision may encourage the trend of restricting the application of Interim Measures to cases concerning death penalty and deportation. Consequently, they preferred the phrase to be changed so as to enable the provision to serve for all possible irreparable damages.⁵⁷

To enhance the protection of children, it would have been more advantageous to have a provision which empowers the CRC Committee to avoid any harm on the allegedly victim child/children while the Committee is processing the communication. Due to their special nature, violations may pose detrimental effect on the wellbeing and development of children. The very purpose of establishing Communications Procedure to children may be defeated if the CRC Committee is made to tolerate the infliction of harm on children and solely strive to avoid potential irreparable damages to children that may result as a consequence of deportation, execution of death penalty, extradition

⁵⁵ Sabelo Gumeddze, *Bringing Communications before the African Commission on Human and Peoples’ Rights’* (2003) 3 *African Human Rights Law Journal*,p.130

⁵⁶ Article 6 of the OP

⁵⁷ Malcolm Langford and Sevda Clark, *supra* note 33,p.6 In the Complaint Procedures of the other core UN treaties Interim Measures are similarly provided to avoid potential irreparable damages to children.(see for example, Article 5 of the Optional Protocol to the CEDAW, Article 5 of the Optional Protocol to the ICESCR and Article 4 of the Optional Protocol to the CRPD)

and the like. To this effect, it is quite preferable to follow the approach taken in the African regional human rights system. The Guidelines of the ACERWC under Chapter 2 Article 2 (IV) (1) provides:

When the Committee decides to consider a Communication, it may forward to the State Party concerned, a request to take provisional measures that the Committee shall consider necessary in order to prevent any other harm to the child or children who would be victims of violations.

It should also be underscored that in order for Interim Measures to play their designed purpose of avoiding infliction of harm on children, they should be made to have strict application. State Parties should be bound to take the measures whenever the CRC Committee requests them. The wording of Article 6 of the OP stated above, however, does not seem to enshrine legally binding provisions to this end. The respondent State, pursuant to the provision, is merely required to consider the request made by the CRC Committee to take Interim Measures. It is up to the State to decide whether taking Interim Measures is justified under the circumstances or not. No explicit obligation is imposed on States to take Interim Measures in accordance with the request by the Committee. This is contrary to the position held by some States in the drafting stage such as Liechtenstein who proposed the inclusion of an additional language to require that States take all appropriate steps to comply with such requests.⁵⁸ The CRC Committee subscribing to this view held that: "...the OP should be framed in a way making explicit the obligation of States Parties to take all the necessary steps to comply with Interim Measures."⁵⁹ Other OPs to the UN treaties have also adopted similar phraseology in this regard.⁶⁰ The trend in the practice of the UN treaty bodies,

⁵⁸ NGO Working Group for the CRC Complaints Mechanism, *supra* note 38. The majority of States, including the U.S, to the contrary, wished the provision dealing with Interim Measures to reflect that Interim Measures are not considered binding. They emphasized that the decisions on whether to take Interim Measures must rest with States.

⁵⁹ Comments by the Committee on the Rights of the Child, *supra* note 28, p.7

⁶⁰ See, for example, Article 5 of the OP to ICESCR, Article 5 of the OP to

however, indicates that they resemble towards making requests for Interim Measures legally binding. In spite of the absence of clear language in the first OP to the International Covenant on Civil and Political Rights (ICCPR) and its Rules of Procedure imposing a duty on States to take Interim Measures, the Human Rights Committee in Communication No.869/1999, for example, held that:

A State commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the covenant, or render examination by the Committee moot and the expression of its views nugatory and futile.⁶¹

In its General Comment, the Committee further stressed the compulsory nature of Interim Measures by affirming that: “failure to implement such Interim or Provisional Measures is incompatible with the obligation to respect in good faith the Procedure of Individual Communication established under the Optional Protocol.”⁶² Under the Guidelines of the ACERWC, States Parties to the ACRWC are required to take Interim Measures whenever the ACERWC requests them. As can be noted from the above provision, States Parties are not simply expected to consider the requests for Interim Measures. Rather, they are bound to take the measures in accordance with the request by the ACERWC.

Arguably, failure to make Interim Measures legally binding up on States may entail serious consequence on children located in Africa, where there is poor practice by States of complying with Interim Measures.⁶³ The execution of Ken Saro-Wiwa by the Nigerian government despite the request made by the African

the CEDAW Article 4 of the OP to CRPD, and Rule 92 of the Rules of Procedure of the Human Rights Committee

⁶¹ *Joint NGO Submission to the Open-ended Working Group on an Optional Protocol to the Convention on the Rights of the Child to Provide Communications Procedure*, Available at <http://www.crin.org/resources/infoDetail.asp?report>, accessed on 10/03/2010

⁶² Human Rights Committee, General Comment No.33, Para 19

⁶³ Lilian Chenwi, ‘Correcting the Historical Asymmetry Between Rights: The Optional Protocol to the International Covenant on Economic Social and Cultural Rights’ (2009), 9 *African Human Rights Law Journal* p.39

Commission for Provisional Measures clearly illustrates the need for making Interim Measures legally binding.⁶⁴

It is also worthy to note that the provision does not fix time limit within which the State concerned should respond to the request made by the CRC Committee to consider Interim Measures. Given the absence of clear terms imposing a duty on States to take Interim Measures, the non-existence of such time frame may further weaken the effectiveness of Interim Measures. Similar shortcoming also exists in the Complaint Procedures of the other core UN treaties. The Rules of Procedure of the African Commission offers important lesson in this regard. Under Rule 101(4), it is stated that the respondent State should, within two weeks of the receipt of the request for provisional measures, report back to the commission on the implementation of the provisional measures requested. There is no equivalent provision in the text of the Rules of Procedures of the UN treaty bodies. It is advisable that the CRC Committee should address this issue in its Rules of Procedure to promptly avoid potential harms to children and guarantee the celerity of the Procedure.

4. *Transmission of Communications.*—On receiving communications, the CRC Committee will, confidentially and as soon as possible, notify the respondent State about the substance of the communication.⁶⁵ The OP has unconditionally permitted disclosure of the identity of the complainant to the respondent State. Article 8(1) reads:

Unless the Committee considers communications inadmissible without reference to the State Party concerned, the Committee shall bring any communication submitted to it under the present protocol confidentially to the attention of the State Party concerned as soon as possible.

The OP provided lesser threshold of protection as compared to other Complaint Procedures such as the ICRD (Article 14(6)) and Rules of Procedure of the Committee on International Convention on the Eliminations of all forms of

⁶⁴ See *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, (2000) AHRLR 212 (ACHPR 1998), Paras 8, 9 and 10

⁶⁵ Article 8(1) of the OP

Discrimination against Women (CEDAW) (Rule 69), which require the consent of the complainants to be established before permitting disclosure. Part of Article 14(6) (a) of CERD, for example, outlines:

The Committee shall confidentially bring any communication referred to it to the attention of the State Party alleged to be violating any provision of this Convention, but the identity of the individual or groups of individuals concerned shall not be revealed without his or their express consent.

Apparently, this provision remains to be problematic for the complainants concerned. It has failed to take in to account the negative consequence that may ensue to children as a result of the disclosure of their identity to the respondent State. As vulnerable groups of the society, special protection measures should have been afforded to them while bringing communications. Given this fact, the ‘protection measures’ envisaged under Article 4 of the OP which seeks to prevent unnecessary suffering of children due to communications will not be complete without shielding children from the possible harm that may be inflicted on them as a consequence of revealing their identity to the respondent State.

5. *Friendly Settlement.*-Primarily targeting at protecting the rights of children without a prolonged examination of communications by the CRC Committee, the OP has brought in to it a Friendly Settlement Procedure.⁶⁶ Although Friendly Settlement Procedures are hailed for providing favorable solutions in a prompt manner, it needs critical scrutiny whenever applied in the context of children. This is mainly due to the fact that unlike the settlement between States, Friendly Settlements between an individual and a State are imbalanced and inevitably raise concerns about the relative powers of the two parties.⁶⁷ In particular, the Procedure may bring about undesirable consequences on child victims who run a great risk of manipulation in the process and agreeing to settlements potentially contrary to their interests.⁶⁸ Realizing such consequence, a number of States during the negotiation process stressed that any Friendly Settlement should respect the obligations

⁶⁶ Article 9 of the OP

⁶⁷ Joint NGO Submission to the OEWG, *supra* note 61, p.11

⁶⁸ *ibid*

set forth in the CRC and its OPs.⁶⁹ This is also reflected in the provision of the OP (Article 9(1)) since it emphasizes that:

The Committee shall make available its good offices to the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the obligations set forth in the Convention and/or the Optional Protocols thereto.

This mandate of the Committee is bolstered by the clear stipulation enunciated under Article 2 of the OP which empowers the Committee to play its key role in preventing the possible manipulation of children and misuse of the Procedure through applying the principle of best interests of the child in supervising the process of Friendly Settlements.

In particular, Friendly Settlement processes involving African States should be closely scrutinized. Given their poor human rights record, African States may not live up to their duty of respecting the rights of the child while pursuing the Friendly Settlement process. In practice, it is also tested since in *Modise* case (*John K. Modise v. Botswana*, Communication 97/93), the Botswana government was found violating the human rights of the complainant in the Friendly Settlement process.⁷⁰ The CRC Committee is expected to be quite prudent in determining whether pursuing Friendly Settlement of the matter involving African States is in the best interests of the child/children involved.

B. Inter-State Communications

Inter-State Communications are the other key Procedures of the OP. Although Inter-State Communications experienced no usage by States under other UN treaties so far⁷¹, the OP has included the Procedure and allowed States to present claims alleging breach of any of the rights guaranteed under the CRC and its OPs. States Parties are given the liberty to either accept or decline from

⁶⁹ Report of the OEWG, supra note 35, p. 18

⁷⁰ Frans Viljoen, 'Communications under the African Charter: Procedure and Admissibility' in Malcolm Evans and Rachel Murray (eds.), *The African Charter on Human and peoples' Rights: The System in Practice 1986–2006* (Cambridge University Press, 2008), p.83

⁷¹ Report of the OEWG, supra note 35, p. 21

recognizing the competence of the CRC Committee to receive and consider Inter-State Communications in respect of the CRC and/or its OPs.⁷² And such declaration may at any time be withdrawn by the State concerned.⁷³ The OP further provided that the Committee shall make available its office to the parties concerned for friendly solutions of the matter subject to communication.⁷⁴ In such occasions, it seems sound to argue that the CRC Committee, pursuant to the mandate entrusted to it under Article 2 of the OP, is required to ascertain whether Friendly Settlement options are in the best interests of the child/children concerned.

It should be acknowledged that the provisions of the OP dealing with Inter-State Communications in general brought no new element on the existing precedent. This may be part of the reason why the Procedure was not given much attention and failed to be discussed at length. The other reason for the absence of due concern to it might have emerged as a result of non-use of it by States in other UN treaties. Some delegations expressed doubts on the potential significance of the Procedure on this ground.⁷⁵

Seen in light of the paramount advantage that can be obtained from the Procedure as a result of its special nature, the shadow of doubt expressed on the potential contribution of the Procedure appears to be unjustifiable. Inter-State Communications have preferable aspects over Individual Communications in some respects. As opposed to Individual Communications which require communications to be submitted by individuals or group of individuals alleging breach of rights committed by States Parties 'within their jurisdiction',⁷⁶ Inter-State Communications enshrined under Article 12 of the OP do not make any reference to States Parties' jurisdiction.⁷⁷ Accordingly, Inter-State Communications

⁷² Article 12(1) of the OP

⁷³ Article 12(4) of the OP

⁷⁴ Article 12(3) of the OP

⁷⁵ Report of the OEWG, *supra* note 35, p. 21

⁷⁶ See, for example, Article 5(1) of the Optional protocol to the ICESCR, Article 2 of the Optional Protocol to the CRPD

⁷⁷ Inter-State Communications under other Complaint Procedures of the UN treaties likewise do not make any reference to States Parties' jurisdiction.

may be used to address extra-territorial violations of children's rights. This will in effect imply that an act or omission contrary to the CRC and its OPs committed by States Parties having an impact on children outside their jurisdiction may be challenged by other States Parties through Inter-State Communications. This has been practically observed in Africa where an Inter-State Communication was instigated against the Republics of Burundi, Rwanda and Uganda for serious violations of the human and peoples' rights of individuals including children in the various provinces of the Democratic Republic of Congo by the armed forces of Burundi, Rwanda and Uganda.⁷⁸ Introducing the Procedure under the CRC may help to address similar extra-territorial violations of children's rights by States Parties. It also opens the door for possible developments in international jurisprudence relating to the application of the provisions of the CRC and its Optional Protocols. However, the above discussion should not be understood to imply that Inter-State Communications will only serve to address extra-territorial violations of children's rights. The absence of reference to any territorial jurisdiction may also enable States Parties to bring to an end child rights violations committed by States Parties within their own jurisdiction.

The other advantage of Inter-State Communications that result from their special nature is that the Procedures enable children to vindicate their rights through a more powerful entity—a State. It is an important asset to enhance the effective enforcement of children's rights as a State Party is in a better position to represent the interest of a child (children) whose rights are violated by another State Party. In this connection, it is essential to note that when the alleged violation committed by a State Party affects the rights of individuals under the jurisdiction of another State Party, the latter's sovereign interest might also be affected.⁷⁹ Accordingly,

See, for example, Article 41 of the ICCPR, Article 21 of CAT, Article 76 of CMW and Article 11 of ICRD

⁷⁸ *Democratic Republic of Congo (DRC) v. Burundi, Rwanda and Uganda* (Communication 227/99), Twentieth Activity Report 2006

⁷⁹ Christian Courtis and Magdalena Sepúlveda, 'Are Extra-territorial Obligations Reviewable under the Optional Protocol to the ICESCR? 27

Inter-State Communications may, in addition to assisting in protecting children's rights, help to safeguard the sovereign interests of State Parties.

The role being played by the Procedure under regional systems also shades light on its potential significance under the CRC. In the European regional human rights system, for example, the number of Inter-State complaints that appear in Strasbourg has shown increment from time to time.⁸⁰ Although few in numbers, the complaints have resulted in significant milestones in the protection of human rights by the European Court of human Rights.⁸¹ As far as the situation in Africa is concerned, although Inter-State Communications are not practiced to the extent one may wish, some positive signs have been detected indicating its potential use. Inter-State Communication, as considered above, has already reached the African Commission.

In this regard, the impact of opt-in options should also be critically analyzed. On the face of poor record of utilizing Inter-State complaints under the existing UN treaties, the presence of opt-in clauses may further weaken the contribution of the Procedure in the CRC regime. With the existence of the opt-in clauses, moreover, it would be difficult to ensure similar level of protection to all children located in State Parties to the OP since children located in States where the State has accepted the competence of the Committee to receive and consider Inter-State Communications will be afforded better protection than children located in States where the State has not made such acceptance of the Competence of the Committee. To avoid discriminatory treatment of children and enhance effective protection of their rights, it is essential to make accepting the Procedure mandatory as in the case of the CERD.

C. Inquiry Procedure

The OP has also incorporated provisions setting out Inquiry Procedure. Pursuant to Article 13 of the OP, the Committee is

Nordic Journal of Human Rights1,p.59

⁸⁰ Liz Heffernan, *supra* note 327,p.25

⁸¹ *ibid*

required to undertake an inquiry if it receives 'reliable' information indicating 'grave' or 'systematic' violations by a State Party of the rights set forth in the CRC and its OPs.

Yet, the Committee can not undertake investigation if the State has made a declaration indicating that it does not recognize the competence of the Committee to conduct an inquiry in respect of the CRC and/or its OPs.⁸² As can be gathered from Article 13(2), the inquiry is provided to be conducted confidentially based on the information submitted by the concerned State as well as other reliable information available to it. The Committee may in addition designate one or more of its members to conduct an inquiry and report to it urgently. Whenever the circumstances warrant and with the consent of the State Party concerned, the inquiry may involve visit to the State's territory.⁸³

Inquiry Procedures, like Inter-State Communications, comprise distinct features that introduce additional advantages to children. Like Inter-State Communications, Inquiry Procedure may also serve to address extra-territorial violations of child rights. This is due to the fact that the Procedure makes no reference to jurisdictional limitation. Hence, acts or omissions committed by States Parties having impact on the rights of children outside their jurisdiction, such as grave or systematic violations of child rights that may occur in a State Party as a consequence of forceful attack or invasion by another State Party may be addressed by Inquiry Procedure.

Indeed, Inquiry Procedure adds some further advantages on Inter-State Communications. Under Inquiry Procedure, violations that are 'systematic' in their nature can be addressed. Moreover, under this Procedure, the identity of the complainant is irrelevant; NGOS, NHRIS and even States can initiate an Inquiry without necessarily involving victims of violations and disclosing their identity to the respondent State or the public. This is particularly important for children who may risk reprisal as a consequence of initiating an Inquiry against their government.

⁸² Article 13(7) of the OP

⁸³ *ibid*

If we visualize its practical importance in the context of Africa, the Procedure may, without necessarily involving victims of violations, enable NGOs, NHRIS and States to instigate inquiry and halt child rights violations in Africa, such as those in Sudan who have been sustaining grave violations of their rights.⁸⁴ What is important to note here is that unlike Inter-state Communications which require communications to be brought from a State Party to the OP that specifically declared to accept the competence of the CRC Committee to receive and consider Inter-state Communications⁸⁵, Inquiry Procedure do not fix limitation on those who can initiate an inquiry. Hence, even a state which is not party to the OP is entitled to utilize the Procedure.

Nevertheless, it should be noted that the Procedure consists of some detrimental aspects that impede its potential significance. In spite of the strong objection by some States such as France,⁸⁶ the OP, for example, has provided opt-out option in relation to the Procedure.⁸⁷ State Parties are granted the possibilities of restricting the competence of the CRC Committee to conduct an Inquiry in respect of the rights set forth in the CRC or its OPs. In order to strengthen the role to be played by the Procedure and reaffirm the indivisibility, interdependence and interconnectedness of human rights set forth under the Preamble, the OP should have avoided the option like that of the OP to the CED.⁸⁸ The inquiry, moreover, cannot be conducted without securing the consent of the concerned State. The Procedure, as a result, will not have application if the concerned State objects it. This will inevitably undermine its effectiveness.

D. Other Key Aspects

The OP is also composed of other key aspects that facilitate the

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Visit

http://www.savethechildren.org/site/c.8rKLIXMGIpI4E/b.6150459/k.96D1/South_Sudan.htm

⁸⁵ See Article 12(2) of the OP

⁸⁶ Visit <http://www.crin.org/resources/infodetail.asp?id=2398>

⁸⁷ See Article 13(7) of the OP

⁸⁸ Look at Article 33 of the Optional Protocol to the CED.

effective use of the OP and implementation of the views and recommendations of the CRC Committee. Under Article 15, for instance, the need for international assistance and co-operation is emphasized for the purpose of assisting States in the implementation of the views and recommendations of the Committee.

Few delegations suggested that new fund for the purpose of assisting States in the implementation of the recommendations of the CRC Committee should be established. The proposal was not accepted since other delegations argued that it would weaken Article 45 of the CRC and should not be dealt under a procedural instrument.⁸⁹ Establishment of funds is not a new innovation within the UN treaties. Some human rights treaties, such as the OP to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) has already provided for the establishment of fund with a view to helping States in the implementation of the recommendations made by the Sub-Committee on Prevention. Through establishing trust fund under the OP to the ICESCR, agreement has been reached that States (especially third world States) need assistance in implementing Economic Social and Cultural (ESC) rights. The CRC also comprises ESC rights. It is not clear why States declined to recognize the importance of establishing special fund for implementing the recommendations of the CRC Committee. This may, in particular, affect children in Africa where the capacity of majority of States to give effect to the recommendations of the CRC Committee is questionable. To enhance effective implementation of the recommendations of the CRC Committee by States parties it would have been advantageous if the OP

⁸⁹ Report of the OEWG, *supra* note 35, p.22. Article 45 of the CRC entitles specialized agencies, the United Nations Children's Fund and other United Nations organs to be represented at the consideration of the implementation of the CRC as fall within the scope of their mandate. The argument advanced by the delegations in this regard seems to evolve from the fear that creating trust fund to assist States in the implementation of recommendations of the Committee will minimize the contribution they render in accordance with the above provision of the CRC

provided for the establishment of a new fund.

Furthermore, the OP has envisaged provisions that aim at advancing the awareness of the public in relation to the OP and the views and recommendations of the Committee in particular with regard to matters involving the State Party by appropriate and active means and in accessible formats to adults and children alike, ‘including those with disabilities’.⁹⁰ A proposal was made by some delegations to make reference to ‘child friendly’ means.⁹¹ The proposal did not get adequate support as a result of which the OP failed to include this requirement in its text. Although there is no explicit mention of this requirement in the provision, it is plain to note that the clause ‘in accessible formats to adults and children alike’ in it gives clue as to the existence of duty on States Parties to provide access to the OP and the views and recommendations of the Committee in a child friendly means.

The importance of ensuring ‘child-sensitive Procedure’ is also highlighted in the OP.⁹² Article 3 states that the Committee should guarantee child sensitive Procedure while adopting its Rules of Procedure. The OP does not give clue on the notion underlying it. Some delegations referred to the definition provided in the ‘UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime’ which define it as: “An approach that balances the child’s right to protection and that takes in to account the child’s individual needs and views’.⁹³ The Committee is expected to deal with the details of it in its Rules of Procedure.

CONCLUSION

The adoption of an OP under the CRC monitoring system is an important step forward in the monitoring system of the CRC. By way of presenting the possibilities of enforcing the rights of children through complaints system, it will enhance the protection of the rights of children. An important point worthy of emphasis,

⁹⁰ Visit [http:// www. crin.org /law/CRC_ complaints](http://www.crin.org/law/CRC_complaints)

⁹¹ Report of the OEWG, supra note 35,p. 22

⁹² See Paragraph 7 of the Preamble Part and Article 3 of the OP

⁹³ ECOSOC Res 2005/20.July 22,2005

however, is the fact that since the OP is devised to protect the rights of children, it is reasonably expected that the Procedures introduced in it take in to account the special status and vulnerabilities of children. This article has assessed the key Procedures of the Op in light of this requirement. The Op introduced three key Procedures: Individual Communications Procedure, Inter-State Communications Procedure and Inquiry Procedure. Through critical assessment of the OP, it has been deduced that the following aspects of the Procedures demand reconsideration.

Under Individual Communications Procedure, the OP allows submission of communications on behalf of children. The instrument, nonetheless, has failed to proactively deal with the potential manipulation of children by their representatives. Earlier drafts of the OP required the CRC Committee to consider whether communications submitted on behalf of a child is in the best interests of the child represented. At the final stage, this mechanism was not taken up since it failed to galvanize adequate support by the majority of States. As with other Complaint Procedures, the OP sets out admissibility requirements. As considered in the discussion, the OP failed to clarify the phrase *unreasonably prolonged* under the requirement of exhausting local remedies. It has been argued that given the special nature of children, the best interests principle should be deployed in determining whether local remedies are unreasonably prolonged or not. Communications are also required to be submitted within one year after the exhaustion of domestic remedies unless it is proved that it was impossible to do so within the prescribed time. This requirement is shown to be disadvantageous to those children located in poor countries (like those in the African continent) who lack adequate knowledge and financial resources to institute international complaints within the prescribed time.

It has been considered that children are not entitled to bring complaints to the CRC Committee without first exhausting local remedies. Such requirements should generally promote the protection of the rights of children. In view of this, the requirement of exhausting domestic remedies, it is argued, should be guided by

the best interests principle so as to enable does not prescribe the yardstick to be employed in determining whether the application of domestic remedies is unreasonably prolonged.

The OP has introduced interim-measures for the purpose of avoiding irreparable damages to children while the CRC Committee is considering communications. The OP, however, has made no meaningful advancement to acknowledge the special nature of children in establishing the Procedure. As with the trend in the Complaint Procedures of other UN treaties, such measures are provided to be taken in exceptional cases to avoid irreparable damages to children. Given the serious consequence that human rights violations may pose on children, it is suggested that the OP should have empowered the CRC Committee to order interim-measures to avoid any harm on children. Furthermore, the measures are not made to have strict application. Some States, in particular, those in Africa, are observed to ignore requests for interim-measures. Hence, the problem may exacerbate if lenient approach is taken by the OP.

The manner of transmission of communication provided in the OP also demands improvement. Although disclosure of the identity of the complainants to the respondent State potentially puts children at risk, the OP made no safeguard and entitles the respondent State to know the identity of complainants. This is even lower than the standard provided under the Complaint Procedures of other UN treaties like the ICRD and Rules of Procedure of the Committee on the CEDAW.

Although there is insignificant use of inter-state Complaint Procedures by States under other complaint Procedures of the UN treaties, the Op has introduced the procedure. The Procedure is advantageous for children since it enables to enforce their rights by a more powerful entity-State. However, the Opt-in option, which makes States Parties subject to the Procedure only if they recognize the competence of the CRC Committee to receive inter-state complaints through declaration, should be re-examined. The option may weaken the contribution of the procedure since States may decline to accept it.

The establishment of inquiry Procedure is instrumental to

enhance the effectiveness of the OP in ensuring protection of the rights of children..Inquiry may be carried out by the CRC Committee if it is notified as to the existence of grave or systematic violations children's rights by a State Party. The complaint may be lodged by NGOs, NHRIs and States Parties. This Procedure is also fraught with defects which undermine its potential significance. Opt-out option, which entitles States Parties to avoid the use of inquiry Procedure by the CRC Committee against them is provided.

Fortunately, the door for potential improvement is not totally closed. The OP under Article 21 has inserted the possibilities of making an amendment to it up on the fulfillment of the required formalities. It is hoped that State Parties will, at some point on time, opt to rectify the drawbacks attached to the Procedures through amendment so as to improve the efficiency of the OP in protecting the rights of children.