

ADDIS ABABA UNIVERSITY



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

BY

ZELALEM SHIFERAW

**SCHOOL OF GRADUATE STUDIES
FACULTY OF LAW**

November 2011

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

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE
LLM DEGREE IN HUMAN RIGHTS LAW**

BY

ZELALEM SHIFERAW

PREPARED UNDER THE SUPERVISION OF

BENYAM DAWIT (Dr.)

**ADDIS ABABA UNIVERSITY
SCHOOL OF GRADUATE STUDIES
FACULTY OF LAW**

November 8, 2011

**COMMUNICATIONS PROCEDURE UNDER THE DRAFT OPTIONAL
PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE
CHILD: A CRITICAL ASSESMENT**

**SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE
LLM DEGREE IN HUMAN RIGHTS LAW**

BY

ZELALEM SHIFERAW

PREPARED UNDER THE SUPERVISION OF

BENYAM DAWIT (Dr.)

APPROVED BY BOARD OF EXAMINERS

1. Supervisor


Benyam Dawit (Dr.)

2. Examiners

i. Professor Tilahun Teshome

ii. Ato Yonas Birmeta

Signature







ACKNOWLEDGEMENTS

First and foremost, i thankfully acknowledge the Almighty God without whom i would not have been in the position where i am. My profoundest gratitude goes to my supervisor Dr.Benyam Dawit who helped me in many ways in writing this research. He is, after all, the one who inspired me to undertake research in this particular area. I have immensely benefited from his critical and constructive comments as well as his constant help and collaboration which he extended at all stages of the research work. I am extremely grateful to my mom and sister, Bonsitu Terresa and Almaz Shiferaw for their strong encouragement and support throughout the writing of this research. It is hardly possible for me to forget the valuable support of my brother Wondwossen Shiferaw who extended the necessary facilities for the research. Moreover, I would like to acknowledge my sister Mulunesh Shiferaw for her strong encouragement in doing the research. Thanks are also due to Afework Derebe who kindly supported me through providing important inputs for the research. Finally, i would like to thank all who put their endeavor and made possible the successful completion of the research.

TABLE OF CONTENTS

	Page
Declaration.....	i
Acknowledgements.....	iii
List of abbreviations and acronyms.....	vii
CHAPTER ONE	
INTRODUCTION	
1.1. Abstract.....	1
1.2. Background.....	2
1.3. Objectives of the Study.....	7
1.4. Scope of the Study.....	8
1.5. Significance of the Study.....	8
1.6. Literature Review.....	9
1.7. Research Method.....	19
1.8. Proposed Structure	19
CHAPTER TWO	
MONITORING THE IMPLEMENTATION OF HUMAN RIGHTS THROUGH COMPLAINTS MECHANISMS: AN OVERVIEW	
2.1. Introduction.....	20
2.2. Unpacking Communications Procedure.....	21
2.3. Access of Individuals to International Complaints Procedures: General Overview.....	22
2.4. Preconditions for Admissibility under the Core UN treaties.....	28
2.5. Conclusion.....	31

CHAPTER THREE

THE CONVENTION ON THE RIGHTS OF THE CHILD AND ITS MONITORING MECHANISMS

3.1. Introduction.....	33
3.2. The Convention on the Rights of the Child.....	34
3.2.1. Historical Background of the Adoption Process of the CRC.....	34
3.2.2. Optional Protocols to the CRC.....	37
3.3. Monitoring Mechanisms of the CRC.....	40
3.3.1. State Reporting under the CRC.....	43
3.3.1.1. Reporting Guidelines.....	47
3.3.1.2. The Review Process.....	50
3.3.2. Weaknesses in the Reporting Process of the CRC.....	52
3.4. Conclusion.....	54

CHAPTER FOUR

TOWARDS A COMPLAINTS MECHANISM: ASSESSING THE FINAL DRAFT OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD

4.1. Introduction.....	56
4.2. Do we need to have Communications Procedure under the CRC? Scrutinizing the Contending Arguments.....	58
4.3. Towards a Draft Optional Protocol to the CRC.....	67
4.4. Key Procedures of the Final Draft Optional Protocol.....	71
4.4.1. Individual Communications.....	71
4.4.1.1. Standing and scope of the Procedure.....	71
4.4.1.2. Admissibility.....	75
4.4.1.3. Interim Measures.....	87
4.4.1.4. Transmission of Communications.....	91

4.4.1.5. Friendly Settlement.....	96
4.4.1.6. Consideration of the Merits of Communications.....	99
4.4.1.7. Follow up to the Views and Recommendations of the CRC Committee.....	105
4.4.2. Inter-State Communications.....	108
4.4.3. Inquiry Procedure.....	111
4.4.4. Collective Communications.....	115
4.5. Other Key Aspects of the Final Draft Optional Protocol.....	121
4.6. Conclusion.....	123

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion.....	125
5.2. Recommendations.....	132
Bibliography.....	139
Annex	

LIST OF ABBREVIATIONS AND ACRONYMS

- i. ACRWC: African Charter on the Rights and Welfare of the Child
- ii. ACHPR: African Charter on Human and Peoples' Rights
- iii. ACHR: American Convention on Human Rights
- iv. ACERWC: African Committee of Experts on the Rights and Welfare of the Child
- v. CAT: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- vi. ECHR: European Convention on Human Rights
- vii. CEDAW: International Convention on the Elimination of all forms of Discrimination against Women
- viii. CED: International Convention for the Protection of All Persons from Enforced Disappearance
- ix. HRC: Human Rights Council
- x. CMW: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- xi. CRC: International Convention on the Rights of the Child
- xii. CRPD: International Convention on the Rights of Persons with Disabilities
- xiii. ICCPR: International Covenant on Civil and Political Rights
- xiv. ICESCR: International Covenant on Economic, Social and Cultural Rights
- xv. ICRD: International Convention on the Elimination of All Forms of Racial Discrimination
- xvi. MDGs: Millennium Development Goals
- xvii. NGO: Non-governmental Organization
- xviii. OPAC: Optional protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts
- xvii. OPSC: Optional Protocol to the Convention on the Rights of the Child on the sale of Children, Child Prostitution and Child Pornography
- xviii. OEWG: Open-ended Working Group

- xix. OHCHR: Office of the United Nations High Commissioner for Human Rights
- xx. UN: United Nation
- xxi. UNDP: United Nations Development Program
- xxii. UNICEF: United Nations Children's Fund
- xxiii. WHO: World Health Organization

CHAPTER ONE

1. INTRODUCTION

1.1. Abstract

Among the core international human rights treaties adopted at the UN level, the CRC is unique for exclusively dealing with the rights of children. The instrument, however, is devoid of an international Complaints Mechanism. Consequently, children are 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 HRC of the UN made a landmark decision in June 2009 through adopting a Resolution (A/HRC/RES/11/1) which established an inter-governmental OEWG having the mandate of exploring the possibilities of establishing Communications Procedure for the CRC. In March 2010, the HRC made another Resolution (A/HRC/RES/13/3) and empowered the OEWG to prepare a draft Optional Protocol that provides Communications Procedure for the CRC. Pursuant to this Resolution, the OEWG prepared a draft Optional Protocol and presented it to the HRC. Scrutinizing its contents, the HRC adopted the draft on 17 June 2011. The instrument will be presented for signature, ratification and accession if it gets final approval by the General Assembly of the UN in December 2011.

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 research will assess the draft Optional Protocol of the CRC adopted by the HRC and examine whether the key Procedures introduced in to the draft (i.e., Individual Communications, Inter-State Communication and Inquiry Procedure) incorporate provisions that take in to account the special status and vulnerabilities of children. The research will also scrutinize other provisions of the draft

having important implication on the application of the key Procedures of the Optional Protocol.

Key Words: draft Optional Protocol, Communications Procedure, Children's rights, remedy, special status, vulnerability.

1.2. Background

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 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 also augmented by two Optional Protocols: the OPSC and the 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

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

² UNICEF, '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 into force in 2002

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

In view of this, the core UN treaties⁸ have adopted mechanisms that help to monitor the implementation of human rights guaranteed in to them. The monitoring process is carried out by the treaty bodies (Committees) established under the instruments. Among the major mechanisms the Committees use to monitor the implementation of the instruments includes Complaints Procedure (hereafter Communications Procedure or Complaints Mechanism).⁹ Such Procedures introduced in the treaties, in general, enable individuals to present grievances alleging violations of their rights enumerated in the treaties to the respective Committees.¹⁰ The Committees, through receiving such complaints, carry out quasi-judicial adjudication and help the victims to obtain redress.¹¹

It is, however, regrettable that the monitoring mechanism of the CRC does not employ Communications Procedure as a means of monitoring the implementation of it

⁵ Andrey 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*

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

⁸ The core UN treaties are ICRD,ICCPR,ICESCR,CEDAW,CAT,CRC,CRPD,CMW and CED

⁹ Patricia Watt, *supra* note 7,p.215

¹⁰ OHCHR, *supra* note 3, p.2 .

¹¹ *ibid*

by States Parties. Various authorities have maintained that providing an international forum for children to present their case will enhance the protection accorded to children under the CRC and its Optional Protocols.¹² The CRC monitoring system, however, is devoid of such system. Hence, individuals / groups of individuals are 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 has been criticized for being incomplete and ineffective.¹³

Perhaps, it is not difficult to contemplate that the absence of Communications Procedure in the CRC monitoring system may, by rendering the overall monitoring process to be incomplete, obviously obliterates the monitoring process and leads to the neglect and disrespect of the rights of the child by member States. It may also make victims of violation of the rights helpless, at least theoretically, and undermine the culture of respect of the rights of children by world States.¹⁴

Without Complaint Procedures, achieving the MDGs may also be challenging.¹⁵ Six of the MDGs (except Goal 1 and Goal 8) can only be met if the rights of children to health,

¹² Nevena Vuckovic Sahovic, 'Feasibility of a Communication Procedure under the Convention on the Rights of the Child' (2009), Available at <http://www2.ohchr.org/english/bodies/hrcouncil/OEWG/2ndsession.htm>, accessed on 11/04/2011 see also Kilkelly Ursula, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001), 23 *Human Rights Quarterly*2, pp.308-326, at 310

¹³ The Cradle-The Children Foundation, Available at <http://www.edocfind.com>, accessed on 09/04/2011, p.2 see also Ursula Kilkelly above, p.311'

¹⁴ *ibid*

¹⁵ The eight goals of the MDGS are: Goal 1: Eradicate extreme poverty and hunger Goal 2: Achieve universal primary education Goal 3: Promote gender equality and empower women Goal 4: Reduce child

education, protection and equality are protected.¹⁶ Many States of the world, especially those in Africa, however, are not fulfilling these rights. Studies conducted in 2007, for example, have revealed that despite the explicit requirement of the CRC to make primary education compulsory and available free to all children, one in four primary school age children in Africa have been found to be outside the formal education.¹⁷ Besides, equal access to education in the early years remains a distant target in Northern and sub-Saharan Africa.¹⁸ The right of children's to health guaranteed under Article 24 of the CRC is not similarly protected in most States of Africa. Large numbers of children are daily infected with HIV. In 2008, central, eastern, southern and western Africa accounted for ninety one percent of all new HIV infections among children globally.¹⁹ However, there is limited free or affordable access to anti-retroviral treatment for children living with HIV.²⁰ Diarrheal diseases, malaria, pneumonia are still causing the deaths of a number of children in Africa.²¹

The right to protection of African children is likewise not respected. Physical, sexual and psychological abuse of children in the form of sexual assault and rape, early marriage, female genital mutilation/cutting and other harmful traditional practices including ritual killings of children, child labor, child trafficking and abduction, institutional violence and abuse, recruitment of children in to armed forces and militia

mortality Goal 5: Improve maternal health Goal 6: Combat HIV/AIDS, malaria and other diseases Goal 7: Ensure environmental sustainability Goal 8: Develop a global partnership for development

¹⁶ UNICEF, 'The Millennium Development Goals: They are about Children'(2003),p.4, Available at www.unicef.org ,accessed on 15/08/2011

¹⁷ African Union Commission, The State of Africa's Children Report (2010),p.61

¹⁸ U.N, 'The Millennium Development Goals Report' (2011),p.21

¹⁹ Ibid,p.49

²⁰ The African Child Policy Forum, 'In the Best Interests of the Child: Harmonizing Laws in Eastern and southern Africa'(2007,p.50

²¹ U.N, supra note 18, p.25

groups are widespread and persistent in Africa. In order to attain MDGs, such serious violations of children's rights need to be addressed. This requires the establishment of an effective international monitoring mechanism of the implementation of children's rights. Introducing Complaints Procedures under the CRC, in this regard, will greatly help in triggering the monitoring mechanism of the CRC and enhancing the implementation of the provisions of the CRC by States. This will, in turn, assist States' endeavor in attaining the MDGs.

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 HRC of the UN decided to establish an OEWG to explore the possibility of elaborating an Optional Protocol to the CRC to provide a Communications Procedure.²² Pursuant to this Resolution, the OEWG underwent deliberations in December 2009 (from 16 to 18 December 2009), and then, the Chairperson Rapporteur of the OEWG came up with a proposal for a draft Optional Protocol (first draft) to be used as a basis for the forthcoming negotiations.²³ This draft was critically considered during the second session of the OEWG which was held from 6 to 10 December 2010 (first part) and from 10 to 16 February 2011 (second part).²⁴ On the

²² For the full account of the substance of the Resolution, visit <<http://www2.ohchr.org/english/bodies/hrcouncil/OEWG/index.htm>>

²³ *Proposal for a Draft Optional Protocol prepared by the Chairperson-Rapporteur 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/WG.7/2/2.

²⁴ *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.5

basis of this discussion, a revised text (second draft) was issued.²⁵ On the last date of the meeting (on 16 February 2011), the Chair-person disclosed to the participants that he carried out amendments to the second draft taking in to account the points raised in the deliberations. The HRC adopted this document on 17 June 2011.²⁶ The final draft (the draft) will be presented to the General Assembly of the UN in December 2011 for final approval.²⁷

1.3. Objectives of the Study

i. General Objective

The HRC of the UN, as noted above, has adopted a final draft Optional Protocol prepared by the OEWG. The draft is waiting final approval by the General Assembly of the UN. The general objective of the research, hence, is to critically assess the Communications Procedure under this final draft Optional Protocol.

ii. Specific objectives

Some of the specific objectives of the research are:

- i. To consider whether the Communications Procedure under the draft instrument takes in to account the best interests of the child
- ii. To assess whether the provisions have drawn inspiration from other Complaint Procedures and incorporated elements that help to promote the interest of the child

²⁵ *Revised Proposal for a Draft Optional Protocol prepared by the Chairperson-Rapporteur 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/WG.7/2/4.

²⁶ Visit <http://www.crin.org/NGOGroup/childrightsissues/ComplaintsMechanism/>

²⁷ *ibid*

- iii. To know as to who is entitled to bring communications before the Committee on the Rights of the Child (hereinafter the CRC Committee).
- iv. To examine whether Interim Measures help to avoid infliction of harm on children while the CRC Committee is considering communications.
- v. To evaluate whether the provisions help to effectively handle complaints and dispense appropriate remedies.
- vi. To consider if the draft Optional Protocol has incorporated effective mechanisms of following up the implementation of the views and recommendations of the CRC Committee.

1.4. Scope of the Study

The scope of the research will be specifically limited to analyzing the provisions of the draft Optional Protocol introducing Communications Procedure under the CRC. In particular, the research will explore the provisions of the draft Optional Protocol setting out the key Procedures; i.e., Individual Communications, Inter-State Communications and Inquiry Procedure. Other Provisions of the draft having important implication on the application of the above stated key procedures will also be subject to scrutiny. In order to assess the provisions of the draft with wider perspective, moreover, the research will examine the provisions of the draft in light of the standards provided in the Communications Procedures established under the core UN treaties and regional human rights systems. The jurisprudence of the treaty bodies of the core UN treaties and the regional human right monitoring bodies may also be analyzed whenever appropriate.

1.5. Significance of the Study

The research work will advance the understanding of the concepts underlying Complaints Procedures and helps to scrutinize the provisions of the draft Optional

Protocol in a broader perspective. By so doing, it will greatly help to evaluate and predict whether the draft Optional Protocol enables to properly monitor the implementation of the CRC and its Optional Protocols. As noted earlier, moreover, the draft Optional Protocol may get a binding effect if adopted by the General Assembly and gets ratification by States. Accordingly, the research work will, through bringing in to attention the possible impact of some aspects of the Procedures introduced in the draft, assists to proactively find out solutions for possible challenges that may accrue while applying the instrument. Furthermore, given the existing very limited researches on the final draft Optional Protocol, the research may serve as an important input for future discussions and research works that may be conducted in relation to the monitoring mechanisms of the CRC.

1.6. Literature Review

So far, very limited research works specifically analyzing the contents of this final draft instrument have been conducted. This might be partly caused by the very recent adoption of the instrument. The majority of literatures found in this regard emphasized on the Proposal for a draft Optional Protocol (first draft) prepared by the Chair-person Rapporteur of the OEWG and the subsequent second draft.

Perhaps, the final draft, the main concern of this research work, is the outcome of developments underwent at the various stages of the deliberations. Scrutinizing the works carried out in relation to the first and second draft of the instrument, hence, is essential to critically understand the existing lacuna in this regard. Among the prominent works carried out in relation to the first draft include comments adduced by the CRC Committee.²⁸ The Committee welcomed the adoption of the draft instrument

²⁸ *Comments by the Committee on the Rights of the Child on the Proposal for a Draft Optional Protocol prepared by the Chairperson-Rapporteur of the Open-ended Working Group on an Optional Protocol to the Convention on the Rights of the Child to provide a Communications Procedure*, (UN.Doc. A/HRC/WG.7/2/3)

and scrutinized various aspects of it. Regarding Article 1 of the instrument, which deals with the competence of the Committee, for example, it proposed the inclusion of a paragraph indicating that in all actions taken under the protocol, the Committee will favor the effective participation of the child and the fact that his/her views will be given due consideration. Besides, it recommended for the addition of a paragraph indicating that the Committee will ensure the celerity of the Procedure.

The Committee also underscored that Collective Communication Procedures will, *inter alia*, allow the Committee to perform its own functions better in ensuring compliance with Convention obligations by allowing it to address a problem affecting an indeterminate number of persons in a single Procedure, rather than to engage in consideration of a series of similar communications arising out of the same situation. Hence, the Committee welcomed the inclusion of it in the draft instrument. The Committee, nevertheless, propounded that the provision dealing with Collective Communications should not limit the capacity to submit Collective Communications to those in consultative status with the ECOSOC. This will, pursuant to the Committee, constrain the flexibility that the Committee may need to exercise. The provisions of the draft dealing with Interim Measures (Article 5), transmission of communications (Article 6), Friendly Settlement (Article 7), consideration of the merits (Article 8) and Inquiry Procedure (Article 10) were also the subject of scrutiny by the CRC Committee.

NGO Groups have also commented on the draft prepared by the Chair-person of the OEWG.²⁹ Like the CRC Committee, the NGO Group also welcomed the adoption of the draft instrument and examined the various provisions of it in light of the standard set out under other International Complaint Procedures. The group underlined that the draft should conform to the standards set out under international and regional human

²⁹ Available at < <http://www.crin.org/resources/infoDetail.asp?ID=23481&flag=report> > accessed on 10/03/2011

rights instruments. Apart from such general consideration, the group has also examined the contents of the provisions of the draft. Scrutinizing the provisions of the draft dealing with competence of the Committee (Article 1(2)), for example, the group upheld the reaffirmation of the 'best interests' principle of the CRC. Nevertheless, the group added that the provision should make an explicit reference to the right of children to be heard guaranteed under the CRC. Regarding Articles 2(2) and 3(2) of the draft,³⁰ the group opined that it should not permit States that are parties to the OPAC and /or OPSC to decline from recognizing the competence of the Committee .

The group has also endorsed the application of the 'best interests' principle under Article 2(5) of the draft, which authorizes third parties to act on behalf of a child/group of children. However, the group expressed concern that the general wording of the provision may be taken to imply the application of the 'best interests' principle without soliciting the consent of the child. The group, therefore, opted for the application of the principle only if the Committee is not convinced that valid consent of the victim child is secured. The group has also critically considered and commented on the provisions of the draft dealing with Collective Communications (Article 3),exhaustion of domestic remedies (Article 4),Interim Measures (Article 5),procedural provisions (Article 6,8,9,10), Friendly Settlement(Article 7),Inquiry Procedures(Article 10),protection measures(Article 13) and reservations(Article 19).

Malcolm Langford and Sevda Clark have also conducted research work on the significance of having Communications Procedure under the CRC monitoring system.³¹

³⁰ Such provisions give discretion to States Parties to opt out of accepting the competence of the CRC Committee to consider individual and collective communications relating to the violations of the rights of children under the OPAC and OPSC

³¹ 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

Upholding the adoption of Communications Procedure under the CRC, the authors proposed the treatment of the following issues under the Optional Protocol. First and foremost, according to their argument, the Optional Protocol should be crafted with careful consideration of the special status and vulnerability of children and the temporality of childhood. Best interest of the child, pursuant to their argument, should also be used to safeguard children from being abused by their representatives. They also added that the Optional Protocol to be adopted should accommodate Interim Measures and Inquiry Procedures. Tracing the contribution of Collective Communications system in protecting the rights of children, the authors, moreover, strongly advocated for the incorporation of this Procedure in the Optional Protocol. The inclusion of Collective Communications in to the Optional Protocol is also suggested by Peter Newell.³² He maintained that Communications Procedure will enhance the effective protection of the rights of children.

The remaining literatures mainly emphasized on the second draft. Among such literatures, the research work conducted by Langford and Clark,³³ is of prominent importance. The authors, with a view to making the Procedure effective for children and maintaining the normative legitimacy of the international human rights system, called for the amendment of some provisions of the second draft instrument. Among the provisions proposed by the authors to be amended concerns Article 2 of the draft. Pursuant to their argument, this provision should be amended to include the principle of 'non-discrimination' in addition to the 'best interests' principle. Concerning the provisions dealing with Individual Communications (Article 6), the authors supported the granting of standing to individuals who had been victims while they were children.

³² Available at <http://www2.ohchr.org/english/bodies/hrcouncil/OEWG/2ndsession.htm> accessed on 10/03/2011

³³ Malcolm Langford and Sevda Clark, 'A Complaints Procedure for the Convention on the Rights of the Child: Commentary on the Second Draft' (2011)

They, however, criticized the provision for it allows opting out of substantive obligations under the two Optional Protocols to the CRC (i.e., OPAC and OPSC).

The above authors also expounded that the Collective Communications system included under the second draft is overarching for the protection of the rights of children for it benefits large group of victims in case systemic issues are at stake or the victim group lacks organizing capacity. The Procedure did exist in the first draft. Nevertheless, during revision, the Article dealing with it included a provision which undermines its key role. Pursuant to the added provision, if States have already recognized the competence of the Committee to receive and consider Collective Communications, they can withdraw from this responsibility at any time they wish. This provision, according to the authors, is problematic as it weakens the effectiveness of the instrument. The authors have also critically analyzed other aspects of the second draft dealing, among others, with admissibility (Article 9), Interim Measures (Article 8), Inquiry Procedures (Article 16) Friendly Settlement (Article 12) and the like.

Yanghee Lee, former Chair-person of the CRC Committee has also explored the justifications for establishing Communications Procedures under the CRC and proposed the elements that should be included in the Optional Protocol.³⁴ Lee attempted to demonstrate that there are a number of justifiable grounds for establishing Communications Procedure under the CRC. Pursuant to Lee's argument, the CRC contains unique rights that can not be found in other international instruments such as the right of the child to know and be cared for by parents, right to rest, leisure and play, and the right to preservation of identity. Accordingly, establishing Communications Procedure under the CRC helps to enforce these rights. Moreover, Communications Procedure will strengthen effective implementation and accountability of States parties. It also helps children to get redress for violations at domestic level. Establishing

³⁴ Yanghee Lee, 'Communications Procedure under the Convention on the Rights of the Child:3rd Optional Protocol' (2010),*18 International Journal of Children's Rights* p 567-583

Communications Procedure for the CRC is also justified since regional human rights instruments, except the ACRWC were not designed with children in mind. Among regional instruments, only the ACRWC comprises provisions that exclusively deal with children. Indeed, there is no regional human rights mechanism in Asia,

Lee finally proposed the contents of the Optional Protocol to accommodate the following: Regarding the scope of the Procedures, the Optional Protocol should comprise all the three instruments: the CRC, OPAC and OPSC. Under Individual Communications, the Optional Protocol should permit individuals to present claims on behalf of others despite the absence of consent if the author can justify acting without such consent. The Optional protocol should, in addition, include Inquiry Procedure. Although Collective Communications are not accepted under other UN treaties, Lee argued, it would be valuable to have it under the CRC. Introducing Interim Measures will also be important. Lee further added that admissibility requirements should include the standard requirements such as exhaustion of domestic remedies rule or denying admissibility if the case has or is being examined under another Procedure. In so far as reservations are concerned, Lee insisted that the Optional protocol should not permit reservations.

Sara Lembrechts has conducted research specifically referring to the final draft Optional Protocol adopted by the HRC of the UN.³⁵ The research in general assessed whether the newly negotiated Optional Protocol to the CRC will help to translate children's rights from principle to practice. In so doing, the research first identified the reasons for the necessity and desirability of a communications Procedure for the CRC. It based the justifications for establishing Complaints System under the CRC on the rights of a child

³⁵ Sara Lembrechts, 'Translating Children's Rights from Principles to Practice: An Evaluation of the Third Optional Protocol to the Convention on the Rights of the Child Providing a Communications Procedure' (2011), (LLM Honors Dissertation, Maastricht University, Faculty of Law)

to a remedy guaranteed under international instruments and argued that the new Optional Protocol constitutes a necessary and desirable means to fulfill the child's right to an effective legal remedy.

Among the primary reasons for establishing Communications Procedure for the CRC stated in the research is absence of adequate mechanisms for children to provide remedies for child rights violations. Due to the absence of international complaints mechanisms under the CRC, children are forced to rely on the existing regional and universal Complaints Mechanisms. However, even when such mechanisms are open for children and their representatives, they are not adequate to provide remedy for violations of the full range of children's rights. The creation of a beneficial international climate has also been traced in the research as a favorable condition for establishing Communications Procedure for the CRC. According to this reasoning, the international community so far perceived ESC rights as non-justiciable. This mindset retarded the adoption of complaints mechanism under the CRC. Fortunately, this view has changed with the debate preceding the recent adoption of the Optional Protocol to the ICESCR. Thus, the adoption of Communications Procedure for the CRC will not be frustrated with arguments challenging the justiciability of ESC rights of the CRC. The other reason for the adoption of Complaints System for the CRC relies on the potential added value it may introduce on the existing monitoring and implementation of the CRC. The added value indicated in the research are: enhancing the international recognition of children as rights holders, development of jurisprudence on the application of the CRC and improving access to justice.

In the research, it is argued that children under the CRC are viewed as: i. seeking protection and participation, whose vulnerability and autonomy should be balanced in accordance with their evolving capacities ii. In need of being free from discrimination

and iii. Subject of justiciable human rights. The research then explored whether these elements are adequately incorporated in the new Optional Protocol.

Regarding the first element, the research found out that the new Optional Protocol under Article 2 contained all the three principles (i.e., the best interests principle, participation and evolving capacities of a child). This indicates that the OEWG has made a fair attempt to balance protection, participation and evolving capacities in the new Procedure. The second element, as discussed in the research, comprises a two fold obligation. It not only requires States to refrain from any action which would violate any of the rights of a child under the CRC (negative obligation) but also imposes a duty on them to actively take whatever measures are necessary to enable individuals to enjoy and exercise the relevant rights (positive obligation to ensure). When viewed in light of these obligations, the new Optional Protocol has made some remarks on the negative duty under Paragraph 2 of the Preamble through requiring States Parties to refrain from treating children differently on the basis of the grounds mentioned in the Paragraph when they seek access to the remedy established by the new Optional Protocol. The positive obligation, pursuant to the explanation made in the research, however, is not reflected in the new Optional Protocol.

In examining whether the third element is addressed in the new Optional Protocol, the research underscored that the permission of bringing communications alleging breach of both ESC rights and civil and political rights is instrumental. Nevertheless, the Optional Protocol has not fully recognized the justiciability of ESC rights as it subjects them to a 'reasonableness' test. Given this special standard of review for ESC rights, it would be unlikely for the indivisibility, interdependence and interrelatedness of all human rights reaffirmed in the Preamble to be translated in to practice.

The research finally considered whether the new Optional Protocol upheld child friendly mechanisms and incorporated the special needs of children. In view of this, the research evaluated the new Optional Protocol in light of the Guidelines on Child Friendly Justice adopted in May 2011 by the Council of Europe (COE). The research presented an argument that the Optional Protocol will avoid that the legal system it creates becomes 'more a source of additional trauma than a remedy for children' if it takes the special care of the rights and needs of children. The research outlined criteria for determining whether child friendly justice system is given effect under the new Optional Protocol. To this end, it listed five aspects of child friendly justice system: The child's right to knowledge and information ii. The timing of the Procedure iii. The child's safety iv. The protection of the child's privacy and v. The extent to which the filing of a complaint as it stands today is adapted to children.

On the first aspect, as indicated in the research, the Guidelines of the COE provide that from their involvement with the justice system, children should be promptly and adequately informed. In practice this is broad task covering a wide spectrum of requirements, going from the content of knowledge and information to child friendly ways of information. In the Optional protocol, the requirement is insufficiently dealt under Article 17 and many aspects of what is provided under the Guidelines of the COE are lacking. Concerning the second aspect, the Guidelines of the COE provide that the urgency principle should be applied to provide a speedy response and protect the best interests of the child, while respecting the rule of law." The research, in evaluating the Optional protocol on this aspect, examined time frames included in the Optional Protocol. It argued that the time frame prescribed for bringing communications after exhausting local remedies is against the interest of children since children may not be well informed about the existence and possibilities of the Communications Procedure or might face other hurdles in pursuing national remedies. The remaining time frames

specified under Article 8 (on transmission of communications), Article 11 (on follow up) and Article 13 (on Inquiry Procedure), in the writer's opinion are too long.

The research analyzed that the third aspect of a child-friendly justice system is addressed in the Guidelines of the COE. It is provided in the Guidelines that children should be protected from harm in all circumstances. This is important throughout the entire Procedure, and especially when they provide evidence or when the case attracts a lot of media attention. The Optional Protocol acknowledges the need for protective measures under Article 4. However, details of it is needed to be addressed under the CRC Committee's Rules of Procedures. The fourth aspect, pursuant to the Guidelines of the COE implies that "no information or personal data may be made available or published, particularly in the media, which could reveal or indirectly enable the disclosure of the child's identity." "Access to documents and records concerning sensitive or personal data of children should be limited." As the research underscored, the Optional Protocol dealt quite comprehensively with the privacy issue. However, the research emphasized, an anonymous transmission of a communication might in certain cases be necessary to protect the best interests and safety of children involved.

On the last aspect, the COE Guidelines provide that: "In all proceedings, children should be treated with respect for their age, their special need, their maturity and level of understanding." This element, according to the argument made in the research, is not met in the Optional Protocol since the instrument strictly requires the submission of communications in a written form without permitting other modes of submissions, like video or oral submissions. The author of the research finally underscored that in order to translate children's rights from principle to practice, the central points identified in the research should be incorporated in to the Optional Protocol.

1.7. Research Method

The research is purely qualitative one. It primarily focuses on analyzing literatures that may contribute for critically assessing the draft Optional Protocol. To this end, it will consult literatures having relation with the draft Optional Protocol and other literatures emphasizing on the complaint Procedures of the core UN treaties and regional Complaint Procedures. On top of this, the research will use comparative approach to assess the various aspects of the draft. Accordingly, it will compare the provisions of the draft Optional Protocol with the equivalent provisions of international and regional Complaint Procedures. Along with this, the research will also consult the jurisprudence developed in relation to the application of certain aspects of the draft Optional Protocol by the UN treaty bodies and regional human rights mechanisms.

1.8. Proposed Structure

The issues that are going to be dealt in this research will be presented in the following chronological order: Chapter one lays down the research proposal. Chapter two clarifies the notion underlying complaints mechanisms and considers their application in monitoring the implementation of human rights at the international and regional level. Chapter three, on the other hand, specifically focuses on the CRC and examines its monitoring mechanisms. Chapters four scrutinizes the arguments advanced against introducing Complaints Procedures under the CRC and assesses the various aspects of the final draft Optional Protocol. Chapter five concludes the study through touching up on the core issues of the study and tables recommendations for the problems identified in the discussions.

CHAPTER TWO

2. MONITORING THE IMPLEMENTATION OF HUMAN RIGHTS THROUGH COMPLAINTS PROCEDURES: AN OVERVIEW

2.1. Introduction

A Communications Procedure is among the most important mechanisms that help to monitor compliance with and implementation of human rights by States. Currently, Communications Procedure is used as a monitoring mechanism both within the UN and regional systems.

At the UN level, Communications Procedure is being used under the charter-based and treaty-based mechanisms. The charter-based mechanism applies Communications Procedure to monitor the implementation of human rights by States through permitting individuals to lodge complaints following the Procedure established under the 1503 Procedure.³⁶ Under the treaty-based system, on the other hand, the monitoring activity is conducted by Committees established under the respective treaties. Among the mechanisms these Committees employ to monitor the implementations of the treaties includes Communications Procedure by virtue of which the Committees receive and consider communications that allege breach of the rights of individuals guaranteed under the treaties. In order for such communications to be considered by the Committees, however, certain conditions are required to be fulfilled. Communications Procedure also serves as a key means of monitoring the implementations of human rights under the African, Inter-American and European human rights systems.

³⁶ 1503 Procedure is adopted by ECOSOC Resolution (ECOSOC Res. 1503(XLVIII)) of 27 May 1970, revised by ECOSOC Res. 2000/3 of 9 June 2000).

This chapter highlights the historical underpinning giving rise to the establishment of Complaint Procedures at an international level. Sifting in to the treaty-based mechanisms, the chapter also examines the preconditions for admissibility envisaged under the Complaint Procedures of the core UN treaties. For convenience, however, the chapter first unfolds the meaning underlying Communications Procedure.

2.2. Unpacking 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.³⁷ 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 etc. 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 NGOs, 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,

³⁷ 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

Collective Communications do not involve disclosure of the identity of victims, since, from the very beginning, no victim requirement is set out under the Procedures.³⁸

2.3. Access of Individuals to International Complaints Procedures: General Overview

The historical sketch relating to the status of individuals under international law indicates that since time immemorial, individuals were not given adequate opportunities to vindicate their rights before international tribunals. International law, for a long period of time, particularly till the end of the Second World War, treated States as exclusive subjects of international law.³⁹ Since relations between States and citizens were treated as belonging to domestic jurisdiction fully regulated by States, violation of norms of international law and legitimate interest of individuals by States were left to be adjudicated by States themselves.⁴⁰

It was after a long philosophical, social and political evolution that individuals started to be considered as subjects of international law.⁴¹ Perhaps, the first precedent when individuals received access to international tribunals was created by the Central-American Court of Justice established by the Washington Convention of 20 December 1907 by the Central American States.⁴² This Court existed from 1907 to 1917 during which it received four individual claims.⁴³ Following this, the creation of the League of

³⁸ Holly 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

³⁹ Richard B.Lilich, 'International Human rights Problems of Law, Policy and Practice,(Little, Brown and Company,1991),p.374

⁴⁰ *ibid*

⁴¹ Janusz Symonides, 'Access of Individuals to International Tribunals and International Human Rights Complaints Procedure s',p.481,Available at < <http://www.edocfind.com>>, accessed on 08/04/2011

⁴² *ibid*

⁴³ The claims, however, were rendered inadmissible for they did not exhaust all domestic remedies.

Nations after the First World War opened a new window for individuals to bring petitions before an international tribunal. This was possible as the international treaties for the protection of the rights of certain minorities adopted under the auspices of the League of Nations established venues for communications; pursuant to which the League of Nations received and examined thousands of communications from members of ethnic minorities who claimed that they had been denied the protection promised in the minorities treaties.⁴⁴

In the aftermath of the Second World War, the importance of recognizing the human rights of individuals took a leap forward and resulted in the adoption of a vast body of international and regional human rights norms. Such instruments were accompanied by monitoring mechanisms constituting Procedures for the examination of complaints by individuals. This was a turning point for individuals since they were given standing before international instances to insist upon the respect of their rights by national authorities.⁴⁵

In the current institutional structure of the UN, Individual Communications may be submitted following the rules established under either the charter-based mechanisms or treaty-based mechanisms. Under the charter based mechanism, pursuant to the 1503 Procedure adopted by ECOSOC Resolution, communications may be submitted to the HRC by 'any person' or 'a group of persons' claiming to be the victims of violations of human rights and fundamental freedoms, or by 'any person' or 'group of persons', including 'NGOs', acting in good faith in accordance with the principles of human rights, not resorting to politically motivated stands contrary to the provisions of the Charter of the United Nations and claiming to have direct and reliable knowledge of the

⁴⁴ Gudmundur Alfredsson, Jonas Grimheden and et al,(eds.) *International Human Rights Monitoring Mechanisms: Essays in Honor of Jakob Th. Möller*,(Martinus Nijhoff, 2001),p.69

⁴⁵ *ibid*,p.68

violations concerned.⁴⁶ The Procedure plays prominent role in bringing compliance to human rights norms by States since the communication may be brought to the attention of the UN highest level of the UN human rights machinery, the HRC. It may thus result in very significant pressure being brought to bear upon a State to change laws, policies or practices that infringe internationally guaranteed human rights.⁴⁷

Under the treaty body mechanism, Individual Communications are considered by Committees established under the treaties. The core UN treaties, except the CRC, provide Communications Procedure for individuals victims of violation of the rights guaranteed in to them. Before considering communications, however, the Committees ascertain the fulfillment of two fundamental conditions: First, they ascertain whether communications are brought against a State Party to the convention in question. For example, if a communication alleges violation of the right to freedom of expression guaranteed under the ICCPR, the State against which complaints is filed should be party to the ICCPR. Second, the Committees ascertain whether the State against which communication is brought recognizes the competence of the Committee to receive communications. Such recognition of competence may be made through a separate

⁴⁶ Human Rights Council, Resolution 5/1: Institution building (18 June 2007): Complaint Procedure, Para 8.7(d).

⁴⁷ OHCHR, *supra* note 3, p.18 Communications Procedure is also provided for under International organizations. The Inspection Panel of World Bank and the Compliance Review Panel of the Asian Development Bank (ADB) can be traced as examples. The above mentioned organs, as a mechanism for monitoring process, provide a unique opportunity for peoples affected by any of the banks' projects to accomplish about the operation of the banks.⁴⁷ Similarly, under the International Labor Organization, (ILO), the right to present complaints is created. According to the Procedure established in it, association of workers and employers are entitled to claim non-compliance with ILO Convention by member States.

declaration as stipulated in the CAT, CERD, CMW and CED or through becoming a party to a separate Optional Protocol to the treaty in question.⁴⁸

Among the regional instruments, the ECHR has been hailed for being the most successful instrument.⁴⁹ The European Court on Human Rights and the European Commission on Human Rights have entertained large quantity of complaints and have rendered favorable decisions, the majority of which have been implemented by the States Parties concerned.⁵⁰ They have also set precedents that clearly defined the scope of protection of the convention which given rise to relevant legislative amendments and to improved national regulations and practices.⁵¹ By virtue of Article 25 of the 1950 ECHR, individuals are granted the right to seek redress for human rights violations and/or apply for preventive protection by petitioning the European Commission/or Court of Human Rights.

In fact, individuals were not permitted to directly petition the Court. They used to access it indirectly. This is because, individuals were primarily authorized to bring communications to the European Commission, which was given the competence to receive applications submitted by alleged victims of violations or by States and examine their admissibility. If it considered the application admissible, the Commission, then, prepared a report in which it Stated its opinion as to whether the convention had been violated, and it directed the case either to a political body, the Committee of Ministers

⁴⁸ The remaining core UN treaties, i.e., ICCPR, ICESCR, CEDAW and CRPD follow this approach. These conventions have Optional Protocols providing Communications Procedure. And recognition by the State of the competence of the Committees to consider communications in such treaties is made through ratifying the Optional Protocols to the treaties.

⁴⁹ *ibid*

⁵⁰ Olivier De Schutter, 'International Human Rights Law, Cases, Materials, Commentary'(Cambridge University Press,2010),p.901

⁵¹ *ibid*

of the Council of Europe, or to the European Court of Human Rights.⁵² In recent years, however, significant changes have been made to the Convention. In 1994, for example, with the entry in to force of protocol No.9, individuals are authorized to refer a case directly to the European Court of Human Rights.⁵³ On November 1998, Protocol No. II to the Convention for the Protection of Human Rights and Fundamental Freedoms brought fundamental changes to the supervisory system as it established one single and permanent Court taking over the responsibilities previously assumed by the Commission. Accepting the jurisdiction of the Court and the filing of Individual Communications by State Parties to the convention is compulsory under the Protocol.⁵⁴

In the Inter-American regional system, the Inter-American Commission established by the Charter of the Organization of American States and the ACHR also permits individuals complaints to be brought to it. Article 44 of the ACHR authorizes 'any person' or 'any non-governmental entity' legally recognized in one or more member States of the organization to lodge petition with the Commission containing denunciations or complaints of violations of the Convention by State Parties.

The ACHPR which was adopted in 1981 and entered in to force in 1986 is subject to monitoring by the African Commission on Human and Peoples' Rights (The African Commission). In 1998, the African system of human rights protection was further strengthened by the adoption of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights.⁵⁵ The African

⁵² *ibid*, p.899

⁵³ The application, nevertheless, is expected to be filed against a State Party to the Protocol

⁵⁴ Olivier De Schutter, *supra* note 50, p.899

⁵⁵ In 2008, Protocol on the Statute of the African Court of justice and Human Rights has been adopted. The Protocol provides for the merger, in the future, of the two judicial bodies: the African Court on Human and Peoples' Rights and the African Court of Justice established by the Constitutive Act of the African Union.

Charter permits the filing of communications. The provision dealing with communications, however, is formulated in a vague manner. Article 55 puts no restriction on who may submit communications to the African Commission. It reads:

Before each Session, the Secretary of the Commission shall make a list of the communications other than those of States Parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.

Thus, it is evident to note that the provision gives no clue as to who is entitled to bring communications before the African Commission. The creative interpretation of the African Commission, in fact, has rectified the difficulty in this regard. It has interpreted this provision as giving *locus standi* to the victims themselves and to the victims' families as well as NGOs and others acting on their behalf.⁵⁶ The Protocol establishing the African Court on Human and Peoples' Rights in limited instances permits individuals to submit claims to the Court. The Protocol under Articles 5(3) and 34(6) allow States Parties, through a separate declaration, to recognize the standing of individuals and NGOs before the Court.⁵⁷

The African human rights system has devoted special attention to children's rights. For the purpose of fostering the protection of children's rights, the ACRWC that specifically deals with children was adopted in 1990. It entered into force in 1999 after being ratified by fifteen member States of the Organization for African Unity (now African Union). Like the CRC, the ACRWC also guarantees diverse rights to children. Indeed, it has

⁵⁶ Magdalena Sepúlveda, Theo van Banning and et al, 'Universal and Regional Human Rights Protection: Cases and Commentaries' (University for Peace, 2004), p.9

⁵⁷ Unless the State concerned through a separate declaration recognize the competence of the Court to receive and consider claims brought by individuals and NGOs, individuals will not have standing before the Court.

made some improvements in some respects.⁵⁸ The implementation of ACRWC is monitored by the ACERWC established under Article 32 of the ACRWC. Pursuant to Article 44 of the ACRWC, 'any person', 'group or non-governmental organization' recognized by the Organization of African Unity, by a member State, or the United Nations, may submit communications relating to any matter covered by the Charter.

2.4. Preconditions for Admissibility under the Core UN treaties

As stipulated under the Communications Procedures of the core UN treaties, before bringing communications to the Committees, the authors of communications are first required to exhaust all available domestic remedies. The rule guarantees that the State Party has the opportunity to remedy a violation of any of the rights set forth under their legal system before the Committee considers the violation.⁵⁹ This requirement, however, is exempted in some special circumstances. Article 4 of the Optional Protocol to the CEDAW, for example, provides that this rule will not apply when the application of such remedies is unreasonably prolonged or is unlikely to bring effective remedies.⁶⁰ A similar provision is available under Article 2(d) of the Optional Protocol to the CRPD, Article 22 of the CAT, Article 77 of CMW and Article 14 of CERD. The Optional

⁵⁸ Compare, for example, provisions dealing with 'definition of child', 'best interests of a child', 'participation of a child', 'right to education', 'and children with disabilities'. For detailed analysis of the departures that exist between the ACRWC and the CRC, consult Benyam Dawit, 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 SAPR/PL

⁵⁹ Sarah Joseph, Carin Benninger-Budel and et al, 'A Handbook on the Individual Communications Procedures of the UN Treaty Bodies'(OMCT Handbook Series Vol. 4),p.284

⁶⁰ Treaty bodies do not fix a particular period for determining whether there is undue delay or not. The Human Rights Committee in *Mekong V Cameroon* (Communication 59/91), a case which had been pending for 12 years after appeals and petition was lodged, for example, ruled that such process had been unduly prolonged and that there was no need of exhaustion. However, in communication 135/94, *Kenya Human Rights Commission V Kenya*, where a case has been pending for three months, the commission held the delay as insufficient to constitute undue delay.

Protocol to the ICESCR similarly provides instances under which the rule may be overlooked. Under Article 3(1) of the instrument, it is stipulated that the rule will not apply if domestic remedies are unreasonably prolonged. Nevertheless, the provision does not stipulate the non-application of the rule when domestic remedies are unlikely to bring effective relief. Accordingly, despite domestic remedies are unlikely to bring effective relief, the applicant is required to exhaust such remedies. Similar type of articulation is adhered to under Article 5(2) (b) of the Optional Protocol to the ICCPR.

Frans Viljoen gave five instances which warrant saying that domestic remedies are unavailable: i.e., i. when a decree or other measure has ousted the jurisdiction of the Courts, making judicial recourse impossible ii. Where pursuing a remedy is dependent on extrajudicial considerations, such as discretion or some extra ordinary power granted to an executive State official iii. Where the nature of the relief sought is not possible in domestic Courts. iv. Where situations of serious massive violations of human rights exist and v. where complaints are detained without trial.⁶¹ The Human Rights Committee has also further clarified that domestic remedies will be considered as unavailable if they are unaffordable by the victim.⁶² The African Commission, in its jurisprudence has elaborated that domestic remedies will be considered as unavailable if the jurisdiction of domestic Courts is ousted and, as a result, no avenue for exhausting local remedies exists.⁶³ It is, however, important to bear in mind that as elaborated by the Human Rights Committee, domestic remedies are not limited to judicial remedies;

⁶¹ Frans Viljoen, 'Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to 1 January 1997' in C. Heyns(ed) *Human Rights Law in Africa 1997* (1999), p.71 as cited in Sabelo Gumeddze, Sabelo Gumeddze, *Bringing Communications before the African Commission on Human and Peoples' Rights'* (2003) 3 *African Human Rights Law Journal*, p.133

⁶² Sarah Joseph, Carin Benninger-Budel and et al, *supra* note 59, p.69

⁶³ See *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) Paras 38 and 39, *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000), Para 32

they may also include administrative remedies.⁶⁴ With respect to ESC rights, Lilian Chenwi argues that domestic remedies may include quasi-judicial remedies such as national human rights commissions, the ombudsman or administrative complaints.⁶⁵

Communications, in order to be rendered admissible, are also required not to be anonymous.⁶⁶ The identity of the author of communications is required to be disclosed. And the author of the communication must be a 'victim' of the violation he/she denounces. The rights violated should, moreover, be guaranteed under the relevant convention. In almost all of the treaties, it is additionally provided that communications will not be declared admissible if:

- i. They constitute *an abuse of the right of submission* of communications or are *incompatible* with the provisions of the concerned convention. Abuse of the right of submission of communications might arise if, for example, a purported victim deliberately submits false information to a Committee.⁶⁷ Despite the absence of time limit for submitting communications after the exhaustion of domestic remedies under the first Optional Protocol and the Rules of Procedures of the Human Rights Committee, communications that excessively delayed without good cause after the exhaustion of domestic remedies have been declared to be inadmissible by the Human Rights Committee on the ground of abuse.⁶⁸ Incompatible communications,

⁶⁴ See, for example, *Brough v Australia*, Communication 1184/2003), Para 8.6.

⁶⁵ 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.35

⁶⁶ See, for example, Article 3 of the Optional Protocols to the ICCPR, ICESCR and CEDAW, Article 2 of the Optional Protocol to the CRPD, Article 31 of the CED, Article 77 of the CMW, Article 22 of CAT and Article 14 of CERD,

⁶⁷ Sarah Joseph, Carin Benninger-Budel and et al, supra note 59, p.74

⁶⁸ See, for example, *Gobin v. Mauritius* (787/97)

on the other hand, are communications that do not allege violations of rights guaranteed under a given treaty.⁶⁹

- ii. The matter Stated under the communications has already been examined by the concerned Committee or has been or is being examined under another Procedure of international investigation or settlement.⁷⁰
- iii. They are manifestly *ill founded* or not *sufficiently substantiated* ⁷¹ and
- iv. The facts that are the subject of communication occurred prior to the entry in to force of the instrument for the State Party concerned unless those facts continued after such date.

Besides, Complaint Procedures of the core UN treaties provide that communications should establish connection between the claimant and the State concerned.⁷² This in effect means that the State Party that is the object of communication should exercise jurisdiction over the party filing petition.

2.5. Conclusion

In this chapter, it has been noted that Communications Procedure is used both by the UN and regional human rights systems as a key means of monitoring the implementation of human rights by States. Analyzing the historical context, it has been

⁶⁹ OHCHR, *supra* note 3, p.5

⁷⁰ The Optional Protocols to the ICCPR and CED set out a bit different requirement in this regard. Article 5(2)(a) of the Optional Protocol to the ICCPR and Article 31(2)(c) of the CED) provide that a communication will be inadmissible if it is being examined under other Procedure of international investigation or settlement. This is implying that even if the matters indicated under the communication has already been examined by the Committees of such instruments or other Procedure of International Investigation or settlement, it may again be considered by the Committees of the ICCPR and CED

⁷¹ *Manifestly ill-founded or insufficiently substantiated* communications are those communications which contain insufficiently developed facts or weak arguments for the violation of the applicable covenant.(see OHCHR, *supra* note 3, p.5)

⁷² See, for example, Article 77 of the CMW and Article 2 of the Optional Protocol to the CEDAW

noted that Communications Procedures are very recent innovations. Until very recently, individuals were denied the right to access International Complaint Procedures.

As considered in the discussion, the monitoring activity under the core UN treaties is carried out by Committees established under the treaties. In order for the merits of communications to be examined by the Committees, however, communications are expected to pass through admissibility test. The admissibility requirements of most Complaint Procedures of the core UN treaties, for example, provide that complainants should first exhaust the available local remedies before bringing the matter to the attention of the Committees. Communications are also required to trace violation of rights guaranteed under the relevant convention. Furthermore, the admissibility requirements provide that communications should not constitute an abuse of the right of submission of communications or be incompatible with the provisions of the concerned convention.

The remaining admissibility rules provide that communications will not be considered on their merits if: i. The matter stated under the communications has already been examined by the concerned Committee or has been or is being examined under another Procedure of international investigation or settlement ii. They are manifestly ill founded or not sufficiently substantiated or iii. The facts that are the subject of communication occurred prior to the entry in to force of the instrument for the State Party concerned unless those facts continued after such date. In the following chapter, the CRC and its monitoring mechanisms will be examined.

CHAPTER THREE

3. THE CONVENTION ON THE RIGHTS OF THE CHILD AND ITS MONITORING MECHANISMS

3.1. Introduction

The CRC is the most important legal instrument for the protection of the rights of children.⁷³ It is composed of wide ranges of entitlements that take in to account the special nature and vulnerability of children. To further advance the protection provided under it, moreover, two additional instruments that augment the CRC have been adopted: the OPAC and the OPSC. Like other core UN treaties, the CRC is supplemented by mechanisms that help to monitor compliance with and implementation of the rights guaranteed in it by States Parties. The monitoring task is carried out by the CRC Committee.⁷⁴

In this Chapter, the monitoring system established under the CRC will be considered. By so doing, it will be examined whether the existing monitoring mechanism introduced under the CRC is adequate to entail compliance with the CRC and its Optional Protocols by States Parties. Moreover, since the CRC Committee also monitors the implementation of the two complementing Optional Protocols to the CRC (the OPAC and OPSC),⁷⁵ the discussions will also touch up on some aspects of such instruments.

⁷³ Jaap Doek, 'The Protection of Children's Rights and the United Nations Convention on the Rights of the Child: Achievements and Challenges' (2003) 22*Saint Louis University Public Law Review* 235, p.1

⁷⁴ The CRC Committee is established under Article 43 of the CRC to monitor the implementation of the norms set forth under the CRC by States Parties

⁷⁵ See Article 8 of the OPAC and Article 12 of the OPSC

3.2. The Convention on the Rights of the Child

3.2.1. Historical Background of the Adoption Process of the CRC

It is important to recognize that the present structure and normative set up of the CRC is the out come of legal developments underwent at the various periods to ameliorate the injustice suffered by children.⁷⁶ Historically, children were placed at a disadvantaged position. In the ancient time, for example, parents used to consider them as their properties.⁷⁷ They were even denied recognition as a human being. In the middle ages, children were accorded better position as compared to the ancient one as they were viewed as human beings, but without consideration of their special nature and vulnerability. Consequently, they were forced to engage in adult tasks including apprenticeships. During Renaissance, however, the view showed a slight improvement and regarded them as weak and seeking parental protection.⁷⁸

Through time, children's rights gained growing attention by the world community. Accordingly, for the first time in history, a declaration articulating provisions designed to proffer safeguards to children was adopted in 1924.⁷⁹ The instrument, however, is couched in the form of welfarist rather than a right-based discourse.⁸⁰ This may be discerned from the provisions which adopted the manner of formulation as: 'The Child that is hungry must be fed', 'The Child that is sick must be nursed', 'The Child must be the first to receive relief in times of distresses' and etc.

⁷⁶ Malcolm Langford and Sevda Clark, *supra* note 31, p.372

⁷⁷ Rebecca Stahl, ' "Don't forget about me": Implementing Article 12 of the United Nations Convention on the Rights of the Child' (2007) 24 *Arizona Journal of International and Comparative Law* 803, p.1

⁷⁸ *ibid*

⁷⁹ The Declaration was adopted on 26, September 1924. It is also called 'Geneva Declaration of the Rights of Children'.

⁸⁰ Malcolm Langford and Sevda Clark, *supra* note 31, p.372

Children were also brought to an international agenda in the wake of the Second World War. The incidence of the Second World War and the resulting consequence on children propelled the international community to find a way around the plight of children.⁸¹ The 1959 Declaration of the Rights of the Child ⁸² is the outcome of such effort. The Declaration incorporates ten principles that broadened the basic concept embedded under the 1924 Declaration of the Rights of Children. Meticulous look at the principles of the Declaration makes it clear that the 'needs' approach followed in the 1924 Declaration was replaced by a 'rights-based discourse'.⁸³

The Principles, however, continued to define children's rights heavily emphasizing on 'care and protection' without guaranteeing rights that protect the 'individual personality', i.e., civil and political rights such as the right to freedom of expression, the right to privacy, the right to freedom of thought and expression and the like.⁸⁴ Most of the principles stipulated in the Declaration entitle the child the right to protection and care. To state some: principle 2, for example, entitles the child to enjoy special protection, principle 4 also guarantees to the child the right to enjoy social security, principle 5 entitles the child who is physically, mentally or socially handicapped to be given special treatment, principle 8 as well entitles the child to be among the first to receive protection.

⁸¹ Cynthia Price and Susan Kilbourne, 'Jurisprudence of the Committee on the Rights of the Child: A Guide for Research and Analysis' (1998) 19 *Michigan Journal of International Law* 633, p.3

⁸² G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp.(No. 16) at 19, U.N. Doc. A/4354

⁸³ This may be inferred from the provisions of the Declaration which unequivocally set out entitlements to the child. Besides, principle 1 of the Declaration, for example, provides "The child shall enjoy all the rights set forth in this declaration..." This mode of articulation, hence, signifies the shift of paradigm from the thinking reflected in the 1924 Declaration which depicts the child as a being in need of service

⁸⁴ Cynthia Price and Susan Kilbourne, *supra* note 81, p.3

In spite of the adoption of the above declarations, reports of States presented on various occasions on the condition and status of children unveiled the prevalence of gross violation of the rights of children.⁸⁵ The reports disclosed that children suffered grave injustices as a consequence of deficient health care and limited opportunity for basic education. It was further indicated in the reports that alarming accounts of children were being abused and exploited as prostitutes or in harmful jobs. More, large numbers of children were reported to be in prison or in other difficult circumstances, as refugees and victims of armed conflict.⁸⁶

Consequently, some States argued for adopting a comprehensive statement on children's rights which would be binding under international law. Indeed, the government of Poland, as part of the events surrounding the International Year of Children, proposed a treaty that would shape the principles of the 1959 Declaration on the Rights of the Child in a legally binding instrument.⁸⁷ Accordingly, the Human Rights Commission of the UN commenced drafting the CRC in 1979 by establishing a working group.⁸⁸ Government delegates were given key role in the drafting process; nevertheless, representatives of the UN bodies and specialized agencies, including the UNHCR, UNICEF and WHO, as well as a number of NGOs were also given an opportunity to take part in the deliberations.⁸⁹

The working group used the draft submitted by the Polish government as a starting point. But through the ongoing deliberations, the group amended and extensively

⁸⁵ OHCHR, Fact Sheet No.10 (Rev.1), 'The Rights of the Child', p.1

⁸⁶ *ibid*

⁸⁷ Cynthia Price and Susan Kilbourne, *supra* note 81, p.4

⁸⁸ *ibid*

⁸⁹ OHCHR, *supra* note 85, p.1

expanded the contents of such draft.⁹⁰ The group expanded the rights in the 1959 Declaration which solely accommodated 'care and protection' rights, to that which also protected the child's individual personality rights such as the right to have an opinion, the right to participate in decisions affecting his/her life and the right to be respected for his/her human dignity.⁹¹ The draft was then submitted to the General Assembly for adoption. By its Resolution issued on 20 November 1989, the General Assembly unanimously adopted the CRC.⁹² After being endorsed by 20 States, the Convention entered into force on 2 September 1990.⁹³

3.2.2. Optional Protocols to the CRC

Inspired by the blatant violations of the rights of children as a consequence of sexual exploitation and involvement in armed conflicts, the General Assembly of the UN has adopted two Optional Protocols to the CRC: the OPAC and OPSC.

The primary responsibility to draft the OPSC was bestowed on the OEWG established by the Human Rights Commission of the UN.⁹⁴ In the adoption process of the OPSC, the Special Rapporteur on the Sale of children, Child Prostitution and Child pornography, the CRC Committee as well as NGOs have participated.⁹⁵ After long and thoughtful deliberation, the OPSC was finally adopted on 25 May 2000 and entered into force on 18 January 2002.⁹⁶

⁹⁰ *ibid*

⁹¹ Cynthia Price and Susan Kilbourne, *supra* note 81, p.4

⁹² Resolution 44/25 of 20 November 1989

⁹³ OHCHR, *supra* note 85, p1

⁹⁴ UNICEF, 'supra note 2, p.3

⁹⁵ *ibid*, p.3

⁹⁶ *ibid*

Under the OPSC, State Parties are required to prohibit the sale of children, child prostitution and child pornography.⁹⁷ Sale of children is defined under Article 2(a) as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.” Child prostitution, as stipulated under Article 2(b) is “the use of a child in sexual activities for remuneration or any other form of consideration.” Child pornography, on the other hand, is defined under Article 2(c) as “any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purpose.” The OPSC further provides that States Parties should criminalize attempts, complicity, or participation in acts relating to the sale of children, child prostitution, and child pornography.⁹⁸ Article 4 sets forth the bases for States Parties to assert jurisdiction over acts relating to the sale of children, child prostitution, and child pornography.

The other Optional Protocol that supplements the CRC is the OPAC. It was primarily adopted to increase the minimum age for participation of children in hostilities from fifteen to eighteen.⁹⁹ The mandate of drafting the text of the OPAC was given to a Working Group established by the Human Rights Commission of the UN in 1994.¹⁰⁰ The draft prepared by the Working Group was enriched by the through discussion carried out with the participation of many countries, NGOs, United Nations agencies and independent experts and after six years of discussion, the Working Group

⁹⁷ Article.1 of the OPSC

⁹⁸ Article 3 of the OPSC

⁹⁹ Note that the minimum age for participation in hostilities was stipulated in the 1977 Additional Protocols and the CRC. The instruments provided 15 years as a minimum age for recruitment and participation in hostilities.

¹⁰⁰ UNICEF, ‘Guide to the Optional Protocol on the Involvement of Children in Armed Conflict’ (UNICEF,2003),p.9

concluded its work in 2000. And the OPAC was formally adopted by the General Assembly of the UN on May 25, 2000 and entered in to force in 2002.¹⁰¹

The OPAC explicitly requires ratifying States to take all feasible measures to ensure that members of their armed forces under the age of eighteen do not take a direct part in hostilities.¹⁰² It further States that children under the age of eighteen are entitled to special protection ¹⁰³and that any voluntary recruitment of persons under the age of eighteen must include adequate safeguards.¹⁰⁴ The instrument provides stringent requirement to rebels and other non-state actors as it requires them to refrain from recruiting persons under the age of eighteen years or using them in hostilities under any circumstances.¹⁰⁵ Under the instrument, moreover, compulsory recruitment below the age of eighteen is prohibited.¹⁰⁶

The OPAC finally requires States Parties to cooperate in implementing the Protocol, for example, through preventive measures and the rehabilitation and social reintegration of victims, including through technical cooperation and financial assistance.¹⁰⁷ Under Article 6, they are also demanded to take all necessary legal, administrative and other

¹⁰¹ *ibid*

¹⁰² Article 1 of the OPAC

¹⁰³ Article 3(1) of the OPAC

¹⁰⁴ Article 3(3) of the OPSC.

¹⁰⁵ Article 4 (1) of the OPAC. This provision, as it can be observed, provides double standard to government and rebels and other non-state actors. This is because, governments, as discussed above, can engage in to carrying out voluntary recruitment of children under the age of eighteen provided the safeguards set out under Article 3 are adhered. Rebels and other non-State actors, however, are required to refrain from recruiting children at any circumstances (whether it is voluntary or not) who have not attained the full age of eighteen.

¹⁰⁶ Article 2 of the OPAC

¹⁰⁷ Article 7(1) of the OPAC

measures to ensure the effective implementation and enforcement of the provisions of this Protocol within their jurisdiction.

3.3. Monitoring Mechanisms of the CRC

In common parlance, ratification of international human rights instruments entails responsibility on States Parties to implement the provisions guaranteed under the instruments within their domestic spheres. Such implementation of the standards set out under the treaties, however, is not solely left to States Parties. Most treaties provide for mechanisms that permit supervisory bodies (Committees) to monitor the implementation of the rights enumerated under the instruments by States Parties. The Committees carry out international human rights monitoring through employing mechanisms such as:

- i. By examining State reports, engaging in a dialogue with them and holding them accountable where they have breached their obligations under the covenants.
- ii. By receiving Individual Communications where the relevant treaty permits this, and
- iii. Through undertaking inquiry and receiving Inter-State complaints in limited cases.¹⁰⁸

As far as the CRC is concerned, examination of State reports is the primary method employed to monitor the implementation of it by State Parties. The monitoring task is bestowed up on the CRC Committee established under Article 43 of the CRC. The Committee, as provided for in this very Article, consists of ten experts of high moral standing and recognized competence in the field covered by the CRC. Deviating from the number fixed in this provision, in fact, the Committee since June 2003 consists of

¹⁰⁸ Richard B.Lilich, *supra* note 39, p.263

eighteen members.¹⁰⁹ This was done for the purpose of eliminating the backlog of reports created as a consequence of huge number of State Parties to the CRC.¹¹⁰

The CRC Committee members are elected by States Parties from among their nationals taking in to account the equitable geographical distribution and principal legal systems.¹¹¹ The members are elected for a term of four years and are eligible for re-election.¹¹² During the first elections for membership in 1991, however, five of the ten Committee members elected were made to receive a term of two years and at a subsequent election in 1993, these members were reelected for a term of four years.¹¹³ This was made for the purpose of preventing a complete changeover in the makeup of the Committee at the end of four years and encouraging continuity in the Committee's deliberations.¹¹⁴

Apart from monitoring the individual countries' progress in implementing the CRC, the CRC Committee also periodically publishes its own General Comments on key issues related to the interpretation, promotion and protection of child rights. This may be inferred from Article 45(d) of the CRC which partly reads: "The Committee may make

¹⁰⁹ This was made through amending Article 43(2) of the CRC. See U.N Doc. A/RES/50/155, 1996

¹¹⁰ Mieke 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.9

¹¹¹ Article 43(2) of the CRC.

¹¹² Article 43(6) of the CRC

¹¹³ Cynthia Price, Stuart N., and et al, 'Monitoring the United Nations Convention on the Rights of the Child: The Challenge of Information Management', *Human Rights Quarterly* (1996) 439-471, at 441

¹¹⁴ *ibid*, as noted above, Committee members are elected for the term of four years. And if at the end of the four years term, all members failed to be re-elected, complete changeover may take place thereby threatening the continuity of the deliberations of the Committee. It is for the purpose of addressing this consequence that the first election process adopted this proactive measure.

suggestions and general recommendations based on information received pursuant to Articles 44 and 45 of the present Convention...”

As of 2011, the Committee has issued thirteen General Comments on a wide range of topics.¹¹⁵ The issues addressed through General Comments are: aim of education (2001), The role of independent human rights institutions (2002), HIV/ AIDS and the rights of the child (2003), Adolescent health (2003), General measures of implementation for the Convention on the rights of the Child (2003), Treatment of unaccompanied and separated children outside their country of origin (2005), Implementing child rights in early childhood (2005), The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (2006), The rights of children with disabilities (2006), Children’s rights in juvenile justice (2007), Indigenous children and their rights under the Convention (2009), the rights of the child to be heard (2009) and the rights of the child to freedom from all forms of violence (2011).

General Comments play significant role in improving the implementation of the CRC’s provisions by States Parties. Mieke Verheyde and Geert Goedertier have expounded that:

General Comments attempt to enhance the understanding of the rights enshrined in the CRC and draw attention to the insufficiencies disclosed by a large number of reports; they illuminate the States Parties’ obligations, aim at stimulating the implementation activities of the governments and relevant international bodies as well as try to clarify the reporting requirements.¹¹⁶

¹¹⁵ Visit www2.ohchr.org/english/bodies/crc/comments.htm

¹¹⁶ Mieke Verheyde and Geert Goedertier, *supra* note 110, p.45

3.3.1. State Reporting under the CRC

State reporting Procedure is used by most of the UN human rights treaties as well as the regional human rights instruments as a primary tool to monitor the implementation of the rights recognized under the instruments.¹¹⁷ State reporting mechanisms help to secure diverse advantages. Pursuant to the elaboration made by Kofi Kuashigah, for example, State reporting is important and laudable to ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules and Procedures and practices in an effort to ensure the fullest possible conformity with the instrument in question.¹¹⁸ By virtue of State reporting, moreover, the public in the State concerned will get an opportunity to scrutinize the laws and policies of their government with respect to the rights in the instruments, and, hence, encourages involvement of relevant sectors of the society.¹¹⁹ Badawi Elsheikh, explaining the role of State reporting under the ACHPR underscored that:“ Reporting Procedure is the backbone of the mission of the Commission; through it, the Commission would be able to monitor the implementation of the Charter and engage State Parties in a process of dynamic implementation.”¹²⁰

Under Article 44(1) of the CRC, State Parties are required to furnish reports to the CRC Committee. It provides:

¹¹⁷ See, for example, Article 40 of the ICCPR, Article 16 of the ICESCR, Article 9 of the CERD, and Article 19 CAT, Article 73 of the CMW, Article 18 of the CEDAW and Article 29 of the CED. The same trend is adhered at the regional level. See, for example, Article 43 of the ACRWC, Article 62 of the ACHPR, Article 57 of the ECHR and Article 42 of the ACHR.

¹¹⁸ Kofi Kuashigah, 'The African Charter on Human and Peoples' Rights: Towards a more Effective Reporting Mechanism', (2002) 2*African Human Rights Law Journal* 2, p.261

¹¹⁹ *ibid*

¹²⁰ Badawi Elsheikh. 'The African Commission on Human and Peoples' Rights: Prospects and problems', (1989) 7 *Netherlands Quarterly of Human Rights* 281, as cited in Kofi Kuashigah above, p.265

(1) States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights

- (a) Within two years of the entry into force of the Convention for the State Party concerned;
- (b) Thereafter every five years.

Hence, according to the above provision, initial reports are required to be submitted within two years of the entry in to force of the CRC for the State Party concerned.¹²¹ Following the initial report, State Parties are obliged to draw up periodic reports on the measures they have adopted which give effect to the rights recognized in the CRC every five years.¹²² The report, pursuant to the provision, should also indicate the progress made by States on the enjoyment of the rights guaranteed under the CRC. In other words, this means that the States are bound to assess the effect of the measures they took to implement the rights. They have to check whether the measures have contributed to the realization of the rights of the child.¹²³

¹²¹ Note that most of the core UN treaties give one year period for submitting initial reports.(See for example, Article 40 of the ICCPR, Article 17 of the ICESCR, Article 19 of the CAT, Article 73 of the CMW, Article 9 of the CERD). The CED, under Article 29,however,grants two years like that of the CRC

¹²² The time gap given for States Parties to submit periodic reports to the respective Committees is different in the various UN treaties. CAT, for example, stipulates four years (Article 19. The CED prescribes two years (Article 29(1)).Under the CERD, two years period is provided (Article 9(1)). The CMW like the CRC provides five years. The ICCPR and the ICESCR portray distinct features as compared to the above considered treaties. No time limit, for instance, is provided under the ICCPR. However, the Human Rights Committee in its 'Decision on Periodicity' has held that State Parties to the ICCPR should submit periodic reports every five years.(See decision of the Human Rights Committee of 22 July 1981,CCPR/C/19).Under the ICESCR as well, no fixed time is Stated for the production of reports. Rather, Article 17(1) gives the impression that States Parties will submit reports in accordance with the program to be scheduled by the ECOSOC.

¹²³ Mieke Verheyde and Geert Goedertier, *supra* note 110, p.16

As evinced under Article 44(2) of the CRC, State reports should also indicate factors and difficulties, if any, affecting the degree of fulfillment of the obligations under the CRC. Besides, they are expected to incorporate sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned. If the report submitted fails to provide sufficient information concerning the implementation of the CRC in the State concerned, the Committee is still authorized to request additional information.¹²⁴ States Parties that submitted comprehensive initial reports are relieved from restating in their subsequent reports information which they already provided in their initial reports.¹²⁵ Finally, with a view to advancing the awareness of the public in relation to the implementation of the CRC by their government, the CRC mandates State Parties to make their reports widely available to the public in their own countries.¹²⁶

The Committee started its formal State Party report examination process at its third Session in January 1993.¹²⁷ During the first and second Sessions held in 1991 and 1992, the Committee spent its time on accomplishing preparatory works such as the drafting of its Provisional Rules of Procedure and General Guidelines Regarding the Form and Content of Initial Reports to be submitted by States Parties.¹²⁸ Through time, however, the work load became unmanageable owing to the increasing number of State Parties to the CRC. Such factor, as considered earlier, has necessitated the increment of the number of Committee members.

¹²⁴ Article 44(4) of the CRC

¹²⁵ Article 44(3) of the CRC

¹²⁶ Article 44(6) of the CRC

¹²⁷ Cynthia Price, Stuart N., and et al, *supra* note 113, p.445

¹²⁸ *ibid*

The CRC Committee has also designed some additional mechanisms that help to cope-up with the rapidly growing workload. In order to clear the backlogs of reports, for example, the General Assembly had approved the proposal submitted to it for the splitting of the Committee in to two chambers.¹²⁹ Hence, since 2005, the Committee has been permitted to work in two chambers for the following two years period.¹³⁰ Nevertheless, the Committee has reverted to the two chambers system again in 2010 to further eliminate the created backlog.¹³¹

The number of sessions to be held by the Committee is also extended for the purpose of reducing the congested work. Conducting one session a year was found to be insufficient to effectively handle the growing workload. Accordingly, the Committee has been permitted to hold three sessions a year starting from 1995.¹³² Each session consists of three weeks period and additional one week at each session is also added for a pre-sessional working group.¹³³ State Parties to the CRC are also asked to submit reports within different time frames.¹³⁴ Other measures have also been devised by the Committee to decrease the work load and undertake review of reports within reasonable time, such as i. Through increasing the number of reports it has to review during each session, i.e., increasing the original six reports per session to eight, nine or ten per session. ii. Reducing the amount of hours it can at the most spend on the discussion of one report. Since its 25th session, a maximum of six hours, instead of nine hours are spent on one report, and iii. Through requiring States Parties to focus on the

¹²⁹ CRC Committee, Recommendation on its Working Methods(U.N Doc. CRC/c/133,2004)

¹³⁰ *ibid*

¹³¹ Yanghee Lee, *supra* note 34,p.573

¹³² CRC Committee, *Conclusions and Recommendations adopted on the organization of work – sessions of the Committee and its subsidiary bodies* (U.N Doc. CCR/C/20, 1993), p. 4

¹³³ *ibid*, During the last pre-session week, the pre-sessional working group makes preparation for the forthcoming session

¹³⁴ Visit www.crin.org

most important issues in drafting their reports.¹³⁵ Interestingly, the designed methods have enabled the Committee to eliminate much of the backlog of reports.¹³⁶ As a result of the reduction of workload, hence, review of reports is currently being carried out one year after their submission as opposed to the previous scenario which used to require two to three years waiting period.¹³⁷

Reporting obligation is also stipulated under the Optional Protocols to the CRC, i.e., the OPAC and OPSC. Both instruments require States Parties to submit, within two years following the entry into force of the instruments in the States, a report to the Committee providing comprehensive information on the measures they have taken to implement the provisions of the Protocols.¹³⁸ After the submission of an initial report, subsequent reports regarding the implementation of the protocols, then, are expected to be included with the government reports of implementation of the CRC as a whole.¹³⁹

3.3.1.1. Reporting Guidelines

The CRC Committee, with a view to guiding States in the preparation of their initial and periodic reports, has adopted General Guidelines regarding the form and content

¹³⁵ Mieke Verheyde and Geert Goedertier, *supra* note 110, p.27

¹³⁶ Yanghee Lee, '18 candles', in Jane Connors, Jean Zermatten and Anastasia Panayotidis (eds.), *18 Candles, The Convention on the Rights of the Child Reaches Majority* (Institut international des droits de l'enfant (IDE),2008),p.11

¹³⁷ *ibid*

¹³⁸ See Articles 12 and 8 of the OPAC and OPSC respectively

¹³⁹ Articles 8(2) of the OPAC and 12(2) of the OPSC similarly provide: 'Following the submission of the comprehensive report, each State Party shall include in the reports they submit to the Committee on the Rights of the Child, in accordance with Article 44 of the Convention, any further information with respect to the implementation of the Protocol. Other States Parties to the Protocol shall submit a report every five years.' Hence, States Parties are mandated to include a report concerning the implementation of the Optional Protocols while preparing the periodic report on the implementation of the CRC.

of the reports on the implementation of the CRC.¹⁴⁰ The Committee has also established General Guidelines on the form and content of the initial reports to be submitted by States Parties on the implementation of the Optional Protocols.¹⁴¹ The guidelines are formulated to provide a clear indication of the nature and depth of information required, and also to impose some degree of uniformity on the production of reports.¹⁴²

Initial reports to be presented by States are required to be prepared in accordance with the structure adopted under the Guidelines prepared by the CRC Committee in 1991 (i.e., Guideline for the preparation of Initial Reports). Under such Guidelines, provisions of the CRC are grouped under eight themes, which are the headings of the prescribed structure of the report.¹⁴³ The thematic approach adhered in the guidelines for initial reports is crucial for it stresses the interrelationship between the Convention's Articles better and encourages the holistic approach to implementation.¹⁴⁴ The eight thematic clusters listed under the Guidelines that should appear in the initial reports are: ¹⁴⁵ i. General Measures of Implementation ii. Definition of the Child, iii. General Principles, iv. Civil Rights and Freedoms v. Family Environment and Alternative Care vi. Basic Health and Welfare, vii. Education, Leisure and Cultural Activities, and viii. Special Protection Measures

Even if the rights under the CRC are classified in to themes, the CRC Committee stressed that such categorization is not made based on the importance of the rights. The

¹⁴⁰ See U.N Doc.CRC/C/5,1991 and U.N Doc.CRC/C/58,1996

¹⁴¹ See U.N Doc. CRC/ OP/ AC/1, 2001 and U.N Doc.CRC/OP/SA/1,2002

¹⁴² Gerison Lansdown, 'The Reporting Process under the Convention on the Rights of the Child', in Philip Alston and James Crawford (eds) *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press,2000),p.113

¹⁴³ Mieke Verheyde and Geert Goedertier, *supra* note 110, p.18

¹⁴⁴ *ibid*

¹⁴⁵ See U.N Doc.CRC/C/5,1991

classification, as underscored by the Committee, reflects the Convention's holistic perspective of children's rights: that they are indivisible and interrelated, and that equal importance should be attached to each and every right recognized therein.¹⁴⁶ The Guidelines prepared for initial reports in relation to the Optional Protocols to the CRC (the OPAC and the OPSC) are not structured in to themes. They are simply adopted in Article by Article system without being clustered in to themes.¹⁴⁷

The Guidelines adopted for initial reports have been criticized for being inadequate in dealing with some aspects of the CRC. Abramson, in this regard commented that:

One glaring inadequacy of the guidelines is that they do not ask States for any information on spending. Even the most elementary questions about what percentage of the budget goes to children's health or education are omitted. States merely 'are encouraged' to provide relevant statistical information and indicators. The State is given total freedom to decide what is relevant.¹⁴⁸

Such defect has entailed large diversity in the quality of the reports submitted by States. Some of them met the quality standards. However, others turned out to contain insufficient information.¹⁴⁹ The CRC Committee, while drafting the Guidelines for periodic reports,¹⁵⁰ has duly considered the shortcomings of the Guidelines for initial reports.¹⁵¹ Such Guidelines, like the Guidelines for initial reports, divide Articles of the CRC in to eight themes.¹⁵² Nevertheless, they distinguish themselves from the initial

¹⁴⁶ See U.N Doc.CRC/C/58,1996,para 9

¹⁴⁷ See U.N Doc. CRC/ OP/ AC/1, 2001 and U.N Doc.CRC/OP/SA/1,2002

¹⁴⁸ B. Abramson, 'First State reports: Sunny and . . . cloudy', *10 International children's Rights' Monitor*, No. 1-2, (1993), p. 23

¹⁴⁹ Mieke Verheyde and Geert Goedertier, *supra* note 110, p.21

¹⁵⁰ The Guidelines for Periodic Reports were adopted by the CRC Committee at its 343rd meeting in 1996. See U.N. Doc. CRC/C/57

¹⁵¹ Mieke Verheyde and Geert Goedertier, *supra* note 110,p.21

¹⁵² See U.N. Doc. CRC/C/58,1996

guidelines in some respects. The Guidelines for periodic reports, for example, unlike the Guidelines for initial reports, contain more detailed questions.¹⁵³ They also differ from Guidelines for initial reports in that they stress the importance of the follow-up of the Committee's recommendations.¹⁵⁴ Besides, such guidelines emphasize the importance of the establishment of implementation strategies, the importance of data and information collection and of the development of appropriate indicators.¹⁵⁵

3.3.1.2. The Review Process

The review of States Parties reports is carried out following three steps: Pre-sessional Working Group, Constructive Dialogue and the Concluding Observations.

The first stage of the examination of State reports involves reviewing by the Pre-sessional Working Group. This working group normally meets for one week immediately after a plenary session of the Committee, in a closed meeting, to prepare for the next session.¹⁵⁶ The Group is composed of CRC Committee members and representatives of the UN bodies.¹⁵⁷ Representatives of NGOs may also be invited to attend the deliberations of the Pre-sessional Working Group. Government representatives and observers, on the other hand, are not allowed to attend such deliberations.¹⁵⁸

¹⁵³ Mieke Verheyde and Geert Goedertier, *supra* note 110, p.22 They contain questions regarding *inter alia* the proportion of the budget devoted to social expenditures for children (health, education, welfare, etc.), the budget trend over the period covered by the report, the steps taken to ensure that the authorities are guided by the best interests of the child in their budgetary decisions etc

¹⁵⁴ U.N Doc.CRC/C/58,1996,para 6

¹⁵⁵ *ibid*, Para 7

¹⁵⁶ Mieke Verheyde and Geert Goedertier, *supra* note 110,p.24

¹⁵⁷ Such as ILO,UNICEF,WHO and World Bank

¹⁵⁸ UNICEF, Fact Sheet: The Committee on the Rights of the Child,p.2

The Working Group is established for the purpose of facilitating the Committee's work under Articles 44 and 45 of the CRC through reviewing State Party reports and identifying in advance the main questions that should be discussed with the representatives of the reporting States.¹⁵⁹ It also provides an opportunity to consider questions relating to technical assistance and international cooperation.¹⁶⁰ The working group, then, generates a list of issues that are presented as questions to the government of the State under review.¹⁶¹

After the Committee has been given answers to the questions sent by the OEWG to the concerned government, the Constructive Dialogue will follow. At this stage, the Committee examines the reports at a public session.¹⁶² The delegation of the reporting State presents the answers to the list of questions received from the Pre-sessional Working Group and answer additional questions from the Committee.¹⁶³ These presentations, then, lead to a dialogue in which the Committee members raise questions, make comments, ask for additional information and the delegates respond.¹⁶⁴ At the end of question and answer period, members of the Committee make individual oral comments about the report, giving positive observation as well as recommendations on how the State Party's compliance might be improved.¹⁶⁵

After the constructive dialogue, the Committee prepares its concluding observations on the report in a private meeting.¹⁶⁶ The concluding observations contain a general

¹⁵⁹ Mieke Verheyde and Geert Goedertier, *supra* note 110,p.24

¹⁶⁰ *ibid*

¹⁶¹ UNICEF, *supra* note 158,p.2

¹⁶² Cynthia Price, Stuart N., & Susan M., *supra* note 113,p.5

¹⁶³ *ibid*

¹⁶⁴ Mieke Verheyde and Geert Goedertier, *supra* note 110,p.26

¹⁶⁵ Cynthia Price, Stuart N and et al, *supra* note 113,p.5

¹⁶⁶ UN.Doc. CRC/c/10,1992,para 41

observation of the report and the main points of the dialogue with the delegations which become part of the Committee's report to the ECOSOC and the General Assembly.¹⁶⁷

3.3.2. Weaknesses in the Reporting Process of the CRC

Although State reporting process devised under the CRC serves important purpose in terms of monitoring the implementation of the CRC and its Optional Protocols, it is linked with some notable loopholes that undermined its key role. The CRC Committee, for example, is not explicitly empowered to compel States Parties to produce reports on due time. This weakness has been noted to affect other treaty bodies as well.¹⁶⁸ Verheyde and Goedertier observed that as of January 2005, there were a total of 129 overdue reports for the CRC; forty three for the OPAC and forty six for the OPSC.¹⁶⁹ Such delay in reporting is quite detrimental since it denies an opportunity for taking timely measures for the defects observed in the implementation process. The delays in reporting occurred in spite of the attempt made by the Committee to do away it through allowing the exceptional submission of combined reports.¹⁷⁰ This rule provides that if a report is due within a year after the dialogue or at the time of the dialogue on the previous report, States Parties will be allowed to submit together with the next report.¹⁷¹ The rule, however, applies for one time only.¹⁷² Furthermore, the CRC Committee, as noted in the previous chapter, has permitted States to submit reports

¹⁶⁷ Cynthia Price, Stuart N., and et al, *supra* note 113,p.5

¹⁶⁸ Nihal Jayawickrama, 'The Judicial Application of Human Rights Law National, Regional and International Jurisprudence (Cambridge University Press, 2002),,p.133

¹⁶⁹ Mieke Verheyde and Geert Goedertier, *supra* note 110,p.44

¹⁷⁰ CRC Committee, *Recommendation on the Organization of Work* (U.N Doc. CRC/C/114, 2002), p. 5.

¹⁷¹ With a view to avoiding further delay in the examination of the report once submitted, the Committee, nonetheless, asks to submit eighteen months earlier than this second deadline.

¹⁷² CRC Committee , *supra* note 170, p.5

within different time frames. If delay in reporting persists, the Committee sends reminders and when these are not replied to, it refers the delays in its annual report to the UN General assembly.¹⁷³ Nonetheless, these mechanisms established to deter delays in furnishing reports were not found to be effective in ensuring reporting with due time.¹⁷⁴

Including the State reporting envisaged in the CRC, country reports are also generally criticized for being non-reliable.¹⁷⁵ Since the reports which are submitted are compiled by governments, they are likely to be self-laudatory.¹⁷⁶ National officials in preparing the reports usually try to describe as positive as possible the situations of children in their countries and often conceal flagrant violations of human rights.¹⁷⁷ To ameliorate this shortcoming, the Committee permitted the submission of alternative reports from NGOs that enable it to verify the credibility of the reports presented by States.¹⁷⁸ Nevertheless, there still remain some problems as to the participation of NGOs in the reporting process. NGOs do not participate directly in the dialogue process and they usually fail to get the chance to refute the awareness of the government representatives.¹⁷⁹ Due to lack of time money and secretariat staff, moreover, the NGO information is too often not sufficiently studied.¹⁸⁰

¹⁷³ CRC Committee , *The Provisional Rules of Procedure* (U.N Doc. CRC/C/4, 1991), Rule 67

¹⁷⁴ James Crawford, 'The UN Human Rights Treaty System: A system in crisis?', in: Philip Alston and James Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press,p.5

¹⁷⁵ Nihal Jayawickrama, 'supra note 168, p.133

¹⁷⁶ *ibid*

¹⁷⁷ Mieke Verheyde and Geert Goedertier, *supra* note 110, p.46

¹⁷⁸ Note that Article 45 of the CRC authorizes the Committee to receive alternative reports

¹⁷⁹ Andrew Clapham, 'UN Human Rights Reporting Procedures: An NGO Perspective', in: Philip Alston and James Crawford (eds.), *supra* note 174, p.187

¹⁸⁰ *ibid*,p.188

Albeit the clear stipulation made in the CRC indicating that the CRC Committee members should serve in their personal capacities,¹⁸¹ election to the Committee membership is too often politicized.¹⁸² Furthermore, most of the members have a full time job at home, and do not have much time to prepare for the work in the Committee between sessions.¹⁸³ This often leads to their absence, especially at the pre-sessional working group and inadequate time to spend preparing the meetings.¹⁸⁴

3.4. Conclusion

The adoption of the CRC is milestone for the protection of the rights of children. The convention incorporates a number of child specific provisions that take in to account the special status and vulnerabilities of children. The Optional Protocols that complement the CRC, i.e., the OPSC and OPAC also play significant role in advancing the protection of children through addressing the sale of children, child prostitution and child pornography and recruitment and involvement of children in hostilities respectively.

The CRC Committee monitors the implementation of the CRC and its Optional Protocols through examining the periodic reports presented to it by States Parties. However, it has been noted that the State reporting mechanism is fraught with notable defects. State reports, for instance, have been noted to be non-reliable. States Parties in their report most of the time describe positive situations concerning children and often conceal flagrant violations of the human rights of children. Besides, NGOs have been observed to play insignificant role in challenging the veracity of State reports.

¹⁸¹ Look at Article 43(2) of the CRC

¹⁸² J. Crawford, *supra* note 174, p.9

¹⁸³ Lucy Smith, 'Monitoring the CRC', in Gudmundur Alfredsson, Jonas Grimheden and et al, *supra* note 43 p.111

¹⁸⁴ A. Clapham, *supra* note 179, p.188

Furthermore, it has been noted that despite the existence of clear provision specifying the CRC Committee members to serve in their personal capacity, the election process to the CRC membership is often politicized.

Interestingly, the HRC has decided to rectify this defect in the monitoring process through establishing Complaint System under the CRC. On June 17, 2011, the HRC has adopted a draft Optional Protocol that enables children to lodge complaints to the CRC Committee. The draft will be presented to the General Assembly of the UN for final approval in December 2011. As it will be considered in the next chapter, some authorities, however, have failed to see the positive contribution of establishing Complaint System under the CRC. The following chapter will scrutinize such arguments and assess the various aspects of the draft Optional Protocol.

CHAPTER FOUR

4. TOWARDS A COMPLAINTS MECHANISM: ASSESSING THE FINAL DRAFT OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD

4.1. Introduction

The CRC, as noted earlier, is the most ratified international human rights instrument ever seen in the history of the UN treaties. The broad recognition of fundamental human rights that provide unique rights to children has contributed for the advancement of the protection of the rights of children to a greater extent. The monitoring mechanism envisaged in it, however, is incomplete. As noted in the previous chapter, its monitoring mechanism is primarily based on the CRC Committee's examination of reports presented by States Parties on a periodic basis. The CRC Committee, up until now, is not empowered to receive and consider communications.¹⁸⁵

With a view to filling this lacuna, in fact, various authorities have stressed on the significance of establishing Communications Procedure under the CRC. Lee, in her oral report to the sixty-third session of the CRC Committee, for example, addressing this issue underscored that the development of Communications Procedure for the CRC would significantly contribute to the overall protection of children's rights.¹⁸⁶ The UN High Commissioner for Human Rights, Ms. Navanethem Pillay also stated: "This

¹⁸⁵ Note that all of the core UN treaties have introduced Communications Procedures as a monitoring mechanism. The ICESCR, among such treaties, has not as yet commenced practicing the Complaint System owing to the absence of sufficient number of State Parties to qualify for the entry in to force of its Optional Protocol.

¹⁸⁶ NGO group for the CRC, 'New Optional Protocol on a Communications Procedures under the Convention on the Rights of the Child', p.3, Available at www.crin.org, accessed on 04/07/2011

mechanism could significantly strengthen the monitoring of the Convention and the furtherance of children's rights."¹⁸⁷ Furthermore, Nevena Vuckovic Sahovic, former member of the CRC Committee, expressing concern on the consequence of lacking a Communications Procedure under the CRC articulated that:

...the lack of a Communications Procedure under the Convention limits the full recognition of the status of children, undermining efforts of States Parties, civil society and other stakeholders to move from legal reforms, plans of action and institutional building to the enforcement of rights.¹⁸⁸

As it will be considered in the following discussions, strong objections challenging the significance of establishing Communications Procedure under the CRC have also transpired. The root causes for such objections, in fact, stems from various grounds. Despite such skepticism, the HRC of the UN, as noted in chapter-one, has adopted a draft Optional Protocol prepared by the OEWG that provides Communications Procedure to the CRC. The instrument will be presented for signature, ratification and accession if it gets approval by the General Assembly of the UN in December 2011.

In this chapter, the arguments opposing the establishment of Complaint System under the CRC will be examined. Through presenting counter-arguments to such contending arguments, it will also be attempted to indicate that introducing Complaints Mechanism for the CRC will help to enhance the effective protection of the rights of children in many respects. The chapter will finally assess the various aspects of the draft Optional Protocol adopted by the HRC of the UN.

¹⁸⁷ *ibid*

¹⁸⁸ Nevena Vuckovic Sahovic, *supra* note 12, para 5

4.2. Do we need to have Communications Procedure under the CRC? Scrutinizing the Contending Arguments

Authorities that oppose the establishment of Communications Procedure under the CRC trace various grounds to justify their position. To state some, there is doubt from the side of these authorities on the feasibility of the Procedure given, among others, the context within which the CRC Committee is operating. Pursuant to this view, it would be quite difficult for the Committee to deal with communications on top of its very demanding reporting process.¹⁸⁹ The Committee is fraught with backlog of reports coming from State Parties to the CRC. Bestowing an additional task of considering communications, according to them, will strain the Committee thereby leading the works of it to be unmanageable.¹⁹⁰

In addition, they have argued that rather than emphasizing on Communications Procedure, it is advantageous to focus on persuading States to improve national remedies for breach of children's rights. Lucy Smith, echoing this view maintained that:

First of all resources spent on work done in countries such as monitoring systems like children's ombudsman, education of professionals and parents, awareness raising will have more effect than added instruments on the international level."¹⁹¹

There is also fear on the part of the opponents that a child alone seldom will know about the Complaints Procedure and even more seldom have the competence or the resource to submit complaints. Consequently, what would follow is that resourceful

¹⁸⁹ NGO Group for the CRC 'Communications Procedure for the Convention on the Rights of the Child' (2009), p.2, Available at <[http:// www.crin.org](http://www.crin.org)> accessed on 05/04/2011

¹⁹⁰ *ibid*

¹⁹¹ Lucy Smith, *supra* note 183, p.116

parents submit complaints on behalf of their children on issues where they themselves have strong feelings.¹⁹²

The significance of the Procedure, moreover, is challenged on the assumption that it will create duplication with the existing mechanisms under other UN treaties. The argument points to the fact that the other core international human rights treaties as well as regional instruments provide access for children to bring communications against a State violating their rights. Consequently, establishing additional Communications Procedure in the existence of these mechanisms, according to this view, creates nothing but duplication.¹⁹³

Less frequent use by children of Communications Procedures under other UN treaties has also propelled an objection to emerge against the proposal for introducing Communications Procedure under the CRC. The study conducted by the OHCHR has revealed that only two percent of cases to UN human rights treaty bodies were brought by or on behalf of children.¹⁹⁴ On the basis of this fact, the delegation from China during the deliberation on the first draft to the third Optional Protocol to the CRC interrogated: "We believe the number has been low, so we need to know why this has been the case. How can we guarantee that the new mechanism can avoid the same problem of being established and underused?"¹⁹⁵

The above stated reasons propounded by the opponents, according to the opinion of the present writer, will not justify denying children to lodge complaints to the CRC

¹⁹² *ibid*, p.116

¹⁹³ NGO Group for the CRC, *supra* note 186,p.2

¹⁹⁴ Malcolm Langford and Sevda Clark, *supra* note 31,p.384

¹⁹⁵ *ibid*

Committee and obtain redress for the violations sustained by them. Now let's have a glimpse look at the substances of the arguments turn by turn.

As considered above, the opposing view, among others, have doubted the contribution of Communications Procedure under the CRC for fear of the possible extra burden it may pose on the operation of the CRC Committee. In reaction to this, contrasting opinion has been reflected from the CRC Committee itself. The Committee, from the very inception, has welcomed the proposal presented for a third Optional Protocol and upheld the endeavor that is underway to introduce Communications Procedure under the CRC monitoring system.¹⁹⁶ The Committee underscored that Communications Procedure will enhance the implementation of the rights guaranteed under the CRC and has not raised the fear that the Procedure may entail extra burden on the Committee.¹⁹⁷

Besides, it is worthy to recall that the CRC Committee has designed mechanisms that help to cope-up with the potential workload. As noted in the previous chapter, it has employed a temporary two chamber system for the purpose of eliminating the accumulated reports and permitted the submission of combined reports in some exceptional circumstances. It has also permitted States to submit reports within different time frames. By using these methods, it has successfully removed the backlogs in recent years.¹⁹⁸ Furthermore, as Lee argued, Communications Procedures have never jeopardized the activities of Committees under the existing UN treaties.¹⁹⁹ Given this fact, hence, it is possible to speculate that introducing Communications Procedure

¹⁹⁶ Comments by the Committee on the Rights of the Child, *supra* note 28, Para 5

¹⁹⁷ *ibid*

¹⁹⁸ NGO Group for the CRC, *supra* note 186, p.2

¹⁹⁹ Yanghee Lee, *supra* note 34, p.573

under the CRC will not pose significant challenge on the ordinary activities of the Committee.

The argument which gives sole emphasis to national remedies for breach of children's rights is also at odds with the real situation in most States of the world. Admittedly, developing effective national remedies for breach of children's rights is an overarching undertaking. Nevertheless, due to the absence of effective local remedies, the rights of children in most States of the world are not respected to the extent required. The CRC Committee in its General Comment has emphasized the fundamental importance of ensuring that the provisions of the Convention are given legal effect within the domestic legal systems of States Parties.²⁰⁰ The Committee, nonetheless, worried that this remains a challenge in many States Parties.²⁰¹ Most States have been assessed to lack an independent and effective internal mechanism to monitor the implementation of the rights within their jurisdiction.²⁰² In line with this, it is relevant to note that introducing Communications Procedure under the CRC will help a lot in vindicating ESC rights of children in areas where such rights are not justiciable. Although a State becomes a party to the CRC, justiciability of ESC rights in the instrument may not be given effect by the State. Establishing Communications Procedure under the CRC, therefore, enables child victims of violations of such rights to present their case to the CRC Committee and get remedy to be offered by the State found to have breached the rights.

As pointed out by Lee, the international promise made to children is not yet kept. The international community, since the League of Nations, has devoted attention to children

²⁰⁰ CRC Committee, General Comment No. 5 (2003): 'General Measures of Implementation of the Convention on the Rights of the Child', UN. Doc A/HRC/WG.7/1/CRP.2, Para 1

²⁰¹ *ibid*

²⁰² Patricia Watt, *supra* note 7, p.215

and their rights through the adoption of various norms and standards, guidelines and pledges. This has led to a remarkable progress in the protection of the rights of children.²⁰³ The progress, as enunciated by Lee, however, was not adequate enough to relieve children from the gross violation of their rights that occur in the domestic spheres of many States. Large number of children, she noted, are still not in school, do not receive quality education, lack access to quality health services, not registered at birth, caught in the middle of conflict, die due to preventable deaths, violated and abused. Accordingly, stressing on the need to provide an international Complaint System for children, Lee argued that the timing to come up with a Communications Procedure under the CRC is long overdue.²⁰⁴

On the face of this reality, moreover, it would be difficult for states to live up to their MDG Commitment. As considered under Chapter One, such flagrant violation of children's rights to health, education, protection and equality is prevalent in Africa. It is quite important that the rights of children should be adequately protected to realize MDGs. Establishing Communications Procedure for the CRC is, therefore, instrumental to enhance the implementation of children's rights by States and attain MDGs.

The point attempted to be made in this regard, hence, is that the adoption of Communications Procedure to the CRC will in no way undermine the effectiveness of national remedies. Indeed, it will have paramount importance in terms of creating international forum to children that helps them to get remedy when national systems fail to address child rights violations effectively. Since in most States of the world, as noted before, the rights of children are not being adequately respected and that States'

²⁰³ Yanghee Lee, 'Reasons and Timing for a Communications Procedure under the Convention on the Rights of the Child', (Paper Presented at the First Session of the OEWG, December 2009), UN.Doc. A/HRC/WG.7/1/CRP.6,p.3

²⁰⁴ *ibid*

legal obligation in many respects are not being adequately fulfilled, providing an international Complaint Mechanism for children turns out to be an indispensable option.

In connection with this, it is laudable to trace the fact that establishing Communications Procedure will help to rectify the drawbacks linked to the implementation of CRC at national level. Due to the absence of Communications Procedure under the CRC, reliance has been made on the Courts of various States to interpret and implement the provisions of the CRC thereby leading to narrow readings that may further limit the rights of the child.²⁰⁵ The presence of Communications Procedure under the CRC, on the other hand, creates an opportunity for the CRC Committee to produce decisions which will amount to jurisprudence on the application of the CRC.²⁰⁶ This, in turn, eases the application of the norms of the CRC by domestic Courts and ensures consistency of interpretation of the standards of the CRC. States Parties to the CRC and its Optional Protocols will also be placed in a better position to clearly understand the duties to respect, protect and fulfill that emanate from ratifying the instruments.

Various authorities, moreover, are of the view that creating the possibility of bringing communications to the CRC will serve as a catalyst for States to develop remedies at the national level for children whose rights are breached.²⁰⁷ Others have opined that it will enable children to be viewed as 'rights holders'.²⁰⁸ Communications Procedure,

²⁰⁵ 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

²⁰⁶ *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.5

²⁰⁷ *Draft Submission to the Open-ended Working Group considering the elaboration of an Optional Protocol to provide a Communications Procedure for the CRC*, Available at <[http:// www.crin.org](http://www.crin.org)> accessed on 05/04/2011

²⁰⁸ Sara Lembrechts. *supra* note 35,p.13

according to this view, offers an opportunity for children to hold adults in their State, family or community accountable for child rights violations and reinforce the international recognition of children as rights holders.²⁰⁹

Fear of manipulation of children was also observed to constitute a ground for sense of despair over the proposal. The argument, as observed above, holds that owing to the lack of resource or competence on the part of children to bring complaints, they will be manipulated by their representatives. Nevertheless, such fear of manipulation should not result in closing the door for communications. It is, in fact, well founded that there may be risk of manipulation of the interest of children by their representatives. And it has been repeatedly raised by various authorities and States participating in the discussion on the initial drafts of the Optional Protocol.²¹⁰ As it will be considered in the next part, there are appropriate safeguards that may be deployed to ameliorate, if not completely avoid, manipulation of children. It is, therefore, unreasonable to object the establishment of Complaint Procedures in the presence of mechanisms that assist in addressing the possible challenge in this regard.

Similarly, fear of duplication of Communications Procedures can not be legitimate ground for objecting the establishment of Communications Procedure under the CRC. The creation of possibility for children to vindicate their rights under the CRC will not result in duplication with the existing Communications Procedures of the core UN treaties and regional human rights instruments. The assertion becomes more tenable when seen in light of the special nature of the CRC. The text of the CRC is composed of child specific provisions that provide unique entitlements to children that can not be found under the existing UN treaties such as the rights of children to have their best interest be a primary consideration (Article 3), the right to be heard in judicial or

²⁰⁹ *ibid*

²¹⁰ Visit http://www.crin.org/law/CRC_complaints/

administrative proceedings (Article 12), the right to survival and development (Article 6), the right to preservation of identity (Article 8), the right to be free from sexual exploitation and abuse (Article 34) and the right to rest, leisure and play (Article 31). At the very least, it is indispensable to have an independent institution that entertains claims alleging violation of the above mentioned rights. Even for the rights that are not exclusively dealt under the CRC, the CRC Committee is more competent than the other treaty bodies to render appropriate remedies. The Committee is composed of individual personnel having special expertise on the rights of children.²¹¹ It is more suited to consider complaints involving breach of children's rights than the other UN treaty bodies.

The same logic applies to the regional systems. From the very beginning, the existing regional treaties, with the exception of the ACRWC, were not adopted bearing children in mind.²¹² That is why the ECHR is devoid of provisions dealing specifically with children and the ACHR consists merely one Article devoted to children's rights.²¹³ This has led the European and Inter-American Courts to apply the standards of the CRC in interpreting their respective conventions for they do not have jurisdictions to adjudicate on the range of children's rights as guaranteed under the CRC.²¹⁴ The situation in Asia is regrettable. No regional human rights mechanisms currently exists for Asia, resulting in the denial of the world's large proportion of children access to any regional human rights mechanisms.²¹⁵ The endeavor made in Africa in this regard is remarkable. Africa is unique among other regional systems for adopting an instrument that solely deals with the rights of children. The ACERWC is empowered to receive communications

²¹¹ As can be discerned from Article 43(2) of the CRC, the CRC Committee is required to comprise experts 'of high moral standing and recognized competence in the field covered by the CRC

²¹² *ibid*

²¹³ See Article 19 ACHR

²¹⁴ Look at Article 44 of the ACHR and Article 32 of the ECHR

²¹⁵ Yanghee Lee, *supra* note 34, p.579

relating to any matter covered by the charter.²¹⁶ Nevertheless, the Procedure is still relatively new and has only started to review communications in November 2009.²¹⁷ There are also some States that still have not ratified the ACRWC. What is more, it can not receive communications related to the rights enshrined in the CRC as it is merely designed to monitor the implementation of the provisions of the ACRWC. Consequently, the African child can not enforce his/her rights that are guaranteed under the CRC but not dealt under the ACRWC.²¹⁸

On its face, the argument which opposes the establishment of Communications Procedure under the CRC on the ground of underuse by children of the existing Communications Procedures appears to be illogical. It is not based on a strong premise enabling to deduce that the same would happen to the CRC Communications Procedure. The creation of an institution composed of individual experts specializing on child rights that consider Communications relating to the CRC may trigger the proliferation of submission of communications by children. Perhaps, the concern expressed by opponents should not be ignored. The root causes that entailed weak utilization of the existing Communications Procedures by children needs to be

²¹⁶ Article 44 of the ACRWC explicitly provides that the Committee established under the Charter can only receive claims alleging violation of the rights guaranteed under the ACRWC.

²¹⁷ Peter Newell, 'Submission to Open-Ended Working Group of the Human Rights Council, considering the Possibility of elaborating an Optional Protocol to Provide a Communications Procedure for the Convention on the Rights of the Child', (A/HRC/WG.7/1/CRP.2), p.9

²¹⁸ Article 23(3) of the CRC which entitles children with disabilities to get assistance free of charge whenever possible, to have access to and receive education, training, health care services and rehabilitation services, Article 37(a) of the CRC which prohibits capital punishment and life imprisonment without the possibility of release for persons under the age of eighteen, Article 37(b) of the CRC which requires detention and imprisonment to be the last resort and be the shortest appropriate period and Article 40(3) that imposes duty on States Parties to establish laws, Procedures, authorities and institutions specifically applicable to children are few among others that lack corresponding provision under the ACRWC.

unfolded. As Langford and Clark emphasized, it is crucial to respond to questions like: is the existing civil society structure adequate enough to litigate the rights of children? Is the existing forum accessible to children? Is the Procedure 'child sensitive'? And etc.²¹⁹ Since the problems causing under use by children of the existing UN treaties may similarly affect the future Communications Procedure of the CRC, finding solutions for the problems at hand will greatly contribute for establishing an improved Communications Procedure under the CRC.

4.3. Towards a Draft Optional Protocol to the CRC

The final draft Optional Protocol, the main focus of this research, is the outcome of a serious of discussions and negotiations underwent so far. Basically, the endeavor to complement the reporting process of the CRC with Communications Procedure has been put in place since the drafting process of the CRC. During this period, a proposal for an individual Communications Procedure was presented by the NGO *Ad HOC* Group on the CRC.²²⁰ Owing to the absence of due attention to it, the proposal was rejected and failed to be discussed in the sessions of the OEWG.²²¹ The rejection of the proposal at this stage, however, never marked the end of the effort. Indeed, there has been a strong and growing international pressure for the drafting and adoption of a third Optional Protocol to the CRC.²²² The proponents include: the CRC Committee, International and National NGOs, Human Rights Institutions and other bodies from all regions.²²³ This concerted pressure eventually propelled the HRC of the UN to give due attention to it and come up with a concrete outcome. By virtue of the Resolution it

²¹⁹ Malcolm Langford and Sevda Clark, *supra* note 31, p. 385

²²⁰ *ibid*, p.374

²²¹ States by that time were more focused on the definition of children's rights than on procedural matters.

²²² *Report of the Open-ended Working Group to Explore the Possibility of Elaborating an Optional Protocol to the Convention on the Rights of the Child to Provide Communications Procedure*, U.N.Doc. A/HRC/13/43, para 27

²²³ Visit [http:// www.crin.org](http://www.crin.org)

adopted in June 2009²²⁴, the HRC officially commenced the adoption process through establishing an inter-governmental OEWG to explore the possibility of elaborating a new Communications Procedure for the CRC.

Pursuant to the Resolution, the OEWG met from 16 to 18 December 2009 during which State representatives, UN agencies, independent experts, NGOs and others discussed different aspects of an Optional Protocol.²²⁵ It was observed at the discussion that the majority of States were generally receptive of having an Optional Protocol that provides Communications Procedure under the CRC.²²⁶ This positive response persuaded the Council to adopt a Resolution²²⁷ and change the mandate of the OEWG from simply considering the need for an Optional Protocol to actually drafting the Procedure. The Resolution requested the OEWG to elaborate an Optional Protocol providing Communications Procedure to the CRC. To this effect, it specifically bestowed on the Chair-person the responsibility of preparing a proposal for a draft Optional Protocol to be used as a basis for the forthcoming negotiations.²²⁸ To live up to this mission, the Chair-person held informal information talks and consultations with governments, representatives of civil society and key experts to collect inputs for the draft.²²⁹ The Chair-person finally prepared the proposal (first draft) and circulated it in August 2010 in all the official languages of the UN.²³⁰

²²⁴ A/HRC/RES/11/1

²²⁵ Visit <http://www2.ohchr.org/english/bodies/hrcouncil/OEWG/1stsession.htm>

²²⁶ *ibid*

²²⁷ A/HRC/RES/13/3

²²⁸ In preparing the proposal for a draft Optional Protocol, the Chair-person was instructed to take into account the views expressed and inputs provided during the first session of the OEWG and give due regard to the views of the CRC Committee and, where appropriate, the views of relevant United Nations special Procedures and other experts

²²⁹ NGO Group for the CRC, *supra* note 37, p.7

²³⁰ *ibid*

In the first draft, the Chair-person proposed 23 Articles dealing with issues like: Individual Communications (Article 2), Collective Communications (Article 3), Inter-State Communications (Article 12), Inquiry Procedure (Article 10), Interim Measures (Article 5), Friendly Settlement (Article 7), and International Assistance and Co-operation (Article 14). This first draft was discussed on the first part of the second session of the OEWG (i.e., from 6-10 December 2010).²³¹

On the basis of the expressed views of States Parties and the comments made on the provisions of the first draft, a second draft was issued. The second draft contained 28 Articles. These Articles were organized in to four parts. Part I (Articles 1 to 5) contained mainly provisions considered relevant in connection with all Procedures. Part II (Articles 6 to 15) comprised provisions on Individual Communications, Collective Communications and Inter-State Communications. Part III (Articles 16 and 17) described the Inquiry Procedure for 'grave' or 'systematic' violations. Part IV (Articles 18 to 28), on the other hand, dealt with 'Final Provisions'. The second part of the session (10 to 16 February 2011) was devoted to discussion on this second draft.²³²

The underlying reason for the conduct of the sessions of the OEWG in to two parts was the absence of consensus among States on some aspects of the Optional Protocol. Initially, discussion on the first draft Optional Protocol prepared by the Chair-person was scheduled to take place from 6 to 10 December 2010 and the OEWG was allowed to extend its meeting only if consensus on the draft is not reached.²³³ Unfortunately, no consensus was reached on some aspects of the draft during this period and the OEWG was forced to hold another five days meeting in the second half of February 2011 (i.e.,

²³¹ The second session of the Working Group was held in two parts: from 6 to 10 December 2010, and from 10 to 16 February 2011.

²³² *ibid*

²³³ NGO Group for the CRC, *supra* note 37,p.7

10-16 February 2011). Most importantly, States were observed to hold polarizing views with respect to issues regarding, *inter alia*: whether the States Parties should be permitted to limit the competence of the CRC Committee to receive and consider communications, whether the Optional Protocol should include Collective Communications, the manner of ascertainment of violation of ESC rights, the application of 'best interests principle', and the like.²³⁴

At the last date of the meeting (on 16 February 2011), a compromise package was established and the Chair-person tabled for adoption a text of a draft Optional Protocol.²³⁵ In introducing the draft, he proposed oral amendments to some aspects of the second draft. The oral amendments proposed: a) The deletion of paragraphs 2 and 3 of Article 6, allowing States Parties not to recognize the competence of the Committee to consider communications under the first two Optional Protocols; b) the deletion of Article 7, allowing the Committee to consider Collective Communications; c) the deletion of Article 10, allowing the Committee to decline consideration of a communication which does not reveal a clear disadvantage; d) The deletion of Article 24, forbidding reservations incompatible with the object and purpose of the protocol.²³⁶ The proposed amendments were approved by the OEWG and presented for adoption to the HRC of the UN. The HRC finally adopted the final draft on 17 June 2011.

The final draft as adopted by the Council contains 24 Articles being clustered in to four parts. Part I outlines 'General Provisions' (consisting of provisions dealing with 'Competence of the Committee on the Rights of the Child', 'General Principles Guiding the Functions of the Committee', 'Rules of Procedure' and 'Protection Measures', Part II deals with 'Communications Procedure' (it contains provisions on 'Individual

²³⁴ Report of the OEWG, *supra* note 24, p.23

²³⁵ *ibid*

²³⁶ *ibid*

Communications', 'Interim Measures', 'Admissibility' 'Transmission of the Communication', 'Friendly Settlement', 'Consideration of Communications' and Inter-State Communications Part III on the other hand sets out 'Inquiry Procedure' and Part IV, the last part, provides 'Final Provisions'. The final draft in general comprises three key Procedures: Individual Communications Procedure, Inter-State Complaints Procedure and Inquiry Procedure. What follows is a closer scrutiny of such Procedures.

4.4. Key Procedures of the Final Draft Optional Protocol

4.4.1. Individual Communications

4.4.1.1. Standing and scope of the Procedure

Pursuant to Article 5 of the final draft, 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.²³⁷ 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.²³⁸

The draft also allows submission of communications on behalf of children.²³⁹ However, the potential risk that may transpire during representation is that representatives may

²³⁷ Among the core UN treaties, the CAT, CMW and 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.

²³⁸ visit http://www.crin.org/law/CRC_complaints/

²³⁹ The issue as to who can represent the child/children was debated. China wanted to limit representatives to adults with close connection to the child. Other States such as Slovenia and

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.²⁴⁰ This potential risk of manipulation of children, as noted earlier, has been one of the grounds for objecting the establishment of Communications Procedure under the CRC. 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."

In the opinion of the present writer, the final draft has minimized the safeguard envisaged in the earlier drafts. The CRC Committee in the final draft 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 Part I of the draft which outlines provisions having general application, 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

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/)

²⁴⁰ Visit http://www.crin.org/law/CRC_complaints/

decline to examine any communication that it considers not to be in the child's best interests.

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 draft seems to reflect the opinion of some groups such as the NGO group for the CRC and the CRC Committee that suggested the best interests principle to be applied in situations when the consent of the child/children concerned has not been clearly established.²⁴¹ 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.²⁴²

This mode of application of the best interests principle, in my opinion, 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.²⁴³ 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.²⁴⁴

²⁴¹ Comments 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.

²⁴² Joint submission, supra note 206, p.6

²⁴³ UNICEF, Handbook on Legislative Reform: Realizing Children's Rights,(Vol.1,2008),p.80

²⁴⁴ J. Todres, supra note 205,p.11

Furthermore, there is no authoritative ground which justifies the CRC Committee to give primacy to the child/children's right to be heard and apply the best interests principle in limited cases when the child/children's valid consent is not established.²⁴⁵ To create conformity with the CRC, the draft should have been framed to impose a duty on the 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.²⁴⁶ 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.²⁴⁷

It is interesting to note that the scope of the final draft Optional Protocol in relation to Individual Communications is comprehensive. No distinction is made by the draft in

²⁴⁵ 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))

²⁴⁶ CRC Committee, General Comment No. 12 (2009):'The Right of the Child to be Heard' U.N Doc.CRC/C/GC/12,para 74

²⁴⁷ The 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)

imposing obligation on States with respect to the three instruments (i.e., the CRC, OPAC and OPSC). If a State is a party to the CRC, OPAC or OPSC, ratifying the Optional Protocol 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.²⁴⁸ Even though States may be parties to the OPAC and/or OPSC, at the time of signing, ratifying or acceding to the Optional Protocol, 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 final draft, such option is dropped.

Under the final draft, moreover, States can not 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 both civil, political and ESC 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.²⁴⁹

4.4.1.2. Admissibility

a) Admissibility Requirements

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 draft on admissibility mainly replicated the existing precedent in other Complaint

²⁴⁸ See Article 2(2) of the first draft and Articles 6(2) of the second draft

²⁴⁹ See Para 3 of the Preamble to the Final Draft

Procedures. The admissibility requirements enumerated in the draft are discussed below.

i. Format of a communication

As with other Complaint Procedures, it is provided in the draft that a communication will not be rendered admissible if it is anonymous.²⁵⁰ 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 draft that communications will not be declared admissible if they are not made in writing.²⁵¹ 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, delegations should have envisaged other forms of submissions such as video or oral submissions in to the draft.

ii. The author should first exhaust domestic remedies before bringing a communication to the CRC Committee

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.²⁵² This rule, nevertheless, will not apply where the application of the remedies is *unreasonably prolonged* or *unlikely to bring effective relief*. The draft, like other international Complaint Procedures, does not prescribe the yardstick to be employed in determining whether the application of domestic remedies is unreasonably prolonged.

²⁵⁰ Article 7(1)(a) of the Final Draft

²⁵¹ Article 7(1)(b) of the Final Draft

²⁵² Article 7(1)(e) of the Final Draft

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.²⁵³ 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 ACERWC in this regard. In its first decision, the ACERWC 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 can not be considered to be in the best interests of children of Nubian descent.²⁵⁴

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.²⁵⁵ This proposal, nonetheless, did not get approval by the majority of delegations and, as a result, was not included in the final draft. As it stands, the position of the majority of delegations seems to be plausible. There are instances which enable to prejudge on 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

²⁵³ Malcolm Langford and Sevda Clark, *supra* note 31, p.395

²⁵⁴ *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)

²⁵⁵ Report of the OEWG, *supra* note 24, p.14

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).²⁵⁶

It is also worthy to note that the final draft does not clarify whether the exhaustion of domestic remedies rule will apply whenever local remedies are unavailable. Many treaty bodies exempt the application of it whenever there are no such remedies.²⁵⁷ As considered in Chapter Two, the African Commission has developed ample jurisprudence in this regard from which lesson is possible to be drawn. If children are relieved from pursuing domestic remedies in such cases, it will help them to directly access the CRC Committee 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.

iii. Communications should be brought to the CRC Committee within one year after the exhaustion of domestic remedies

As pointed out under Article 7(1) (h) of the draft, 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

²⁵⁶ *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000), Para 32

²⁵⁷ OHCHR, '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.

domestic remedies.²⁵⁸ 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.²⁵⁹ 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.²⁶⁰ In the end, the precedent in the Optional Protocol to the ICESCR (Article 3(2) (a)) which prescribes one year was adopted.²⁶¹

In my view, the provision which requires communications to be submitted within one year after the exhaustion of domestic remedies should be avoided. 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.²⁶² It goes 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

²⁵⁸ 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

²⁵⁹ *ibid*

²⁶⁰ *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.

²⁶¹ Pursuant to Rule 91(f) of the Rules of Procedure of the Committee on CERD, moreover, complainants are required to submit communications six-months after exhausting the available domestic remedies.

²⁶² Malcolm Langford and Sevda Clark, *supra* note 33, p.6

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.²⁶³

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.²⁶⁴ 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 draft 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 facts that gave rise to the complaint arose.²⁶⁵ Undoubtedly, the potential risk that may materialize as a consequence of time

²⁶³ 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

²⁶⁴ See Paragraph 5 of the Preamble to the Final Draft

²⁶⁵ 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

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.²⁶⁶ 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 draft 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. In my opinion, 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 Optional Protocol to the ICESCR and the CERD, do not fix time limit for submitting communications after exhausting domestic remedies.²⁶⁷ It is unfortunate that although

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.

²⁶⁶ *ibid*

²⁶⁷ 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

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 final draft instrument.

iv. Other admissibility requirements

The draft 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 Optional Protocols thereto.²⁶⁸ What really constitutes an abuse of the right of submission of communications is not mentioned in the draft. However, the CRC Committee can deal with this rule through drawing lesson from the experience of other treaty bodies. As considered in Chapter Two, the Human Rights Committee in its practice, for example, has declined to consider unexplained excessively delayed submissions on the ground of abuse. The CRC Committee may come up with other justifiable grounds that amount to abuse of the right of submission. 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 Optional Protocols.²⁶⁹ If a communication alleges violation of a right not guaranteed under the CRC or its Optional Protocols, the CRC Committee may decline to consider it. The draft, in addition, provides that a communications will not be rendered admissible if the subject matter of it has been already examined by the Committee or has been or is

local remedies. Some authorities have commented that the phrase 'reasonable time' may entail the effect of prejudizing valid claims since what is reasonable for one commissioner may not be necessarily so to the other. (See Sabelo Gumeddze, *supra* note 61 p.134 The UN 1503 Procedure likewise adopts reasonable time period.

²⁶⁸ Article 7(1)(c) of the Final Draft

²⁶⁹ See, for example, Article 56(2) of the ACHPR

being examined under other Procedure of international investigation or settlement.²⁷⁰ During the discussions, some delegations proposed the inclusion of a language specifying that the CRC Committee should decline to consider a communication if it finds that the communication was being considered under regional Procedure.²⁷¹ The proposal was not accepted by the majority of delegations. They argued that regional bodies lack the competence to adjudicate many of the rights guaranteed under the CRC and its Optional Protocols since the existing regional instruments do not cover all the provisions contained in the CRC and its Optional Protocols.²⁷²

Apparently, the reasoning seems to fail appreciating the situation in Africa. As considered before, there are a number of rights that are guaranteed both under the ACERWC and CRC. Accordingly, children in Africa may bring a particular matter both to the attention of the ACERWC and the CRC Committee thereby entailing duplication of decisions and encouraging forum shopping. It also runs counter to the underlying purpose of establishing Complaint System under the CRC. As can be inferred from the Preamble, States Parties, in establishing the Complaint Procedure to children, have the intention of complementing regional monitoring mechanisms in mind.²⁷³ This will be realized if the CRC Committee gives recognition to decisions rendered by regional Procedures. The writer, therefore, holds the view that the Optional Protocol should include a provision precluding the CRC Committee from considering communications already examined under regional Procedures.

²⁷⁰ Article 7(1)(d) of the Final Draft

²⁷¹ Report of the OEWG, *supra* note 24, p.15

²⁷² See paragraph 6 of Preamble to the Final Draft

²⁷³ Report of the OEWG, *supra* note 24, p.15

The CRC Committee may also decline to consider communications if it finds communications to be manifestly ill founded or not sufficiently substantiated²⁷⁴ or the facts that are the subject of communication occurred prior to the entry in to force of the Optional Protocol 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.²⁷⁵

It is worthwhile to analyze that the draft has overlooked some important issues in dealing with admissibility criteria. There is, for example, no explicit mention made in the draft 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 ACRWC, communications that are based exclusively on media will not be admitted.²⁷⁶ 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."²⁷⁷ The fate of communications written in disparaging or insulting language is not also settled. Such issues are dealt

²⁷⁴ Article 7(1)(f) of the Final Draft

²⁷⁵ Article 7(1) (g) of the Final Draft

²⁷⁶ 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)

²⁷⁷ *Jawara v. The Gambia*, supra note 276, Para 26

with under the ACHPR and the UN 1503 Procedure.²⁷⁸ This rule helps to ensure respect for State Parties and their institutions.²⁷⁹

b) The Impact of Reservations on Admissibility

It is regrettable that the final draft has entitled States Parties to make reservations on the provisions of the Optional Protocol. The first and second drafts were composed of a provision prohibiting reservations.²⁸⁰ It was, nevertheless, removed from the final draft text for lack of adequate support by the majority of States.²⁸¹ Hence, a communication will be rendered inadmissible if the competence of the Committee to consider the subject matters of the communication is excluded by the respondent State through reservation.

However, it is possible to argue that State Parties can not validly undertake reservations on the Optional Protocol and make communications to be rendered inadmissible. Under international law, a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: a) The reservation is prohibited by the treaty or b) The reservation is incompatible with the object and purpose of the treaty.²⁸² In our context, since the draft has not expressly prohibited reservations, State

²⁷⁸ 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)

²⁷⁹ Sabelo Gumeddze, *supra* note 267, p.130

²⁸⁰ Look at Articles 19 and 24 of the first and second draft instruments respectively

²⁸¹ Available at <http://www.crin.org/resources/infodetail.asp?id=23908>, accessed on 13/07/2011. New Zealand spoke out on behalf of States who wanted to allow for reservations as long as they did not go against the aims of the Optional Protocol.

²⁸² Vienna Convention on the Law of Treaties of 23 May 1969, Article 19

Parties are at liberty to formulate reservations in so far as the reservation is compatible with the object and purpose of the Optional Protocol. However, the object and purpose of the Optional Protocol is, among others, to provide international Communications Procedure to children and enhance the implementation of the CRC and its Optional Protocols.²⁸³ Surely, creating the possibility of reservations to the Optional Protocol will, through restricting the application of certain provisions of the instrument, undermine the intended purpose of providing international Complaint Mechanism to children. Thus, formulating reservations to the provisions of the Optional Protocol will run counter to the object and purpose of the instrument.

It should also be noted that banning reservations has developed precedent in the UN parlance. The Optional Protocol to the CEDAW under Article 17 has a provision prohibiting reservations. The Human Rights Committee has elaborated in its General Comment that: "...reservation relating to the required Procedures under the first Optional Protocol to the ICCPR would not be compatible with its object and purpose."²⁸⁴ The Committee has affirmed this position in *Kennedy v. Trinidad and Tobago* (Communication No. 845/1999, U.N.) through holding that Tobago's reservation to the first Optional Protocol to the ICCPR is contrary to the object and purpose of the instrument and, hence, is invalid.

As rightly put forward by NGO groups for the CRC and some States including Slovenia, the ban on reservation made under the initial drafts should have been maintained given the purely procedural nature of the Communications Procedure

²⁸³ See, for example, Paragraph 10 of the Preamble to the Final Draft Optional Protocol

²⁸⁴ Human Rights Committee, General Comment No.24 on 'Issues relating to reservations made up on ratification or accession to the Covenant or its Optional Protocol', (1994) U.N.DOC .CCPR /C /21? Rev.1/Add 6.4,Para.14

established under the Optional Protocol.²⁸⁵ The instrument has neither introduced any new nor expanded the existing substantive rights and obligations to those already accepted by the States. An option has already been given to States under the CRC and its Optional Protocols to reduce their obligation with regard to the rights guaranteed in the instruments while signing, ratifying or acceding to them.²⁸⁶ Undoubtedly, giving extra-opportunity for States to avoid responsibility under the instruments will not be inline with children's best interests.

4.4.1.3. Interim Measures

The final draft has incorporated provisions on Interim Measures (also called Provisional Measures) that help to avoid irreparable harm to the victim/ victims of alleged violations.²⁸⁷ Article 6 (1) of the Final Draft 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 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,

²⁸⁵ Available at http://www.crin.org/law/CRC_complaints/ accessed on 10/07/2011

²⁸⁶ There is no provision under the CRC and its Optional Protocols that prohibit reservation. Accordingly, States Parties can make reservations to the provisions of the instruments provided the reservations formulated do not go against the object and purpose of the instruments.

²⁸⁷ Article 6 of the Final Draft

they preferred the phrase to be changed so as to enable the provision to serve for all possible irreparable damages.²⁸⁸

In my opinion, however, it would have been more advantageous for children to include 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 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 for consideration of communications 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 final draft 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

²⁸⁸ 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)

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 such as Liechtenstein who maintained: "States must go beyond simply considering requests made by the Committee for Interim Measures" and proposed the inclusion of an additional language to require that States take all appropriate steps to comply with such requests.²⁸⁹ The CRC Committee subscribing to this view held that: "...the Optional Protocol should be framed in a way making explicit the obligation of States Parties to take all the necessary steps to comply with Interim Measures."²⁹⁰

Other Optional Protocols to the UN treaties have also adopted similar phraseology in this regard.²⁹¹ The trend in the practice of the UN treaty bodies, however, indicates that they resemble towards making requests for Interim Measures legally binding. In spite of the absence of clear language in the first Optional Protocol to the 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

²⁸⁹ NGO Working Group for the CRC Complaints Mechanism, *supra* note 258. 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.

²⁹⁰ Comments by the Committee on the Rights of the Child, *supra* note 28,p.7

²⁹¹ See, for example, Article 5 of the Optional Protocol to ICESCR, Article 5 of the Optional Protocol to the CEDAW Article 4 of the Optional Protocol to CRPD, and Rule 92 of the Rules of Procedure of the Human Rights Committee

communication alleging a violation of the covenant, or render examination by the Committee moot and the expression of its views nugatory and futile.²⁹²

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."²⁹³ The African regional human rights mechanism has also moved a step forward in this respect. 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.²⁹⁴ The execution of Ken Saro-Wiwa by the Nigerian government despite the request made by the African Commission for Provisional Measures clearly illustrates the need for making Interim Measures legally binding.²⁹⁵ It is, therefore, essential that the Optional Protocol should comprise legally binding provisions on Interim Measures. State Parties to the Optional Protocol should be bound to take Interim Measures following the request by the CRC Committee. This

²⁹² *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

²⁹³ Human Rights Committee, General Comment No.33, Para 19

²⁹⁴ Lilian Chenwi, *supra* note 65 p.39

²⁹⁵ See *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, (2000) AHRLR 212 (ACHPR 1998), Paras 8, 9 and 10

would help to protect the rights of children while the communications is being processed by the CRC Committee and ensure the effectiveness of the Procedure.

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.

4.4.1.4. 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.²⁹⁶ The scope of confidentiality that should be placed while notifying States about the communications was subject to controversy during the deliberations of the OEWG. The first draft provided that the identity of the complainant will not be disclosed to the State Party or otherwise without the express consent of the individual concerned.²⁹⁷ In order

²⁹⁶ Article 8(1) of the Final Draft

²⁹⁷ The term 'otherwise' seems to refer to the 'public'

for the identity of the individual to be revealed both to the State and the public, the consent of the individual concerned was needed to be established.

Reflecting on this provision, some authorities attempted to demonstrate that the non-disclosure of communications to the public will prejudice the individual designed to be protected as it closes the door for *amicus curie* interventions.²⁹⁸ Since the communication is not publicized, NGOs, NHRIs and other interested groups will not get the opportunity to intervene during the consideration of communications thereby weakening the effectiveness of the proceeding.²⁹⁹ Some delegations also saw the relevance of publicity in light of the benefit it adds through deterring other violations by State Parties.³⁰⁰ On the opposite side, an opinion challenging this view was observed to emerge from other delegations raising concern that publicity of communications may erode the general principle of privacy right enshrined under Article 16 of the CRC.³⁰¹ Finally, a compromise was reached and the final draft, in a separate provision under the title dealing with 'protection measures' stipulated that the identity of an individual /group of individuals, as a general rule, will remain confidential. In exceptional circumstances, however, if the individual/individuals concerned consented so, it may be subject to publicity.³⁰²

The present writer holds the view that the modality of disclosure of the identity of the complainant envisaged in the draft will not promote the interests of the allegedly victim

²⁹⁸ Malcolm Langford and Sevda Clark, 'supra note 33, p.3. The term *amicus curie* is a Latin term which literally means 'friend of the Court'. It is defined in Black's Law Dictionary (8th ed., 2004) as 'A person who is not a party to a law suit but who petitions the Court or is required by the Court to file a brief in the action because that person has a strong interest in the subject matter.'

²⁹⁹ Malcolm Langford and Sevda Clark, supra note 33, p.3

³⁰⁰ Report of the OEWG, supra note 24, p.17

³⁰¹ *ibid*

³⁰² *ibid*, p.17

child/children. Although creating the possibility for children to express their views on the matter relating to publicity is crucial, relying solely on their views may not ameliorate the potential risk that may affect children as a consequence of publicity. Article 3 of the CRC, as has been noted above, requires that the best interests principle should be given effect in all actions concerning children. The CRC Committee has stated that the phrase 'in all actions concerning children' should be interpreted as broadly as possible.³⁰³ The CRC Committee should only disclose the identity of the complainant if it considers that disclosure of the identity of complainants is inline with their best interests. Nonetheless, the CRC Committee should, in determining whether disclosure is in the child/children's best interests, give due weight to the views of the child/children in accordance with their age and maturity.

The final draft has also 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 draft provided lesser threshold of protection as compared to other Complaint Procedures such as the CERD (Article 14(6)) and Rules of Procedure of the CEDAW Committee (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.

³⁰³ J. Todres, *supra* note 205, p.11

The formulation in the draft was made to reflect the position held by the delegations of some States such as the U.S who argued that it would be reasonable for States to know the identity of victims to ensure that concrete violation had taken place and effective remedies could be provided.³⁰⁴ Mexico has also added that the identity of the victim must be known to determine whether domestic remedies had been exhausted.³⁰⁵

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. It is crucial to analyze that children may suffer a lot as a result of divulging their identity not only to the public, but also to the respondent State concerned. Given this fact, the 'protection measures' envisaged under Article 4 of the draft which seeks to prevent unnecessary suffering of children due to communications (including the publicity of 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. In order to trigger effective utilization of the instrument by children and guarantee protection to children, the Committee should determine whether revealing the identity of the child/children involved is inline with their best interests. In such cases as well, the CRC Committee should give due weight to the views of the child/children concerned in accordance with their age and maturity in determining whether disclosure is inline with their best interests.

The respondent State, upon receiving the communication, is bound to submit to the CRC Committee written explanations or Statements clarifying the matters and remedy,

³⁰⁴ NGO Working Group for the CRC Complaints Mechanism, *supra* note 258

³⁰⁵ *ibid*

if any, that it may have provided to the complainant.³⁰⁶ It is anticipated that for the purpose of fostering the celerity of the Procedure, the CRC Committee will through its Rules of Procedure entitle the respondent State to present its arguments in relation to both admissibility and the merits.³⁰⁷ The State is required to reply as soon as possible and within six months. The Chair-person of the OEWG, in his first draft, proposed three months period for the State to respond to communications. He explained that the three months period was justified given the developmental status of children and the need for promoting the celerity of Procedures.³⁰⁸ The six-month time limit set forth in the final draft was championed by the majority of delegations who expressed that it would be difficult for respondent States to submit response for communications within three months. Canada and U.S. for instance, argued that a six-month time period for States to respond would be more appropriate as three months time limit would be especially difficult to meet for federal States, where it can take more time to gather the necessary facts and information.³⁰⁹

The final draft Optional Protocol is not exceptional in fixing a six-month time limit; indeed, the majority of the core UN treaties have, likewise, prescribed similar period of time for submitting responses for communications.³¹⁰ Shorter time limit, however, is tested in the UN treaties' regime and other Complaint Procedures. Article 41(6) (b) of the CERD has stipulated three months time for States to respond to communications. The Complaints Procedure under the European Social Charter fixed no time for States

³⁰⁶ Article 8(2) of the Final Draft

³⁰⁷ This is the trend in the Complaints Procedure of most of the core UN treaties (See, for example, Rule 69 of the Rules of Procedure of the CEDAW Committee and Rule 97 of the Rules of Procedure of the Human Rights Committee).

³⁰⁸ See the explanatory memorandum by the Chair-person of the OEWG on the first draft.

³⁰⁹ NGO Working Group for the CRC Complaints Mechanism, *supra* note 258

³¹⁰ See provisions in the Optional Protocols of the ICESCR (Article 6(2)), ICCPR (Article 4(2)), CRPD (Article 3) and CEDAW (Article 6(2))

to reply to communications. It is the European Committee of Social Rights that determines the time frame on a case by case basis and the Committee usually allots very short period of time.³¹¹ These precedents are stark examples elucidating that shorter time limits are realistic.³¹² Taking in to account the special needs of children, the final draft should have employed a lesser time limit for submitting explanations for communications by respondent State that help to halt any unnecessary delay in the Communications Procedure. Shorter time limits may also help to minimize the risk that may ensue to children as a consequence of the weak provisions on Interim Measures considered above.

4.4.1.5. Friendly Settlement

Primarily targeting at protecting the rights of children without a prolonged examination of communications by the CRC Committee, the final draft has brought in to it a Friendly Settlement Procedure.³¹³ Among the core UN treaties, the ICESCR represents a watershed in terms of providing Friendly Settlement Procedures between individuals and States through its Optional Protocol. The rest of treaty body systems permit Friendly Settlements between States for Inter-States communications.³¹⁴ Friendly Settlement Procedure for Individual Communications is also provided under the European and Inter-American Human Rights Systems. The African Human Rights System provides Friendly Settlement Procedure between States.

³¹¹ Robin Churchill and Urfan Khaliq, 'The Collective Communications Procedure of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' (2004), 15 *EJIL* (417-456), p.436

³¹² Joint NGO Submission to the OEWG, *supra* note 292, p.11

³¹³ Article 9 of the Final Draft

³¹⁴ See Article 41 of the ICCPR, Article 21 of CAT and Article 76 of CMW.

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.³¹⁵ 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.³¹⁶ Realizing such consequence, a number of States during the negotiation process stressed that any Friendly Settlement should respect the obligations set forth in the CRC and its Optional Protocols.³¹⁷ This is also reflected in the provision of the draft (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 draft 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, it should be underscored that 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

³¹⁵ Joint NGO Submission to the OEWG, *supra* note 292, p.11

³¹⁶ *ibid*

³¹⁷ Report of the OEWG, *supra* note 24, p. 18

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.³¹⁸ 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.

The CRC Committee, in addition, is required to follow up the implementation of the Friendly Settlement by the State concerned.³¹⁹ The State is required to submit information to the Committee on the measure it has taken to implement the terms of the agreement. Nonetheless, the time gap available for the State to respond to the request made by the Committee is not explained. This may, through creating unnecessary delay, weaken the effective implementation of the settlement reached.³²⁰ The draft is also silent on the role to be played by the Committee in case there is none or unsatisfactory implementation of the Friendly Settlement. It was suggested by the CRC Committee and NGO groups that the draft should, in such circumstances, create the possibility of reopening the case by the Committee or resubmitting by the author of communications.³²¹ Without opening a room for such mode of application, the draft has bluntly provided that an agreement on a Friendly Settlement reached under the

³¹⁸ 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

³¹⁹ Article 11 of the Final Draft

³²⁰ NGO groups, among the participants, suggested that the State should be required to submit its response within 'reasonable time' (see Joint NGO Submission to the OEWG, supra note 292, p12)

³²¹ See Comments by the Committee on the Rights of the Child, supra note 28, p.8 and Joint NGO Submission to the OEWG, supra note 292,p.13

auspices of the Committee will close consideration of the communication under the Optional Protocol.³²²

4.4.1.6. Consideration of the Merits of Communications

Unless consideration of a communication is discontinued as a result of agreement through Friendly Settlement or any other ground, the Committee will embark on examining the merits of communications.³²³ It will examine whether the facts alleged in the case constitute violation of the rights guaranteed in the CRC or its Optional Protocols. The drafters of this Article have attempted to add on the existing standard and enhance the celerity of the Procedure through requiring the CRC Committee to consider communications 'as quickly as possible'.

The Committee considers communications in the light of all documentation submitted to it by the complainant and the respondent State.³²⁴ The draft, however, provided no clue regarding the application of oral hearings. During the discussions, it was suggested by many States that the Complaint Procedure should give adequate emphasis to the views of the child.³²⁵ Despite these suggestions, the issue regarding oral hearings was not treated in the final draft. In fact, most Complaint Procedures of the UN treaties in

³²² Article 9(2) of the Final Draft

³²³ Article 10 of the Final Draft

³²⁴ Article 10(1) of the Final Draft. It seems to be that the CRC Committee in its Rules of Procedures will include a provision allowing the Committee to consult, as appropriate, relevant documentation emanating from other UN bodies, specialized agencies, funds, programmes and mechanisms, and other bodies, including from regional human rights systems, and any observations or comments by the State Party concerned (See the explanatory memorandum of Article 8 of the first draft prepared by the Chair Person Rapporteur of the OEWG)

³²⁵ NGO Working Group for the CRC Complaints Mechanism, *supra* note 258

the same manner do not have provisions dealing with oral arguments.³²⁶ The absence of provision to this effect, on the other hand, has persuaded some treaty bodies to deny oral hearings. The Human Rights Committee, for example, interpreted the reference made to 'written information' under Article 5 of the first Optional Protocol to the ICCPR in a way precluding oral hearings.³²⁷ Henry Steiner argued that although the provision refers to 'written information', there is nothing explicitly stopping oral hearings.³²⁸

It should be born in mind that permitting oral hearings will help the Committee to adequately understand the substance of the case and the real challenges affecting the child victim. It is an important mechanism which enables the Committee to elicit the views of the child in the adjudication process and render effective remedies for the violations inflicted on the child. The child is already granted under Article 12 of the CRC the right to express his/her views in all matters affecting him/her. Consideration of communications involving him/her indisputably affects him/her. Accordingly, the child should be given an opportunity to express his/her views orally relating to the communication.

As rightly argued by Henry Steiner in the context of the Complaint Procedure of the ICCPR, the absence of clear provision authorizing oral proceedings under the draft Optional Protocol should not be understood as closing the door for its application. This line of argument, perhaps, is buttressed by the draft Optional Protocol itself. Under

³²⁶ It is, however, important to recognize that the CAT Committee, pursuant to Rule 111(4) of its Rules of Procedure, can invite the author to submit oral evidence.

³²⁷ Liz Heffernan, 'A Comparative View of Individual Petition Procedures under the European Convention on Human Rights and the International Covenant on Civil and Political Rights' (1997) 19.1 *Human Rights Quarterly* 78-112, p.25

³²⁸ Henry Steiner: 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?', in Philip Alston and James Crawford, *supra* note 174, p.15

Article 2, it is provided that the Committee should, while carrying out its functions, give due weight to the views of the child in accordance with his/her age and maturity. This would clearly imply that the Committee should allow oral hearings in considering communications.

The CRC Committee examines cases in closed meetings.³²⁹ This will presumably entail that only parties to the communication, their representatives, witnesses and experts will be allowed to attend the meetings.³³⁰ As expressed by few delegations during the sessions of the OEWG, however, closed sessions may result in lack of transparency and make *amicus curie* interventions very difficult.³³¹ The writer, hence, holds the view that the Optional Protocol should not totally close the possibilities of interventions. Although *amicus curie* interventions are not allowed under Complaint Procedures of the core UN treaties, the practice in the regional human rights systems have elucidated that *amicus curie* interventions help in providing legal arguments or valuable information on how the case affects people other than the parties to the case.³³² The CRC Committee will, as a result, be placed in a better position to get information on how the case affects children other than those involved in the case. It will also make the Committee to draw attention to relevant matters not already brought to the Committee's attention by the parties involved.³³³ Nevertheless, the Optional Protocol should not permit public hearings unconditionally. The Committee should be required to hold public hearing if it finds that it is inline with the child/children's best interests.

³²⁹ Article 10(2) of the Final Draft

³³⁰ See, for example, Rule 102 of the Rule of Procedure of the African Commission on Human and Peoples' Rights

³³¹ Report of the OEWG, *supra* note 24, p. 19

³³² Magdalena Sepúlveda Theo van Banning and et al, *supra* note 56, p.5

³³³ *ibid*

The other issue which merits consideration at this stage concerns examination of communications alleging breach of ESC rights. As has been observed earlier, the draft has followed comprehensive approach in treating ESC rights and civil and political rights under Individual Communications. States Parties can not discriminately undertake to receive communications relating to ESC rights or civil and political rights. Through permitting children to bring communications in relation to ESC rights, the draft has reinforced the justifiability of ESC rights and the indivisibility, interdependence and interconnectedness of human rights anchored in the Preamble.³³⁴ Nevertheless, it is plain to note that States are not yet fully convinced on the justiciability of ESC rights and the indivisibility, interdependence and interconnectedness of human rights. This may be discerned through analyzing the standard of treatment employed for ESC rights under the draft. Article 13(1) of the draft stipulates:

When examining communications alleging violations of economic, social or cultural rights, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with article 4 of the Convention. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the economic, social and cultural rights in the Convention.

The CRC Committee will, pursuant to the provision, consider the 'reasonableness' of the steps taken by the respondent State when examining communications alleging breach of ESC rights. In applying the standard, the Committee is further required to bear in mind the discretion granted for States to adopt a range of policy measures for implementing ESC rights.

³³⁴ See paragraph 3 of the Preamble to the Final Draft

The CRC Committee will not apply the 'reasonableness' standard when examining communications brought in relation to civil and political rights. This discriminatory treatment of the two sets of rights is inserted in spite of the strong objection raised by some delegations who argued that it would create hierarchy of rights and run counter to the principle of indivisibility and interdependence of human rights.³³⁵ The wide support given for the 'reasonableness' standard of review by States, in the opinion of Lembrechts, is a stark example elucidating that long standing prejudice towards ESC rights are not overcome.³³⁶ As a result, Lembrechts argues, a unique opportunity to bridge the classical dichotomy between ESC rights and civil and political rights is lost.³³⁷

Nevertheless, the Optional Protocol, in my view, can not create unique opportunity to avoid the dichotomy between the two sets of rights. The CRC has already employed different treatment to such groups of rights. Part of Article 4 of the CRC, in outlining the duty of States Parties to give effect to the rights under the CRC provides: "... In regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources..." The requirement of 'availability of resources' is merely prescribed for ESC rights and other rights guaranteed under the CRC are not subjected to such requirement. The CRC Committee elaborated that the requirement of 'availability of resources' included in the provision introduces the concept of 'progressive realization' of ESC rights.³³⁸ This implies that States Parties, according to the explanation of the CRC Committee, are expected to realize ESC rights progressively.

³³⁵ Report of the OEWG, supra note 24,p. 19

³³⁶ Sara Lembrechts, supra note 35,p.34

³³⁷ *ibid*

³³⁸ CRC Committee, supra note 200,Para 7

The Optional Protocol is a procedural instrument which merely creates possibilities for children to present claims with respect to the CRC and its Optional Protocols. It can not be structured to create new substantive obligations on States Parties. Through the Optional Protocol, State Parties may only be obliged to receive communications alleging breach of substantive rights which they already committed to fulfill. This approach is adhered by the draft. 'Reasonableness' standard of review introduced in the draft is not a standard designed to establish new substantive obligation or altering the already created obligations of States Parties. As explained by the Committee on ICESCR, in determining whether the steps taken by States were 'reasonable', 'the time frame in which the steps were taken' will, among others, be taken in to consideration.³³⁹ This clearly indicates that 'reasonableness' standard is a reflection of the principle of progressive realization of ESC rights.³⁴⁰ The inclusion of 'reasonableness' standard of review under the draft, hence, signifies the reaffirmation of the approach adopted under the CRC in relation to ESC rights.

The draft provisions do not clarify the notion of 'reasonableness'. It remains to be seen how the CRC Committee interprets it whenever confronted with communications alleging breach of ESC rights under the CRC. Nevertheless, as the trend in the jurisprudence of national Courts unveiled, the concept of 'reasonableness' is not a monolithic standard.³⁴¹ State courts have been observed to apply the standard

³³⁹ *Statement by the Committee: An evaluation of the obligation to take steps to the "Maximum of available resources" under an Optional Protocol to the Covenant* U.N. Doc. E/C.12/2007/1, Para 8

³⁴⁰ In State Courts, like the Constitutional court of South Africa as well, 'reasonableness' standard had been the basis on which the justiciability of the duty to progressively realize ESC rights was affirmed(See Bruce Porter, 'The Reasonableness of Article 8(4)- Adjudicating Claims From The Margins'(2009) 27 *Nordic Journal of Human Rights*,p.46

³⁴¹ Brian Griffey, 'The' reasonableness' test: Assessing violations of state obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights'(2011) 11*Human Rights Law Review* 2,p.305

inconsistently with radically different levels of deference to States on policy and budgetary matters, resulting in equally varied outcomes.³⁴² The CRC Committee should be cautious to avoid inconsistency in applying the 'reasonableness' standard of review. It should, in particular, apply similar level of deference to State Parties' policy choice for implementing ESC rights. Inconsistent application of the standard may result in varied outcomes on similar cases. This will, in turn, lead to extending different level of protection to children.

After examining communications, the CRC Committee is bound to transmit its views on the communication, together with its recommendation, if any, to the parties concerned without delay.³⁴³ States parties are required to follow up the views and recommendations of the CRC Committee. The following part will consider the Procedure adopted in the draft for monitoring follow up to the views and recommendations of the CRC Committee.

4.4.1.7. Follow-up to the Views and Recommendations of the CRC Committee

The draft Optional Protocol, like the Compliant Procedures of the other core UN treaties, has adopted Procedures for monitoring follow-up by States of the views and recommendations of the CRC Committee. Introducing follow-up Procedure is advantageous since it opens an avenue for addressing problems encountered when implementing views and recommendations and guarantees that they would be actually implemented.³⁴⁴ It also allows for guidance and support to be provided to States regarding measures taken to comply with the views and recommendations.³⁴⁵

³⁴² Ibid

³⁴³ Article 10(3) of the Final Draft

³⁴⁴ Lilian Chenwi, *supra* note 65, p.46

³⁴⁵ *ibid*

It is provided under Article 11(1) that: "the respondent State should, as soon as possible and within six months, submit written response including information on any action taken and envisaged in the light of the views and recommendations of the Committee." The first draft prescribed three months time for the submission of written response. The proposal, nonetheless, was not accepted since numerous delegations argued that in light of the potentially far-reaching measures required for implementing the CRC Committee 's views, such as change in domestic practice or legislation, the three months period would turn out to be insufficient.³⁴⁶ Given the potential harm that delays in implementation may cause to children, the six months time allotted for submitting responses appears to be too long. To promote the interest of children, the drafters should have foreseen innovative tools that help to foster immediate implementation of the views and recommendations of the Committee. To this end, the draft should, at the very least, have adopted the suggestions of many delegations to provide three months period for submitting responses as a general rule and allow submission of same within six months in exceptional circumstances.³⁴⁷

The CRC Committee is further granted discretion to order the concerned State to present in its subsequent report further information on the implementation of the views and recommendations.³⁴⁸ The Committee is also required to include a summary of its activities under the Optional Protocol in to the report it presents to the General Assembly.³⁴⁹ This will serve as an additional instrument for provoking compliance by States Parties since the identity of non-complying States will be disclosed to the General Assembly thereby contributing for mobilization of shame.

³⁴⁶ Report of the OEWG, *supra* note 24, p. 20

³⁴⁷ *ibid*

³⁴⁸ Article 11(2) of the Final Draft

³⁴⁹ Article 16 of the Final Draft

Obviously, the above mentioned mechanisms are not sufficient to ensure effective implementation of the views and recommendations of the CRC Committee. After all, the term 'view' is traditionally understood to connote determination of the issue that is short of legally binding obligation.³⁵⁰ Consequently, Committees of the UN treaty bodies in general are considered to lack explicit authority to hand down decisions that are binding up on State Parties.³⁵¹ This has, in turn, resulted in poor record of compliance to the views and recommendations of the treaty bodies by delinquent States.³⁵² To ameliorate this hurdle, other treaty bodies have, in their Rules of Procedure and practice, adopted additional methods. Most treaty bodies, for instance, have designated Special Rapporteurs having the mandate of ascertaining the measures taken by States Parties to give effect to the views of the Committees.³⁵³ Langford and Clark have suggested the importance of considering other innovative Procedures such as: (i) not closing a communication until the Committee is satisfied there has been compliance, particularly in cases of grave or systemic violations; (ii) allowing an expedited re-submission of the complaint where there has not been compliance; or (iii) being permitted to invoke the Inquiry Procedure when there is insufficient compliance with a decision.³⁵⁴ The CRC Committee has ample opportunities to draw lesson from the experience of such treaty bodies and proactively deal with challenges that may hinder the effective implementation of its views and recommendations by States Parties.

³⁵⁰ Scott Davidson, 'Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee' in Grant Huscroft and Paul Rishworth (eds.), *Litigating Rights Perspectives from Domestic and International Law* (Oxford - Portland Oregon, 2002),p.307

³⁵¹ J. Crawford, supra note 174, p.2

³⁵² Liz Heffernan, for example, has noted that compliance to the views of the Human Rights Committee by delinquent States till 1990 is remarkably incomplete.(see Liz Heffernan above, supra note 327, p.25)

³⁵³ See, for example, Rule 101 of the Rules of Procedure of the Human Rights Committee, Rule 73 of the Rules of Procedure of the CEDAW Committee, Rule 95 of the Rules of Procedure of the CERD Committee and Rule 114 of the Rules of Procedure of the CAT Committee.

³⁵⁴ See Malcolm Langford and Sevda Clark, supra note 33,p.9

4.4.2. Inter-State Communications

Inter-State Communications are the other key Procedures of the draft Optional Protocol. Although Inter-State Communications experienced no usage by States under other UN treaties so far³⁵⁵, the draft Optional Protocol has included the Procedure and allowed States to present claims alleging breach of any of the rights guaranteed under the CRC and its Optional Protocols. States Parties are given the liberty to either accept or decline from recognizing the competence of the CRC Committee to receive and consider Inter-State Communications in respect of the CRC and/or its Optional Protocols.³⁵⁶ And such declaration may at any time be withdrawn by the State concerned.³⁵⁷ The draft has further provided that the Committee shall make available its office to the parties concerned for friendly solutions of the matter subject to communication.³⁵⁸ In such occasions, it seems sound to argue that the CRC Committee, pursuant to the mandate entrusted to it under Article 2 of the draft, 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 draft 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.³⁵⁹

³⁵⁵ Report of the OEWG, supra note 24,p. 21

³⁵⁶ Article 12(1) of the Final Draft.

³⁵⁷ Article 12(4) of the Final Draft

³⁵⁸ Article 12(3) of the Final Draft.

³⁵⁹ Report of the OEWG, supra note 24,p. 21

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',³⁶⁰ Inter-State Communications enshrined under Article 12 of the draft do not make any reference to States Parties' jurisdiction.³⁶¹ Accordingly, Inter-State Communications 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 Optional Protocols 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.³⁶² 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

³⁶⁰ See, for example, Article 5(1) of the Optional protocol to the ICESCR, Article 2 of the Optional Protocol to the CRPD

³⁶¹ Inter-State Communications under other Complaint Procedures of the UN treaties likewise do not make any reference to States Parties' jurisdiction. See, for example, Article 41 of the ICCPR, Article 21 of CAT, Article 76 of CMW and Article 11 of CERD.

³⁶² *Democratic Republic of Congo (DRC) v. Burundi, Rwanda and Uganda* (Communication 227/99), Twentieth Activity Report 2006

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.³⁶³ Accordingly, 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.³⁶⁴ Although few in numbers, the complaints have resulted in significant milestones in the protection of human rights by the European Court of Human Rights.³⁶⁵ 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. Rather than closing the door for

³⁶³ Christian Courtis and Magdalena Sepúlveda, 'Are Extra-territorial Obligations Reviewable under the Optional Protocol to the ICESCR?' 27 *Nordic Journal of Human Rights* 1, p.59

³⁶⁴ Liz Heffernan, *supra* note 327, p.25

³⁶⁵ *ibid*



their potential use under the CRC, therefore, it is important to introduce Inter-State Communications under the CRC and find out mechanisms that provoke the effective use of them by children.

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 Optional protocol 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 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.

4.4.3. Inquiry Procedure

The final draft has also incorporated provisions setting out Inquiry Procedure. Pursuant to Article 13 of the draft, the Committee is 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 Optional Protocols. Article 13(1) pronounces:

If the Committee receives reliable information indicating grave or systematic violations by a State party of rights set forth in (a) The Convention (b) The Optional Protocol on the sale of children, child prostitution and child pornography (c) The Optional Protocol on the involvement of children in armed conflict, the Committee shall invite the State party to cooperate in the

examination of the information and, to this end, to submit observations without delay with regard to the information concerned.

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 Optional Protocols.³⁶⁶ 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.³⁶⁷

After examining the findings of the inquiry, the Committee is required to transmit without delay those findings to the State Party concerned together with its comments and recommendations.³⁶⁸ Up on receiving the comments and recommendations, the State is expected to submit its observation to the Committee as soon as possible and within six months.³⁶⁹ As stated under Article 14, the Committee is empowered to monitor follow-up to its comments and recommendations by the State concerned. To this effect, it may, for example, request the State to explain the measures it took and envisaged in response to the inquiry. The Committee may also request the concerned State to include in its subsequent reports any measure it has taken in response to the inquiry. Consulting the concerned State, the Committee may, in addition, include

³⁶⁶ Article 13(7) of the Final Draft

³⁶⁷ *ibid*

³⁶⁸ Article 13(4) of the Final Draft

³⁶⁹ Articles 13(5) of the Final Draft

summary account of the results of the proceedings in the report it presents to the General Assembly.³⁷⁰

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, for example, 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 revictimization or reprisal as a consequence of initiating an Inquiry against their government.

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 being recruited and used by armed

³⁷⁰ Article 13(6) of the Final Draft

forces and groups suffering rape or sexual abuse at their hands.³⁷¹ What is important to note here is that unlike Inter-state Communications which require communications to be brought from a State Party to the Optional Protocol that specifically declared to accept the competence of the CRC Committee to receive and consider Inter-state Communications³⁷², Inquiry Procedure do not fix limitation on those who can initiate an inquiry. Hence, even a state which is not party to the Optional Protocol 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,³⁷³ the draft, for example, has provided opt-out option in relation to the Procedure.³⁷⁴ 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 Optional Protocols. 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 draft should have avoided the option like that of the Optional Protocol to the CED.³⁷⁵ The inquiry, moreover, can not 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.

³⁷¹ Available at <http://www.un.org/apps/news/story.asp?NewsID=23796&Cr=sudan&Cr1>, accessed on 29/08/2011

³⁷² See Article 12(2) of the Final Draft

³⁷³ Visit <http://www.crin.org/resources/infodetail.asp?id=2398>

³⁷⁴ See Article 13(7) of the Final Draft

³⁷⁵ Look at Article 33 of the Optional Protocol to the CED.

4.4.4. Collective Communications

Similar to the drafting stages of the Optional Protocols to the CEDAW and ICESCR, the issue as to whether the CRC Complaint Procedure should incorporate Collective Communications was subject to serious debate. Earlier drafts included the Procedure and permitted the CRC Committee to consider Collective Communications brought by NHRIs, Ombudsman Institutions and NGOs.³⁷⁶ The Procedure, however, was not able to galvanize adequate support, and, hence, was not included in the final draft.

Delegations have failed to see the specific advantages that Collective Communications may provide to children. Collective Communications generally allow the submission of communications without directly involving individual child victims in the process.³⁷⁷ The Procedure, as a result, is suitable to address violations victims of which can not be easily identifiable; such as abuse of children through pornography.³⁷⁸ Besides, since there is no disclosure of the identity of allegedly victims of violations, concern over confidentiality, revictimization and protection of children throughout the Procedure are addressed.³⁷⁹ This is more importantly advantageous for African children who may expectedly suffer revictimization as a consequence of bringing communications against their government. The establishment of the Procedure may also serve additional advantages to African children. It is presumed that most African children will encounter difficulties in bringing communications before an international human rights body (like the CRC Committee) as a consequence of financial and other constraints. Collective Communications, on the other hand, will enable large number of children

³⁷⁶ See Article 3 of the first draft and Article 7 of the second draft

³⁷⁷ Joint NGO Submission to the OEWG, *supra* note 292, p.7

³⁷⁸ Peter Newell, 'Collective Communications: An Essential Element In The New Optional Protocol For The Convention On The Rights Of The Child' p.3, Available at <http://www2.ohchr.org/english/bodies/hrcouncil/OEWG/index.htm> accessed on 10/03/2011

³⁷⁹ *ibid*

facing obstacles of filing individual communications to be represented by NGOs, NHRIs or Ombudsman Institutions and enforce their rights.

It should be born in mind that the requirement of tracing the individual situation of victims of human rights violations (victim requirement) may pose serious consequence on the enforcement of children's rights. The requirement is particularly found under Individual Communications where complainants are required to clearly indicate the suffering sustained by them or by individuals on behalf of whom they are bringing the communication.³⁸⁰ This will create difficulty in preventing potential violations of children's rights as a consequence of the wrongful practice, law or policy of State Parties. The practical case of *Tadman v. Canada* ³⁸¹ illustrates the impact of this requirement. In this very case, the authors were non-Catholics who complained that the Roman Catholic schools were the only non-secular schools receiving full and direct public funding and wanted to nullify the Canadian legislation alleging it to be discriminatory.³⁸² Their communication was rendered inadmissible by the Human Rights Committee since, although the complainants belonged to different religious denominations, their children were attending public secular schools which are funded like catholic schools.³⁸³ The implication is that, in order to challenge the Canadian legislation on this point, the authors of the complainants in *Tadman* would have had to

³⁸⁰ As considered earlier, for example, the Final draft under Article 5 Provides that "Communications may be submitted by or on behalf of an individual or group of individuals...claiming to be victims of a violation by that State Party..." Similar provision is also found under Complaint Procedures of the Other core UN treaties, See, for instance Article of the Optional Protocol to CEDAW, Article of the Optional protocol to ICESCR, Article of Optional protocol to CRPD

³⁸¹ *Tadman et al. v. Canada*, (Communication No. 816/1998)

³⁸² *ibid*, Para 6.2

³⁸³ *ibid*

place their children in non-public, non-Roman Catholic schools with the financial implication this would have entailed on them.³⁸⁴

Under Collective Communications, this challenge is addressed since there is no victim requirement. Complainants are not required to wait until the risk that may ensue to children as a consequence of law, policy or practice complained to be against an international instrument materializes. There is no need of explaining the situation of each individual alleged to have been victim of a violation. It suffices if complaining NGOs, NHRIs or Ombudsman Institutions clearly indicate that a given law, policy or practice is against an international instrument to which the respondent State is a party and that it generally caused (or may cause) the human rights violation of a large number of individuals concerned. As a result, the decision that may be rendered in such cases may, in addition to addressing violations which in fact sustained, serve to prevent potential violations of children's rights.

This is clearly observed in the Collective Communication brought to the ACERWC considered earlier. The communication in this particular case was brought on behalf of children of Nubian descent in Kenya against the government of Kenya which, according to the communication, refused to give Kenyan Citizenship to Nubian children in violation of Article 6 in particular sub-articles (2) (3) and (4) and Article 3 of the ACRWC and, as a result, led them to incur other consequential violations including Article 11(3) and Article 14 of the ACRWC. The Communication particularly alleges that many persons of Nubian descent are not granted the ID cards to prove nationality, or only get them after along delay. Consequently, the communication describes, the future prospect of Nubian children are severely limited and often leaves them

³⁸⁴ Olivier De Schutter, *supra* note 50, p.813

stateless.³⁸⁵ Considering the merits of the communication, the ACERWC finally found multiple violations of children's rights guaranteed under the ACRWC and recommended, among others, that the government of Kenya should take all necessary legislative, administrative and other measures in order to ensure that children of Nubian descent in Kenya that are otherwise stateless, can acquire a Kenyan nationality and the proof of such a nationality at birth.³⁸⁶ It is possible to note that the communication has partly based its allegation on the potential risk that Nubian children may incur. Furthermore, the decision of the ACERWC, as one may note, has a prospective dimension. The adoption of legislative, administrative and other measures will not only benefit those children who in fact suffered violations, it also helps to prevent violations that may be inflicted on future generations of Nubian children.

Many delegations objected Collective Communications Procedure alleging, inter alia, that it would overlap with the Inquiry Procedure and that the provision on Individual Communications contemplated the submission of communications by group of individuals.³⁸⁷ Delegations also opposed the Procedure arguing that it creates difficulty in terms of exhausting domestic remedies.³⁸⁸ One may be surprised to note that although Collective Communications Procedure is being practiced in the regional human rights mechanisms of Europe and Africa many delegations from these regional systems were not willing to include the Procedure in to the CRC monitoring system.³⁸⁹

In the present writer's opinion, the above mentioned grounds do not justify excluding Collective Communications from the ambit of the CRC monitoring system. As opposed

³⁸⁵ *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*, supra note 274, Para 5

³⁸⁶ *ibid*, Para 69

³⁸⁷ Report of the OEWG, supra note 24, p. 13

³⁸⁸ *ibid*

³⁸⁹ Report of the OEWG, supra note 24, p. 13

to the arguments raised by many delegations, for example, Collective Communications will not overlap with Inquiry Procedure. From the very outset, Inquiry Procedures normally address 'grave' or 'systematic' violations.³⁹⁰ The threshold for instigating Collective Communications, as can be observed from the trend in the Complaint Procedures of the regional human rights systems, is not limited to 'grave' or 'systematic' violations. Under the Collective Complaint System of the European Social Charter, for instance, communications may be brought to the European Committee of Social Rights if there is 'unsatisfactory application' of the European Social Charter.³⁹¹ The ACRWC, on the other hand, does not stipulate limit on the type of violations that should be considered by the ACERWC. Under Article 44(1) of the ACRWC, it is provided that the ACERWC may receive communications 'from any person, group or NGOs recognized by the Organization of African Unity'. Since violations of children's rights that do not fall within the purview of 'grave' or 'systematic' violations may be addressed by Collective Communications, introducing the Procedure will not duplicate Inquiry Procedure. On top of this, as the NGO Group for the CRC suggested, it is possible to avoid the potential duplication through stipulating different threshold for instigating Collective Communications.³⁹²

Delegations have also declined to accept Collective Communications arguing that Individual Communications already contemplated the submission of communications by group of individuals. This argument seems to juxtapose Collective Communications with group communications. There is notable difference between the two Procedures. In group communications, as noted in previous discussion, there is the possibility of

³⁹⁰ See, for example, Article 8 of the Optional Protocol to the CEDAW, Article 11 of the Optional Protocol to the ICESCR and Article 6 of the Optional Protocol to the CRPD.

³⁹¹ See Article 4 of the 1995 Protocol to the European Social Charter

³⁹² NGO Group for the CRC, 'Statement on Article 3 and 12', Available at www.crin.org, accessed on 06/07/2011

disclosure of the identity of the complainant to the State and the public. Collective Communications, on the other hand, do not involve individual child victims in the process. Moreover, unlike group communications, Collective Communications usually involve some level of generality. Because of their collective nature, communications of such type raise questions concerning non-compliance of a State's law or practice with one of the provisions of a given instrument.³⁹³ They are used to address violations that stem from a general measure of policy affecting a wide range of people.³⁹⁴ .

The non-application of exhaustion of domestic remedies rule in Collective Communications has also been the ground for objecting the inclusion of the Procedure in to the Optional Protocol. The ACERWC in the above cited case has considered whether complainants have exhausted available domestic remedies before bringing the matter to it.³⁹⁵ Under the European human rights systems, however, exhaustion of domestic remedies rule is not set as an admissibility requirement. Churchill and Khaliq reasoned that the exclusion of domestic remedies rule from the admissibility requirement of the European Social Charter is due to the fact that in many cases there will be no domestic remedy available since the provisions of the European Social Charter are not part of domestic law and/or are not self-executing.³⁹⁶ Obviously, this ground will not block the application of the exhaustion of domestic remedies rule under the Complaint Procedure of the CRC. Most State Parties to the CRC have made the provisions of the CRC part of their domestic laws by using various mechanisms such as adopting children's code/ Children's Act and enacting laws on specific issues related to children's rights such as child labor, child trafficking, female genital mutilation and

³⁹³ Robin Churchill and Urfan Khaliq, *supra* note 311, p.431

³⁹⁴ Olivier De Schutter, *supra* note 50, p.807

³⁹⁵ *See supra* note 385, Para 24-35

³⁹⁶ Robin Churchill and Urfan Khaliq, *supra* note 311, p.434

etc.³⁹⁷ Accordingly, there is high tendency for the exhaustion of domestic remedies rule to be applied under the CRC Complaint Procedure.

4.5. Other Key Aspects of the Final Draft Optional Protocol

The draft is also composed of other key aspects that facilitate the effective use of the Optional Protocol and implementation of the views and recommendations of the CRC Committee. Under Article 15 of the draft, 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.³⁹⁸ Establishment of funds is not a new innovation within the UN treaties. Some human rights treaties, such as the Optional Protocol to the CAT (under Article 26) 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 Optional Protocol to the ICESCR (Article 14(3)), agreement has been reached that States (especially third world States) need assistance in implementing ESC rights. The CRC also comprises ESC rights. It is not

³⁹⁷ UNICEF, *supra* note 243, at 'x'

³⁹⁸ Report of the OEWG, *supra* note 24, 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

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 draft provided for the establishment of a new fund.

Furthermore, the draft has envisaged provisions that aim at advancing the awareness of the public in relation to the Optional Protocol 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'.³⁹⁹ A proposal was made by some delegations to make reference to 'child friendly' means.⁴⁰⁰ The proposal did not get adequate support as a result of which the draft 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 Optional Protocol 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 draft.⁴⁰¹ Article 3 of the draft, for example, states that the Committee should guarantee child sensitive Procedure while adopting its Rules of Procedure. The draft 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

³⁹⁹ Visit [http:// www. crin.org /law/CRC_ complaints](http://www.crin.org/law/CRC_complaints)

⁴⁰⁰ Report of the OEWG, supra note 24, p. 22

⁴⁰¹ See Paragraph 7 of the Preamble Part and Article 3 of the Final Draft

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'.⁴⁰² The Committee is expected to deal with the details of it in its Rules of Procedure.

4.6. Conclusion

Given the shortcomings linked to the State reporting mechanism, establishing Complaint System under the CRC remains to be quite indispensable for triggering the implementation of the CRC and its Optional Protocols by States Parties. Complaint Procedures will, through complementing the State reporting process envisaged in the CRC, give an opportunity for children to mount claims alleging breach of their rights guaranteed under the CRC and its Optional Protocols and get remedy through an international process. This would, in particular, create advantageous situations for children located in areas where domestic remedies are not available or are ineffective if they exist at all.

The establishment of Communications Procedure under the CRC, moreover, helps to rectify the defect that has been observed in many States in applying the Provisions of the CRC. Due to the absence of authoritative interpretation of the CRC and its Optional Protocols, Courts of many States are interpreting the provisions of the CRC and its Optional protocols in a manner that limits the rights of the child. If a Communications Procedure is introduced under the CRC, it will give an opportunity for the CRC committee to produce decisions that develop jurisprudence on the application of the provisions of the CRC and its Optional Protocols. In addition, it has been noted that Communications Procedure will serve as a catalyst for States to strengthen appropriate remedies at national level. Communications Procedure has also been noted to play key role in achieving MDGs. The rights of children in most states, especially in Africa are

⁴⁰² ECOSOC Res 2005/20, July 22, 2005

not respected. Establishing Communications Procedure for the CRC will help to address these violations of children's rights and enable states to live up to their MDG commitment. In this regard, hence, the decision made by the HRC of the UN to establish Complaint Procedures under the CRC is groundbreaking. The draft Optional Protocol prepared by the OEWG is already adopted by the HRC on 17, June 2011 and it will be presented for final approval to the General Assembly of the UN in December 2011.

The draft Optional Protocol as adopted by the HRC of the UN has included Procedures that enable children to bring communications to the CRC Committee. The key Procedures included in the draft are: Individual Communications, Inter-State Communications and Inquiry Procedure. However, there are issues of concern that demand further analysis by States. Critical scrutiny of the Procedures reveals that little attention is drawn to the special status and vulnerabilities of children. The provisions setting out the Procedures, in general, are not tailored in a way enhancing the effective use of the Optional Protocol by children. Appropriate safeguards are not established to avoid the potential manipulation of children during representation. The best interests principle is not made to play its designed role. Collective Communications are not included despite their potential significance in protecting violations of children's rights. Interim Measures in their current form do not adequately serve to avoid infliction of harm on children while the CRC Committee is considering communications. Provisions on Inter-State Communications and Inquiry Procedure have also failed to add on the existing precedent and promote the real interests of children. In the upcoming session of the General assembly, States should reconsider the impact of such loopholes on the effectiveness of the Optional Protocol. The following chapter will draw general conclusions out of the preceding discussions and present recommendations for the problems identified in the study.

CHAPTER FIVE

5. CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

Monitoring the implementation of the CRC by States Parties is primarily carried out through the CRC Committee's examination of State Party reports. Nevertheless, it has been noted that the State reporting procedure of the CRC is inextricably linked with loopholes that have continued to undermine its role.

To start with, the CRC Committee does not have sufficient authority and mechanisms to compel States Parties to submit reports on due time. This has resulted in delay in reporting by States, which in turn minimized the possibilities of taking timely measures on factors that impede the implementation of the CRC and its Optional Protocols by States. State reports are also non-reliable. This is due to the fact that State Parties in their report usually describe positive situations of children without revealing the flagrant violations of children's rights or the challenges faced in implementing the CRC and its Optional Protocols in their territories. Although the CRC Committee has recognized NGOs as important stakeholders in the implementation of children's rights and to participate in the reviewing process and challenging the credibility of State reports through submitting alternative reports, limited contribution has been made by NGOs so far. At the outset, NGOs do not usually participate in the dialogue process directly and they usually fail to get the chance to refute the awareness of the government representatives. Due to lack of time, money and shortage of secretariat staff, information submitted by NGOs has at times also been found to be insufficiently backed by evidence such as research and data. Some shortcomings have also been detected in relation to the CRC Committee. Election to the CRC Committee membership has often been noted to be politicized than being mainly merit based. Most of the

members have another full time job and as a result, they do not spend sufficient time to prepare for the work in the Committee. Given these shortcomings on the reporting procedure, establishing Communications Procedure under the CRC appears to be quite important for enhancing the effectiveness of the monitoring process and advancing the protection of children's rights.

By way of presenting counter-arguments to the main arguments raised by authorities that challenged the significance of establishing Communications Procedure for the CRC, moreover, it has been considered that there are a number of grounds that justify providing Communications Procedure under the CRC. Some of these grounds may be summarized as follows:

- i. In most States of the world, children are sustaining serious violations of their human rights as a consequence of the non-existence (in effective) remedies at the local level. Establishing Communications Procedure for the CRC will, hence, enables children to get remedy when national systems fail to address child rights violations. In line with this, it is also considered that on the face of this flagrant violations of children's rights, States will not be in a position to live up to their MDG commitments. The challenge, as observed in the discussion above, is more severe in Africa where the rights of children to health, education, protection and equality are not respected in most states. Without fulfilling their obligation towards these rights, it would be quite daunting for States to attain the MDGs.
- ii. Communications Procedure helps to rectify the drawbacks in applying the provisions of the CRC and its Optional protocols by States' / domestic Courts. Many State Courts narrowly interpret the provisions of the CRC and its Optional Protocols partly due to the absence of authoritative interpretation of the instruments. Introducing Communications Procedures will give an opportunity for the CRC Committee to develop jurisprudence on the application of the CRC and its Optional Protocols and

provide guidance for State Courts on the manner of application of the instruments. It also offers clear insight on the scope of the duties to respect, protect and fulfill emanating from ratifying the CRC and its Optional Protocols.

- iii. The CRC comprises unique rights that can not be found under the existing UN treaties such as 'the right of a child to have his/her best interests be a primary consideration' (Article 3), 'the right of a child to express his/her views' (Article 12) and 'the right of a child not to be separated from his/her parents' (Article 9). The existing treaty bodies can not entertain complaints alleging violation of such rights. Establishing Complaint procedures under the CRC enables children to bring communications relating to such rights before the CRC Committee and enforce their rights. The same holds true for regional human rights systems. The current regional human rights instruments, save the ACRWC, are not adopted bearing children in mind. It is only the ACRWC that enshrines provisions dealing specifically with children. Nevertheless, there are a number of rights under the CRC which can not be found under the ACRWC, such as Article 37(a) which prohibits capital punishment and life imprisonment of children without the possibility of release, Article 37(b) which requires detention and imprisonment to be the last resort and be the shortest appropriate period and Article 40(3) which imposes duty on States Parties to establish laws, Procedures, authorities and institutions specifically applicable to children. On top of this, some African states are not still parties to the ACRWC.
- iv. The Communications Procedure will also serve as a catalyst for States to develop remedies for children at national level and raise international recognition of children as rights holders.

It is interesting to note that analyzing the existing lacuna in the monitoring system of the CRC, the HRC of the UN has made a landmark decision to adopt an Optional Protocol that provides Communications Procedure for the CRC. By virtue of the Resolution it adopted in June 2009 (A/HRC/Res/11/1/), the HRC established an

OEWG having the mandate of exploring the possibility of establishing Communications Procedure under the CRC. In March 2010, the HRC through its Resolution (A/HRC/Res/13/3/) extended the mandate of the OEWG from merely exploring the possibility of establishing Communications Procedure to drafting the Optional Protocol. Based on this Resolution, the OEWG prepared a draft Optional Protocol and presented it to the HRC for adoption. On June 17, 2011, the draft was adopted by the HRC. The General Assembly of the UN is expected to finally approve the draft in the upcoming December 2011 session.

The draft Optional Protocol as adopted by the HRC is divided into four parts: Under Part I provisions having general application are outlined. It deals with issues like 'Competence of the Committee on the Rights of the Child', 'General Principles Guiding the Functions of the Committee', 'Rules of Procedure' and 'Protection Measures', Part II contains provisions dealing with 'Individual Communications', 'Interim Measures', 'Admissibility', 'Transmission of Communication', 'Friendly Settlement', 'Consideration of Communications' and 'Inter-State Communications' Part III on the other hand sets out 'Inquiry Procedure' and Part IV, the last part, provides 'Final Provisions'. The draft in general has introduced three key Procedures: Individual Communications, Inter-State Communications and Inquiry Procedure.

Under Individual Communications, the draft allows all individuals (children and other individuals who sustained violations while they were children) within the jurisdiction of a state party to bring communications alleging breach of their rights guaranteed under the CRC, the OPAC and OPSC against the State. The draft also permits submission of communications on behalf of children. In such cases, however, the consent of children being represented is required to be established unless the author justifies acting on their behalf without such consent.

The draft, in establishing Individual Communications has followed a comprehensive approach. The CRC Committee is empowered to receive and consider communications with respect to the CRC and its Optional Protocols. If a state ratifies the Optional Protocol, it will be bound to receive communications in relation to the CRC and its Optional Protocols provided the state is a party to the instruments. No option is also given to states to select certain rights from the CRC and its Optional Protocols and limit the Competence of the Committee in respect of such rights. The draft, hence, has reinforced the indivisibility, interdependence and interconnectedness of human rights in this regard.

Like other Complaint Procedures, admissibility requirements such as the requirement of exhausting available domestic remedies, submitting communications in a written form, avoiding anonymity in submitting communications are also stipulated in the draft. Besides, the draft allows reservations. Accordingly, the Committee will not consider a communication as admissible if the state concerned has limited the competence of the CRC Committee to consider the subject matter of the communication through reservations. Furthermore, the Committee is authorized to request the concerned state to consider Interim Measures in exceptional circumstances to avoid possible irreparable damage to the victim/victims of alleged violations.

If a communication submitted to the CRC Committee is declared to be admissible without reference to the State Party concerned, it will be brought to the attention of the State Party confidentially and as soon as possible. The identity of the complainant will be revealed to the respondent State. However, it will not be disclosed to the public unless the author of the communication gives his/her consent to this effect. The Committee is required to make its offices available to the parties for Friendly Settlement of the matter. Consideration of a communication will be closed if an agreement is reached through such Friendly Settlement Procedure.

Unless consideration of a communication is closed as a result of Friendly Settlement reached between the parties or any other cause, the Committee will resume considering the communication and the respondent State which received the communication will be required to submit as soon as possible and within six months written explanation or statement clarifying the matter and the remedy, if any that it may have provided. The Committee considers communications as quickly as possible in the light of all documentation submitted to it. In examining communications alleging breach of ESC rights, the Committee will consider the 'reasonableness' of the steps taken by the respondent State. After examining communications, the Committee will transmit its views on the communication, together with its recommendations, if any, to the respondent State without delay.

The draft has provided mechanisms that enable the CRC Committee to follow up on its views and recommendations and Friendly Settlement agreements by the respondent State. The draft requires the respondent State to submit to the Committee a written response on any action taken and envisaged in the light of the views and recommendations of the Committee as soon as possible and within six months. The Committee may further invite the State Party to submit further information on the measures the state Party has taken in response to the views and recommendations of the Committee, including implementation of a Friendly Settlement agreement in its subsequent report under Article 44 of the CRC, Article 8 of the OPAC and Article 12 of the OPSC.

Inter-State Communications is also provided under the draft. State Parties are granted the possibility of bringing communications alleging that another State Party is not fulfilling its obligations under the CRC and/or its Optional protocols. Opt-in possibility is provided in the Procedure. Hence, unless State Parties declare to the effect recognizing the competence of the CRC Committee to consider Inter-State

communications, they will not be bound by Inter-State Communications. As in the case of Individual Communications, the Committee under this Procedure is also required to make available its office for friendly solutions.

Inquiry Procedure is the other key Procedure included in the draft. The Procedure allows the CRC Committee to conduct an inquiry if it receives reliable information indicating 'grave' or 'systematic' violations by the State Party of rights set forth in the CRC and/or its Optional Protocols. The Procedure is heavily dependent on the willingness of the State Party concerned. Furthermore, opt-out option is included in the draft relating to this Procedure. This entails that if a State Party through declaration expresses its non-recognition of the competence of the Committee to undertake Inquiry in respect of the rights set forth in the CRC and its Optional Protocols, the Committee can not apply the Procedure.

The draft finally emphasized on the importance of international assistance and cooperation. The CRC Committee may, with the consent of the State party concerned, transmit its views and recommendations to United Nations Specialized agencies, funds and programs and other competent bodies that indicate a need for technical advice or assistance together with the State Party's observation and suggestions, if any, on those views or recommendations.

5.2. Recommendations

The overall assessment of the draft reveals that there are a number of issues of concern that States should reconsider in the upcoming session of the General Assembly of the UN. The draft, as it stands, lacks provisions that adequately promote the interests of children. The key Procedures of the draft, i.e., Individual Communications, Inter-state Communications and Inquiry Procedure have not made sufficient improvements from the existing precedent to incorporate provisions that take in to account the special status and vulnerabilities of children. Accordingly, in order to enhance the potential significance of the Optional Protocol, the writer strongly recommends the following elements to be addressed in the Optional Protocol, Rules of Procedure or practice of the CRC Committee.

- i. Under Individual communications, the Optional Protocol should clearly provide effective mechanisms that help to avoid the potential risk of manipulation of children by their representatives. In its current form, the draft has provided the requirement of securing the consent of the child/children being represented as a means of avoiding potential manipulation of children. The best interests principle is made to play insignificant role in this regard since the Committee will apply it only if it thinks that the consent of the child/children being represented is not established. This is not an appropriate safeguard to avoid potential manipulation of children. It also contradicts Article 3 of the CRC which requires that the best interests principle be a primary consideration in all actions concerning children. Accordingly, the Optional Protocol should be framed in a way that explicitly requires the CRC Committee to determine whether considering a communication is inline with the child/children's best interests. In determining this, however, the Committee should be required to take in to account the views of the child/children represented in accordance with their age and maturity. To this end, a separate provision may need to be articulated

under an Article dealing with Individual Communications having the following substantive content:

Where a communication is submitted on behalf of a child as defined in Article 1 of the convention, or group of children, the committee shall determine whether it is in the best interests of the child or group of children concerned. In doing so, however, the committee should take in to account the views of the child or group of children concerned, the views of the child/children being given due weight in accordance with their age and maturity.

- ii. Under admissibility rule, as considered in the discussion, it is provided that communications will not be rendered admissible if they are not made in writing. This is disadvantageous for children since they may not be capable of expressing their real feelings through a written communication. Thus, the Optional Protocol should permit other forms such as video and oral submissions. The draft under admissibility rule also provides that the exhaustion of domestic remedies rule will not apply if local remedies are unreasonably prolonged. The draft does not offer guidance on what unreasonably prolonged remedies are. Nevertheless, taking in to account the serious consequence that delayed remedies may pose on children, the CRC Committee should, in determining whether local remedies are unreasonably prolonged or not, apply the best interests principle. Furthermore, the provision included in the draft which requires communications to be submitted within one year after the exhaustion of domestic remedies should be eliminated. This is due to the fact that bringing communications, among others, requires knowledge about international Complaint Procedures and financial resource. Children in poor countries such as those in Africa are hardly acquainted with such knowledge and facilities. Consequently, the one year period may lapse without being used by children sustaining violations. To promote the effective use of the Procedure by children, therefore, the draft should either exclude the time frame or require

Communications to be submitted within reasonable period of time after the exhaustion of domestic remedies.

- iii. States Parties under the draft are permitted to formulate reservations in so far as such reservations are not against the object and purpose of the Optional Protocol. Perhaps, States Parties can not validly make reservations on any provision of the draft since the object and purpose of the Optional Protocol is, among others, to provide international Communications Procedure to children and address violations of children's rights. Nevertheless, States Parties may insist on making reservations and nullifying such reservations may cause delay in processing communications. To do a way with this potential risk, it is advisable to include a provision which prohibits reservations.
- iv. Interim Measures should have broad application. Since the very purpose of establishing Complaints System to children, among others, is to address violations of children's rights, the CRC Committee's role should not be limited to avoiding irreparable harms on children; it should be extended to avoiding any infliction of harm on children while the Committee is considering communications. Moreover, it is important to make Interim Measures legally binding. States Parties should be legally bound to take Interim Measures whenever the Committee requests them. On top of this, the Optional Protocol should set time frame under which States Parties should respond to requests for Interim Measures. In particular, most African states have been observed to ignore Interim Measures and the absence of legally binding provision and time frame within which States should respond to requests for Interim Measures may exacerbate the problem.
- v. The draft allows disclosure of the identity of complaining child/children to the public upon the fulfillment of consent of the concerned child/children. Nevertheless, relying solely on the views of the child/children may not adequately help to avoid the potential risk that may affect the child/children as a consequence of publicity.

- viii. The draft provided no clue regarding oral hearings. In order to give opportunity for the child/children to express their views on the case, the CRC Committee should, either in its Rules of Procedure or practice allow oral hearings.
- ix. Examination of communications is designed to be conducted in closed meetings. Accordingly, parties to the communication, their representatives, witnesses and experts will presumably attend the meetings. This may, however, result in lack of transparency and make *amicus curie* interventions very difficult. Hence, the CRC Committee should be permitted to hold public meetings if it is in the best interests of the child/children involved.
- x. In examining communications alleging violation of ESC rights, the CRC Committee will consider the 'reasonableness' of the steps taken by the respondent State for implementing the rights. In applying the standard, however, the Committee should devote its utmost effort to apply similar level of deference to State's discretion in adopting a range of policy measures for implementing ESC rights. This will enable it to come up with consistent outcomes and offer similar level of protection to children.
- xi. The inclusion of a procedure that helps to monitor follow up to the views and recommendations of the CRC Committee by State Parties is instrumental. Nonetheless, the six months period given for States Parties to submit written response on the measures taken and envisaged in relation to the views and recommendations of the Committee may entail unnecessary delay. In order to foster immediate implementation of the views and recommendations of the Committee and enable children to get timely redress for violations sustained by them, the Optional Protocol should stipulate three months period as a general rule and permit the submission of reports within six months in exceptional cases. Moreover, the experience of the existing UN treaties has shown that the modalities established in the draft that help to monitor follow-up to the views and recommendations of the CRC Committee by States Parties are not adequate. It is advisable that the Committee

should come up with additional mechanisms of supervising follow up to its views and recommendations by State Parties.

- xii. States should not be frustrated with the non-use of Inter-State Communications under the existing UN treaties. The trend in the regional human rights systems has clearly indicated the potential contribution of the procedure for the CRC. Hence, States should come up with noble ideas to promote the effective use of the Procedure by children rather than holding pessimistic approach towards the Procedure. To this effect, the opt-in possibility inserted in the draft should be eliminated. Like the CERD, accepting the competence of the CRC Committee to receive and consider Inter-State Communications should be made mandatory. This will enable to gain a twofold advantage: In addition to triggering the effective protection of children's rights through reinforcing the indivisibility, interdependence and interrelatedness of human rights affirmed in the Preamble, it also helps to avoid the potential discriminatory treatment of children located in States where Inter-State Communications are given recognition and in those States where Inter-State Communications are denied recognition through opt-in possibilities.
- xiii. In addition, States should put an endeavor to improve the potential significance of Inquiry Procedure in protecting the rights of children. The draft in its current format contains opt-out option which grants States Parties the possibility of avoiding responsibilities under Inquiry Procedure. This may weaken the role to be played by the Procedure. For similar reasons mentioned above for Inter-State Communications, hence, States should revisit the provisions of the draft dealing with Inquiry Procedure and exclude opt-out possibilities.
- xiv. The Optional Protocol should include Collective Communications. The Procedure may bring immense contribution in protecting the rights of children. There is no victim requirement in the Procedure and may help to address flagrant violations of children's rights without exposing children in to any risk of revictimization. It will

also enable children lacking the necessary facilities to bring Individual Communications like those located in Africa to enforce their rights being represented by NGOs, NHRIs and Ombudsman Institutions.

- xv. Finally, it should be underscored that the Optional Protocol should provide for the establishment of new funds for the purpose of assisting States in the implementation of the recommendations of the CRC Committee. This is especially crucial for third world States like those found in Africa where majority of States have limited resource to give effect to the recommendations of the Committee.

BIBLIOGRAPHY

I. Books

- Alfredsson Gudmundur, Grimheden Jonas and et al,(eds.)(2001) *International Human Rights Monitoring Mechanisms: Essays in Honor of Jakob Th. Möller*,(Martinus Nijhoff, Leiden. Boston)
- Black's Law Dictionary (8th ed., 2004)
- Clapham Andrew(2000), 'UN Human Rights Reporting Procedures: An NGO Perspective', in: Philip Alston and James Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, Cambridge),
- Crawford James. (2000), 'The UN Human Rights Treaty System: A system in crisis?', in: Philip Alston and James Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, Cambridge),
- Davidson Scott (2002), 'Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee' in Grant Huscroft and Paul Rishworth (eds.), *Litigating Rights Perspectives from Domestic and International Law* (Oxford - Portland Oregon)
- De Schutter, Olivier (2010) 'International Human Rights Law, Cases, Materials, Commentary' (Cambridge University Press, Newyork)
- Freeman Michael (2007), 'A Commentary on the United Nations Convention on the Rights of the Child: Article 3 The Best Interests of the Child', (Martinus Nijhoff, Leiden. Boston)
- Jayawickrama Nihal (2002), 'The Judicial Application of Human Rights Law National, Regional and International Jurisprudence (Cambridge University Press, New York)
- Joseph Sarah, Benninger-Budel Carin and et al 'A Handbook on the Individual Communications Procedures of the UN Treaty Bodies'(OMCT Handbook Series V.4)

- Lansdown Gerison (2000), 'The Reporting Process under the Convention on the Rights of the Child', in Philip Alston and James Crawford (eds.) *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, Cambridge)
- Sep.lveda Magdalena, van Banning Theo and et al(2004), 'Universal and Regional Human Rights Protection: Cases and Commentaries' (University for Peace, Costa Rica)
- Smith Lucy (2009), 'Monitoring the CRC', in (eds), Alfredsson Gudmundur, Grimheden Jonas and et al *International Human Rights Monitoring Mechanisms Essays in Honor of Jakob Th. Möller*, (Martinus Publications, Leiden. Boston),
- Steiner Henry (2000): 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee ?', in Philip Alston and James Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, Cambridge),
- Verheyde Mieke and Goedertier Geert (2006), '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, Leiden. Boston)
- Viljoen Frans (2008), '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, New York)

II. Articles

- Chapman Andrey (1996), 'A "violation Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' *18 Human Rights Quarterly*1
- Chenwi Lilian (2009), 'Correcting the historical asymmetry between rights: The Optional Protocol to the International Covenant on Economic Social and Cultural Rights' *9 African Human Rights Law Journal*

- Churchil Robin and Khaliq Urfan (2004), 'The Collective Communications Procedure of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' 15 *EJIL* (417-456),
- Courtis Christian and Sepúlveda Magdalena (2009), 'Are Extra-territorial Obligations Reviewable under the Optional Protocol to the ICESCR?' 27 *Nordic Journal of Human Rights* 1,
- Cullen Holly (2009), 'The Collective Communications Procedure of the European Social Charter: Interpretative Methods of the European Committee of Social Right' *Human Rights Law Review*
- Cynthia Price, Hart Stuart and et al,(1996) 'Monitoring the United Nations Convention on the Rights of the Child: The Challenge of Information Management', *Human Rights Quarterly*
- Dawit Benyam (2008), 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *SAPR/PL*
- Doek Jaap (2003), 'The Protection of Children's Rights and the United Nations Convention on the Rights of the Child: Achievements and Challenges' 22 *Saint Louis University Public Law Review* 235
- Elsheikh Badawi (1989), 'The African Commission on Human and Peoples' Rights: Prospects and problems', 7 *Netherlands Quarterly of Human Rights* 281
- Griffey Brian (2011), 'The' reasonableness' test: Assessing violations of state obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' 11 *Human Rights Law Review* 2
- Gumeddze Sabelo(2003), Bringing Communications before the African Commission on Human and Peoples' Rights' 3 *African Human Rights Law Journal*
- Heffernan Liz (1997), ' A Comparative View of Individual Petition Procedures under the European Convention on Human Rights and the International Covenant on Civil and Political Rights' 19.1 *Human Rights Quarterly* 78-112,

- Kuashigah Kofi(2002), 'The African Charter on Human and Peoples' Rights: Towards a more Effective Reporting Mechanism', *2 African Human Rights Law Journal 2*,
- Langford Malcolm (2009), 'Closing the Gap? An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *27 Nordic Journal of Human Rights1*
- Langford Malcolm and Clark Sevda (2010), 'The New Kid on the Block: A Complaints Procedure for the Convention on the Rights of the Child' *28 Nordic Journal of Human Rights 2*
- Lee Yanghee(2010), 'Communications Procedure under the Convention on the Rights of the Child:3rd Optional Protocol' *18 International Journal of Children's Rights*
- Lilich, Richard B.,(1991), 'International Human Rights Problems of Law, Policy and Practice,(Little, Brown and Company)
- Price Cynthia and Kilbourne Susan(1998), 'Jurisprudence of the Committee on the Rights of the Child: A Guide for Research and Analysis' *19 Michigan Journal of International Law 633*,
- Porter Bruce (2009), 'The Reasonableness of Article 8(4)- Adjudicating Claims From The Margins' *27 Nordic Journal of Human Rights*,
- Stahl Rebecca (2007), "'Don't forget about me": Implementing Article 12 of the United Nations Convention on the Rights of the Child' *24 Arizona Journal of International and Comparative Law 803*,
- Todres J (1998). 'Emerging limitations on the rights of the child: The UN Convention on the Rights of the Child and its early case law' *30 Columbia Human Rights Law Review 159*.
- Ursula Kilkelly 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001), *23 Human Rights Quarterly2*,

III. Other Materials

- African Union Commission(2010), 'The State of Africa's Children Report'
- General Comment No. 5 (2003), 'General measures of implementation of the Convention on the Rights of the Child'
- Langford Malcolm and Clark Sevda (2011), 'Complaints Procedure for the Convention on the Rights of the Child: Commentary on the Second Draft' (Norwegian Center for Human Rights)
- Lee Yanghee(2008), '18 candles', in Jane Connors, Jean Zermatten and Anastasia Panayotidis (eds.), *18 Candles, The Convention on the Rights of the Child Reaches Majority* (Institute international des droits de l'enfant (IDE))
- Lee Yanghee (2009), 'Reasons and Timing for a Communications Procedure under the Convention on the Rights of the Child', (Paper Presented at the First Session of the OEWG,), UN.Doc. A/HRC/WG.7/1/CRP.6,
- Lembrechts Sara (2011), 'Translating Children's Rights from Principles to Practice: An Evaluation of the Third Optional Protocol to the Convention on the Rights of the Child Providing a Communications Procedure'(LLM Honors Dissertation, Maastricht University Faculty of Law)
- OHCHR, Fact Sheet No.7/Rev.1,
- OHCHR, Fact Sheet No.10 (Rev.1), 'The Rights of the Child'
- The African Child Policy Forum (2007), 'In the Best Interests of the Child: Harmonizing Laws in Eastern and southern Africa'
- UNICEF (2003), 'Guide to the Optional Protocol on the Involvement of Children in Armed Conflict'
- UNICEF, Fact Sheet: The Committee on the Rights of the Child
- UNICEF (2008), 'Handbook on Legislative Reform: Realizing Children' Rights',(Vol.1)

- UNICEF (2009), " 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'
- UNICEF (2009), 'Hand Book on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography'
- U.N (2011), 'The Millennium Development Goals Report'

IV. Internet Sources

- CRIN, 'Meeting of the UN Working Group for the Communications Procedures, December 2009' (Child Rights Information Network, January 2010), Available at <http://www.crin.org/docs/OP_CRC_WG_Meeting_Dec2009.pdf>,accessed on 15/05/2011
- Draft Submission to the Open-ended Working Group considering the elaboration of an Optional Protocol to provide a Communications Procedure for the CRC, Available at <<http://www.crin.org>> accessed on 05/04/2011
- Newell Peter, 'Collective Communications: An Essential Element In The New Optional Protocol For The Convention On The Rights Of The Child, Available at <http://www2.ohchr.org/english/bodies/hrcouncil/OEWG/index.htm> accessed on 10/03/2011
- NGO Group for the CRC, Campaign for a new Optional Protocol to the CRC establishing a Communications Procedure (November 2010), Available at <<http://www.edocfind.com>> accessed on 34/04/2011
- NGO group for the CRC, 'New Optional Protocol on a Communications Procedures under the Convention on the Rights of the Child', Available at www.crin.org.accessed on 04/07/2011
- NGO Group for the CRC 'Communications Procedure for the Convention on the Rights of the Child'(2009),Available at <<http://www.crin.org>> accessed on 05/04/2011

- NGO Working Group for the CRC Complaints Mechanism, 'Complaints Mechanism: Articles 4,5 and 6' Available at http://www.crin.org/law/CRC_complaints
- 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
- OHCHR, 'Frequently asked Questions about Treaty Body Complaints Procedure' Available at http://www.ohchr.org/english/bodies/petition/docs/23_faq.pdf, accessed on 23/03/2011.
- Symonides Janusz, 'Access of Individuals to International Tribunals and International Human Rights Complaints Procedures', Available at < <http://www.edocfind.com>>, accessed on 08/04/2011
- The Cradle-The Children Foundation, Available at <<http://www.edocfind.com>> accessed on 09/04/2011
- UNICEF (2003) The Millennium Development Goals: They are about Children' Available at www.unicef.org ,accessed on 15/08/2011
- Vuckovic Sahovic Nevena(2009), 'Feasibility of a communication procedure under the Convention on the Rights of the Child' Available at <[http:// www2.ohchr.org/english/bodies/hrcouncil/OEWG/2ndsession.htm](http://www2.ohchr.org/english/bodies/hrcouncil/OEWG/2ndsession.htm),> accessed on 11/04/2011
- Watt Patricia, 'Monitoring human rights treaties', Available at <<http://www.edocfind.com>.> accessed on 09/04/2011

V. International Instruments and other UN Documents

- African Charter on Human and Peoples' Rights
- African Charter on the Rights and Welfare of the Child
- Convention on the Rights of the Child
- American Convention on Human Rights
- Declaration of the Rights of the Child

- European Convention on Human Rights and Fundamental Freedoms
- Geneva Declaration of the Rights of the Child
- 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)
- International Covenant on the Elimination of all Forms of Racial Discrimination
- International Convention for the Protection of All Persons from Enforced Disappearance
- International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Optional Protocol to the International Covenant on Civil and Political Rights (first Optional protocol),
- Optional protocol to the International Covenant on Economic, Social and Cultural Rights
- Optional Protocol to the International Convention on the Elimination of all forms of Discrimination against Women
- Optional Protocol to the International Convention on the Rights of Persons with Disabilities
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child pornography
- Vienna Convention on the Law of Treaties of 23 May 1969
- ECOSOC Res. 1503(XLVIII)
- ECOSOC Res. 2000/3
- U.N.Doc. A/HRC/WG.7/2/3
- U.N Doc. CRC/C/4, 1991),

- U.N. Doc A/HRC/WG.7/1/CRP.2
- U.N Doc.CRC/C/GC/12
- U.N. Doc. CCPR/C/21?Rev.1/Add 6.4
- U.N.Doc. A/HRC/WG.7/1/CRP.5)
- U.N Doc. A/HRC/WG.7/1/CRP.2
- U.N. Doc. A/HRC/WG.7/2/2.
- U.N. Doc. A/HRC/WG.7/2/4.
- U.N. Doc. A/HRC/17/36
- U.N.Doc. A/HRC/13/43
- U.N. Doc. E/C.12/2007/1

VI. Case Law

i. African Committee of Experts on the Rights and welfare of the Child

- *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)

ii. African Commission on Human and Peoples' Rights

- *Democratic Republic of Congo (DRC) v. Burundi, Rwanda and Uganda*, (Communication 227/99)
- *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, (2000) AHRLR 212 (ACHPR 1998),
- *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000)
- *John K. Modise v. Botswana*, (Communication No. 97/93)
- *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998)

iii. Human Rights Committee

- *Brough v Australia*, (Communication 1184/2003)

- *Gobin v. Mauritius* (Communication 787/97)
- *Kennedy v. Trinidad & Tobago*, (Communication No. 845/1999)
- *Kenya Human Rights Commission v Kenya* (communication No,135/94)
- *Mekonga V Cameroon* (Communication No.59/91)
- *Tadman et al. v. Canada*, (Communication No. 816/1998)

Annex**Draft optional protocol to the Convention on the Rights of the Child to provide a communications procedure**

The States parties to the present Protocol,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Noting that the States parties to the Convention on the Rights of the Child (hereinafter referred to as the Convention) recognize the rights set forth in it to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status,

Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms,

Reaffirming also the status of the child as a subject of rights and as a human being with dignity and with evolving capacities,

Recognizing that children's special and dependent status may create real difficulties for them in pursuing remedies for violations of their rights,

Considering that the present Protocol will reinforce and complement national and regional mechanisms allowing children to submit complaints for violations of their rights,

Recognizing that the best interests of the child should be a primary consideration to be respected in pursuing remedies for violations of the rights of the child, and that such remedies should take into account the need for child-sensitive procedures at all levels,

Encouraging States parties to develop appropriate national mechanisms to enable a child whose rights have been violated to have access to effective remedies at the domestic level,

Recalling the important role that national human rights institutions and other relevant specialized institutions, mandated to promote and protect the rights of the child, can play in this regard,

Considering that, in order to reinforce and complement such national mechanisms and to further enhance the implementation of the Convention and, where applicable, the Optional Protocols thereto on the sale of children, child prostitution and child pornography and on the involvement of children in armed conflict, it would be appropriate to enable the Committee on the Rights of the Child (hereinafter referred to as the Committee) to carry out the functions provided for in the present Protocol,

Have agreed as follows:

Part I

General provisions

Article 1

Competence of the Committee on the Rights of the Child

1. A State party to the present Protocol recognizes the competence of the Committee as provided for by the present Protocol.
2. The Committee shall not exercise its competence regarding a State party to the present Protocol on matters concerning violations of rights set forth in an instrument to which that State is not a party.
3. No communication shall be received by the Committee if it concerns a State that is not a party to the present Protocol.

Article 2

General principles guiding the functions of the Committee

1. In fulfilling the functions conferred on it by the present Protocol, the Committee shall be guided by the principle of the best interests of the child. It shall also 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.

Article 3

Rules of procedure

1. The Committee shall adopt rules of procedure to be followed when exercising the functions conferred on it by the present Protocol. In doing so, it shall have regard, in particular, for article 2 of the present Protocol in order to guarantee child-sensitive procedures.
2. The Committee shall include in its rules of procedure safeguards to prevent the manipulation of the child by those acting on his or her behalf and may decline to examine any communication that it considers not to be in the child's best interests.

Article 4

Protection measures

1. A State party shall 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 the present Protocol.
2. The identity of any individual or group of individuals concerned shall not be revealed publicly without their express consent.

Part II

Communications procedure

Article 5

Individual communications

1. Communications may be submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a State party, claiming to be victims of a violation by that State party of any of the rights set forth in any of the following instruments to which that State is a party:

- (a) The Convention;
- (b) The Optional Protocol to the Convention on the sale of children, child prostitution and child pornography;
- (c) The Optional Protocol to the Convention on the involvement of children in armed conflict.

2. 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.

Article 6

Interim measures

1. 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.

2. Where the Committee exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the communication.

Article 7

Admissibility

1. The Committee shall consider a communication inadmissible when:

- (a) The communication is anonymous;
- (b) The communication is not in writing;
- (c) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention and/or the Optional Protocols thereto;
- (d) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
- (e) All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief;

(f) The communication is manifestly ill-founded or not sufficiently substantiated;

(g) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State party concerned, unless those facts continued after that date;

(h) The communication is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit.

Article 8

Transmission of the communication

1. Unless the Committee considers a communication 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.

2. The State party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have provided. The State party shall submit its response as soon as possible and within six months.

Article 9

Friendly settlement

1. 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.

2. An agreement on a friendly settlement reached under the auspices of the Committee closes consideration of the communication under the present Protocol.

Article 10

Consideration of communications

1. The Committee shall consider communications received under the present Protocol as quickly as possible, in the light of all documentation submitted to it, provided that this documentation is transmitted to the parties concerned.

2. The Committee shall hold closed meetings when examining communications received under the present Protocol.

3. Where the Committee has requested interim measures, it shall expedite the consideration of the communication.

4. When examining communications alleging violations of economic, social or cultural rights, the Committee shall consider the reasonableness of the steps taken by the State party in accordance with article 4 of the Convention. In doing so, the Committee shall bear in mind that the State party may adopt a range of possible policy measures for the implementation of the economic, social and cultural rights in the Convention.

5. After examining a communication, the Committee shall, without delay, transmit its views on the communication, together with its recommendations, if any, to the parties concerned.

Article 11

Follow-up

1. The State party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee a written response, including information on any action taken and envisaged in the light of the views and recommendations of the Committee. The State party shall submit its response as soon as possible and within six months.
2. The Committee may invite the State party to submit further information about any measures the State party has taken in response to its views or recommendation or implementation of a friendly settlement agreement, if any, including as deemed appropriate by the Committee, in the State party's subsequent reports under article 44 of the Convention, article 12 of the Optional Protocol on the sale of children, child prostitution and child pornography or article 8 of the Optional Protocol on the involvement of children in armed conflict, where applicable.

Article 12

Inter-State communications

1. A State party to the present Protocol may, at any time, declare that it recognizes the competence of the Committee to receive and consider communications in which a State party claims that another State party is not fulfilling its obligations under any of the following instruments to which the State is a party:
 - (a) The Convention;
 - (b) The Optional Protocol to the Convention on the sale of children, child prostitution and child pornography;
 - (c) The Optional Protocol to the Convention on the involvement of children in armed conflict.
2. The Committee shall not receive communications concerning a State party that has not made such a declaration or communications from a State party that has not made such a declaration.
3. The Committee shall make available its good offices to the States parties concerned with a view to a friendly solution of the matter on the basis of the respect for the obligations set forth in the Convention and the Optional Protocols thereto.
4. A declaration under paragraph 1 of the present article shall be deposited by the States parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under the present article; no further communications by any State party shall be received under the present article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State party concerned has made a new declaration.

Part III

Inquiry procedure

Article 13

Inquiry procedure for grave or systematic violations

1. If the Committee receives reliable information indicating grave or systematic violations by a State party of rights set forth in the Convention or in the Optional Protocols thereto on the sale of children, child prostitution and child pornography or on the involvement of children in armed conflict, the Committee shall invite the State party to cooperate in the examination of the information and, to this end, to submit observations without delay with regard to the information concerned.
2. Taking into account any observations that may have been submitted by the State party concerned, as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State party, the inquiry may include a visit to its territory.
3. Such an inquiry shall be conducted confidentially, and the cooperation of the State party shall be sought at all stages of the proceedings.
4. After examining the findings of such an inquiry, the Committee shall transmit without delay these findings to the State party concerned, together with any comments and recommendations.
5. The State party concerned shall, as soon as possible and within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.
6. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2 of the present article, the Committee may, after consultation with the State party concerned, decide to include a summary account of the results of the proceedings in its report provided for in article 16 of the present Protocol.
7. Each State party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in the present article in respect of the rights set forth in some or all of the instruments listed in paragraph 1.
8. Any State party having made a declaration in accordance with paragraph 7 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General of the United Nations.

Article 14

Follow-up to the inquiry procedure

1. The Committee may, if necessary, after the end of the period of six months referred to in article 13, paragraph 5, invite the State party concerned to inform it of the measures taken and envisaged in response to an inquiry conducted under article 13 of the present Protocol.
2. The Committee may invite the State party to submit further information about any measures that the State party has taken in response to an inquiry conducted under article 13, including as deemed appropriate by the Committee, in the State's party subsequent reports under article 44 of the Convention, article 12 of the Optional Protocol to the Convention on

the sale of children, child prostitution and child pornography or article 8 of the Optional Protocol to the Convention on the involvement of children in armed conflict, where applicable.

Part IV

Final provisions

Article 15

International assistance and cooperation

1. The Committee may transmit, with the consent of the State party concerned, to United Nations specialized agencies, funds and programmes and other competent bodies its views or recommendations concerning communications and inquiries that indicate a need for technical advice or assistance, together with the State party's observations and suggestions, if any, on these views or recommendations.

2. The Committee may also bring to the attention of such bodies, with the consent of the State party concerned, any matter arising out of communications considered under the present Protocol that may assist them in deciding, each within its field of competence, on the advisability of international measures likely to contribute to assisting States parties in achieving progress in the implementation of the rights recognized in the Convention and/or the Optional Protocols thereto.

Article 16

Report to the General Assembly

1. The Committee shall include in its report submitted every two years to the General Assembly in accordance with article 44 (5) of the Convention a summary of its activities under the present Protocol.

Article 17

Dissemination and information on the Optional Protocol

1. Each State party undertakes to make widely known and to disseminate the present Protocol and to facilitate access to information about 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.

Article 18

Signature, ratification and accession

1. The present Protocol is open for signature to any State that has signed, ratified or acceded to the Convention or either of the first two Optional Protocols thereto.

2. The present Protocol is subject to ratification by any State that has ratified or acceded to the Convention or either of the first two Optional Protocols thereto. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention or either of the first two Optional Protocols thereto.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General.

Article 19

Entry into force

1. The present Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or instrument of accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

Article 20

Violations occurring after the entry into force

1. The Committee shall have competence solely in respect of violations by the State party of any of the rights set forth in the Convention and/or the first two Optional Protocols thereto occurring after the entry into force of the present Protocol.
2. If a State becomes a party to the present Protocol after its entry into force, the obligations of that State vis-a-vis the Committee shall relate only to violations of the rights set forth in the Convention and/or the first two Optional Protocols thereto occurring after the entry into force of the present Protocol for the State concerned.

Article 21

Amendments

1. Any State party may propose an amendment to the present Protocol and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States parties with a request to be notified whether they favour a meeting of States parties for the purpose of considering and deciding upon the proposals. In the event that, within four months of the date of such communication, at least one third of the States parties favour such a meeting, the Secretary-General shall convene the meeting under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States parties present and voting shall be submitted by the Secretary-General to the General Assembly for approval and, thereafter, to all States parties for acceptance.
2. An amendment adopted and approved in accordance with paragraph 1 of the present article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States parties that have accepted it.

Article 22

Denunciation

1. Any State party may denounce the present Protocol at any time by written notification to the Secretary-General of the United Nations. The denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under articles 5 or 12 or any inquiry initiated under article 13 before the effective date of denunciation.

Article 23

Depositary and notification by the Secretary-General

1. The Secretary-General of the United Nations shall be the depositary of the present Protocol.
2. The Secretary-General shall inform all States of:
 - (a) Signatures, ratifications and accessions under the present Protocol;
 - (b) The date of entry into force of the present Protocol and of any amendment thereto under article 21;
 - (c) Any denunciation under article 22.

Article 24

Languages

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
 2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States.
-