

The New Kid on the Block

A Complaints Procedure for the Convention on the Rights of the Child

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I. Introduction

The Convention on the Rights of the Child is the only core international human rights treaty to lack a complaints mechanism. Unlike the other eight treaties falling in this category,¹ there is no protocol or other procedure that allows allegations of concrete violations to be heard by its oversight body. In the last eighteen months, the UN Human Rights Council has moved at remarkable speed in seeking to fill this institutional lacuna.²

On 17 June 2009, the Council established an Open-ended Working Group for this purpose. Its mandate was to 'explore the possibility of elaborating an optional protocol to the Convention on the Rights of the Child to provide a

1 See Figure 1 and text to n 23.

2 At its 11th session, on 17 June 2009, the Human Rights Council adopted resolution A/HRC/RES/11/1 by which it decided to establish an Open-ended Working Group to explore the possibility of elaborating an optional protocol to the Convention on the Rights of the Child to provide a communications procedure complementary to the reporting procedure under the Convention. See preambular paragraphs.

communications procedure'.³ The Working Group first met in December 2009 to discuss the merits of such a mechanism which attracted the attendance of more than one hundred governments in addition to UN agencies and numerous civil society organisations.

With the objective of critically focusing on the justifications for the protocol, this article was prepared and publicly presented after the first session. Since then the Working Group has accelerated its work. With the support of the Council,⁴ the Chair produced the text of a draft protocol for discussion in December 2010. We have analysed this text elsewhere⁵ but believe, it is worth maintaining a focus on the rationalisations for and against the protocol. They remain highly relevant for ongoing drafting choices and the eventual discussions over ratification.

The paper proceeds by providing in Section II some historical background to the CRC and the creation of the Working Group. Section III analyses the 'pros' and 'cons' of a complaints procedure for children by sifting through the arguments raised in the Working Group. The final section discusses some of the problematic ways in which the discussion is being framed and comments on key issues that need to be addressed in the drafting, including lessons from other international processes and the growing practice of children rights litigation.

II. Background to Working Group

The Convention on the Rights of the Child

Children's rights have been subject to a series of cascading legal developments throughout the 20th Century that aimed at bringing children out of the shadows of 'historical diplomatic invisibility'.⁶ The 1924 Declaration of the Rights of the Child was the first international expression of rights owed to children although its language is couched in a welfarist rather than a rights discourse. In parallel with the post-Second World War developments in international human rights law, the

3 Ibid [1].

4 UNHRC, Res 13/3 (14 April 2010) UN A/HRC/RES/13/3.

5 M Langford and S Clark, 'Last But Not Least: A First Look at the Draft Complaints Procedure for the Convention on the Rights of the Child' (2010) Working Paper <<http://www.jus.uio.no/smr/english/people/aca/malcolm/index.html>>.

6 G Van Bueren, *The International Law on the Rights of the Child* (Nijhoff, Dordrecht 1995)

1959 Declaration of the Rights of the Child⁷ represented a paradigmatic shift in thinking about children's rights by adopting the language of entitlement. As the 'conceptual parent' of the CRC, the Declaration paved the way for the drafting of the CRC between 1978 and 1989.

The CRC is commonly hailed for its embrace of the full range of human rights (civil, political, economic, social and cultural)⁸ and its ratification record: 'no other United Nations human rights treaty [has] entered into force so quickly and been ratified by so many states in such a short period of time.'⁹ The United States is now the only member of the UN that has not ratified the Convention or publicly evinced an intention to do so.¹⁰ The CRC and its two protocols on child soldiers, and the sale of children, child prostitution and child pornography have been heavily promoted by both UNICEF and children's organizations, and integrated in their activities to a certain degree.

The extent to which the ratification CRC has impacted the realization of children's rights is the subject of an emerging field of research. While quantitative evaluations of the effects of human rights treaties is a contested field,¹¹ Beth Simmons has demonstrated that improvements in children's rights are partly correlated with ratification of the CRC and its protocols. After adjusting for other possible causes, she finds that levels of child labour and numbers of child soldiers and, to much a lesser extent, unimmunized children fell after ratification, particularly in middle-income countries.¹² She also points to qualitative evidence of the catalytic role of the Convention on civil society mobilisation and the development of new legal frameworks.¹³ In addition, one can witness the *destabilising* effect of the principle of the 'best interests of the child' as lawmakers and bureaucrats are required to consider the children's interest more deeply. For example, in areas such as asylum law, the CRC has had a particular influence with national courts.

7 In contrast to the Universal Declaration of Human Rights, this was adopted by the General Assembly of the UN on 20 November 1959 without abstention.

8 G Van Bueren, 'Committee on the Rights of the Child: Overcoming Inertia in this Age of No Alternatives' in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, Cambridge 2008).

9 LJ LeBlanc, *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights* (University of Nebraska Press, Lincoln, Neb. 1995).

10 Somalia expressed its intention to ratify; see —, 'Somalia to Join Child Rights Pact: UN' Reuters (20 November 2009) <<http://af.reuters.com/article/topNews/idAFJ0E5AJ0IT20091120>>.

11 E Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights' (2005) 49 *Journal of Conflict Resolution*, 925.

12 B Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, New York 2008) 307.

13 *Ibid.*

A number have found that immigration authorities must take into account the CRC in administrative decisions over deportation.¹⁴ However, the global situation of children is not something the international community can be particularly content with. Amidst the ongoing efforts in the field, the importance of providing children with legal remedies has emerged.

Calls for a Complaints Procedure

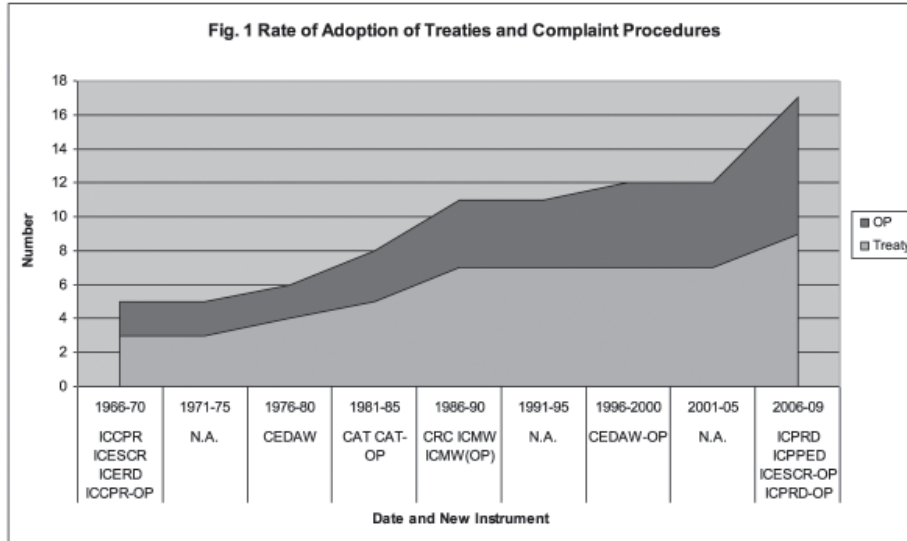
On the adoption of the Convention in 1989, no procedure was included for individuals to submit complaints. During the drafting process, the NGO Ad Hoc Group on the CRC had attempted to persuade states of the advantages of an individual petition system. Nevertheless, due to the ‘lack of state support the proposals were never formally tabled and discussed in the sessions of the Working Group.’¹⁵ The bulk of the discussion was instead focused on whether a supervisory committee was needed and what form the reporting procedure should take, if any.¹⁶ The issue did surface at a very late stage but was of little consequence: in 1988 during the Technical Review process, that the Legal Counsel to the Working Group argued that, ‘The draft convention should include an article of the settlement of disputes. Such a provision would be very useful, for such a new subject as this one’.¹⁷

14 The Canadian Supreme Court stated that, ‘The principles of the Convention [CRC] and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H[umanitarian] & C[ompassionate Review] power’: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [71]. See also *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (New Zealand) and *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20; (1995) 183 CLR 273 (Australia). For an article analysing all three decisions, see S Mykyta, ‘Encouraging a Culture of Justification: A Comparison of *Teoh* and *Baker*’ (2003) 8(2) Deakin Law Review, 367.

15 Van Bueren (n 6) 389.

16 See extracted records and summaries in UN, *Legislative History of the Convention on the Rights of the Child* (United Nations, Office of the High Commissioner for Human Rights 2007) 815.

17 UN Doc E/CN.4/1989/WG.1/CRP1 [5] reprinted in (n 16) 897.



Undoubtedly, this was not the final word on the matter. There was nothing to prevent the re-emergence of a demand for a complaints mechanism. This was perhaps inevitable given the subsequent acceleration in adoption of communication procedures for other core human rights treaties (see Figure 1)¹⁸. In 2000, the German NGO *Kindernothilfe* began lobbying for an optional protocol and by June 2008, more than 400 organisations across the world had joined an international campaign.¹⁹ In the same month, the Committee on the Rights of the Child (‘CRC Committee’) signalled its backing. Yanghee Lee, Chair of the Committee, declared that the ‘Time has come’ for a protocol. According to her, the Committee had ‘weighed the pros and cons’ and was ‘now inviting all stakeholders to come forth

18 The other eight of the nine core international human rights treaties to have individual complaints mechanisms are the Optional Protocol to the International Covenant on Civil and Political rights (ICCPR); Optional Protocol to the Convention on the elimination of Discrimination against Women (CEDAW); Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Optional Protocol to the Convention on the Rights of Persons with Disabilities (CRPD); and the International Convention for the Protection of All Persons from Enforced Disappearance (ICAED); the Convention on Migrant Workers (ICMRW) and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR). The latter two are not yet in force and will become operative when 10 states parties have made the necessary declarations.

19 CRIN, ‘Complaints Mechanism: Update and Next Steps’ (*Child Rights Information Network*, 3 July 2009) <<http://www.crin.org/resources/infoDetail.asp?ID=20291>>. The number of organizations is now 629.

and seriously work together on the drafting process'.²⁰ UNICEF expressed its support if governments were willing to take the lead while the European Network of Ombudspersons for Children (ENOC) called for the establishment of the communications procedure as it would enhance the status and authority of the CRC.²¹

The choice of date for the launch of campaign was strategic. The UN Human Rights Council was just concluding its negotiations over a similar protocol to ICESCR opening up the political space for new initiatives. Children's organizations energetically engaged the Council and states such as France and Slovenia responded to the demand for a working group by leading an initiative for a resolution. In record-breaking time, the Council set the wheels in motion for the creation of the 'Open-Ended' Working Group with a resolution in June 2009.²²

The Working Group held its first session in Geneva six months later.²³ The atmosphere of this meeting was largely positive and States were generally receptive to the idea. The Chair's interpretation of proceedings was that there was 'strong and unanimous support' for the the elaboration of the necessary OP, as evidenced by the fact that 'many States indicated their commitment to this goal,' with no state having voiced opposition to the proposal.²⁴ During the session, many states took the floor to argue that children had waited long enough, that children's rights are unique and require a unique procedure, that children's rights must be protected nationally and internationally and that a protocol will facilitate a stronger normative framework.²⁵ While the Chairperson did not secure a resolution at the meeting he approached the Human Rights Council for a mandate to commence drafting.²⁶ This was achieved in the weeks afterwards. The second session was held in December 2009 to discuss a draft protocol. While this meeting revealed some more sceptical voices, the focus had clearly turned to the scope and reach of the protocol.

20 CRIN, 'Communications Procedure: Committee on the Rights of the Child Endorses Campaign', (*Child Rights Information Network*, 23 June 2008) <<http://www.crin.org/resources/infoDetail.asp?ID=17602&flag=news>>.

21 Ibid.

22 Ibid [1].

23 UNHRC, '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 a Communications Procedure' (21 January 2010) UN Doc A/HRC/13/43.

24 CRIN, 'Meeting of the UN Working Group for the Communications Procedure, December 2009' (*Child Rights Information Network*, January 2010) <http://www.crin.org/docs/OP_CRC_WG_Meeting_Dec2009.pdf>.

25 Ibid. See for example, the statements of representatives from the Maldives, Slovenia, Portugal, and Switzerland.

26 CRIN (n 24).

III. Assessing the Justification for a Protocol

The discussions in the first session of the Working Group provide a useful point of departure in analysing the need for an optional protocol.²⁷ The arguments raised by states and other participants touch on the constituent elements for public policy in terms of normative justifications, schematic design and consequentialist analysis. However, the structure of the Working Group session was confusingly grouped around a series of open, closed and overlapping questions: (i) Reasons and timing, (ii) Existing mechanisms, (iii) Efficiency in protection, (iv) Unique rights, and (v) Implications of a procedure. We will therefore divide the analysis according to the four core arguments (and their counter-arguments) for the protocol that emerged in the discussion, namely that:

1. Children have a right to an international remedy for violations of their rights;
2. An optional protocol would improve the existing system of international complaints mechanisms for children;
3. Children's rights would be better protected in national law and practice; and
4. The procedure is easily implementable.

It is nonetheless useful to keep a theoretical perspective in mind when considering the claims and proposals for specific text. Criteria developed in the field of international regime design may be of assistance.²⁸ If we adopt a broad understanding of normative legitimacy, we could posit that the creation of any new international procedure not only requires *legal legitimacy* in terms of state consent to any treaty or protocol, but also:

27 One could also begin with various normative theories which start from some form of ideal political design (from republicanism through to liberal contractualism and legal cosmopolitanism). While this starting point may not necessarily be particularly helpful in concrete policy discussions it could help identify underlying philosophical premises, which are often a departure point for many actors in a debate.

28 See for example, D Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *American Journal of International Law* 596; G Ulfstein, 'Do We Need a World Court of Human Rights?', in O Engdahl and P Wrangé (eds), *The Law as it was and the Law as it Should Be* (2008), at 261; A Follesdal, 'The Legitimacy Deficits of the European Union' (2006), 14(4) *Journal of Political Philosophy* 441; A Buchanan, and R Keohane, 'The Legitimacy of Global Governance Institutions' in RaVR Wolfrum (ed) *Legitimacy in International Law* (Springer, Berlin 2008).

- *democratic* legitimacy (e.g., sufficient participation of both States and victims, possibly together with some principle of subsidiarity);
- *procedural* legitimacy (ensures transparency and adjudicators have sufficient expertise etc); and
- *output* legitimacy (the policy or mechanism is able to effectively address a problem in an efficient manner compared to alternatives).

In the case of international regimes whose decisions are binding, greater levels of justification are needed for each of these elements. In this case, we are considering a proposal for a *quasi-judicial* procedure which means one's expectations for each should be softened.

Before turning to the debate, it is important to define more precisely what group we are talking about. Who are 'children' for the purposes of an optional protocol? Observing the discourse of the Working Group, it is surprising to discover a largely non-temporal picture of childhood. Children are constantly referred to in the present tense. While this point may appear semantic or pedantic, the consequences are significant. For instance, an early draft of a possible protocol by NGO groups limits the right of communication to 'children' which would, on its face, exclude adults who had faced violations of their rights as children. Yet, the concept of childhood is highly diachronic in construction: the composition of the group 'children' changes every day. New individuals join at birth and others leave as they reach 18 years. While the memberships of other groups are somewhat in flux – for example, through changed self-identification or birth or death – childhood is explicitly defined by temporality and changes in its composition are swift. In Section IV, we therefore argue that for the optional protocol to achieve legitimacy, it would need to take a historical perspective of childhood and include adults who have suffered violations as children. We note that this view has been now accepted after our public presentations of this paper, and it is this understanding of childhood that we will adopt for the analysis.

Children Have a Right to an International Remedy

Many delegates pointed to the inherent right of children to a remedy for violations of their rights. In the Working Group, the representative from Slovakia put the argument this way: 'there was no doubt that children were full rights holders and should have every chance to have their rights respected'.²⁹ He continued that,

²⁹ CRIN (n 24) 2.

'having the CRC Committee investigate complaints is the only way to go to ensure all their rights are fulfilled,' although acknowledging that is was only one extra tool to increase 'effective implementation'.

By remedy, it is customarily assumed that the term is composite and refers to both 'the substance of relief as well as the procedures through which relief may be obtained.'³⁰ Both of these elements are relevant to an OP to the CRC which is said to provide the *procedural* mechanism for child victims of human rights violations and *substantive* redress or damages for violations of child rights. This distinction is made clear in the HRC Resolution 10/14 where reference is made to 'child-sensitive procedures' as a means of facilitating effective remedies.

This argument for the primacy of remedies has been central to human rights thought and the right to a remedy was contained in the Universal Declaration of Human Rights itself in Article 29. However, its application to children is of more recent pedigree. In discussions of the extension of remedial rights in other fields of human rights, children are largely invisible as a potential group of claimants. In the last decades, there has been significant focus on the rights of children as defendants in criminal proceedings or witnesses in court proceedings, but there has not been the same level of attention on children as claimants. The key exceptions to this rule have been child-specific fields such as access to primary and secondary education or child protection. Here, we can find litigation at the domestic and regional level,³¹ but the cases are not necessarily framed through the perspective of children's rights, and the degree to which the proceedings are child-sensitive is debatable.

The idea of a child's right to a remedy was also not mentioned in the CRC. However, the Committee in its General Comment No. 12 in 2003 has implied such a right. It first views it as a corollary of substantive rights, 'For rights to have meaning, effective remedies must be available to redress violations'.³² More instrumentally, it sees remedies as essential to the effective implementation of the CRC:

30 D Shelton, *Remedies in International Human Rights Law* (2005) 8-9.

31 See for example, *Brown v Board of Education*, 347 U.S. 483 (1954); *Minority Schools in Albania*, PCIJ Reports 1935, Series A/B, No. 64; *Tucker v Toia*, 43 N.Y.2d 1, 7 (1977).

32 UNCRC 'General Comment No. 5': General Measure of Implementation of the Convention on the rights of the Child' (2003) UN Doc CRC/GC/2003/5, 7. It also notes that 'This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties'.

Children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives.

In March 2009, before the Working Group was created, the state-constituted Human Rights Council endorsed this position. Their resolution called on all states 'to ensure that child-sensitive procedures are made available to children and their representatives so that children have access to means of facilitating effective remedies for any breaches of any of their rights arising from the Convention'.³³

Given this strong state affirmation of the right of children to a remedy, it may not be surprising that no delegates in the Working Group disagreed with this basic position. Indeed, none of the more general arguments against judicial or administrative review at the national or international level were expressed.³⁴ There were no claims that it was an intrusion on democratic or sovereign space; that legalisation of rights distracted from effective collective solutions or that other forms of international dispute resolution could obviate the need for such a procedure.³⁵

Moreover, there were no states who ventured the argument that they themselves were perfectly capable of fashioning domestic remedies with the consequence that the focus should be on strengthening national systems. The representative of South Korea, which supports the process, did ask the question 'whether having a domestic system would not be a good alternative to a CRC complaints mechanism.'³⁶ The answers provided by other states emphasised 'that there are often no effective national systems for safeguarding children's rights' and that 'one of the main ways to improve national remedies is to bring in the OP'.³⁷ The argument runs that the requirement of the exhaustion of remedies under the OP will force states to

33 UNHRC (n 2) [11].

34 See analysis of the discussions on this topic in the OP-ICESCR Working Group in the context of the broader literature in M Langford, 'Closing the Gap? An Introduction to the Optional Protocol' (2009) 27(1) *Nordic Journal of Human Rights*, 1.

35 There have been calls for example for a Special Rapporteur for the Girl-Child, in response to the marginalisation of the girl-child in international human rights law, who can expedite the process and promotion of an ongoing intersectional approach that facilitates girls' inclusion in international human rights law. N Taefi, 'The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child' (2009) 17 *The International Journal of Children's Rights* 345. However, the sentiment was clear at the Working Group that additional tools were potentially needed beyond that of the Special Rapporteur mandates.

36 CRIN (n 24) 6.

37 CRIN (n 24) 8.

improve national complaint systems to avoid international complaints or that the protocol may inspire national actors to push them to do so. This claim certainly carries some weight and it is arguable that the Optional Protocol to ICCPR has helped lead to the improvement of remedial systems at the national level.³⁸

What was particularly interesting in this first session was that there was little discussion over which rights deserved a remedy. No states objected to economic, social and cultural (ESC) rights being included in the proposed mechanism. In 1999, the Chairperson of the Committee for the CRC had identified the justiciability of ESC rights as a potential barrier to the development of a protocol.³⁹ Ten years later, delegates at the Working Group expressly stated that it was no longer. One likely reason for this is that the issue was substantially addressed during the drafting of the OP-ICESCR. The adoption by consensus of the OP-ICESCR in the General Assembly in December 2008 had seemingly resolved the question.

This presumption is mostly correct. From 2004 to 2006, the justiciability of ESC rights was discussed intensively in the OP-ICESCR Working Group. The question was largely settled after presentations of the growing jurisprudence on ESC rights, particularly cases that set the boundaries and conditions, rather than the content, of state action.⁴⁰ In the following three years, the OP-ICESCR Working Group sought to largely address disagreements between states on the *degree* of justiciability.⁴¹ This dissensus was largely resolved through drafting choices in the protocol, for example through the inclusion of the reasonableness test and

38 For instance, in Australia, Chief Justice Brennan stated that ‘The opening up of international remedies to individuals pursuant to Australia’s accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports.’ *Mabo & Ors v. Queensland (No. 2)* [1992] HCA 23; (1992) 175 CLR 1 [42] per Brennan J.

39 CRIN (n 24) 4-5. She is also quoted as indicating that the international community was more interested in the definition of child rights at this time rather than procedural matters; see UNHRC (n 23) [26].

40 This comparative and international jurisprudence has been compiled and discussed in a number of publications: see M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008); F Coomans (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerpen: Intersentia and Maastricht Centre for Human Rights, 2006) and R Gargarella, P Domingo and T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate, Burlington, VT 2006); International Commission of Jurists (ICJ), *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (ICJ 2008).

41 Concerns by the United States officials are strongly expressed for example in M Dennis and D Stewart, ‘Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?’ (2004) 98 AJIL at 462.

the acknowledgement that states had different means of realizing the ICESCR rights.⁴² However, the compromise did not satisfy all states and some indicated their substantive reservations upon adoption in 2008.⁴³

None of these same states raised the issue again in the CRC Working Group in 2009. Nonetheless, the probability that the issue will remain dormant is unlikely. Indeed, at the time of publication, some states were beginning to raise the issue in the second session. This may require a partial return to the debates of the OP-ICESCR Working Group and states may consider whether to include an explicit reasonableness test for ESC rights.

Another issue that would require consideration in the context of ESC rights is the implications of the best interest of the child. Domestic courts have been divided on whether this principle requires prioritisation of children in access to health services or housing rights. The Superior Court of Justice in Brazil has stated for example that:

The constitutional right to the absolute priority of children and adolescents in the exercise of the right to health is established by constitutional norm which is emphasised by articles 7 and 11 from Statute of Children and Adolescents.....To submit a child or adolescent in a waiting list in order to attend others is the same as to legalise the most violent aggression of the principle of equality, essential in a democratic society provided by the Constitution, putting also into risk the clause in defense of human dignity.⁴⁴

The South Africa Constitutional Court has largely shied away from this position.⁴⁵ Thus, it could be useful to consider the linkages between the best interests of the child principle and the duty in CRC to progressively realise economic and social rights and whether any particular consequences may or should flow from this.

42 See B Porter, 'The Reasonableness of Article 8(4) – Adjudicating Claims From The Margins' (2009) 27(1) *Nordic Journal of Human Rights* 39.

43 Langford (n 34).

44 Resp 577836, quoted in F Piovesan, 'Brazil: Impact and Challenges of Social Rights in the Courts' in (n 40).

45 *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

Improve International Complaints System for Children

A great part of the discussion in the Working Group centered on whether a complaints procedure would improve the existing system of international complaints mechanisms. Of course, one of the most consistently heard arguments is that the CRC is the only core human rights treaty to lack a complaint procedure. On its face, this claim partly rings of ‘me-too-ism’ and should not be the decisive reason for creating a procedure. It might be better argued that the absence of a mechanism poses a challenge to the legitimacy of the current system of international quasi-judicial review. In the 1993 Vienna Declaration and Programme of Action, states emphasised that the rights of the child should be a priority in the United Nations system-wide action on human rights. One Working Group expert argued that the singling out of the CRC in this regard is discriminatory against children and ‘filling this very obvious gap in the armoury of human rights instruments is in itself a necessary confirmation of full acceptance by states of the child as a rights holder.’⁴⁶ In essence, this argument recognises what Schingold has earlier labelled as the ‘symbolic ... capabilities which attach to rights’⁴⁷ Mere recognition of a children’s right to an international remedy goes beyond being a mere tokenistic gesture and has the potential to impact the broader and personal ‘politics of rights’.

However, the debate also focused on the more instrumental question of whether there are procedural and substantive gaps in the existing architecture.

Procedural

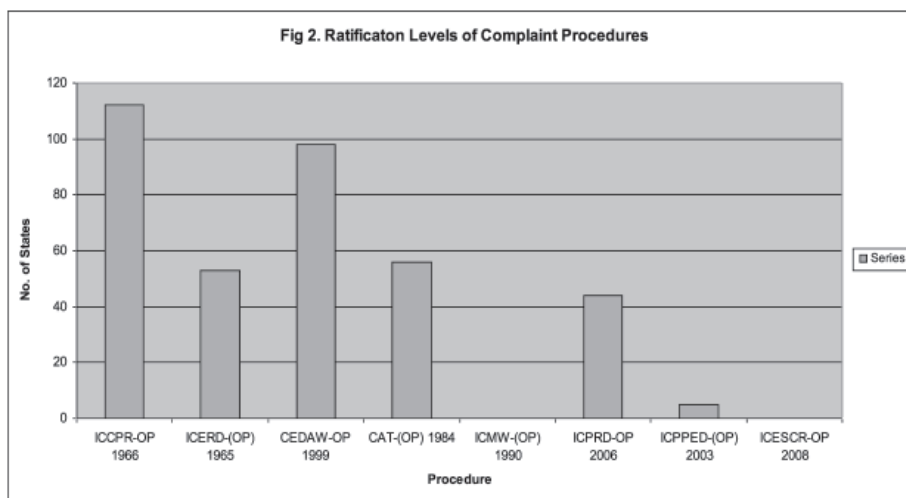
Some states were concerned that an optional protocol for the CRC would lead to the ‘duplication of a communications procedure with existing mechanisms under other Conventions.’⁴⁸ It is correct that children can seek direct redress for any alleged breaches under five other international human rights conventions whose complaint mechanisms have come into force (see Figure 2).⁴⁹ In addition, there are number of regional conventions in Europe, Africa and the Americas available to children. Moreover, many cases brought by adults may have positive flow-on effects for children.

46 PS Pinheiro, ‘Reasons and Timing to Elaborate a Communications Procedure under the Convention on the Rights of the Child’ (10 December 2009) UN Doc A/HRC/WG.7/1/CRP.4, 4.

47 S Scheingold, *The Politics of Rights: Lawyers, Public Policy and Social Change* (Yale University Press, Ann Arbor 1974) 9.

48 CRIN (n 24) 7-8.

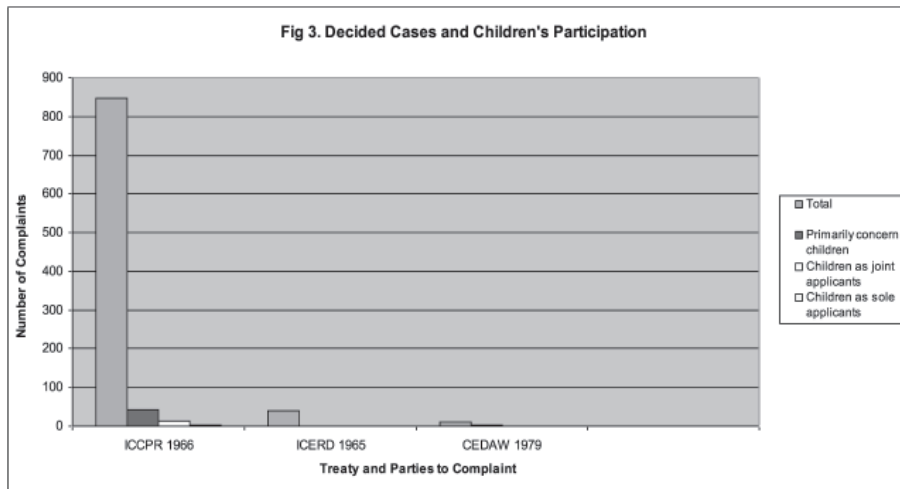
49 See n 18.



However, it was pointed out by some delegates that the number of international cases involving children is significantly low although the European Committee on Social Rights has received a high number of children's rights complaints since the dawn of its collective complaints procedure. Marcus Schmidt from OHCHR Petitions Secretariat indicated that approximately 2 per cent of cases to UN human rights treaty bodies were brought by or on behalf of children.⁵⁰ In our analysis of cases,⁵¹ we found approximately 40 such cases before the Human Rights Committee (HRC), and one each to the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) and Committee and the Committee on the Elimination on Racial Discrimination (CERD Committee) (see Figure 3, below).

50 CRIN (n 24) 16.

51 M Langford and S Clark, presentation (Economic Rights of the Girl Child, Oslo, 24 September 2009).



The cases brought before the HRC are clustered under particularly identifiable themes, namely: disappearances, custody cases, deportation (under the heads of interference with family and failure to protect minors), religious education, death row, and imprisonment. It is also possible to point to other HRC cases where children would be directly affected by the decision. This can be exemplified by a case brought by parents regarding their right to educate their children according to their religious beliefs.⁵² Similar cases where children were indirectly affected were the minority rights cases, where the decision of the HRC has an effect on children as members of specifically indigenous groups.

The one relevant case brought before the CERD Committee involved racial discrimination; it was brought by a father on behalf of his son, aged 15 at the time of events. The case was ruled inadmissible by Committee on two grounds: that there were no heads of dispute or provisions identified by the author for complaint and the remedy was seen to fall outside the scope of the Convention as the author requested a criminal retrial.⁵³ The complaint brought before the CEDAW Committee is procedurally interesting: a six-year-old child, two of her siblings with an NGO brought the case on behalf of their deceased mother.⁵⁴ As this is the only communication brought by a child applicant to the CEDAW Committee (and brought on behalf of an adult applicant), it could support one author's claim that

52 See *Waldman v Canada* (1999) and *Tadman et al v Canada* (1999).

53 *CP and his son MP v Denmark* (Communication No. 5/1994) (CERD Committee).

54 *Fatma Yildirim (deceased) v Austria* (Communication No. 6/2005) (CEDAW Committee).

CEDAW is not necessarily effective at protecting the rights of girl children.⁵⁵

We have also indicated in Figure 3 the nature of the applicant. It is clear that the application is made by an adult, often an interested party herself or himself, on the child's behalf, rather than the child submitting his or her own Communication. As pointed out by Newell in relation to international and regional complaints procedures, 'it seems likely that, to date, most if not all of the cases in which children are named as applicants have in fact been initiated and pursued by adults and the named children have had very little, or no, involvement in the procedure'.⁵⁶

But these claims should be interrogated a little further. Simply pointing to a low usage of the other mechanisms by children does not make the case for an optional protocol to the CRC. We need to understand why this has occurred. We would agree with China when it asks, '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?'⁵⁷ Therefore, we should question whether NGOs and children's movements promoting the protocol may be part of the problem. If children's advocates themselves do not prioritise litigation of children's rights under existing procedures, will a new protocol make a difference? However, if the explanation is elsewhere, the CRC protocol may potentially help to various degrees. For example, if the reason is located in children's lack of agency and ability to pursue and drive their own claims, then a child-specific or child-sensitive mechanism may help reduce barriers to litigation.

If we turn to social science literature for an answer as to the general causes of human rights litigation, we find conflicting theories and evidence. Charles Epp argues that a civil society support structure is the essential determinant of litigation.⁵⁸ Others point to the equal importance of supply-side legal and institutional

55 Taefi (n 35). Incidentally, the word 'girl' does not feature at all in the terminology of the Convention.

56 P Newell, 'Children's Use of International and Regional Human Rights Complaint/Communications Mechanisms: Background Paper' (International Justice for Children 2007) <http://www.coe.int/t/transversalprojects/children%5CSource%5CJusticePeterNewellBackground_en.doc> accessed 29 September 2009.

57 CRIN (n 24).

58 C Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (University of Chicago Press, Chicago 1988).

frameworks which govern accessibility.⁵⁹ Therefore, improving the 'supply-side' dimension of international mechanisms for children could make an important but not comprehensive contribution to increasing the number of children's rights complaints. This would particularly be the case if the optional protocol for the CRC could be made more child-sensitive and a collective communications could also be included. The CRC has shown some ability to make the periodic reporting procedure more child sensitive although only in a limited form so far.⁶⁰

However, the Working Group should also reflect on whether the demand-side factors for international children's rights litigation exist. Is there an adequate civil society structure for children's right litigation? And do states have a role in ensuring the provision of adequate legal aid? One possible argument for the demand-side is the possible endogenous effect of a protocol. Its mere existence may compel civil society to consider litigation as a strategy and states to provide better legal support.⁶¹

Substantive

The second reason propounded for the improvement of existing international protection for children was substantive. It concerns the allegedly unique nature of the rights in the CRC. The breach of a right in the CRC cannot necessarily be addressed under other international human rights instruments. The Vice Chair of the CRC went as far as to say that, 'nearly all the rights under the CRC are specific rights. It is much easier to mention the rights that are not specific to children; they are the thematic rights such as non discrimination and so on, which apply to all treaties.'⁶² Detrick has similarly argued that there is 'no doubt whatsoever that the content of the Convention constitutes a major leap forward in the standard-setting on children's issues.'⁶³

59 B Wilson, 'Rights Revolutions in Unlikely Places: Costa Rica and Colombia' (2009) 1(2) *Journal of Politics in Latin America* 59; V Gauri and D Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008); M Langford, 'Domestic Adjudication of Economic, Social and Cultural Rights: A Socio-Legal Survey' (2010) 11 *SUR -International Journal of Human Rights* 1.

60 W Heesterman, 'An Assessment of the Impact of Youth Submissions to the United Nations Committee on the Rights of the Child', (2005) 13 *The International Journal of Children's Rights* 351.

61 Pinheiro (n 46).

62 CRIN (n 24) 11.

63 S Detrick, J Doek and N Cantwell, *The United Nations Convention on the Rights of the Child: a Guide to the 'Travaux préparatoires'* (M. Nijhoff, Dordrecht 1992).

The following (non-exhaustive list) provides some examples of the CRC's improvements over other treaties:

- Best interests of the child shall be a 'primary consideration' in all actions concerning children (Article 3);⁶⁴
- Preservation of identity, including nationality, name and family relations without unlawful interference (Article 8);
- Right to express opinions (Article 12) which is 'a unique provision in a human rights treaty, which addresses the legal and social status of children, who, on the one hand lack the full autonomy of adults but, on the other, are subjects of rights';⁶⁵
- Prevention of abuse by those responsible for care (Article 19) which is significant as it implicitly extends responsibility to private individuals, thereby destabilising the 'traditional' public private divide, emphasizes prevention of intra-familial abuse and neglect 'which has never previously figured in a binding instrument';⁶⁶
- Adoption (Article 21) which codifies principles that were adopted three years earlier by the UN in the framework of a non-binding declaration.⁶⁷
- Health and access to care (Article 24) where for the first time State's are under an obligation to work towards abolishing harmful traditional practices and references are made to the advantages of breastfeeding;
- Rights of child cared for outside the family to periodic review of care (Article 25);
- Obligation to recover maintenance from those having financial responsibility for the child (Article 27);

64 This article is another one of the underlying themes and 'guiding principles' of the CRC in its stipulation that the child's best interests must be a 'primary consideration' in all actions concerning children.

65 UNCRC General Comment No. 12: The Right of the Child to be Heard (2009) at 5.

66 Ibid at 28.

67 Detrick, Doek and Cantwell (n 63) 28.

- Education and school discipline to be consistent with child's human dignity (Article 28);
- Education to meet detailed aims (Article 29);
- Right to rest, leisure and play (Article 31); and
- Specific protection from sexual exploitation and abuse, including child pornography (Article 34).

Even where the CRC does not spell out exclusive rights, it does so in a unique fashion. By way of an example, the right to education is enshrined in a range of international conventions, including the ICESCR, CEDAW and various regional treaties. However, in articulating the right, the CRC provides more detail by requiring that 'States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity' (Article 28) and sets out some of the broader aims of education for children in Article 29. In its General Comment 1 on the Aims of Education and Article 29, the CRC Committee stressed the importance of these aims as being 'linked directly to the realization of the child's human dignity and rights, taking into account the child's special developmental needs and diverse evolving capacities.' Thus, it could be argued that even where the rights are covered elsewhere, the child-focused nature of the rights constituted therein makes the CRC uniquely suited to promote and protect the rights of children specifically.

There are two possible responses to this *sui generis* claim. The first is that the integrationist approach to treaty interpretation means that other committees should interpret the rights in their Covenant in a manner consistent with the CRC, particularly given the near-universal ratification. Children's rights are specifically mentioned in the both ICCPR and ICESCR and it would not require great legal imagination to interpret these threadbare children rights in light of the more fulsome CRC. The difficulty with this argument is that the leading Committee in this area, the HRC, has been very cautious about referring to jurisprudence of other bodies. The sheer number of unique rights also begs the question of how far other Committees can go. They lack the specific mandate of, say, the Inter-American Court on Human Rights and the African Commission on Human Peoples' Rights to continually interpret their instruments in line with developing international human rights law.

The second response concerns the systemic effects. A number of states worried that yet another complaints mechanism would lead to ever-growing fragmentation and duplication. China and Canada expressed concern, whilst the Netherlands stated 'that "There is going to be duplication, but we shouldn't see this as a prob-

lem. They already have these varying options already with the existing treaty conventions.”⁶⁸ Interestingly, a significant number of states took a positive view of this dilemma and emphasised the complementarity and synergies in the field of children’s rights that could be developed. Forum shopping would also be discouraged it was suggested when there was a consistency of approach and overlap between the treaty bodies.⁶⁹ The capacity of other committees might be questionable, particularly given that committee members act in a voluntary capacity on a part-time basis and the HRC is behind in its current caseload.

Better Protection of Rights in Practice

The third argument for the protocol was clearly outcome-based. It was frequently stated in the Working Group that the optional protocol would improve the protection of the rights in practice. A bundle of potential indirect and direct positive consequences were set out. The views expressed were that the ‘OP was vital’ and ‘will afford special protection to children and will give civil society new tools to advocate for better national systems’⁷⁰ as well as the belief ‘that this procedure would add to the Convention and assist States at national level to better promote and protect children’s rights’⁷¹. In terms of direct impacts, the procedure does have the potential to provide justice for victims and lead to actual policy, legal and other changes that would benefit a wide group. It was claimed with some reason that the procedure would promote the development of better national legal systems for complaints as noted above.⁷² The procedure may also generate soft and persuasive legal influence. Jurisprudence under the protocol could assist in the better definition of children’s rights and affect regional and national courts and tribunals in their interpretations in particular cases.

However, one must be cautious about excessive expectations. The proposal is for a quasi-judicial review not a court. Without the power to make binding orders (unlike European and Inter-American human rights courts), international human rights treaty bodies can only be expected to make a modest impact in practice.

68 CRIN (n 24) 8.

69 One might be tempted to also say that the adoption of an OP for CRC could help ensure the slow movement towards a unified treaty body system with clearer and stronger powers over complaints. Even if many children’s rights and women’s rights groups tend to be highly sceptical towards the loss of specific treaty bodies with their specialist focus, a unified body with specialist committees may be a better alternative.

70 CRIN (n 24) 4.

71 CRIN (n 24) 19.

72 See text at footnotes 40 to 41.

This context is important to remember as there is a tendency in debates over the effectiveness of human rights litigation for opponents to stress that review is both simultaneously illegitimate (because the adjudicator has too much power) and ineffective (because the adjudicator is too weak)⁷³ while supporters often argue the opposite. It is extremely difficult to carry both pairs of views simultaneously.⁷⁴

A better departure point for consideration of quasi-judicial review is whether it can have a reasonable impact, particularly given the quasi-judicial nature of orders and the likely tight admissibility requirements. This position seems backed up by recent empirical research. In a quantitative analysis of the effect of the OP to ICCPR, Simmons found that ‘there is some evidence to suggest that ratification of the individual complaints mechanism of the ICCPR is associated with modest improvements in civil liberties, controlling for many other possible explanations.’⁷⁵ In some countries, the effect of particular decisions of the HRC can be qualitatively witnessed. For example, in Australia, legislation on criminalization of homosexuality and restricting access to military survivor benefits for gay partners was reformed after Australia lost cases in the Human Rights Committee.⁷⁶ However, it is equally possible to find findings and recommendations from other cases that have not been implemented.

Moreover, the impact is likely to be varied across countries. Research generally tends to indicate that the impact is often highest in middle-income and transitional countries where protection of children’s rights may be worse but there is a higher respect for international decisions. In the case of CRC, it may be arguable that the near universal ratification could provide a stronger possibility for implementation due to greater peer pressure.

The major concern raised in the Working Group over potential impact related to the potential abuse of the system. One summary of the meeting reads that ‘Sweden raised the issue of manipulation asking how we ensure that the child is not manipulated through the complaints procedure.’⁷⁷ Peter Newell, an expert, stated that ‘in many cases (civil, penal or administrative) there were risks of a conflict of

73 See for example, J Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *The Yale Law Journal*, 1346.

74 See discussion of this point in M Langford, ‘Justiciability of Social Rights: From Practice to Theory’ (n 40).

75 B Simmons, ‘Should States Ratify? Process and Consequences of the Optional Protocol’ (2009), 27(1) *NJHR* 64.

76 *Nicholas Toonen v. Australia* (Communication No 488/1992); *Edward Young v. Australia* (Communication No 941/2000).

77 CRIN (n 24) at 12.

interest between the parents and the child.⁷⁸ Thus, the positive impacts may be skewed towards a child's guardians rather than the child itself.

Argentina responded that the Working Group should look to the CRPD on how the issue of capacity can be addressed and we discuss possible solutions below in Section IV. These include ensuring the Committee focuses on the best interests of the child, allows third parties to intervene in complaints as parties or *amicus curiae* and/or include a collective complaints system to help ensure that there are a high number of cases that explicitly begin from a public interest perspective.

Easily Implementable

The final bundle of arguments concerned the ease with which the procedure could be created. In this case, the Committee is already established and the UN OHCHR Secretariat indicated that they are well-placed to start receiving claims under the CRC. Poland expressed its concern that the procedure could lead to a flood of cases 'citing the European Court of Human Rights with its backlog of currently more than 100,000 applications.'⁷⁹ However, fears for the potential for flood of cases to the current systems are probably overblown given existing trends in cases.⁸⁰ Marcus Schmidt from the Petitions Team at the OHCHR Secretariat stated:

I also want to dispel the idea that as soon as an Optional Protocol is formed, the Petition Unit is swamped. This is certainly not the case as it actually usually takes a year or two to get the first complaints as you have to go through the exhaustion of domestic remedies... On the additional resources issue, this will be monitored as the process moves forward. Experience shows that resources are gradually needed to increase but only gradually over time. CEDAW has only had 23 cases and only one person is allocated to this. This gives you an idea of what might be expected.⁸¹

The Chair of the CRC Committee, Ms. Lee tried to allay these fears thorough her reassurances that the CRC Committee's role would in no way be compromised by the addition of a communications procedure.

78 UNHRC (n 23) 12.

79 CRIN (n 24) 7.

80 M Scheinin and M Langford, 'Revolution or Evolution? Extrapolating from the Experience of the Human Rights Committee, (2009), 27(1) Nordic Journal of Human Rights 97.

81 CRIN (n 24) 16.

Preliminary Conclusions

In sifting through the different arguments for and against creating a complaints procedure, it is clear that most centre on its potential 'output' legitimacy, the added value of its various symbolic and material effects. At this stage, issues of democratic and procedural legitimacy appear to be mostly relegated to the drafting stage.

In our opinion, the primary function of UN-created international human rights law is to establish model standards with enforcement playing only a secondary role. Thus in assessing output legitimacy one should give more weight to the modular rather than direct role of such a procedure. Given the considerable neglect of children's remedial rights in domestic and international law, the mere adoption of the protocol (and its jurisprudence) could carry an important signaling effect to states, civil society, judiciaries, regional systems, other treaty bodies and not least children themselves.

One should not hold out excessive hopes that such a procedure will play a significant role in directly impacting children's rights. This would probably only occur if the UN moves towards creating a unified and full-time treaty body system with court-like enforcement powers or civil society organisations devote considerable more resources and time to litigation and follow-up.

IV. Towards the Drafting

Given the mood of the Working Group's first session it was not surprising that states have begun the drafting at a comparatively early stage. Some states and NGOs may wish to rush the process in order to have the mechanism in place as soon as possible but this temptation should be partly resisted. The full three years normally allocated for drafting should be used to good effect. An effective CRC complaints procedure may require some procedural innovations that will require time for proper discussion and every new complaints procedure has generally contributed some improvement or novelty to the international complaints system.

A more deliberated process will also build consensus and increase the chances for widespread ratification. On this point we can only look to the CRC itself. The drafting of the CRC took place over a period of eleven years. As highlighted by one particular commentator, and noted by the Secretary-General at the time, there was a 'spirit of great co-operation not only amongst the non-governmental organizations but also among states' during the drafting stages of the CRC, to the

extent that ‘a great number of state representatives became more involved with the subject of the treaty than is the norm.’⁸² Most poignantly, the lowest common denominator approach of adopting each provision by consensus can perhaps be one reason that accounts for the CRC’s unprecedented ratification rate by States.

At the same time, it is worthwhile keeping in mind the reflection of Philip Alston as to the suitability of an international diplomatic forum being able to ‘resolve’ all relevant issues in the drafting of international instruments. An advisor during the drafting of the CRC itself, he states in this vein that ‘the inevitably superficial nature of the diplomatic negotiations that took place at the international level in order to produce a compromise document such as the Convention [CRC] are not all at conducive to a detailed or nuanced understanding of many of the key issues that arise.’⁸³

In keeping with this spirit, we note five areas that require particular attention.

Who is the Victim? And for how long?

The new optional protocol needs to be drafted with careful consideration of the special status and vulnerability of children and the temporality of childhood. Existing complaints procedures do not permit victims to remain anonymous. Thus, applications which are pursuing the rights of an individual child under other treaty bodies have to name the child as applicant, and where the child is regarded as having capacity, to indicate that they have given their consent to the application being made. A protocol to the CRC should potentially include an identity-suppression provision – that the identity of the child would not be revealed *except with the child’s express consent* or sufficient justification.⁸⁴

Moreover, adults should also be able to access the procedure for violations committed during their childhood. At the first session, Italy was seemingly the only participant alive to the issue of temporality. They asked what happens in the event that the violation complained of occurred in childhood but is presented by the complainant when they are an adult. We would reply that such cases should be heard. Why subject children in this case to a limitation that is not imposed in essence on adult victims of the same violations? Since the victim remains one in the same individual, the violation occurs in childhood but the effects do not end

82 Van Bueren (n 6) 388.

83 P Alston, S Parker and J Seymour (eds), *Children, Rights and the Law* (Clarendon Press, Oxford 1992) vi-vii.

84 See the similar provision in Article 14(6)(a) in CERD and CEDAW Article 6(1) respectively.

with childhood. The procedure should be flexible in this regard.

There are also a number of practical reasons. Many children may only become aware in their adulthood that a violation has occurred when they were young or only as an adult do they have the capacity to set the litigious wheels in motion. By the time the slow-moving machinery of domestic and international remedies reaches their conclusion in the Committee, the complainant may very well be an adult. The low reported usage of the existing treaty-body system by children may be partly because they are adults by the time they register a case. Scientific research is also increasingly discovering the ways in which childhood maltreatment affects an individual physically, mentally and emotionally, 'with those impacts often extending well into old age, if the victim does not receive the right help ... The child is the victim, yet the processing of the violation can be a life-long struggle for the adult.'⁸⁵ Such an adult-inclusive jurisdiction would also potentially improve and expand the jurisprudence of the Committee and increase the deterrent effect of its rulings. As to the nature of the victim, the provision in an OP could therefore state something to this effect:

Communications *may be submitted by or on behalf of an individual* or groups of individuals, within the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party during their childhood, up to the age of 18.

Moreover, it could be argued that the short time span for childhood requires faster and more urgent procedures for dispute resolution. This is bolstered by research indicating that violation of rights in childhood – from torture to institutionalisation to malnutrition- have longer-lasting effects in life than if they occur in adulthood.⁸⁶

85 ASCA Media Release, 'ASCA Seeks Global Change for Child Abuse Victims and Adult Survivors through Submission to Australian Human Rights Commission Consultation' (ASCA, 15 June 2009) <<http://www.asca.org.au/associations/8549/files/Human%20Rights%20FINAL%20Media%20Release.pdf>>.

86 For example, in the UN Secretary-General, World Report on Violence against Children UN Doc A/61/299: 'The impact of institutionalization goes beyond the experience by children of violence. Long-term effects can include severe developmental delays, disability, irreversible psychological damage, and increased rates of suicide and recidivism' [54] and that 'it was estimated that one million children are deprived of their liberty. Most of these are charged with minor or petty crimes, and are first-time offenders. Many are detained because of truancy, vagrancy or homelessness. In some countries, the majority of children in detention have not been convicted of a crime, but are awaiting trial' [61].

However, the Working Group should consider what should occur if the violations occurred both during childhood and adulthood. Should the choice of forum be left to the complainant or should possibilities be created in the protocol for the case to be split between different Committees? The different committees might handle the case simultaneously but attempt to ensure some harmonisation of approach.

Best Interests of Child and Consent

A major concern with a complaints procedure would be to ensure that the child's use of the procedure is genuine and in keeping with their interests and autonomy and is not being abused by their representatives. This was a concern expressed by members of the Working Group to the extent that it was suggested that children only should be able to complain to the CRC Committee. This view is perhaps not as simplistic as it is naïve. Children already have access to representation to appear before the other treaty bodies and a restriction of this existing right would have to be strongly justified.

The issue is perhaps best addressed in the drafting. There are safeguards that can easily be implemented in the OP to the CRC, with one significant element being the use of the 'best interests of the child' – one of the guiding principles of the CRC – where the child is not able to consent due to age or other reason. Thus the substantive wording of a provision might look like the following:

Where a communication is submitted on behalf of an individual or group of individuals, this shall be with the individual's consent unless the author can justify acting on their behalf without such consent, in which case the Committee shall consider whether it is in the best interests of the child or children concerned to consider the communication.⁸⁷

The representation of children is also not a novel concept for advocates and the judiciary in a number of domestic jurisdictions. For instance, the issue arises in the Northern American context whereby children are represented by state authorities in cases of care and custody. Echoing both autonomy and interest-based theories of child's rights, one advocate highlights the distinction, for example, between the 'expressed interest of the child' namely the child's own interest as represented by

⁸⁷ Taken from the Text of Draft Optional Protocol to provide a communications procedure, by the NGO Advocacy Group (February 2008).

her own lawyer, as opposed to the 'protected interests of the child' typically argued by the lawyer appointed as a guardian.⁸⁸

However, it cannot go unnoted that the CRC has 'moved significantly ahead of domestic law' in many respects.⁸⁹ Thus, the drafters need not be entirely constrained by domestic procedures and practice in formulating an effective, child-friendly and focused complaint mechanism for children. The ambiguity surrounding the concept of the best interests of the child is perhaps the strongest reason in favour of having it tested and applied by the quasi-judicial body that is the CRC Committee.

Thus, any persons representing the child (as the victim) would have to demonstrate and satisfy this test in order for the complaint to be admissible before the CRC Committee. Consequently, the heads of complaint would have to address the concerns of the victim-child, as opposed to the rights of the representative parent, lawyer or otherwise. This would avoid manipulation of the child, in such cases as some of those brought before the HRC by parents, in custody cases, where the parent-author claimed to be representing the child, whilst in fact the child's interest was only invoked to bolster the parent's claim. As a safeguard, the CRC Committee may be required to check with the child (subject to her understanding) that a complaint submitted on her behalf reflects her views and that she wishes the author to act on her behalf. In cases where it is decided that the complainant-author is not submitting the claim on the child's behalf, consideration would need to be given as to whether the Committee still has discretion to consider the complaint. The protocol could also allow the possibility for different representatives.

Collective Complaints

At the Working Group, a number of experts suggested the inclusion of a collective complaints mechanism for the CRC complaints procedure. Canada instead expressed concern. While such a procedure exists at the regional level, it is yet to be included in an international complaints mechanism. Early drafts of the OP-ICESCR included a collective communications procedure which permitted international non-governmental organisations with ECOSOC consultative status

88 L Pitts, 'The Right to be Heard: The Child as Legal Person' in B Klug and K Alaimo (eds) *Children as Equals: Exploring the Rights of the Child* (University Press of America, Lanham 2002) 172.

89 Alston, Parker and Seymour (n 83) vi.

to submit communications. It also allowed States parties to declare that certain of their national organisations had the right to submit collective communications. This was opposed by some states and the revised draft of the OP-ICESCR permitted all NGOs with ‘relevant expertise and interest’ to submit complaints ‘where appropriate’. However, it did not gain the support of a sufficient number of States and the article was dropped.

It may be arguable that the CRC-OP represents the best moment for the introduction of a collective complaints procedure which would allow public interest-driven complaints in particular circumstances. Newell attempted to reassure states that the collective complaints procedure would be one way of developing a procedure which could constructively influence national laws and policies: ‘surely we have to accept and welcome a dual aim of communications – to achieve individual remedies where violations have occurred as speedily as possible, but also prevent further, similar violations from occurring.’ In a similar vein Paulo Pinheiro argued:

During the UNSG’s Study process, I worked closely with the Council of Europe and its human rights mechanisms and became aware of the collective complaints procedure under the European Social Charter and Revised Social Charter (which has been used with good effect, among other issues concerning children, to challenge the persisting legality of corporal punishment in some member states). In the case of children, I believe there are strong arguments for allowing collective communications from reputable, approved bodies and organisations, without the need to identify individual child victims of violations.

Given the vulnerability of childhood and concerns over manipulation by parents in some cases, the argument for some type of collective complaint system may be stronger for the CRC. It could also be consistent with interest-based theories of children’s rights which allow some external evaluation and representation of a child’s interests.⁹⁰ Indeed, the principal argument for a collective complaint systems for adults is that victims are not well-positioned to mount claims due to grounds of repression, geography or poverty and the limitations of children in being able to fully express their best interests may be another ground in that reasoning. The Gordian knot to untangle will be how to develop such a procedure that

90 See *ibid* for a lively debate about the pros and cons of both arguments as being best suited to advancing and promoting the rights of children in international law.

does not raise the alarm of states, particularly those like China, who fear international NGOs lodging complaints against it.

Child-Sensitive Procedures, Admissibility and Interim Measures

Significant work will need to be done on ensuring the system is accessible for victims who are children at the time their complaint comes to the Committee. Reviews of national practice in this regard will be important as well as an evaluation of the Committee's own attempt to include children in its periodic reporting process. This may require new innovations in the requirements for presentation of petitions, specific hearings with the children or a power for the Committee to actively obtain new sources of information from other actors. Amicus curiae interventions might also be encouraged. The potential for ordering of interim measures should be included given the potentially lasting effects of violations in childhood. Thus the language in Article 5 to OP-ICESCR, which strongly restricts the use of interim measures, may need revisiting. All of these proposals, and likely more, would require close scrutiny but states should approach the issues openly in attempt to ensure that the process is fair for all parties involved in a complaint.

Inquiry Procedure and Remedies

Optional protocols increasingly contain an inquiry procedure which allows the relevant committee to investigate a situation in a State Party if it receives 'reliable information indicating grave or systematic violations'. However, a visit to the territory of the State is often premised upon consent. Moreover, some protocols make the procedure opt-in. For example, states must specifically declare they accept this procedure at the time of ratification or later. These two features often mean the procedure will not be significantly used in practice. Strong consideration should be given to an inclusion or opt-out procedure for state consent to the procedure and consider compulsory acceptance of state visits. Again, the particularities of the rights of childhood may justify such an approach.

Likewise, consideration might be to granting stronger powers to the Committee in terms of the follow-up of its orders. A notable trend in many domestic and regional jurisdictions is a greater diversity of remedies from weaker and dialogical forms of review through to supervisory orders where adjudicators require a losing party to return to the body and explain its implementation (or not) of an order.

Such strong remedies tend to be used when there is clear and consistent evidence that the party is unwilling or unable to implement a remedy.⁹¹

V. Conclusion

The rapidity of efforts to develop an international complaint procedure for the CRC is startling but understandable given the CRC's orphan status amongst the core treaties on this matter. In our opinion, the arguments for this quasi-judicial form of review appear reasonably strong, although the reasons behind the low usage of current mechanisms require greater interrogation lest a system is established and then not used. Drafting a protocol that is effective for children, transparent and participatory while respecting the primary function of State's in setting policy should therefore constitute the main task of the Working Group.

91 K Roach and G Budlender, 'Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable' (2005) 122 South African Law Journal 325.