

THE THIRD OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON A COMMUNICATIONS PROCEDURE: A NEW METHOD OF LEGAL PROTECTION OF CHILDREN'S RIGHTS

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Ljubica Mihajlović

Faculty of Law, University of Niš, Republic of Serbia

Abstract. *One of the most important developments in the children's rights protection system established under the auspices of the Convention on the Rights of the Child (CRC, 1989) was the adoption of the Third Optional Protocol to the Convention on a Communications Procedure (2011), which completed the system of monitoring and protection of children's rights by the Committee on the Rights of the Child. The competences of the Committee on the Rights of the Child have been expanded, and children have been given the opportunity to address the Committee either directly or through adult representatives, alleging violations of the rights guaranteed by the Convention on the Rights of the Child, the First Optional Protocol and the Second Optional Protocols to the Convention on the Rights of the Child.*

Key words: *rights of the child, Convention on the Rights of the Child, Third Optional Protocol, individual complaints*

1. INTRODUCTION

One of the most important functions that provides for the effective exercise of the rights of the child guaranteed by the Convention on the Rights of the Child (1989)¹ is the supervision procedure, which ensures that children's rights are respected, observed and effectively exercised, i.e. that they not remain merely declarative. In relevant literature, supervision is defined as a set of activities aimed at assessing and measuring the implementation of the rights of the child in different areas of life, including the assessment

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Corresponding author: Ljubica Mihajlović, LL.M., PhD student, Faculty of Law, University of Niš, Trg kralja Aleksandra 11, 18105 Niš, Republic of Serbia. E-mail: ljubicamihajlovic90@gmail.com

¹ The Convention on the Rights of the Child (hereinafter: the CRC) was adopted and opened for signature and ratification by the UN General Assembly by Resolution no. 44/25 of 20 of November 1989 and entered into force on 2 September 1990. See: UN Convention on the Rights of the Child (1989), available at <https://www.unhcr.org/uk/4d9474b49.pdf?msclkid=1ffc2261b2b911ec89fa906f7315b5f1>

of situations where the rights of the child have been violated and particularly the cases where such violations call for judicial protection (Vučković Šahović, Petrušić, 2015: 250). The Committee on the Rights of the Child (hereinafter: the Committee)², as a treaty body established by the Convention on the Rights of the Child (hereinafter: CRC), has the most important role within the international system of supervision.

The supervision by the Committee is carried out through the reporting procedure. Under Articles 44 and 45 of the CRC, the reporting procedure implies the submission of reports on the measures adopted by the State Parties and progress made in the exercise of the CRC rights. The Committee jurisdiction also covers the implementation of two optional protocols to the CRC. This competence is established in Article 8 of the Optional Protocol to the CRC on the Participation of Children in Armed Conflict (OPAC), and Article 12 of the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (OPSC).³ The Committee performs its function by adopting general comments, on the basis of interpretation of the CRC provisions, which contributes not only to overcoming the generalizations in the CRC provisions but also to the evolving nature of the CRC (OHCHR, 2022).⁴

In addition to the above competences, there were views and suggestions in literature that the Committee could take over the role of an International Court of the Rights of the Child. It is a consequence of the fact that there is still no international or regional judicial body that would adequately and with sufficient authority decide on the violations of the rights of the child.⁵ This idea was first put into effect by adopting Third Optional Protocol to the CRC on

² The establishment and competences of the Committee are regulated in Articles 43-45 of the CRC. The Committee was originally composed of ten experts of high moral values and recognized expertise in areas covered by the CRC. The UN General Assembly Resolution no. 50/155 of 21 December 1995 approved the amendment to Article 43(2) CRC; thus, the word "ten" was replaced by the word "eighteen". The decision to increase the number of Committee members was justified by the increasing number of ratification of this international agreement (182 states) and by the fact that the Committee recognizes the importance of monitoring the implementation of the CRC by the contracting states. The Amendment contained in Resolution no. 50/155 (1995) entered into force on 18 November 2002, when it was accepted by two thirds of the CRC State Parties (128 out of 191 states). The amended Article 43(2) CRC is available online at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>. The text of the UN General Assembly Resolution no. 50/155 (1995) is available online at <https://undocs.org/en/A/RES/50/155>.

³ In the Socialist Republic of Yugoslavia (SRY), these two Optional Protocols to the CRC were ratified in 2002, by the adoption of the Act on the Ratification of the Optional Protocol to the Convention on the Rights of the Child on the Participation of Children in Armed Conflicts, *Official Gazette of the SRY- International Agreements*, no. 7/2002 (Serb.: *Zakon o potvrđivanju Fakultativnog protokola o učešću dece u oružanim sukobima uz Konvenciju O Pravima Deteta*, "Sl. list SRJ - Međunarodni ugovori", br. 7/2002), and the Act on the Ratification of the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, *Official Gazette of the SRY- International Agreements*", no 7/2002 (Serb. *Zakon o potvrđivanju Fakultativnog protokola o prodaji dece, dečijoj prostituciji i dečijoj pornografiji uz Konvenciju o pravima deteta*, "Sl. list SRJ-Međunarodni ugovori", br. 7/2002).

⁴ The Committee has adopted twenty-five general comments so far, and is currently drafting the twenty-sixth general comment on children's right to a healthy environment. For the list of all the Committee's general comments adopted so far (with links), see: OHCHR/UN Human Rights Office (2022): General comments/ Committee on the Rights of the Child, available online at <https://www.ohchr.org/en/treaty-bodies/crc/general-comments>

⁵ Bearing in mind that the judges of the European Court of Human Rights (ECtHR) do not have special knowledge in psychology and do not have the expertise to conduct appropriate analysis of reports submitted by national courts, there are views that the existing legal and social thought is moving towards the establishment of an international tribunal for the rights of the child. The ECtHR does not hear children directly and cannot have an accurate insight into each individual case concerning the rights of the child because they only have direct contact with the government representatives and the applicant. The principle of the best interests of the child is a "subjective" concept, the interpretation of which is conditioned by several factors and has a significant dose of subjectivity, even when the principle of objectivity is present in the court decision-making process (Stanila, 2019: 42).

a Communications Procedure (hereinafter: the Third Optional Protocol/ OPIC),⁶ by which the Committee has acquired quasi-judicial powers to examine communications submitted by individuals or groups acting on behalf of children as right holders. The communications may be submitted either directly or through representatives, on the grounds of violation of the children's rights guaranteed by the CRC, the First Optional Protocol or the Second Optional Protocol.

2. THE THIRD OPTIONAL PROTOCOL: A NEW CHAPTER IN THE CHILDREN'S RIGHTS PROTECTION SYSTEM

The Third Optional Protocol to the Convention on a Communications Procedure (OPIC, 2011) was adopted after two decades of applying the CRC provisions, when experts on children's rights protection concluded that the supervision and protection system in this field should be completed by vesting the Committee on the Rights of the Child with the authority to handle individual complaints (Lee, 2010: 567).⁷ The working group for drafting the text of the Third Optional Protocol was established by a Resolution of the Human Rights Council of 17 June 2009. The UN General Assembly adopted the Third Optional Protocol on 19 December 2011,⁸ which entered into force in April 2014 (Carletti, 2020: 116). The Third Optional Protocol established the possibility for individuals, groups, or their representatives to address the Committee through one of two possible procedures: the Communications Procedure and the Inquiry Procedure. The Communications Procedure has been regulated as a procedure for individual communications (Articles 5-11 of the OPIC) and Inter-State Communications (Article 12 of the OPIC). The Inquiry Procedure, initiated upon complaints alleging grave or systematic violations of the guaranteed children's rights is regulated in Articles 13 and 13 of the OPIC.

2.1. Individual Communications Procedure

Article 5 of the Third Optional Protocol to the CRC on a Communications Procedure regulates Individual Communications Procedure, also known as the *complaints procedure* (OPIC, 2022).⁹ Communications (complaints) may be submitted by or on behalf of an individuals or a group of individuals under the jurisdiction of a state that has ratified the Third Optional Protocol who active procedural legitimacy to file an individual complaint

⁶ United Nations (2011). Optional Protocol to the Convention on a Communications Procedure, available online at https://treaties.un.org/doc/source/signature/2012/CTC_4-11d.pdf

⁷ Notably, the intention of the advocates for the rights of the child (both in terms of adopting the CRC and establishing the Committee) was to establish a body which would receive and consider individual and interstate complaints concerning compliance with the provisions of the CRC and the First and the Second Optional Protocols, but that the final text of the CRC did not contain such provisions; namely, due to the comprehensive nature of the CRC, there was a need for a compromise solution, which was ratified in almost all countries of the world (Lee, 2010: 567). In addition to the influence of the Committee members, the adoption of the Third Optional Protocol was greatly influenced by civil society representatives, upon whose proposal (in 2008) the UN General Assembly formed an open working group on drafting the Third Optional Protocol (Carletti, 2020: 116).

⁸ UN (2011): Optional Protocol to the Convention on a Communications Procedure (OPIC). The text of the Third Optional Protocol includes a preamble and 24 articles grouped into four parts: Part 1: General Provisions (Articles 1-4); Part 2: Communications Procedure (Articles 5-12); Part 3: Inquiry Procedure (Articles 13-14); and Part 4: Final Provisions (Articles 15-24).

⁹ See: OPIC (2022): *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC) website*, last updated June 2022; <https://opic.childrightsconnect.org/what-is-opic/the-mechanisms/>

before the Committee, claiming a violation of children's rights guaranteed under the CRC, or the First or the Second Optional Protocol. Adults may file individual complaints on behalf of children if there is explicit consent of the child, unless the complainant may justify acting on behalf of the child or a group of children without their consent. (Article 5 of the OPIC).

This procedure allows the child, groups of children or their representatives, who claim that their rights have been violated, to submit a complaint or communication to the Committee. In this way, rights of the child guaranteed by the CRC and the First and Second Optional Protocols can be protected. As a condition for filing a complaint, it is necessary that the violation was committed by a State Party that has ratified the CRC, the First or the Second Optional Protocol. It is also necessary that a specific Contracting State has ratified the Third Optional Protocol. Before filing an application, the applicant must first exhaust legal remedies prescribed by the national law and obtain a final decision of the national court, unless the domestic remedies prove to be ineffective or unreasonably prolonged. The eligibility (admissibility) conditions in Article 7 of the OPIC are stipulated in negative terms; thus, the Committee will consider a communication inadmissible if: a) it is anonymous; b) it is not in writing; c) it constitutes an abuse of the right to submit such a communication or is incompatible with the provisions of the CRC, or the First or the Second Optional Protocol; d) the same matter has already been examined by the Committee or is being examined under another procedure of international investigation or settlement; e) all available domestic remedies have not been exhausted, unless it is proven that the remedy procedure is unjustifiably prolonged or unlikely to be effective; f) the complaint is manifestly ill-founded or insufficiently substantiated; g) the facts which are the subject matter of the complaint occurred before the entry into force of the Third Optional Protocol in a particular State Party, unless the facts continued to exist after that date; h) the complaint has not been filed within one year after the domestic remedies had been exhausted, unless the complainant shows that it was impossible to lodge a complaint within that time limit. (Article 7 of the OPIC). The strictly set admissibility criteria explain many rejected applications. By September 2019, the Committee had received more than 300 petitions, and only 99 have been accepted as admissible (OPIC, 2022).

Therefore, the procedure initiated by filing individual communications (complaints) is a quasi-judicial procedure, which results in the adoption of the Committee's opinion on the existence or non-existence of the violation of the guaranteed children's right. The Committee may formulate recommendations for a State Party that has violated the rights of the child (Article 10 of the OPIC). In case of an established violation of the rights of the child, the State Party shall give due consideration to the Committee views and recommendations, and submit a written response as soon as possible, stating what measures have been taken or are to be taken in compliance with the Committee opinion and recommendations (Article 11 of the OPIC). Thus, the Committee's opinion on the existence of a violation of children's rights concurrently establishes the responsibility of the State Party and its international obligation to act in accordance with the adopted opinion.

Under the individual communications procedure, the Third Optional Protocol also envisages the possibility of reaching an amicable settlement (Article 9 of the OPIC) as one of the ways of ending the procedure, which established the Committee's duty to make its good services available to interested parties in view of reaching a friendly settlement. It is a favored dispute resolution method which allows the complainant and the State Party to come to a mutually agreed solution on the violation alleged by the complainant. The settlement procedure is terminated by a settlement agreement, without a decision of the Committee, whose

duty is to provide adequate space and assistance to the parties, and to ensure that the settlement agreement fully complies with the CRC, the First and the Second Optional Protocols, as well as with the well-established principle of the best interests of the child.

The amicable settlement procedure may be initiated at the request of one of the parties at any time, from the moment the petition (complaint) has been received by the Committee until the moment when the decision on the merits is rendered. The procedure is voluntary, and the parties must give their explicit consent. In case the Committee concludes that the parties are unlikely to reach an agreement, the Committee may intervene, either to facilitate a dialogue or to reinstate its own proceedings if one of the parties withdraws from the process or demonstrates reluctance to reach a friendly settlement.

The Committee encourages the submission of petitions directly by children and strives to respond to every child's petition as soon as possible in a child-friendly manner. By September 2019, the Committee had received 6 petitions directly submitted by children (OPIC, 2022).

2.2. Interstate Complaints Procedure

Article 12 of the Third Optional Protocol (OPIC) establishes the inter-state communications procedure. Thus, a State Party which has ratified the Third Optional Protocol and declared its acceptance of the inter-state communication procedure may file a complaint with the Committee against another State which has ratified the Third Optional Protocol and accepted the application of the inter-state communications procedure. This procedure may be applied to protect the rights guaranteed by the CRC, the First and the Second Optional Protocols, if the State that allegedly committed the violation has ratified the CRC, the First or the Second Optional protocol (OPIC, 2022).¹⁰

2.3. The Inquiry Procedure

The Inquiry Procedure is regulated in Articles 13 and 14 of the Third Optional Protocol (OPIC). This procedure is a mechanism which enables the Committee to investigate alleged grave and systemic violations of the CRC, the First or the Second Optional Protocol by State Parties that have ratified these international instruments. This procedure is an optional mechanism because Article 13(7) of the OPIC explicitly provides that each State Party may declare that it does not recognize this competence of the Committee at the time of ratification of the Third Optional Protocol (an *opt-out clause*), and thus exclude the application of this procedure by a declaration. Thus, if the Committee receives reliable information indicating serious or systematic violations of rights (e.g. sale of children, child prostitution, pornography, or involvement of children in armed conflicts), it may decide to conduct an inquiry (Articles 13(1) OPIC). In order to initiate this procedure, it is not necessary to have exhausted all domestic remedies or to identify the specific victim(s). The inquiry is conducted confidentially, in cooperation with the State Party at all stages of the proceedings (Article 13(3)OPIC). By October 2021, the Committee had conducted one investigation, and is currently conducting four investigations (OPIC, 2022).

¹⁰ For more, see: OPIC (2022). available at <https://opic.childrightsconnect.org/what-is-opic/the-mechanisms/>

3. THE SCOPE AND LIMITS OF THE THIRD OPTIONAL PROTOCOL

Although the entry into force of the Third Optional Protocol is a great achievement in the field of children's rights protection, the question is whether its entry into force is a definite victory for those who have advocated for its adoption. This question arises because the final text of the Third Optional Protocol has been formulated after long negotiations between the members of the working group and, particularly, considering the fact that its provisions are essentially a compromise between different interests.

The process that preceded the final formulation of the Third Optional Protocol involved lengthy discussions, largely pertaining to the issue who would have active procedural legitimacy to submit petitions to the Committee. In addition to the submission of individual petitions, the dominant idea was to prescribe the possibility of submitting collective petitions alleging a violation of the children's rights guaranteed by the CRC, the First and the Second Optional Protocols (UN GA: Draft Proposal for Third Optional Protocol, 2011a).¹¹

According to the originally formulated proposal, individual children or a group of children or their representatives who claimed to be victims of violations of children's rights guaranteed by the CRC, or the First and the Second Optional Protocols, had active procedural legitimacy to submit individual petitions to the Committee (Article 6 of the Draft Proposal 2011). The submission of collective petitions was regulated in Article 7 of the Draft Proposal (2011), which envisaged that each State Party to had the possibility to declare (at the time of signing or ratifying the Optional Protocol) whether it would accept the Committee's competence to receive and consider collective petitions (the so-called *opt-in clause*). It was further stipulated that collective petitions may be submitted by human rights organizations, ombudsmen, or non-governmental organizations. A state that accepts the possibility of submitting collective petitions could withdraw this statement at any time by notifying the UN Secretary-General (Article 7 of the Draft Proposal 2011).

It was stated that introduction of the institute of collective complaint would enable communication in cases when victim choose not to file an individual petition, as well as to prevent the revictimization of children. On the other hand, some of the reasons given by the members of the working group against the introduction of the collective complaint are that this institute largely overlaps with the institute of inquiry procedure in case of serious and systematic violations of rights and with the reporting procedure. It was claimed that in the case of collective complaints it is often not easy to identify the victim, which according to opponents of this procedure leads to abstract procedures and reduces the possibility of the state to respond to the submitted petition in the right way (UN GA: Report of the Working Group, 2011b:13).¹²

The text of the Optional Protocol adopted by the Human Rights Council Resolution 17/18 of 14 July 2011 (UN GA, 2011c)¹³ did not envisage the institute of collective petition

¹¹ This legal solution is contained in the UN General Assembly (2011a): *Revised proposal for a draft optional protocol to the Convention on the Rights of the Child*, submitted to the UN General Assembly on 18 January 2011 by the Human Rights Council Working Group (2nd session); available online at http://www.bayefsky.com/reform/a_hrc_wg7_2_4.pdf

¹² UN General Assembly (2011b): *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*, UN GA A/HRC/17/36 of 25 May 2011, Human Rights Council (17th session), Chairperson-Rapporteur: D.Štefánek (Slovakia); https://archive.crin.org/sites/default/files/images/docs/A.HRC.17.36_en.pdf?msclkid=a28affeea54011ec8d36c3e6fc6aaaf0

¹³ UN General Assembly (2011c): Resolution A/HRC/RES/17/18 adopted by the Human Rights Council, Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, HRC 17th Session, Geneva; available at <https://www.refworld.org/docid/4e72fbb12.html>

although the working group members who had advocated for introducing this institute stated that the collective petition (as a kind of *actio popularis*) is provided in the African Charter on the Rights and Welfare of the Child and the Additional Protocol to the European Social Charter (Carletti, 2020: 117). It was an opportunity to introduce the institute of collective petition, which would enable children from different groups (whose rights had been violated and who were ready to speak publicly) to be represented by the non-governmental sector or institutions for the protection of the rights of the child (children's ombudsman). It was also an opportunity to draw public attention to violations of children's rights, to prevent secondary victimization of children, and to give the Committee the opportunity to interpret the text of CRC on a case-by-case basis. Unfortunately, the international community missed the opportunity to provide a wider scope of protection for children's rights at the international level by envisaging this institute in the Optional Protocol. Thus, the institute of collective petitions is not contained in the last version of the Third Optional Protocol adopted by the UN General Assembly on 19 December 2011.¹⁴

One of the obstacles precluding the Third Optional Protocol (OPIC) to achieve its full function in the field of children's rights protection is the fact that this Protocol has been ratified by a relatively small number of countries, and that the ratification process is very slow. Thus, according to the UN Treaty Collection (2022)¹⁵, in 2022, eight years since the entry into force of the Optional Protocol, 48 States have ratified the OPIC, 16 have signed but not yet ratified it, and 133 have taken no action (OPIC, 2022).¹⁶ The Republic of Serbia signed the Third Optional Protocol in 2012, but it has not been ratified by the National Assembly.¹⁷ It seems that the hesitation of states to ratify the Third Optional Protocol is a consequence of fear that their actions could be criticized by another international human rights body, in this case the Committee.

On the other hand, the resistance of State Parties to enable children to directly submit individual complaints to the Committee (for violations of the rights guaranteed by the CRC, the First and the Second Optional Protocol) may be understood as a reflection of their distrust in children as right holders and active subjects in these proceedings because the direct submission of individual complaints to the Committee implies the highest level of children's participation.

¹⁴ UN General Assembly (2011d): Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC), adopted by UNGA Resolution A/RES/66/138 of 19 December 2011; https://treaties.un.org/doc/source/docs/A_RES_66_138-Eng.pdf; <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-communications>

¹⁵ UN Treaty Collection (2022): *11. d Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, New York, 19 December 2011 Ratification status on 30.8.2022; available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4

¹⁶ After considering the ratification status of the listed countries, we can conclude that the largest countries in the world have taken no action (the United States, Australia, Canada, New Zealand, China, Russia, India, Indonesia, Mexico, and the United Kingdom are not even signatories to the Third Optional Protocol 2011). Some European countries (Bulgaria, Greece, Hungary, Iceland, Lithuania, the Netherlands, Norway, Sweden) are not signatories either. On the other hand, some countries (Austria, Mali, Malta, Mauritius, Morocco, Romania and Serbia) are signatories to the Third Optional Protocol but they have not ratified it. For more information, see: OPIC (2022): Ratification Status, available at <https://opic.childrightsconnect.org/ratification-status/>

¹⁷ North Macedonia is another former Yugoslav republic that signed the Third Optional Protocol in 2012 but has not ratified it yet. The Third Optional Protocol (OPIC) was ratified by Bosnia and Herzegovina (2018), Croatia (2017), Montenegro (2013), and Slovenia (2018). See: Ratification status data at <https://indicators.ohchr.org/> and https://treaties.un.org/pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-11-d&src=IND

In terms of justifying the introduction of the provision allowing children to submit individual petitions, Smith (2013) raised the issue of education: whether children know their rights and whether they are able to access the new protection mechanism established under the auspices of the CRC. She proposed introducing a human rights educational program in institutions for children education and upbringing, which would provide lessons for both children and their parents/guardians (Smith, 2013: 305). The human rights education was also promoted in the UN Declaration on Human Rights Education and Training (2011).¹⁸

The Third Optional Protocol is not the first international document allowing children to submit individual complaints for the protection of their rights. Such a provision is also envisaged in Article 44 of the African Charter on the Rights and Welfare of the Child (1990).¹⁹ In the system under the auspices of the Convention on the Rights of the Child, this possibility is introduced only by the Third Optional Protocol to the CRC as an additional document (Smith, 2013: 305).

In terms of allowing individual petitions to be filed by children, the question arises whether there are more states in the contemporary world that are willing to enable children to use their active procedural legitimacy before an international quasi-judicial body; if they have confidence in children's capacity to be active subjects in these proceedings, they will decide to ratify the Third Optional Protocol. On the other hand, there are many other state that are highly unlikely to entrust children with such a capacity.

Some authors also raise the issue of the legal nature of the individual communications procedure before the Committee, which leads to decisions that are not legally binding. Considering that this quasi-judicial mechanism only requires states to "give due consideration" to the recommendations and to report on the legislative and other measures taken, the Committee opinions and recommendations are not legally binding on the State Parties. On the other hand, the small number of ratifications is justified by the inability to meet the strict acceptability conditions, as well as by the fact that there is a lack of awareness about communications procedure in the general public (Carletti, 2020: 119).

For all these reasons, the effects of the Third Optional Protocol are still limited. Therefore, additional ratifications of the Third Optional Protocol would contribute to ensuring a more complete protection of the rights of the child beyond national borders, increasing children's participation in these proceedings, and promoting the evolutionary nature of the CRC through its interpretation when considering individual complaints.

We believe that the ratification of the Third Optional Protocol by the Republic of Serbia would enable a more comprehensive protection of the rights of the child, which would open a completely new chapter in understanding and promoting the rights of the child guaranteed

¹⁸ The UN General Assembly adopted the UN Declaration on Human Rights Education and Training by Resolution A/RES/66/137 of 19 December 2011.. This Declaration reaffirms the principle that every individual should strive to promote respect for human rights and fundamental freedoms through teaching and education, that education should be aimed at the full development of human personality and a sense of dignity, and that it should promote understanding, tolerance, and friendship among nations. Thus, states are obliged to ensure respect aimed at the promotion, protection and effective realization of human rights and fundamental freedoms. The Declaration is available at <https://www.ohchr.org/en/resources/educators/human-rights-education-training/11-united-nations-declaration-human-rights-education-and-training-2011?msclkid=dc5ba843a69311ec85b95d7ee15091af>

¹⁹ African Charter on the Rights and Welfare of the Child (1990), adopted by the African Union at the 26th Ordinary Session of the Assembly of Heads of State and Government of the OAU, Addis Ababa, Ethiopia, July 1990, entered into force on 29 November 1999; available at https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf?msclkid=602e33afb2bb11ecb44a1ead5f713bcc

by the CRC, the First Optional Protocol and the Second Optional Protocols.²⁰ Given the fact that the Committee is a multidisciplinary expert body composed of specialists from different fields who are professionally engaged in the field of children's rights and welfare (psychologists, social workers, medical professional, legal professionals specializing in human rights and children's rights, etc.), the Committee is the most adequate authority to decide on the violation or non-violation of children's rights referred in their petitions (OHCHR/UN Office of the High Commissioner for Human Rights, 2022).²¹ Thus, the Committee's multidisciplinary composition generates a holistic approach to the protection of children's rights (Lee, 2010: 574).

4. THE COMMITTEE PRACTICE ON INDIVIDUAL COMMUNICATIONS

According to the OHCHR data, on 23 February 2022, there were 85 individual complaints pending before the Committee, the largest number of which were lodged against Switzerland (21), Spain (17), and France (11) (OHCHR, 2022).²² The insight into the Committee's practice (OCHR: CRC Jurisprudence, 2022)²³ shows that the Committee made 24 decisions by 25 March 2022 on the merits of the submitted complaints and issued them in the form of an opinion (*adoption of views*); 29 complaints were rejected as inadmissible (*inadmissibility decision*); in 31 cases, the Committee decided to discontinue the proceedings for various procedural reasons (*discontinuance decisions*). The largest number of complaints referred to alleged violations of the rights of migrant children, while 16 out of 24 opinions referred to Spain (OHCHR, 2022).

In this part of the paper, we will look into one of the Committee decisions referring to the alleged violation of the child's right to maintain a personal relationship and direct communication with a non-resident parent. The Committee's View on *Communication no. 30/2017 of 3rd February 2020* (OHCHR: CRC Jurisprudence, 2022)²⁴ was issued against the State of Paraguay. The complainant (an Argentine citizen) submitted a complaint acting on behalf of his daughter born in 2009 (an Argentine citizen), claiming that the child was a victim of violation of the rights guaranteed by Articles 3, 4, 5, 9, 10, 18 and 19 of the Convention (CRC). According to the complaint, the petitioner's daughter was born in Argentina, in a relationship with the child's mother (a citizen of Paraguay). Eleven days after the birth of the child, the mother moved with the child to her hometown in Paraguay. The petitioner occasionally traveled to Paraguay to visit his daughter. The decision on child

²⁰ Children enjoy the protection of their rights before other international judicial bodies, such as the European Court of Human Rights (which directly refers to the CRC), the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, and the African Court of Human Rights.

²¹ Under Article 43 of the CRC, the Committee consists of 18 independent experts, who are persons of high moral standing, elected by State Parties; they serve in their personal capacity and may be re-elected after the expiry of their mandate. For more on the Committee membership, see: OHCHR (2022): Committee –Membership; available at <https://www.ohchr.org/en/treaty-bodies/crc/membership>

²² See: The list of cases pending before the Committee on the Rights of the Child (February 2022), available at: OHCHR (2022); <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRC/TablePendingCases.pdf>

²³ The database of the jurisprudence of the EU Treaty Bodies established under the auspices of the UN, including the practice of the Committee, can be accessed at OCHR (2022): Jurisprudence; see: <https://juris.ohchr.org/>

²⁴ OHCHR (2022): CRC Jurisprudence/ UN Committee on the Rights of the Child (2020): Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning *Communication No. 30/2017 N.R. v. Paraguay* (CRC/C/83/D/30/2017) of 3 February 2020; <https://juris.ohchr.org/Search/Details/2629>

custody was never made but the mother actually took care of the child. Over time, the mother started preventing contact between the petitioner and the child. The petitioner initiated a civil court proceeding in Paraguay in 2015, seeking to be allowed to communicate directly with his daughter by phone and the child to visit him occasionally in Argentina. In its decision, the domestic court regulated the manner of maintaining personal relations between the child and the petitioner, including as follows: communication with the child via Skype on Mondays, Wednesdays and Fridays from 18:00 to 19:00, for which the petitioner would provide the necessary equipment; the petitioner's right to spend one Saturday a month (from 9 am to 6 pm) with a child; and the child's right to visit the father in Argentina (a week during the winter and summer holidays). However, the final court decision was not executed in a timely manner, given the passage of time from its adoption to the time the application was submitted to the Committee (Committee Opinion, § 2).

The petitioner claimed that the state, by not taking measures to enforce the court decision, violated the rights of the child guaranteed by the CRC and did not respect the principle of the best interests of the child. He referred to the ECtHR decisions in *Strumia v. Italy* (2016) and *Giorgioni v. Italy* (2016), where the ECtHR found a violation of the right to respect for private and family life guaranteed by Article 8 of the European Convention on Human Rights (ECHR) (Committee Opinion, § 3.1). He referred to the violation of Article 10(2) of the CRC which guarantees a child whose parents reside in different states the right to maintain a personal relationship and direct contact with both parents, except in exceptional circumstances. He claimed that the state of Paraguay violated Articles 18 and 19 of the CRC because both parents are responsible for the child's upbringing and education, and that the state had not taken any action in terms of ensuring the exercise of this right (Committee Opinion, § 3.8).

The State argued that application should be declared inadmissible *ratione temporis* pursuant to Article 7(g) of the Third Optional Protocol because the alleged violation occurred before its entry into force in Paraguay and because domestic remedies have not been exhausted. The state claimed that there was no evidence of a violation because this is a child that attends a private school, lives with his mother in a decent home, maintains contact with the father over the Internet, and visited the father in Argentina in the period from 2017 to 2018, while the mother paid the costs of one of the trips (Committee Opinion, § 4).

The Committee concluded that, pursuant to Article 20 of the Third Optional Protocol (OPIC), the communication was admissible *ratione temporis* because the alleged violation continued after its entry into force in Paraguay. Regarding the exhaustion of domestic remedies, the Committee concluded that admissibility criteria were met because the petitioner repeatedly addressed the Paraguayan authorities, claiming that the right to a fair trial had been violated, including recourse to the Supreme Court. Regarding violations of Article 18 and 19 of the CRC, the Committee concluded that the conditions of admissibility were not met because these violations were not sufficiently substantiated, but that the alleged violations of Article 3, 4, 5, 9 (3) and 10 (2) of the CRC are sufficiently reasoned and acceptable (Committee Opinion, § 7).

Deciding on the merits, the Committee concluded that the State Party had failed to take the necessary measures to ensure the enforcement of the decision governing contact between the child and the complainant, whereas the father repeatedly addressed the judicial authorities of the State of Paraguay claiming the violation of the guaranteed rights due to non-enforcement of the final court decision. According to Article 9 (3) of the CRC, State Parties have an obligation to respect the right of a child separated from one or both parents

to maintain personal relations and direct contact with both parents on a regular basis, unless this is contrary to the best interests of the child. The Committee claimed that the preservation of the family environment includes the preservation of the child's ties in a broader sense, and that these ties are particularly important in cases where parents are separated and live in different places. Therefore, the Committee should establish whether the authorities of the State Party have taken effective measures to ensure the preservation of personal ties and contacts between the petitioner and the child. The Committee referred to the general rule that it is the responsibility of State Parties to interpret and apply domestic law, unless their assessment proves to have been manifestly arbitrary and led to a denial of justice (Committee Opinion, § 8).

The Committee concluded that decisions regarding the regulation of personal relations between the child and the parent (from whom the child is separated) must be urgently made and executed because the passage of time may have irreparable consequences on their relationship. As the domestic court decision was not enforced, the petitioner and the child were unable to maintain regular and direct contact for several years; the child did not maintain direct contact via the Internet with the author and she did not want to travel to Argentina during the holidays. Bearing in mind that the adoption of an interim measure would prevent the problem of gradual alienation of the child from the father, the Committee concluded that the State did not take sufficient and timely steps to enforce the interim measure concerning the final court decisions, which all led to a violation of Articles 3, 9 and 10 of the CRC (Committee Opinion, § 8).

Therefore, the State should provide the child with effective satisfaction for her injuries, in particular by taking effective measures to enforce the final judgment, through counseling and other appropriate and proactive support services to rebuild the relationship between the child and the father, primarily taking into account the best interests of the child. The Committee further noted that it was the responsibility of the State Party to prevent similar violations in the future, and recommended the State Party to: 1) take the necessary measures for the urgent and efficient execution of court decisions in a child-friendly manner so that the relationship between the child and the parent is re-established and preserved; 2) organize trainings for judges and other professionals on the child's right to maintain regular contact with both parents, as well as on the content of General Comment no. 14 (Committee Opinion, § 9).

According to Article 11 of the OPIC, it is necessary for the State Party to submit information on the measures taken to implement the Committee's opinion, as soon as possible but not later than 180 days from the date of receiving the Committee opinion. The State party also has the duty to publish the opinion of the Committee and to disseminate it widely. In compliance with Article 44 of the CRC, the State Party is also bound to submit a report with detailed information on these measures (Committee Opinion, § 11).

5. CONCLUSION

The adoption of the Third Optional Protocol to the CRC on Communications Procedure (OPIC) represents the realization of decades-long aspirations to complete the international system of protection of the rights of the child. It aimed to ensure that the guaranteed children's are not declarative but that legal provision contain a potential sanction for non-compliance. The Third Optional Protocol (OPIC) allows children to submit individual

complaints, either individually or through their representatives, to the Committee on the Rights of the Child.

The Committee on the Rights of the Child is an international body which has powers reminiscent of judicial powers but they are in fact quasi-judicial. It is not a court in the true sense of the word because it does not exclusively consist of lawyers; it is a quasi-judicial mechanism and a multidisciplinary body composed of experts in different areas who come from the State Parties that have ratified the CRC. Thus, the decisions made by the Committee are not judgments but opinions or views on alleged violations of children's rights. As such, they are not formally binding but have a great *de facto* impact on the State Parties and their international reputation in case of inobservance of the issued recommendations. In this sense, the Third Optional Protocol has a great potential for effective protection of children's rights at the international level. *In concreto* interpretation of the provisions envisaged in the CRC, the First Optional Protocol and the Second Optional Protocol on a case-by-case basis makes these provisions more flexible; they are like a "living tissue" that may be applied to an indefinite number of individual cases.

The most recent data shows that one of the main obstacles to accomplishing the intended goals of the Third Optional Protocol seems to be a relatively small number of ratifications, as well as the slow ratification process in the countries that have signed the Third Optional Protocol. In that sense, as it is necessary to accelerate the ratification process of this international legal instrument, we urge the Republic of Serbia to ratify the Third Optional Protocol to the CRC on Communications procedure. It would contribute to promoting respect for, observance and effective protection of children's rights.

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TREĆI FAKULTATIVNI PROTOKOL O POSTUPKU PO PRITUŽBAMA UZ KONVENCIJU O PRAVIMA DETETA – NOVI PUT PRAVNE ZAŠTITE PRAVA DETETA

Jedan od značajnijih trenutaka u oblasti zaštite prava deteta koja se ostvaruje pod okriljem Konvencije o pravima deteta, jeste donošenje Trećeg fakultativnog protokola o postupku po pritužbama, kojim je zaokružen sistem nadzora i zaštite prava deteta od strane Komiteta za prava deteta, jer je navedenim protokolom nadležnost Komiteta za prava deteta proširena, a deci pružena mogućnost da se neposredno ili posredstvom odraslih obraćaju Komitetu za prava deteta i to predstavkama kojima će se pozivati na povrede prava garantovanih Konvencijom o pravima deteta, odnosno Prvim i Drugim fakultativnim protokolom uz Konvenciju o pravima deteta.

Ključne reči: prava deteta, Konvencija o pravima deteta, Treći opcioni protokol, individualna predstavka.