

# The Third Optional Protocol to the International Convention on the Right of the Child: A Success or a Failure for the Enforcement of Children's Rights?

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## Abstract

The Third Optional Protocol to the International Convention on the Rights of the Child is a milestone for the recognition of children's rights and access to justice. However, the mechanism's capacity to fulfil its purpose rests on its ability to accommodate children's needs and rights. This article explores the extent to which the Optional Protocol is a child-friendly justice mechanism by analysing its provisions. It concludes that the provisions under the Optional Protocol are inadequately adapted to children's rights and needs. The article argues that the current state of the mechanism's weaknesses outweighs its potential strengths in providing enhanced access to justice for children. The article goes on to argue that a further reform, in the form of a collective complaints mechanism, would be of particular benefit for children and address some of the Optional Protocol's current weaknesses.

## Keywords

Third Optional Protocol to the CRC – International Convention on the Rights of the Child – CRC – Access to Justice for Children – Enforcement of Children's Rights – Child-Friendly Justice – Children's Rights – Collective Complaints Procedure.

## 1. Introduction

'For rights to have meaning, effective remedies must be available to redress violations.'<sup>1</sup> The Third Optional Protocol (OP) to the International Convention on the Rights of the Child (CRC) has the capacity to ensure that children have access to effective remedies and came into force on 14 April 2014. The OP provides for a method that enables children to submit a complaint to the Committee for the CRC

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<sup>1</sup> The United Nations Committee on the Rights of the Child, 'General Comment 5: General Measures of implementation of the Convention on the Rights of the Child' (2003) CRC/GC/2003/5, para 24.

(the Committee) about violations of their rights under the CRC and the two additional previously existing Optional Protocols.<sup>2</sup>

In order for the OP to provide a method for the effective enforcement of children's rights, it needs to contain special measures that take into account children's unique status as human rights holders. The OP must acknowledge that children have a vulnerable and dependent status that makes it harder for them to access justice than adults.<sup>3</sup> Thus, the OP must offer child-friendly justice to ensure that children have access to justice. Child-friendly justice is defined as a system that "gives primary consideration to a child's right to protection and that takes into account a child's individual needs and views".<sup>4</sup> This article examines whether the OP improves access to justice for children. The question will be evaluated by analysing whether the OP provides a child-friendly enforcement mechanism.

Access to justice can be defined as either being able to approach a court with a claim and have it tested, or the ability to approach a court and have the claim heard according to procedural rights, or the ability to obtain legal aid due to lack of resources.<sup>5</sup> This article will focus on the first category primarily but will also touch upon the last category. The article concludes that an analysis of the context and provisions under the OP demonstrates that its weaknesses outweigh its strengths in ensuring effective access to justice for children.

It is argued that the OP could have provided for much stronger child-friendly justice and it therefore appears as a failure rather than a success. A collective complaints procedure will be suggested as one reform that would help strengthen the OP complaints procedure to put it more in line with its main purpose of ensuring access to justice for children. Section two will examine the strengths of the OP by looking at the contextual importance of the OP for children's rights. Section three will assess the weaknesses of the OP by analysing its provisions and their inadequate regard for child-friendly justice. Section four will discuss a collective complaints procedure to evaluate measures to strengthen the OP's potential to provide access to justice to children.

## **2. The Strengths of the Optional Protocol and Practical Issues with Access to Justice for Children**

In order to analyse whether the OP will enhance access to justice for children and effectively enforce children rights, it is first necessary to understand the contextual importance of the OP for children. Thus, this section sets out the potential strengths of the OP by looking at its theoretical and practical benefits for children's rights. The section will go on to analyse the issues with domestic access to justice for children.

### **A. The Strengths of the Optional Protocol**

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<sup>2</sup> The two other optional protocols are; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 16 March 2001, entered into force 18 January 2002) A/RES/54/263; and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) A/RES/54/263.

<sup>3</sup> General Comment 5 (n 1) para 24.

<sup>4</sup> United Nations Office on Drug and Crime, *Justice in Matters Involving Child Victims and Witnesses of Crime*, April 2009, 5.

<sup>5</sup> Francioni, *Access to Justice as a Human Right* (Oxford University Press 2007) 1.

Firstly, the OP is normatively significant for children. The OP demonstrates that children are no longer seen as incapable of having independent human rights.<sup>6</sup> Arguments put forward by some academics stating that children are dependent upon their parents for human rights protection and not as independent human rights holders are thereby weakened.<sup>7</sup> This argument is exemplified through the preamble of the OP which states:

*Reaffirming also the status of the child as a subject of rights and as a human being with dignity and with evolving capacities, Recognizing that children's special and dependent status may create real difficulties for them in pursuing remedies for violations of their rights...*<sup>8</sup>

Consequently, the CRC's effort to ensure that children are independent rights holders and not subjected to parents' unlimited power has taken another important step with the OP. Thus, the OP has symbolic value because it has the capacity of making sure children are no longer seen as "...mini-humans with mini-rights...".<sup>9</sup> In addition, the normative value of the OP creates an opportunity for states to show their true commitment to children's rights.<sup>10</sup> By ratifying the OP, states are encouraged to ensure that children's rights are taken more seriously.<sup>11</sup> The OP's normative value is therefore seen as invaluable because it furthers children's status as human rights holders and encourages states to take steps to that effect. The normative importance of the OP is also important because it is the most convincing argument for making the OP as child-friendly as possible. However, as will be analysed in section three, the capacity of the OP in achieving this result was not fulfilled.

Secondly, the OP has the capacity to enhance access to justice for children in a practical manner. It will create the first forum for children to have their unique rights heard by a body of child experts under the UN treaty body system.<sup>12</sup> The views that

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<sup>6</sup> Lee, 'Communications procedure under the Convention on the Rights of the Child: 3 Optional Protocol' (2010) 18 *International Journal of Children's Rights* 567, 568.

<sup>7</sup> A full review of this debate is outside the scope of this article. For examples of the debate, please see; Purdy, 'Why Children Shouldn't have Equal Rights' (1994) 2 *The International Journal of Children's Rights* 223; McGillivray, 'Why Children do have Equal Rights: in Reply to Laura Perdy' (1994) 2 *The International Journal of Children's Rights* 243; Campbell, 'Really Equal Rights? Some Philosophical Comments on 'Why Children shouldn't have Equal Rights' by Laura M. Pardy' (1994) 2 *The International Journal of Children's Rights* 259; Hafen and Hafen, 'Abandoning Children to their Autonomy: the United Nations Convention on the Rights of the Child' (1996) 37 *Harvard International Law Review* 449.

<sup>8</sup> The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) A/HRC/RES/17/18 (the optional protocol to the CRC), preamble para 4-5.

<sup>9</sup> Gilchrist, 'The Optional Protocol to the Women's Convention: An Argument for Ratification' (2000-2001) 39 *Columbia Journal of Transnational Law* 763, 778; Egan, 'The New Complaints Mechanism for the Convention on the Rights of the Child: A Mini Step Forward for Children?' (2013) 22 *International Journal of Children's Rights* 1, 18.

<sup>10</sup> Byrnes, 'Slow and Steady Wins the Race?: The Development of an Optional Protocol to the Women's Convention' (1997) 91 *American Society of International Law* 383, 385.

<sup>11</sup> De Wet, 'Recent Developments Concerning the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (1997) 13 *South African Journal on Human Rights* 514, 516.

<sup>12</sup> Lee (n 6) 576; Van Bueren, 'Acknowledging Children as International Citizens: A Child Sensitive Communications Mechanism for the Convention on the Rights of the Child' in

will be issued by the Committee on specific cases will develop jurisprudence that will guide states in attending to the specific rights of children. This function is the first of its kind at the international level, but already exists in the regional sphere in Africa under the African Charter for the Rights and Welfare of the Child (ACRWC).<sup>13</sup> However, the African complaints function only applies to the African continent and this left a gap for the protection of children's rights in the rest of the world. The OP has the capacity to fill the gap because all children will have an additional layer of justice no matter where they live in the world.<sup>14</sup> However, it is important to note that this capacity is subject to individual states ratifying the OP. Nevertheless, the universal coverage of the OP is of particular importance for Asia as there is no regional human rights treaty there.<sup>15</sup> Hence, the OP creates practical benefits that can enhance the implementation of children's rights significantly. Unfortunately this function is likely to be limited based on the restrictive admissibility criteria under the OP.

Thirdly, the OP encourages the improvement of domestic remedies.<sup>16</sup> The OP highlights the need for child-friendly domestic remedies and thereby encourages the need for states to strengthen their domestic justice systems.<sup>17</sup> The OP's mere existence creates pressure for states to review their own justice systems. This could arguably be linked to the fact that states do not like the negative publicity that international complaints bring under optional protocols more generally.<sup>18</sup>

Furthermore, the OP provides guidance on how to implement children's rights though the jurisprudence it produces under the procedure.<sup>19</sup> It does this by giving detailed advice in specific cases.<sup>20</sup> This mechanism creates an effective avenue for helping states with implementation of children's rights when compared to only having the pre-existing reporting procedure.<sup>21</sup> The reporting procedure provides more broad and general guidance. Thus, the OP complements the reporting procedure and creates a more effective method for guiding states in their rights implementation.<sup>22</sup> The guidance the OP provides is of vital importance because it aids the harmonization of domestic laws with the CRC and will hopefully help develop stronger child-friendly domestic justice systems.

### ***B. Issues with Enforcing Children's Rights in Domestic Legal Systems***

Children who want to enforce their rights face many issues at the domestic level. There is, for example, a lack of knowledge on children's human rights among

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Invernizzi and Williams, *The Human Rights of Children: From Vision to Implementation* (Ashgate Publishing limited 2011) 125.

<sup>13</sup> African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) CAB/LEG/24.9/49, article 44.

<sup>14</sup> Van Bueren, (n 12) 124.

<sup>15</sup> Ibid.

<sup>16</sup> Gilchrist (n 9) 783.

<sup>17</sup> Ibid; De Beco, 'The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: Good News?' (2013) 13 Human Rights Law Review 367, 369.

<sup>18</sup> Gilchrist (n 9) 780.

<sup>19</sup> Byrnes (n 10) 385.

<sup>20</sup> Arambulo, 'Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: can an ideal become reality?' (1996) 2 University of California Davis 111, 128.

<sup>21</sup> Van Bueren, *The International Law on the Rights of the Child* (Marinus Nijhoff Publishers, Save the Children 1998) 411.

<sup>22</sup> Lee, (n 6) 577.

children.<sup>23</sup> This section will analyse some of these issues and provide some recommendations. The section will go on to discuss the limited literature commenting on the need for the OP.

The cost of litigation is a hurdle that is particularly troublesome for children's access to justice. Children can find the costs of litigation more burdensome than adults, as they are generally not financially independent and rely on their parents for money.<sup>24</sup> It can be argued that legal aid for children that is given on an independent basis from parents is of particular importance because it is a key tool to overcome this issue. The idea of children enforcing their rights under the OP may encourage states to provide better legal aid for children and states can use the model found under the South African legal system.<sup>25</sup>

Under the South African Constitution children are to be given free legal help in civil matters if substantial justice is at stake.<sup>26</sup> This means that when the state is considering whether to give legal aid to a child, the state does not only give legal aid to children whose parents cannot afford legal services.<sup>27</sup> The state also gives legal aid to children with parents who can afford the costs of litigation but refuse to give financial support to children for this purpose.<sup>28</sup> Hence, a child's access to justice does not depend on whether a child's parents are willing to financially support the child but the substance of the child's legal claim. This model of legal aid could assist states in enhancing access to justice for children and in a child-friendly manner.

Many of the barriers children face in accessing justice are linked to domestic legal systems not being adapted to children's needs.<sup>29</sup> Apart from the OP, a suggested method to overcome this situation is the introduction of a new OP solely dedicated to access to justice for children. The new OP would add a new right to the CRC and it could look similar to the access to justice right that exists under the International Convention on the Rights of Persons with Disabilities (CRPD).<sup>30</sup> The right to access to justice under the CRPD covers the main concern persons with disabilities face in accessing justice.<sup>31</sup> A similar right covering the specific needs of children may improve access to justice for children. The Committee could then guide states, via the state reporting system and the new OP, on what measures they need to take in order to fulfil this right.<sup>32</sup> The OP's communications procedure and the newly added access to justice right would provide children with an avenue for submitting complaints to the Committee on inadequate access to justice procedures in their domestic justice systems.

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<sup>23</sup> Report of the United Nations High Commissioner for Human Rights, 'Access to Justice for Children', A/HRC/25/35 16<sup>th</sup> December 2013, 6 para 13.

<sup>24</sup> Coram Children's Legal Centre, *Submission of Evidence to the Office of the High Commissioner for Human Rights (OHCHR)* September 2013, 7.

<sup>25</sup> Constitution of the Republic of South Africa (approved 4 December 1996, took effect 4 February 1997) article 28(1)(h).

<sup>26</sup> *Ibid.*

<sup>27</sup> Stewart, 'Resource Constraints and a Child's Right to Legal Representation in Civil Matters at State Expense in South Africa' (2011) 19 *International Journal of Children's Rights* 295, 314.

<sup>28</sup> *Ibid.*

<sup>29</sup> UNODC Report (n 4) 13.

<sup>30</sup> The Convention on the Rights of Persons with Disabilities (adopted 24 January 2007, entered into force 3 May 2008) A/RES/61/106 (ICRPD) article 13.

<sup>31</sup> Grant and Nauhaus, 'Liberty and Justice for All: The Convention on the Right of Persons with Disabilities' (2012-2013) 19 *ILSA Journal of International and Comparative Law* 347, 352.

<sup>32</sup> *Ibid* 353.

It is argued that the OP is vital for children as rights holders as it can provide enhanced access to justice on both the international and domestic level. However, Smith disagrees as she denies the need for an OP.<sup>33</sup> Smith argues that the issue of not having an OP is not as bad as it appears.<sup>34</sup> She argues that the time and resources that would be spent on the OP could instead be used for better methods of enforcing children's rights.<sup>35</sup> Smith suggests that efforts should be put towards raising awareness and educating society on children's rights.<sup>36</sup> This is said to be a more realistic way of monitoring the implementation of children's rights.<sup>37</sup> Smith's argument is logical in terms of the suggested measures being easier and cheaper. However, the easier way risks rejecting the opportunity and the benefits the OP could bring:<sup>38</sup> The idea behind the OP is to ensure that the vulnerable situation children face in rights enforcement is improved.<sup>39</sup> The OP has the capacity to fill the gap left by domestic legal systems not having been adequately adapted to children's needs by providing an international complaints procedure specialised for children's needs. Thus, the OP practically has the capacity to provide the additional empowerment children have been missing.<sup>40</sup> This will increase children's chances of enforcing their rights and it will put two-way pressure, from domestic systems and the international sphere, on states to change their systems to become more child sensitive.<sup>41</sup> Hence, the benefits of having the OP outweigh the limitations.

### **C. The Need for the Optional Protocol**

The OP has great theoretical and practical importance in terms of enhancing access to justice for children. Arguably the most important theoretical strength of the OP is the normative significance it brings in terms of children being recognised as independent human rights holders. An equally important practical function of the OP is its capacity to provide an avenue where experts on children's unique rights are hearing children's claims. Furthermore, the OP will allow for detailed guidance on how states can adjust their justice systems to become more child-friendly based on the views that the Committee will produce on individual complaints. Thus, the potential benefits of having an international child-friendly communication procedure outweigh the arguments put forward by Smith. It is argued that the OP is of vital importance in terms of the potential it provides in creating an international system that normatively acknowledges children as fully-fledged human rights holders and the practical tool it provides to do so. However, the question of whether the OP is capable of achieving this will be assessed through analysing the provisions under the OP in the next section.

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<sup>33</sup> Smith, 'Monitoring the CRC' in Alfredsson et al, *International Human Rights Monitoring Mechanisms, Essays in Honour of Jakob Th.Möller*, 2nd revised edn (Martinus Nijhoff 2009) 115.

<sup>34</sup> *Ibid* 114.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid* 115.

<sup>37</sup> *Ibid* 116.

<sup>38</sup> Fortin, *Children's Rights and the Developing Law* (Cambridge University Press 2005) 48.

<sup>39</sup> CRC General Comment 5 (n 1) para 24.

<sup>40</sup> Chenwi, 'Correcting the historical asymmetry between rights: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2009) 9 *African Human Rights Law Journal* 23, 50.

<sup>41</sup> Cole, 'When All Else Fails: International Adjudication of Human Rights Abuse Claims, 1976-1999' (2005-2006) 84 *Social Forces* 1909, 1911.

### 3. Weaknesses of the International Complaints Process and the Optional Protocol

In order to assess whether the OP will be able to ensure effective access to justice for children and aid the enforcement of children's rights, its provision will be analysed. A preliminary consideration to address prior to this analysis is the issues children face in accessing the OP domestically. Thus, this section will focus on the issues the admissibility criteria under the OP could cause and the costs of preparing complaints for the OP.

#### A. *The Exhaustion of Domestic Remedies Rule*

Children may face particularly harsh challenges in accessing the OP based on the admissibility criteria to the procedure. Access to the OP depends on the fulfilment of the admissibility criteria found under article 7 of the OP.<sup>42</sup> Article 7(e) may become a particularly restrictive admissibility criterion for children. It states that claims under the procedure will not be accepted if '[a]ll available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief...'.<sup>43</sup> Hence, children must exhaust their domestic remedies before submitting a complaint under the OP. Smith sees this criterion as a potential barrier to accessing the OP for children.<sup>44</sup> She sees it as an obstacle due to the unique situation the OP could create in terms of legal capacity of children.<sup>45</sup> Children will have the legal capacity to directly access the OP but they may, on the other hand, lack the capacity to pursue domestic remedies prior to submitting any complaints under the OP.<sup>46</sup> Smith bases this argument on domestic legal systems requiring parents or adults to pursue a claim on behalf of children.<sup>47</sup> Smith argues that the difficulties children would face domestically would make it very hard for them to fulfil the admissibility criterion under article 7(e) of the OP.<sup>48</sup> Children in this situation would be unable to satisfy the admissibility criterion and they would thereby be unable to access the OP.<sup>49</sup> Hence, the exhaustion of domestic remedies criterion may severely limit access to justice for children.

However, the exceptions to the admissibility criterion under article 7(e) may help overcome its restrictive nature. The exceptions state that the criterion does not apply when domestic remedies are ineffective, unavailable or unduly prolonged.<sup>50</sup> The purpose of this criterion is to see whether firstly there are any effective remedies domestically that could aid an applicant. Where there are no such domestic remedies 'available', the exception would apply. Hence, in a situation where there is no process for children to enforce their rights domestically, it can be argued that the criterion would not apply because there would not be any effective remedies

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<sup>42</sup> The Optional Protocol to the CRC (n 8) article 7(e).

<sup>43</sup> *Ibid.*

<sup>44</sup> Smith, 'The Third Optional Protocol to the UN Convention on the rights of the child? – Challenges Arising Transforming the Rhetoric into Reality' (2013) 21 *International Journal of Children's Rights* 305, 311.

<sup>45</sup> *Ibid* 306.

<sup>46</sup> *Ibid* 311, 313.

<sup>47</sup> *Ibid* 313, 315.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid* 315-316.

<sup>50</sup> Bayefsky, *How to Complain to the UN Human Rights Threat System* (Kluwer Law International 2003) 52.

'available'.<sup>51</sup> The question is then whether this analysis would apply to children who have not been able to pursue domestic claims because they do not have help from adults to pursue their claims for them. It should be noted that no definite answer could be given since the exception to the criterion is applied on a case-by-case basis.<sup>52</sup> However, it can be theorised that children in this situation would be seen as being denied access to justice and that would make any remedies under domestic systems 'unavailable'.<sup>53</sup> Hence, it is argued that children in this context could fall under the exception to the criterion because children would not be able to access justice without impediment.<sup>54</sup> It can therefore be argued that the admissibility criterion under article 7(e) may not restrict access to the OP in this context, contrary to Smith's analysis. Furthermore, it was suggested during the drafting of the OP that in situations where children do not have the capacity to pursue domestic remedies the criterion should not be strictly applied.<sup>55</sup> Thus, applying the exception to the criterion suggests that Smith's argument is flawed because children would be likely to fall under the exception. In addition, it appears counterproductive to develop the OP to enhance access to justice for children if it includes criteria that would openly exclude many children from accessing the procedure.<sup>56</sup> Accordingly, the admissibility criterion under article 7(e) is unlikely to unduly restrict children's access to the OP. In fact, the criterion may further, rather than restrict, children's access to justice.

The exhaustion of the domestic remedies rule has the capacity to become a tool that aids child-friendly justice. The exception to the rule has been shown to have a particularly beneficial meaning for children's rights under the African Charter for the Rights and Welfare of the Child (ACRWC). The Committee for the ACRWC has taken a very innovative approach to the exception of the domestic remedies rule in a case on children's rights, the *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v The Government of Kenya* case.<sup>57</sup> The Committee for the ACRWC has stated that the best interest of the child is a determinative factor in deciding whether domestic remedies are unreasonably prolonged.<sup>58</sup> In this case, the children to the claim had been waiting with a pending case in their domestic court for over six years and the case was not showing any sign of being resolved.<sup>59</sup> The Committee for the ACRWC saw this as being contrary to the best interest of the child and allowed the case to be exempted from the exhaustion of domestic remedies rule.<sup>60</sup> It is argued that a best interests of the child approach has the capacity to make the criterion

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<sup>51</sup> Trindade, *The Application of the Rule of Exhaustion of Domestic Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge University Press 1983) 57.

<sup>52</sup> *Z.T. (No. 2) v Norway*, CAT Case no 238/2003, (5 December 2005) para 8(1).

<sup>53</sup> Bayefsky (n 50) 51.

<sup>54</sup> Viljoen, *International human rights law in Africa* (Oxford University Press 2007) 336.

<sup>55</sup> Nevell, *Submission to Open-ended Working Group of the Human Rights Council, considering the possibility of elaborating an Optional Protocol to provide a communications procedure for the Convention on the Rights of the Child*, 2009, para 44.

<sup>56</sup> Lee (n 6) 579, 580.

<sup>57</sup> Durojaye and Foley, 'Making a First Impression: an Assessment of the Decision of the Committee of Experts in the *Nubian Children Communication*' (2012) 12 *African Human Rights Law Journal* 564, 565; *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v The Government of Kenya*, Comm no 002/Com/002/2009 (2011).

<sup>58</sup> *Ibid* para 32.

<sup>59</sup> *Ibid*.

<sup>60</sup> *Ibid*



under the OP child-friendly. If this approach to the exhaustion of domestic remedies rule were to be used by the Committee for the CRC, it would allow children to access justice despite not having exhausted all domestic remedies. This would be particularly beneficial for children with slow justice systems as the operations of these systems may be seen as contrary to the best interests of the child.<sup>61</sup> Hence, the exhaustion of domestic remedies criterion may aid access to justice rather than restrict it.

Children may face additional practical issues accessing the OP due to issues they face domestically.<sup>62</sup> Concerns have been raised that children may not be able to access the OP due to, for example, lack of knowledge of the complaints procedure under the OP, a lack of competency in sending complaints, and inadequate funds to send complaints.<sup>63</sup> Commentators have therefore been unsure about whether children will be able to access the OP.<sup>64</sup> It is argued that only some aspects of these concerns are valid. Regarding the issue of children being unaware of the complaints procedure, states are under an obligation to inform about the OP in a format adapted for children.<sup>65</sup> Thus, this concern may currently be valid but will hopefully become non-existent with time. The claim that children are generally not competent to make a complaint under the OP can be seen as too general an assumption. Some children may very well be able to submit a complaint with the guidance they need according to their evolving capacities.<sup>66</sup> It may further be said that this is a narrow approach to children's capacity and runs contrary to what academics who favour presuming children's competency have said.<sup>67</sup> Accordingly, assuming that children generally will not be competent to submit complaints does not seem a valid argument.

However, the final concern, about the costs of litigation, may be a more valid one. The procedure under the OP is free but that does not take away the costs of preparing the documentation and potentially getting a legal representative to submit a complaint under the procedure.<sup>68</sup> Children who can use NGO's, or other not-for-profit organisations, to assist them with the preparation of their complaint may not have this issue. However, NGO's cannot help every child wanting to pursue a claim under the OP.<sup>69</sup> In addition, international legal procedures do not offer legal aid. It is argued that children may not be able to access the OP due to financial restrictions. Furthermore, inadequate legal aid under domestic systems limits children's chances of having the tools to pursue a complaint under the OP further.<sup>70</sup> Even in domestic legal systems where legal aid is given for domestic legal processes, very few offer legal aid for international claims.<sup>71</sup> In addition, states do not appear to be obliged to provide legal aid for international claims. The Human Rights Council has stated that treaty provisions referring to domestic obligations on legal aid refers to domestic

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<sup>61</sup> Durojaye and Foley (n 57) 571-572.

<sup>62</sup> Smith (n 33) 115.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> The Optional Protocol to the CRC (n 8) article 17.

<sup>66</sup> The Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) A/RES/44/25 (CRC), 3, article 3.

<sup>67</sup> Van Bueren (n 21).

<sup>68</sup> Gilchrist (n 9) 770.

<sup>69</sup> Butler, 'Legal Aid before Human Rights Treaty Monitoring Process' (2000) 49 *International and Comparative Law Quarterly* 360, 372.

<sup>70</sup> Onoria, 'The African Commission on Human and Peoples' Rights and the exhaustion of local remedies under the African Charter' (2003) 3 *African Human Rights Law Journal* 1, 13.

<sup>71</sup> Butler (n 69) 370.

claims and not international ones.<sup>72</sup> Consequently, it seems highly unlikely that the Committee for the CRC would take another approach. To avoid making financial constraints a reason why children will not be able to access justice, it is suggested that the OP should offer legal aid.<sup>73</sup>

The European Court of Human Rights has an aid scheme which could be used as a model to develop one under the OP. The scheme offers legal aid if 'necessary for the proper conduct of the case before the Chamber' and if the applicant does not have the necessary resources.<sup>74</sup> It covers both legal, travel, and subsistence costs, but it is only given once the state that the applicant comes from has submitted a comment on the admissibility of the case or the time for submission has elapsed.<sup>75</sup> Thus, the applicant must sustain the costs of the claim until this stage and this may limit some applicants' capacity to submit complaints.<sup>76</sup> In addition, the amount of aid given is low and it is therefore unlikely that it can cover all the applicants' expenses.<sup>77</sup> Nevertheless, despite the flaws of the European Court's model, it could be used to develop a model suitable for children under the OP. However, this development is unlikely to occur due to the Committee's limited budget.<sup>78</sup> Experts have further stated that international legal aid is unlikely to be given in the future due to the complexities it involves.<sup>79</sup> It would require some form of calculation of how much aid should be given which would be hard to determine due to the different legal systems of the state parties to the OP.<sup>80</sup> Consequently, the issue of international legal aid may thus become a significant hurdle for children's access to the OP. Although it appears practically unlikely that international legal aid will be developed, it is still suggested that theoretically it would be highly beneficial for children's access to justice.

### **B. The 'Unwritten Material Rule'**

The rest of section three will assess the weaknesses of the OP by analysing its provisions. In order to assess whether the OP will be able to enforce children's rights effectively, it is necessary to set out a framework on how to assess it.<sup>81</sup> There are several to choose from but those most relevant for this article are: whether the actual text of the OP is capable of effectively achieving the purpose of the OP,<sup>82</sup> a comparison of the OP to older Optional Protocols to see whether it addresses the particular needs of children,<sup>83</sup> and an exploration of relevant alternatives.<sup>84</sup>

<sup>72</sup> *Simalae Toala et al v New Zealand*, ICCPR Case no 675/1995, (22<sup>nd</sup> of November 2000) para 6.2.

<sup>73</sup> Butler (n 69) 387.

<sup>74</sup> The European Court of Human Rights, Rules of the Court, 1<sup>st</sup> of January 2014, rule 101.

<sup>75</sup> *Ibid* rule 100, 103-104.

<sup>76</sup> Butler (n 69) 364.

<sup>77</sup> *Ibid* 366-367.

<sup>78</sup> Egan (n 9) 3.

<sup>79</sup> Butler (n 69) 370.

<sup>80</sup> *Ibid* at 387.

<sup>81</sup> Mahon, 'Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2008) 8 Human Rights Law Quarterly 617, 643.

<sup>82</sup> Vandenbogaerde and Vandenhoe, 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An *Ex Ante* Assessment of its Effectiveness in Light of the Drafting Process' (2010) 10 Human Rights Law Review 207, 231.

<sup>83</sup> Mahon (n 81) 644.

<sup>84</sup> Vandenhoe, 'Completing the UN Complaint Mechanisms for Human Rights Violations step by step: Towards a Complaints Procedure Complementing the International Covenant on

The main purpose behind the OP is to develop an enforcement function specifically for children's rights and needs.<sup>85</sup> This is argued since the states that were involved in the discussion on the need to develop the OP were only opposed to it if it did not add anything new in this context.<sup>86</sup> Accordingly, it is suggested that the OP is meant to add a new feature under international law that accommodates children's rights and needs. Commentators have stated that building the new OP on old models found under the other core treaties to the UN 'would be a loss of opportunity', as older Optional Protocols do not adequately accommodate children's rights and need.<sup>87</sup> It should be noted that there was another competing interest of ensuring consistency among all the Optional Protocols under the UN treaty body system during the drafting of the OP.<sup>88</sup> However, this latter consideration may come into conflict with the interest of ensuring that the complaints procedure is 'as 'child-friendly' as possible'.<sup>89</sup> It can therefore be argued that there was a need to strike a balance between these two competing interests.<sup>90</sup> In order to see whether a fair balance was struck between the competing interests, the provisions under the OP will next be analysed in detail. This will result in an analysis of whether the OP is an effective enforcement mechanism for children, as children need child-friendly procedures in order to access justice.<sup>91</sup>

A preliminary analysis can be done on the strengths of the provisions under the OP. Some elements of the OP can be seen as child-friendly because they seem to accommodate the particular rights and needs of children. One aspect that is particularly child-friendly is the preamble to the OP. It recognises the particular status of children as human rights holders and the need for a child sensitive justice procedure for children.<sup>92</sup> A second aspect is that the Committee is guided by the best interests of the child principle and is meant to take into consideration the views of children according to their age and maturity.<sup>93</sup> Thirdly, the Committee are supposed to develop the Rules of Procedure in a child sensitive manner.<sup>94</sup> An example of this can be seen by the fact that the Committee has the power to permit oral hearings at the merits stage.<sup>95</sup> This will enhance children's rights under the CRC to participate in judicial proceedings concerning them.<sup>96</sup> The Committee can also refuse to take on a case that would not be in the best interests of the child.<sup>97</sup> Fourthly, and more significantly, the OP imposes an obligation on states to ensure that children are not

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Economic, Social and Cultural Rights' (2003) 21 *Netherlands Quarterly of Human Rights* 423, 455.

<sup>85</sup> Lee (n 6) 576.

<sup>86</sup> Egan (n 9) 2-3.

<sup>87</sup> Van Bueren (n 12) 126.

<sup>88</sup> De Beco (n 17) 368.

<sup>89</sup> Egan (n 9) 10.

<sup>90</sup> Langford and Clark, *A Complaints Procedure for the Convention on the Rights of the Child: Commentary on the Second Draft*, Norwegian Centre for Human Rights, 7 February 2011, 1, available online at: [http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGCRC/Session2/NCHR\\_Commentary.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGCRC/Session2/NCHR_Commentary.pdf) [accessed on 8 May 2016].

<sup>91</sup> CRC General Comment 5 (n 1) para 24.

<sup>92</sup> The Optional Protocol to the CRC (n 8) preamble para 4-5,7.

<sup>93</sup> *Ibid* article 2.

<sup>94</sup> *Ibid* article 3(1).

<sup>95</sup> Committee for the CRC, 'Rules of Procedure' (April 2013) CRC/C/62/3, rule 19.

<sup>96</sup> The Optional Protocol to the CRC (n 8) article 12(2).

<sup>97</sup> *Ibid* article 3(2).

harmed due to submissions to the OP.<sup>98</sup> This provision adds extra protection for children as it defines harm to include human rights violations and this added aspect does not appear in most other Optional Protocols.<sup>99</sup> Fifthly, children's identities are protected unless they have given their express consent to have them revealed publicly.<sup>100</sup> This feature seems to be in line with the European Court of Human Rights' practice of codifying the names of children as in the case of *Z v UK*.<sup>101</sup> Hence, there are some child-friendly aspects to the OP, although it should be noted that they seem to be mostly developed in relation to protective aspects rather than empowering ones.

Other aspects of the OP can be seen as less child-friendly. Arguably the least child-friendly aspect is the admissibility criterion that does not allow for the submissions to be in an unwritten format. The rule, which will be called 'the unwritten material rule',<sup>102</sup> is contained in Article 7(b) which states that a submission is inadmissible if '[t]he communication is not in writing'.<sup>103</sup> This may render the OP inaccessible for children and risk that the OP is not assisting with effectively enforcing children's rights. This rule appears odd since the OP was intended to be as child-friendly as possible and the drafters recognised that many children cannot write.<sup>104</sup> However, it should be noted that the Committee, composed of different individuals to the drafters, did not want this harsh criterion as they recognised that it would exclude children.<sup>105</sup> The criterion is particularly alarming since the drafters recognised that children in their own capacity should be able to access to OP,<sup>106</sup> and should not have to rely on adults to submit their complaints. Accessing the OP does then not seem practically possible for some children. Children who cannot write or who would want to express themselves in other formats may be few,<sup>107</sup> but it can still be maintained that this situation is troublesome from an equality approach.<sup>108</sup> These children are essentially in principle, and practically, excluded from accessing the OP, while children who can read and write are included. More equal access to the OP would have been possible if at least in principle the criterion allowed for material to be submitted in other formats. In addition, allowing unwritten material would have the symbolic value of recognising the effort of trying to make the OP as child-friendly as possible.<sup>109</sup> Furthermore, the unwritten material rule is even harder to defend in light of other Optional Protocols existing under the core treaties of the UN. The admissibility criteria to the ICRPD do not include any explicit criteria requiring

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<sup>98</sup> Ibid article 4(1).

<sup>99</sup> The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 6 October 1999, entered into force 22 December 2000) A/RES/54/4 (CEDAW) article 5; The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 5 March 2009, entered into force 5 May 2013) A/RES/63/117(ICESCR) , article 13.

<sup>100</sup> The Optional Protocol to the CRC (n 8) article 4(2).

<sup>101</sup> *Z & Ors v United Kingdom* (Case no 29392/95) 10 May 2001(ECHR).

<sup>102</sup> I will refer to the substance of this provision as 'the unwritten material rule' throughout; The Optional Protocol to the CRC (n 8) article 7(b).

<sup>103</sup> Ibid.

<sup>104</sup> Egan (n 9) 10; The UN Human Rights Council, '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 (2011) A/HRC/17/36, para 51.

<sup>105</sup> Ibid para 53.

<sup>106</sup> Ibid para 39-44.

<sup>107</sup> Ibid para 52.

<sup>108</sup> Costa, 'Poverty and human Rights: From Rhetoric to Legal Obligations, a Critical Account of Conceptual Frameworks' (2008) 9 Sur: International Journal on Human Rights 81, 91.

<sup>109</sup> De Beco (n 17) 376.

submissions to be in writing.<sup>110</sup> This feature can be interpreted to allow unwritten formats of complaints under the CPRD. It can be argued that there appears to be no good reason, in this context, not to allow unwritten material under the OP. Hence, the unwritten material rule is particularly harmful to a procedure aiming at being as child-friendly as possible. The rule is also unnecessary, given the fact that other complaints procedures under the UN treaty system do not require material to be in a written format. The unwritten material rule risks reducing access to the OP significantly. The unwritten material rule can be seen as further aggravating the inaccessibility of the OP since there are many formats that children could submit complaints in that would enhance access to the OP. Alternative forms of submitting complaints were recognised during the drafting of the OP, as some states saw videotapes as a potential method of submission.<sup>111</sup> Commentators have therefore recommended the use of audio-visual methods to submit complaints.<sup>112</sup> It is further argued that the use of email would greatly accommodate the submission of complaints.<sup>113</sup> Children could, for example, videotape or audiotape their complaint and send it via email to the Committee. However, it does not appear that the UN has fully recognised this format of submission yet, as the guidelines for how to fill in a submission form states that it has to be sent via post because it must be signed.<sup>114</sup> Thus, finding a more flexible approach to the signature rule is recommended in order to allow for electronic submissions. The American Convention of Human Rights (ACHR) allows submission to be made via email and this model could be used as precedent for the OP.<sup>115</sup>

A second alternative could be to allow the complaint to be submitted in the form of drawings.<sup>116</sup> This has been used as a method of communication in the International Criminal Court which has allowed 500 drawings from children in the Darfur conflict for a case against the state.<sup>117</sup> The drawings formed part of the contextual evidence and were used in cases against government officials and the president.<sup>118</sup> It was the first time that international law allowed this,<sup>119</sup> and this approach could be further developed under the OP. The practical issues of using drawings could be solved, as they were in the Darfur case, by having an accompanying text that helps put the drawings into a legal context to describe, for example, who the victim is and who the perpetrator is.<sup>120</sup> It is argued that this approach could be very useful under the OP. This option would be particularly helpful in the context of traumatised children as they may have difficulties expressing themselves verbally and textually.<sup>121</sup> The alternatives suggested here would help

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<sup>110</sup> ICRPD, (n 30) article 2.

<sup>111</sup> The HRC Report (n 104) para 51.

<sup>112</sup> Van Bueren (n 12) 129.

<sup>113</sup> Ibid.

<sup>114</sup> Office of the High Commissioner of Human Rights, 'Frequently Asked Questions about Treaty Body complaints Procedure', available online at: [http://www2.ohchr.org/english/bodies/petitions/individual.htm#\\_ftnref5](http://www2.ohchr.org/english/bodies/petitions/individual.htm#_ftnref5). [accessed on 16 April 2014].

<sup>115</sup> Inter-American Court on Human Rights, 'Rules of Procedure' (28<sup>th</sup> of November 2009) article 28.

<sup>116</sup> Van Bueren (n 12) 129.

<sup>117</sup> Mitchell et al, *Picturing Research: Drawing as Visual Methodology* (Sense Publishers 2012) 68.

<sup>118</sup> Ibid; Aradau and Hill, 'The Politics of Drawing: Children, Evidence and the Darfur Conflict' (2013) 7 *International Political Sociology* 368.

<sup>119</sup> Ibid 369.

<sup>120</sup> Ibid 381.

<sup>121</sup> Ibid 373.

enhance access to justice for children. They would also help the OP to be more in line with the CRC and the Committee's general comments.<sup>122</sup> This is because the alternatives could enhance the enjoyment of children's freedom of expression and participation,<sup>123</sup> since children have the right to express themselves in the form they want.<sup>124</sup> These child-friendly communication methods would further contribute to the greater participation of children under the OP, as is also their right under the CRC.<sup>125</sup> Alternative communication methods seem highly beneficial but they also may require resources in order to be interpreted and their authenticity confirmed.<sup>126</sup> The resource constraint the Committee face would then potentially become an issue.

The unwritten material rule shows that the balance is tilting towards the need to keep the OP in line with the old Optional Protocols under other UN treaty bodies, rather than the need to accommodate the particular rights and needs of children.<sup>127</sup> Even provisions under the OP allowing for child-friendly measures focus on protection, rather than empowerment, with the exception of having regard for the views of children according to their age and maturity. Protection is important for children, due to their special status as human rights holders, but the fact that provisions like the unwritten material rule are included makes the OP too paternalistic. Thus, this criterion appears to disturb the fine balance between protecting children and empowering them under the CRC. In this regard the OP contradicts the CRC in terms of not upholding the latter's protection of the evolving autonomy of children, found under the best interests of the child and the evolving capacities of the child considerations of the CRC.<sup>128</sup> In addition, it is argued that the potential normative importance of the OP in representing children as independent human rights holders discussed in section two is lost under this rule. Hence, it is not surprising that some more critical commentators question whether the OP will be beneficial to parents rather than children.<sup>129</sup> However, these concerns have been remedied to a limited extent by the Rules of Procedure because they allow 'non-written materials' to be sent in addition to the written communication.<sup>130</sup> It is argued that this remedying factor is inadequate because the aim of the OP is to be as child-friendly as possible. This measure still does not make up for the fact that the initial submission must be in writing. The unwritten material rule suggests that the OP will not be a tool to enhance access to justice for children. The weakness that this rule creates, risks undermining the OP's potential strengths. Thus, the OP is unlikely to improve access to justice for children and the enforcement of their rights. Other rules under the OP appear to follow the same path and the time limits under the procedure will be analysed next.

### ***C. Time Limits under the Optional Protocol***

Another admissibility criteria that may have a negative impact on the OP's effectiveness in ensuring access to justice for children is the time limit it imposes for submitting a complaint. Article 7(h) to the OP states that a communication is declared inadmissible if '[t]he communication is not submitted within one year after the

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<sup>122</sup> Van Bueren (n 12) 129.

<sup>123</sup> CRC (n 66) article 12-13.

<sup>124</sup> Van Bueren (n 12) 129.

<sup>125</sup> CRC (n 66) article 12(2).

<sup>126</sup> The HRC Report (n 104) para 51.

<sup>127</sup> Egan (n 9) 17-18.

<sup>128</sup> Van Bueren, *Child Rights in Europe* (Council of Europe 2007) 37.

<sup>129</sup> Smith, R (n 44) 311.

<sup>130</sup> Rules of Procedure for the Optional Protocol to the CRC (n 95) rule 16 (3) (d).

exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit.<sup>131</sup> This appears to not be child-friendly, particularly because only two other Optional Protocols have time limits; namely, the Optional Protocols to the International Convention on Economic Social and Cultural Rights (ICESCR) and the International Convention on the Elimination of all form of Racial Discrimination (ICERD).<sup>132</sup> Hence, having a stricter time limit than most other Optional Protocols is unnecessary for children.<sup>133</sup> Yet, most states were in favour of the time limit.<sup>134</sup> It can be theorised that the reason for this decision is linked to the concern of 'opening the floodgates' to submissions.<sup>135</sup> Thus, states wanted to reduce the risk of the Committee being overwhelmed with complaints. Moreover, some states suggested that the time limit should only be 6 months from the exhaustion of domestic remedies,<sup>136</sup> which would make it the second strictest time limit under the UN treaty body system. Other states with less strict views tried to accommodate the time limit to children's needs by specifying that the time should start from the age of maturity.<sup>137</sup> The latter proposal can be seen as more child friendly. However, the most suitable option for children's needs came from the NGOs participating in the discussions on the OP. They suggested that there should be no time limits for children to submit a complaint,<sup>138</sup> due to the stated issue of lacking legal capacity to pursue a complaint at a particular age and also because children may not be aware of the OP.<sup>139</sup>

Nevertheless, the 12-month rule includes an exception: if the child can show that it was impossible to submit a claim within the time limit.<sup>140</sup> However, what this exception means is unclear since it is new and no case law or guidelines interpreting it exist yet. A preliminary prediction is that the exception may be applicable to children who have not been able to submit a complaint within the time period due to lacking legal capacity, because it would have been impossible for them to do so. The children unaware of the OP seem less likely to fit within the exception, unless their human rights violations are of an ongoing nature. The time limit is unnecessarily restrictive in the context of the OP's aim and it renders the OP less successful than it could have been in bringing about access to justice for children.

Alternative time limits could fulfil the need for restricting the number of complaints while accommodating children's rights and needs better. If a time limit is deemed necessary under the OP, a more child-friendly one should be sought. The time limit under the ACRWC states that a complaint should be sent within a reasonable time.<sup>141</sup> This seems to be a much more child-friendly alternative to the current one under the OP. Thus, the present time limit is too restrictive since few other Optional Protocols have it and its affect on children is particularly severe due to their vulnerable position. This argument is particularly aggravating because it is

<sup>131</sup> The Optional Protocol to the CRC (n 8) article 7 (h).

<sup>132</sup> The Optional Protocol to the ICESCR (n 99) article 3(2); The International Convention on the Elimination of All forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) GA/RES/2106 (XX) (ICERD) article 14(5).

<sup>133</sup> The HRC Report (n 104) para 54.

<sup>134</sup> Ibid.

<sup>135</sup> Mahon (n 81) 635.

<sup>136</sup> The HRC Report, (n 104) para 54.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid para 55.

<sup>139</sup> Ibid.

<sup>140</sup> The Optional Protocol to the CRC (n 8) article 7(h).

<sup>141</sup> African Union, 'Guidelines for the consideration of communications provided for in article 44 of the African Charter on the Right and Welfare of the Child', ACERWC/8/4, chapter 2 article 1(III)(e).

unlikely that the OP will open up a large number of complaints since only about 2-2.5% of claims under the UN treaty bodies involve children.<sup>142</sup> In addition, the other limiting criteria discussed in this section are likely to restrict access to the OP further and thereby make it unlikely that there will be a large number of complaints. Hence, the time limit is too strict and this puts it at odds with the purpose of having a child-friendly complaints procedure. This may have the devastating effect of weakening the OP's accessibility and effectiveness in enforcing children's rights.

#### ***D. The Lack of a Speedy Procedure under the Optional Protocol***

Once a claim has managed to pass the strict admissibility criteria, other issues emerge that could affect children more severely than adults and have a potentially negative impact on the OP's effectiveness. In order to see whether the OP will be effective in enforcing children's rights two particular aspects will be highlighted: the lack of a speedy procedure under the OP and the high threshold for the interim measures.

A child-friendly procedure should be as fast as possible in order to ensure that a child's right to development is the least affected.<sup>143</sup> Yet, the OP does not appear to make any special accommodations for this in relation to states' time limits to respond to initial complaints and to provide a follow up answer.<sup>144</sup> Article 8(2) states that '[t]he State party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have provided. The State party shall submit its response as soon as possible and within six months.'<sup>145</sup> In order to make any argument suggesting a change to the time limit it is first necessary to understand the importance of children's right to development. The right to development appears as a unique right for children as it does not exist under the text of other legally binding UN treaties. It means that children have a right to live a life where their development is possible: a right to a good quality life.<sup>146</sup> The Committee has further stated that development for very young children sets the foundation for their whole persona.<sup>147</sup> It is against this backdrop that it can be argued that a speedy OP procedure is of fundamental importance for children in order for it to be truly effective in enforcing their rights.

In order to understand why the time limit was set it is necessary to understand the arguments put forward by the state parties at the drafting stage. State replies to submissions sent are supposed to be sent 'as soon as possible and within six months'.<sup>148</sup> Most states during the drafting suggested that the time limit should be six months as it appears to be a general rule under older Optional Protocols.<sup>149</sup> However, some states sought a more child-friendly limit by trying to achieve a flexible time limit through a general rule of six months but in exceptional circumstances three

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<sup>142</sup> HRC, '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 (2010) A/HRC/13/43, para 78.

<sup>143</sup> De Beco (n 17) 377.

<sup>144</sup> Ibid.

<sup>145</sup> The Optional Protocol to the CRC (n 8) article 8(2).

<sup>146</sup> Mower, *The Convention on the Rights of the Child: International Law Support for Children* (Greenwood Publishing Group 1997) 33-39.

<sup>147</sup> UN Committee on the Rights of the Child, 'General Comment 7: Implementing Child Rights in Early Childhood' (2005) CRC/C/GC/7/Rev.1, 3.

<sup>148</sup> The Optional Protocol to the CRC (n 8) article 8(2).

<sup>149</sup> The HRC Report (n 104) para 67.



months.<sup>150</sup> The latter option is preferable but the shorter time limit could have been chosen as a general rule and not an exception based on the general three months rule under the ICERD.<sup>151</sup> This claim can be further strengthened by the recognition that a shorter time limit of three months is particularly important for children and exists under the ACRWC.<sup>152</sup> A shorter time period was not chosen despite it being in the interest of children. Based on the above, the time limit for states to reply to a complaint is too long because it could affect children's right to development. This aspect of the OP is particularly troublesome in terms of the purpose of the OP since the drafters could have chosen a shorter time limit based on the models existing under the ICERD or the ACRWC.

Other time limits follow the same pattern of not taking into account the optimal time period to accommodate the needs of children. The time limit for states to inform the Committee of measures taken in order to implement their recommendation is the same as for the reply to the Committee.<sup>153</sup>

The State party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee a written response, including information on any action taken...The State party shall submit its response as soon as possible and within six months.<sup>154</sup>

During the drafting, most states argued for a six and not a three month period because the recommendations may require a significant effort and three months was not seen as enough time to implement them.<sup>155</sup> However, the Committee supported having a three-month general rule and in exceptional cases six months.<sup>156</sup> The Committee's approach is preferable in terms of making the OP child-friendly. A flexible period of between three to six month for both the initial submission by states and the follow up report by states would accommodate the Committee's power to prioritise urgent cases and cluster cases together, which would be better than the current six month rule.<sup>157</sup> This would ensure that the prioritised cases are dealt with faster and enhance effective enforcement of children's rights.

The time limits for state parties to submit their representations risks compromising the purpose of the OP. The time limit of six months regarding the initial submission from states is the same as for most of the other Optional Protocols, despite the acknowledgement of children's need for healthy development via a speedy procedure<sup>158</sup>. The particular needs of children are not reflected in the six-month rule for the initial state party report.<sup>159</sup> A complaint is likely to take the average time of the other complaints submitted under older Optional Protocols of one to two years.<sup>160</sup> On top of this, there is the time period spent on domestic remedies prior to the complaint. It is therefore understandable why commentators argue that justice

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<sup>150</sup> Ibid.

<sup>151</sup> The Optional Protocol to the ICERD (n 132) article 14(6)(b).

<sup>152</sup> The African Union Guidelines (n 141) article 2(II)(4).

<sup>153</sup> The Optional Protocol to the CRC (n 8) article 11(1).

<sup>154</sup> Ibid.

<sup>155</sup> The HRC Report (n 104) para 78.

<sup>156</sup> Ibid.

<sup>157</sup> Rules of Procedure for the Optional Protocol for the CRC (n 95) article 17(1)(2).

<sup>158</sup> Egan (n 9) 12-13.

<sup>159</sup> Ibid.

<sup>160</sup> Lee (n 6) 575.

delayed is justice denied and it applies in this context.<sup>161</sup> Commentators have also stated that there is a need to ensure a child's sense of time is protected.<sup>162</sup> However, this seems unlikely under the current text of the OP. Moreover, the time limits for states' response period are unnecessarily generous for a procedure that is meant to accommodate children's needs and rights, and in particular children's right to development. The time limits risk reducing the OP's effectiveness in enforcing children's rights.

### ***E. A High Threshold for Interim Measures***

Interim measures are of particular importance for the effective enforcement of children's rights. Interim measures are one of the key powers of international tribunals.<sup>163</sup> They ensure that urgent and irreparable situations are addressed when the normal complaints procedure is inadequate.<sup>164</sup> This can be seen as particularly important in the context of children as it can be a vital measure to protect against irreparable harm to children's development,<sup>165</sup> as well as other harm. Thus, this function is very important in children's complaints as violation of their human rights could have irreparable harm for their development. In addition, interim measures could to some extent remedy the lack of a speedy procedure as discussed above. Children could get help faster under this function, which could help prevent situations from getting worse.<sup>166</sup> But more importantly, interim measures would be helpful for the Committee because they have, under their Rules of Procedure, the power to consider such cases faster.<sup>167</sup> However, even though interim measures could speed up the Committee's work, states do not seem to have the same obligation in terms of their responses. Nevertheless, interim measures can become a vital mechanism to protect children's needs and enforce their rights.

However, the potential effectiveness of interim measures risks being weakened due to the extra high threshold found for such measures under the OP:

At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State party concerned for its urgent consideration a request that the State party take such interim measures as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations.<sup>168</sup>

The insertion of 'exceptional circumstances' is only found under one other Optional Protocol and that is the one under the ICESCR.<sup>169</sup> Most other Optional Protocols only require the 'irreparable damage' threshold.<sup>170</sup> The reason for the heightened threshold appears to be based on the tension between states during the

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<sup>161</sup> Ibid.

<sup>162</sup> Van Bueren (n 12) 130.

<sup>163</sup> Pasqualucci, 'Interim Measures in International Human Rights: Evolution and Harmonization' (2005) 38 *Vanderbilt Journal of Transnational Law* 1, 4.

<sup>164</sup> Ibid 3.

<sup>165</sup> Nevell (n 55) 54.

<sup>166</sup> Garber, 'The New Optional Protocol to the Convention on the Rights of the Child: 10 Things you should Know' (2012) 37 *Alternative Law Journal* 111, 112.

<sup>167</sup> The Rules of Procedure of the Optional Protocol to the CRC (n 95) rule 7(7).

<sup>168</sup> The Optional Protocol to the CRC (n 8) article 6(1).

<sup>169</sup> The Optional Protocol to the ICESCR (n 99) article 5(1).

<sup>170</sup> ICRPD (n 30) article 4(1); The Optional Protocol to the ICEDAW (n 99) article 5(1).

drafting. Some states tried to limit the power of the Committee to use this function while others did not.<sup>171</sup> It can be argued that states wanting to limit the Committee's power do not fully accept that quasi-judicial tribunals can impose binding interim measures.<sup>172</sup> Despite the fact that the Human Rights Council has stated that 'a State party commits grave breaches of its obligations under the Optional Protocol [to the ICCPR] if it acts to prevent or frustrate consideration by the Committee of a communication'.<sup>173</sup> Nevertheless, some states supporting the important role interim measures play tried to include legally binding wording in the text.<sup>174</sup> Nevertheless, the final text lacks a reference to a legally binding obligation to comply with the requests for interim measures. The result risks weakening the OP's effectiveness as a tool for children to enforce their rights since some states may still argue that they do not need to comply with the Committee's decision.<sup>175</sup> This could potentially be remedied in the future since some academics believe that interim measures are an inherent power of the Committee and thereby a general rule of binding international law.<sup>176</sup> Moreover, the wording of the interim measures under the OP is restrictive and may limit the Committee's power to assist children in enforcing their rights.

It is argued that the extra threshold for interim measures under the OP in the context of children is unnecessarily strict. It may reduce interim measures' remedial function in speeding up the complaints procedure process by the Committee. The added threshold and the uncertain legal nature of interim measures under the OP have the potential effect of weakening its effectiveness in enforcing children's rights.<sup>177</sup> Thus, the Committee must now take extra measures to ensure that not only irreparable harm is satisfied, but also that it is an exceptional situation. This may have the effect of decreasing the use of the function.<sup>178</sup> The extra high threshold contributes to the flaws of the OP as it does not accommodate children's particular rights and needs.

#### ***F. The Weaknesses of the Optional Protocol Risk Reducing its Effectiveness***

Based on the analyses in section three, the weaknesses of the provisions in the OP outweigh its strengths discussed in section two. Thus, the provisions under the OP risk reducing its potential of ensuring access to justice for children and assisting with the enforcement of their rights. It is argued that the provision that is worst in terms of providing child-friendly access to justice is the unwritten material rule. The rule runs contrary to the purpose of the OP, and there are alternatives that could accommodate children's rights better. Furthermore, the time limit to submit complaints is not adequately adapted for a child-friendly complaints procedure, as it is unnecessarily restrictive and risks making the OP inaccessible for many children. In terms of effectiveness and respecting children's right to development, the time limits for states to submit their representations are too generous. The unnecessarily high threshold for interim measures risks weakening the OP's effectiveness in enforcing children's rights and protecting their right to development further.

However, some aspects of the OP are particularly adapted to protecting children's unique rights and needs. The exhaustion of domestic remedies rule may at

<sup>171</sup> The HRC Report (n 104) para 62.

<sup>172</sup> Pasqualucci (n 163) 5.

<sup>173</sup> *Piandiong et al. v. Philippines*, ICCPR Case no 869/1999, (19 October 2000) 5.2.

<sup>174</sup> The HRC Report (n 104) para 62.

<sup>175</sup> Garber (n 166).

<sup>176</sup> Pasqualucci (n 163) 13.

<sup>177</sup> Vandenhoele (n 84) 456.

<sup>178</sup> Vandenberghe and Vandenhoele (n 82) 235.

first glance appear restrictive but through jurisprudence under the ACRWC, it has been demonstrated that the rule can be used to further, rather than restrict, access to justice for children. Nevertheless, in respect of the issues identified under this section the next section will look into a key recommendation on how to improve the OP to make it more child-friendly.

#### **4. A Collective Complaints Procedure under the Optional Protocol**

Based on the assessment of the OP's weaknesses in section three, it is suggested that the OP needs to be reformed in order to be able to fulfil its purpose. This section will argue that a collective complaints procedure would be a beneficial reform. The OP does not have a collective complaints procedure but such a procedure could help improve access to the OP for children and was suggested by experts in the drafting process.<sup>179</sup> This will be argued since the function can be particularly beneficial to children.<sup>180</sup> A collective complaints procedure may help overcome barriers to access justice discussed above, and the unnecessarily restrictive admissibility criteria in the previous section. In order to make this argument it is necessary to define what a collective complaints procedure is, how it can benefit children under the OP, and why states are skeptical of the procedure, in order to be able to evaluate its suitability under the OP. The European Social Charter's collective complaints procedure will be explored as a model to follow for the OP as was suggested during the drafting of the OP.<sup>181</sup>

##### **A. A Collective Complaints Mechanism to Ensure Better Access to the Optional Protocol**

Collective complaints procedures are a confusing area of international law because the term is used in different areas.<sup>182</sup> The term has, for example, been used to describe any claim that involves more than one claimant.<sup>183</sup> This would include individual complaints that cover claims brought on behalf of a group of individuals who are all victims themselves. However, this interpretation does not appear to cover the full meaning of the term since a collective complaints mechanism would then already exist under the individual complaints procedure of the OP.<sup>184</sup> A better understanding of the term would be that an individual or an organisation can bring a complaint on behalf of a group of victims without having to satisfy the criterion of being a victim.<sup>185</sup>

<sup>179</sup> HRC (working group on an optional protocol to the Convention on the Right of the Child), 'Comments by the Committee on the Rights of the Child on the proposal for a draft optional protocol prepared by the Chairperson-Rapporteur of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure' (2010) A/HRC/WG.7/2/3, para 13.

<sup>180</sup> Ibid; Neviell (briefing paper submitted to the first session on open-ended working group to explore the possibility of elaborating an optional protocol to the Convention on the Rights of the Child), *Collective communications – an essential element in the new Optional Protocol for the Convention on the Rights of the Child* (September 2010) 4, available online at: [http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGCRC/Session2/BriefingCollectiveCommunications\\_en.doc](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGCRC/Session2/BriefingCollectiveCommunications_en.doc) [Accessed on 8 may 2016].

<sup>181</sup> Committee on the CRC (n 179) para 3(d).

<sup>182</sup> De Wet (n 11) 533.

<sup>183</sup> Neviell (n 180) 1.

<sup>184</sup> De Wet (n 11) 533.

<sup>185</sup> Vandenbogaerde and Vandenhole (n 82) 243.

A collective complaints procedure would not require the person submitting the complaints to ask for consent from the person whose rights have been violated or have any personal link to the violation.<sup>186</sup> Thus, for the purpose of this article a collective complaints procedure refers to 'communications concerning potential or actual violations of rights within the CRC (and/or its existing two Optional Protocols) without the identification of specific cases involving a child victim or groups of victims'.<sup>187</sup> A person who has identified violations of, for example, children's rights in a school could submit a complaint under the OP without asking for consent from the children involved. This approach is a more liberal approach to the traditional requirement for standing since it does not require the person submitting the complaint to be a victim.

A collective complaints procedure can improve access to the OP for a number of reasons. Firstly, it allows victims to remain unidentified.<sup>188</sup> This has been highlighted as of particular importance for children who are victims of sexual exploitation or violence,<sup>189</sup> as they, like other vulnerable groups, may not be easily identifiable.<sup>190</sup> The procedure would also avoid re-victimising these children because they do not have to participate in the process of the claim.<sup>191</sup> The procedure would also help children who fear approaching the justice system due to the risk of not being believed or possible reprisal.<sup>192</sup> Thus, this would assist very vulnerable children. For example, children who are victims of trafficking are often subject to fear of approaching the authorities as traffickers claim that the authorities may deport children to their home countries,<sup>193</sup> or prosecute them for crimes committed as a trafficked victim,<sup>194</sup> and this causes mistrust in the justice system.<sup>195</sup> Allowing anonymity could also help other vulnerable groups of children such as girl child soldiers, as they are often stigmatised upon return to home from army life.<sup>196</sup> This is due to the stigma attached by the communities where the girls are from of possible sexual abuse the girls may have faced during their army life.<sup>197</sup> These girls are vulnerable because the rehabilitation systems existing for child soldiers risks excluding girls because they are often based on providing help to those that return a gun and girls may not have had a combat role, but rather a domestic one working in the camps.<sup>198</sup> Thus, these girls would not have a gun to return and remain stigmatised and without rehabilitation. In this context, a collective complaints procedure would allow an NGO to challenge the practice of not rehabilitating girl child

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<sup>186</sup> Vandenhoe (n 84) 450.

<sup>187</sup> Neviell (n 180) 1 [emphasis removed].

<sup>188</sup> Ibid.

<sup>189</sup> Ibid 5.

<sup>190</sup> Bijnsdorp, 'The Strength of the Optional Protocol to the United Nations Women's Convention' (2000) 18 Netherlands Quarterly of Human Rights, 329, 335.

<sup>191</sup> The HRC Report (n 104) para 49.

<sup>192</sup> HRC, 'Joint report of the Special Rapporteur on the sale of children, child prostitution and child pornography and the Special Representative of the Secretary-General on Violence against Children' (7 March 2011) A/HRC/16/56, para 5.

<sup>193</sup> Joshi, 'The Face of Human Trafficking' (2002) 13 Hastings Women's Law Journal 31, 34-35.

<sup>194</sup> HRC, 'Report by the Special Rapporteur on trafficking in persons, especially women and children' (2012) A/HRC/20/18, para 23-30.

<sup>195</sup> Ibid.

<sup>196</sup> Fujio, 'Invisible Soldiers: How and Why Post-Conflict Processes Ignore the Needs of Ex-Combatant Girls' (2008) 10 Journal of Law and Social Challenges 1, 3.

<sup>197</sup> Ibid 11.

<sup>198</sup> Ibid 12-13.

soldiers based on discrimination without using specific girls as victims. This would help children access justice in general, and in particular provide access to justice for very vulnerable groups of children.

A collective complaints procedure could help improve children's protection and overcome some of the issues discussed in section three<sup>199</sup>. A collective complaints mechanism is an effective way of ensuring access for children that face particular barriers in order to access justice.<sup>200</sup> It could be of particular importance for poor rural children,<sup>201</sup> because these children face significant barriers accessing justice. They may face barriers by simply living far away from courts since they will need to afford to travel to be able to physically reach the justice system.<sup>202</sup> They may also have a very hard time using the justice system due to lack of finances and legal knowledge.<sup>203</sup> External support that, for example, an NGO could give by bringing their complaint under a collective complaints procedure would be invaluable to them. The practical concerns that could hinder children from accessing the OP domestically, discussed in section three, such as lacking legal aid and legal knowledge, could potentially be overcome via this approach.

A collective complaints procedure could help the Committee to offer guidance on structural issues that violate many children's rights. Collective complaints allows for larger groups to bring a claim at once, which can be very important when a violation affects more than one or a few persons.<sup>204</sup> Thus, an individual complaints procedure may not be adequate in order to remedy situations where many children are affected. This could, for example, be the case when a violation is caused by a systematic structure in a state.<sup>205</sup> Collective complaints would be beneficial for children as the Committee could address these kinds of large-scale issues that individual complaints may not allow them to.<sup>206</sup> This may help the Committee to effectively enforce children's rights as they could hear one case instead of many with very similar situations.<sup>207</sup> Moreover, collective complaints may be a more effective way to ensure that states remedy violations found by the Committee, as a large group of victims may put more pressure on a state than an individual complainant can.<sup>208</sup> This can be key for the enforcement of children's rights since states, as seen in section one, have not yet adapted their systems adequately for children's rights. Having a collective complaints procedure can be vital in order to ensure that all children in principle, and in particular the most vulnerable ones, have access to the OP. Hence, based on the advantages of having a collective complaints procedure for children, such a mechanism should be added to the OP.

The potential importance of a collective complaints procedure was recognised during the drafting of the OP as a provisional version was included which stated that:

National human rights institutions and ombudsman institutions and non-governmental organizations in consultative status with the United Nations

<sup>199</sup> The HRC Report (n 104) para 49.

<sup>200</sup> Van Bueren (n 21) 412.

<sup>201</sup> Aceves, 'Actio Popularis? The Class Action in International Law' (2003) *The University of Chicago Legal Forum* 353, 356.

<sup>202</sup> General Assembly, 'Report of the Special Rapporteur on extreme poverty and human rights' (2012) *A/67/278*, para 27.

<sup>203</sup> Bijnsdorp (n 190) 335.

<sup>204</sup> Aceves (n 201).

<sup>205</sup> Bijnsdorp (n 190) 334.

<sup>206</sup> Neviell (n 180) 4-5.

<sup>207</sup> Committee on the CRC (n 179) para 13.

<sup>208</sup> Aceves (n 201) 400.

Economic and Social Council with particular competence in the matters covered by the Convention and the Optional Protocols thereto, which have been approved for that purpose by the Committee, may submit collective communications alleging grave or systematic violations.<sup>209</sup>

However, this provision was rejected despite the clear advantages and compelling arguments to keep it.<sup>210</sup> In order to understand why it was rejected it is necessary to examine the four main arguments states made during the drafting. Firstly, states argued that a collective complaints mechanism was unnecessary as the individual complaints mechanism, the inquiry procedure, and the reporting procedure covered its function.<sup>211</sup> These states argued this because the individual complaint procedure already allows for groups of individuals to bring claims.<sup>212</sup> They further stated that the inquiry procedure already addresses grave and systematic violations.<sup>213</sup> This creates some overlap between the individual and collective complaints procedures. Secondly, states argued that there was no collective complaints procedure under the other Optional Protocols and there was no need for it as there was no gap in the protection for children.<sup>214</sup> However, there may not be any collective complaint mechanism under the UN treaty bodies' Optional Protocols but there is, as will be seen, a settled one in regional law.<sup>215</sup> Regarding there being no gap in protection of children under the OP, it has been shown above that vulnerable children may not be able to access the OP.<sup>216</sup> Thirdly, states appeared to be confused about how the admissibility criteria applicable to individual complaints would apply to collective complaints.<sup>217</sup> Lastly, states seemed to fear abstract complaints and the issues they would cause for states in defending themselves properly.<sup>218</sup>

Overall, states seem unwilling to accept a collective complaints procedure and commentators have suggested that this is due to the fact that states were confused over what a collective complaints mechanism would actually entail.<sup>219</sup> This could be linked to the UN system for human rights being heavily focused on states,<sup>220</sup> and states are reluctant to limit their sovereignty by giving away power to NGOs.<sup>221</sup> Hence, states appear fearful of the potentially broad scrutiny that collective complaints may bring.<sup>222</sup> The arguments put forward by states opposing the

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<sup>209</sup> HRC (working group on an optional protocol to the Convention on the right of the Child), 'Proposal for a draft optional protocol prepared by the Chairperson-Rapporteur of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure' (2010) A/HRC/WG.7/2/2, article 3 (1).

<sup>210</sup> Egan (n 9) 17-18.

<sup>211</sup> The HRC Report (n 104) para 48.

<sup>212</sup> Ibid.

<sup>213</sup> Ibid.

<sup>214</sup> Ibid.

<sup>215</sup> Council of Europe, European Social Charter (Revised), (adopted 3 May 1996, entered into force 1 July 1999) ETS 163 (ECS).

<sup>216</sup> The HRC Report (n 104) para 49.

<sup>217</sup> Ibid at para 48.

<sup>218</sup> Ibid at para 48.

<sup>219</sup> De Beco (n 17) 383-384.

<sup>220</sup> Aceves (n 201) 392.

<sup>221</sup> De Albuquerque, 'Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights-The Missing Piece of the International Bill of Human Rights' (2010) 32 Human Rights Quarterly 144, 173.

<sup>222</sup> De Wet (n 11) 535.

procedure are not as compelling as the reasons discussed for including one. Children who may not be able to bring an individual complaint or a group of children in a state who have had their rights violated, would be able to benefit from this procedure. Nonetheless, the lack of a collective complaints procedure can be seen as a potentially serious flaw for ensuring access to the OP and its effective enforcement of children's rights.

### ***B. The Collective Complaints Procedure under the European Social Charter: a Model for the Optional Protocol***

The OP would greatly benefit from a collective complaints procedure due to the advantages it brings for children. It will therefore be suggested that if one can provide a clear example of how a collective complaints procedure functions and its benefits, states may be less opposed to it and more willing to adopt it.<sup>223</sup> The collective complaints procedure under European Social Charter (ESC) will be used for this purpose, as it can be viewed as a successful model. It will also be used to illustrate practically how a collective complaints procedure under the OP can overcome some of the restrictive aspects discussed in section three.

The European Social Charter is the counterpart to the European Convention of Human Rights,<sup>224</sup> and covers socio-economic rights. It allows for a collective complaints procedure that has been described as both simple and accessible.<sup>225</sup> The procedure is voluntary as states can choose to sign up for it as an addition to the ESC.<sup>226</sup> Standing for the procedure is provided for specific organisations and under similar conditions as the draft procedure under the OP. It provides standing for 'international organisations of employers and trade unions',<sup>227</sup> and '...international non-governmental organisations which have consultative status with the Council of Europe and have been put on a list established for this purpose...'.<sup>228</sup> In order to be included in the second category, organisations need to show that they have specialised information in a particular field that can be certified.<sup>229</sup> The protocol also allows for 'national organisations of employees and trade unions' to submit complaints against the state they belong to.<sup>230</sup> States can also include other representative domestic NGO's but in order for them to be allowed to do so the state in question must declare that they have allowed this.<sup>231</sup> In addition, international and domestic NGOs must possess 'particular competence' in the area they bring a complaint in.<sup>232</sup>

The broad admissibility criterion of a collective complaints procedure under the OP has the potential to allow for greater access to justice. The Committee for the ESC has taken a very broad approach to the requirement of 'particular competence':

<sup>223</sup> De Beco (n 17) 383-384.

<sup>224</sup> Mikkola, 'Social Rights as Human Rights in Europe' (2000) 2 European Journal of Social Security 259, 261.

<sup>225</sup> Costa, *International Justice for Children* (Council of Europe Publishing 2008) 12.

<sup>226</sup> Additional Protocol to the European Social Charter providing for a System of Collective Complaints (adopted 9 November 1995, entered into force 1 July 1998) ETS 158, preamble.

<sup>227</sup> *Ibid* article 1(a).

<sup>228</sup> *Ibid* article 1(b).

<sup>229</sup> Council of Europe, Additional Protocol to the European Social Charter Providing for a System of Collective Complaints - Explanatory Report – [1995] COETSER 3 ETS no 158, para 20.

<sup>230</sup> The Additional Protocol to the ESC (n 226) article 1(c).

<sup>231</sup> *Ibid* article 2(1).

<sup>232</sup> *Ibid* article 3.



they have set the bar much lower in case law by asking for some specialised knowledge.<sup>233</sup> However, commentators have criticised the complaints procedure for not allowing individuals to apply under the procedure.<sup>234</sup> This appears linked to the reasoning that a collective complaint does not necessarily have to be limited to allowing organisations to bring a complaint but it could also allow access to individuals with a sufficient interest in a case. This approach to collective complaints is seen under Indian law.<sup>235</sup> However, this broad approach has not been taken by the ESC Committee or the draft under OP. Nevertheless, it is suggested that the CRC Committee, if it were to adopt a collective complaints procedure, should take the same relaxed approach to the competences of the NGOs as the ESC Committee. Allowing for individuals with sufficient interest in a matter could also be beneficial for providing broad standing. In addition, the broad admissibility that this approach would provide could enhance access to justice for children under the OP.

The collective complaints procedure under the ESC may aid states in understanding how the procedure could apply under the OP. One of the main reasons why the collective complaints procedure is successful under the ESC is its relaxed approach to admissibility, as it enhances access to justice. The collective complaints procedure does not require any far-reaching admissibility criteria.<sup>236</sup> The text of the protocol only requires the submission to be in writing, cover an article to the ESC that the state at hand has ratified, and set out why the state has not satisfactorily applied the article.<sup>237</sup> It also requires that the individual who represents the case to sign the submission.<sup>238</sup> Hence, very few admissibility criteria are required compared to the individual complaints procedure under the OP. This is of particular importance for the potential collective complaints procedure to the OP as states seem confused over how the admissibility criteria apply.<sup>239</sup> The ESC procedure can clarify this.

Firstly, the procedure does not ask for domestic remedies to be exhausted.<sup>240</sup> The reason appears to be that many states do not allow the ESC to be adjudicated domestically, since such a treaty may not form part of domestic law or organisations do not have standing.<sup>241</sup> Thus, there would in this situation be no domestic remedies to exhaust. Other commentators have argued that domestic remedies should be used if they allow for a case to be tested in these circumstances.<sup>242</sup> However, if one intends to preserve the anonymity of the victims then having an exhaustion of domestic remedies rule would frustrate that cause.<sup>243</sup> The purpose of allowing anonymity would then be lost and this is particularly troubling under the OP due to the situation of vulnerable children. Secondly, the procedure does not require any time limits because collective complaints generally either challenge the compatibility

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<sup>233</sup> Churchill and Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights' (2004) 15 *European Journal of International Law* 417, 428.

<sup>234</sup> Novitz, 'Are social rights necessarily collective rights? A critical analysis of the Collective Complaints Protocol to the European Social Charter' (2002) *European Human Right Law Review* 50, 52-53.

<sup>235</sup> Sampat, *Public Interest Litigation* (Deep and Deep Publications 2002) 14.

<sup>236</sup> Mikkola (n 224) 268.

<sup>237</sup> The Additional Protocol to the ESC (n 226) article 4.

<sup>238</sup> Churchill and Khaliq (n 233) 432.

<sup>239</sup> De Beco (n 17) 383-384.

<sup>240</sup> Mikkola (n 224) 268.

<sup>241</sup> Churchill and Khaliq (n 233) 434.

<sup>242</sup> *Ibid.*

<sup>243</sup> De Beco (n 17) 281.

of a domestic law with a treaty or a practice and these are generally ongoing issues that are not time bound.<sup>244</sup> Hence, time limits serve no purpose. The time limits found in the admissibility criteria under the OP should then arguably neither apply to a potential collective complaints procedure under the OP. Thirdly, ill-founded submissions is not an admissibility criterion but an issue for the merits level.<sup>245</sup> Fourthly, the complaint is admissible even if it may otherwise be deemed as an abuse of the procedure.<sup>246</sup> Lastly, the procedure allows for claims that have already been heard in other international tribunals to be heard again.<sup>247</sup> Understanding how the collective complaints procedure works in practice could aid states that were confused over how the procedure could apply under the OP to welcome it. In addition, having a complaints procedure under the OP with the broad admissibility criteria discussed here would address some the concerns in section three onwards. Hence, not requiring domestic remedies to be exhausted or have time limits to submit a complaint would assist in enhancing access to justice for children under the OP.

The procedure has proven to be a very useful tool for addressing violations of children's rights. The charter has been used on numerous occasions in relation to children's rights. The first case the Committee for the ESC heard, the *International Commission of Jurists (ICJ) v. Portugal* case, concerned child labour in Portugal.<sup>248</sup> In this case Portugal had outlawed the employment of children below the age of 15 in conformity with article 7 of the ESC, yet children were still employed in practice below that age.<sup>249</sup> This case is a good example that demonstrates how a collective complaints procedure could help children whose rights are being violated through a widespread practice. This kind of human rights violation would be less appropriately solved through the individual complaint procedure. This function may therefore be very helpful in some circumstances in order to ensure that children are enjoying their rights in practice and not just in law.<sup>250</sup> This practical example demonstrates how a collective complaints procedure may aid access to the OP.

The procedure can clarify the concerns states had for the draft collective complaints procedure under the OP. Firstly, the procedure has helped clarify a concern that the drafters had regarding abstract cases being submitted. The procedure maintains a difference between an abstract complaint and a general one and only the general one is acceptable.<sup>251</sup> The case law under the procedure has demonstrated that the issues addressed have all been on particular issues affecting a defined group of children. Hence, general concerns and not abstract claims. This could help states understand that a collective complaints procedure is not as wide as

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<sup>244</sup> Churchill and Khaliq (n 233) 433-434.

<sup>245</sup> Ibid.

<sup>246</sup> Ibid 434.

<sup>247</sup> The explanatory note to the ESC collective complaints procedure (n 229) article 4 para 31.

<sup>248</sup> *International Commission of Jurists (ICJ) v Portugal* (Case no 1/1998) 9 September 1999 (ECSR).

<sup>249</sup> Ibid.

<sup>250</sup> In addition, there have been other categories of cases on children's rights under the procedure that have proven that the procedure is useful for groups of vulnerable children that may not have been able to pursue individual claims. For examples see; *World Organisation against Torture ("OMCT") v Greece* (Case no 17/2003) 7 December 2004 (ECSR), a case on laws concerning corporal punishment of children; *Defence for Children International (DCI) v. Belgium* (Case no 69/2011) 23 October 2012 (ECSR), a case on migrant children's rights to socio-economic rights under the ESC; 3 June 2008 (ECSR), a case concerning children with disabilities' right to education.

<sup>251</sup> Churchill and Khaliq (n 233) 432.

it may appear and states will therefore have the opportunity to respond to complaints just as they can under the individual complaints procedure. Secondly, the procedure has also helped clarify how the reporting procedure and a collective complaints procedure work in practice and that they do not necessarily overlap.<sup>252</sup> The two procedures fulfil two different functions since the collective complaints procedure, for example, has the ability to analyse in detail one particular problem in an adjudicative manner that the reporting procedure does not allow for.<sup>253</sup> The reporting procedure covers broader issues and not in as precise a manner. The procedures are also complementary as the collective complaints procedure can address issues in between the time that the reports are being submitted.<sup>254</sup> It is argued that this cooperation could enhance access to the OP and enforcement of children's rights since the reporting procedure could highlight a systematic issue and the collective complaints procedure could address the issue before the next reporting deadline is due if states have not taken measures to fix it.<sup>255</sup> The concerns states had for the draft version of the OP are answered here and demonstrate that it is not a cause for concern but is an opportunity to ensure better access to the OP.

The procedure has other advantages that could persuade states to agree to develop a collective complaints mechanism for the OP. The procedure is relatively speedy.<sup>256</sup> This would, as has been discussed in section three, be of particular benefit for a child's right to development. The evidential burden for organisations is relatively low.<sup>257</sup> It can, for example, be enough to show that a law is absent and that a law is required under the ESC.<sup>258</sup> More evidence appears necessary if a complaint concerns a practice that may be incompatible with the treaty and a common form of evidence is statistical studies.<sup>259</sup> Moreover, the issues commentators have put forward regarding the procedure under the ESC do not appear applicable to the OP. The concerns raised refer to the Committee under the ESC lacking remedial power,<sup>260</sup> and the role the Committee of Ministers plays as a political body in determining whether to issue recommendations to a breaching state or not.<sup>261</sup> Hence, these concerns are not applicable to the OP as the Committee has the right to issue recommendations to states.<sup>262</sup> The advantages could help amend some of the issues discussed in section two as a speedy procedure has the potential to overcome the issues of unnecessarily generous time limits for states reporting obligations. The practical benefits would assist in making the OP more child-friendly than its current form suggests.

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<sup>252</sup> Ibid 447.

<sup>253</sup> Ibid 448.

<sup>254</sup> Ibid.

<sup>255</sup> Nolan, 'Aggravated Violations', Roma Housing Rights, and Forced Expulsions in Italy: Recent Developments under the European Social Charter Collective Complaints System' (2011) 11 Human Rights Law Review 343, at p. 346-347.

<sup>256</sup> Mikkola (n 224) 268.

<sup>257</sup> Churchill and Khaliq (n 233) 430.

<sup>258</sup> *World Organisation against Torture ("OMCT") v. Greece* (n 250) para 44.

<sup>259</sup> *European Federation of National Organisations working with the Homeless (FEANTSA) v France* (Case no 39/2006) 5 December 2007, 22.

<sup>260</sup> Novitz (n 234).

<sup>261</sup> Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' (2009) 9 Human Rights Law Review 61, 62-63..

<sup>262</sup> The Optional Protocol to the CRC (n 8) article 10(5).

### ***C. A Collective Complaints Procedure to Improve Access to the Optional Protocol***

The ESC collective complaints procedure appears as a good model to be used for the OP because it would improve access to it. Adding a collective complaints procedure would have the potential to address some of the barriers to the OP discussed in section three. The procedure would allow a person or an organisation to bring a claim on behalf of children. This could greatly assist vulnerable groups of children who may not individually be able to pursue a claim to enforce their rights or do not have the resources to do so. The procedure would give the Committee the power to address broader issues that concern many children and thereby give them the opportunity to enforce children's rights in a more efficient manner in this context. The procedure would also not require domestic remedies to be exhausted nor set any time limits to submit a complaint. In addition, the procedure has the potential to help the complaints process become faster and thereby protect children's right to development. The case law under the ECS demonstrates that the procedure would enable the Committee to address widespread violations of children's rights and vulnerable groups that may not be able to pursue their own claims.

Moreover, it is recommended that a collective complaints procedure under the OP remove the high threshold that the draft version included of only accepting grave or systematic violations.<sup>263</sup> The ESC procedure does not include a threshold for the level violations of rights need to reach before a collective complaint can be submitted. The OP's draft collective complaints procedure appears to set an unnecessarily high threshold for such a procedure. Thus, it is argued that the threshold should be changed to 'violations of rights of multiple victims', as was suggested by some during the drafting of the procedure under the OP.<sup>264</sup> A lower threshold may be needed in order to ensure that the purpose and the advantages the collective complaint procedure could bring are achieved. This would also reduce the overlap with the inquiry procedure.<sup>265</sup> Hence, the procedure provides a great complementary function for when the individual complaints procedure is not adequate. Furthermore, the procedure under the ESC demonstrates how it could work under the OP in practice. It is hoped that this clarification will persuade states that there are more benefits than disadvantages to having the collective complaints procedure. It is therefore argued that a collective complaints procedure has the potential of making the OP more child-friendly. The added function could strengthen the OP's role in ensuring improved access to justice for children.

## **5. Conclusion**

It appears inevitable that the weaknesses of the OP outweigh its strengths. The potential of the OP to provide improved access to justice for children and enforcement of their rights is in its current state unlikely. Hence, the OP could have been more successful than its current format, due to the OP's weak provisions in terms of providing child-friendly justice. Based on this conclusion, it seems unlikely that the OP will effectively enforce children's rights without reforms. A collective complaints procedure is suggested as one particularly prominent reform due to its benefits for children's unique rights and needs.

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<sup>263</sup> Committee on the CRC (n 179) para 15.

<sup>264</sup> The HRC Report (n 104) para 49.

<sup>265</sup> Langford and Clark (n 90) 5.

The first weakness of the OP is the rule of having to exhaust domestic remedies. This is an issue because children may not be able to exhaust domestic remedies due to their lack of legal capacity in the domestic sphere. However, this hurdle appears exaggerated, as children who are being denied the adult help they require to use domestic justice systems may fall under the exceptions to the rule. They would most likely fall within the category of 'unavailable remedies' as they appear to practically be denied such remedies in this situation. It is further argued that this rule can aid the development of child-friendly justice as the Committee can follow the practice under the ACRWC, using the best interest of the child concept to make this rule less stringent for children. Thus, the rule would have the potential to fulfil its purpose without being unduly strict. However, children are still faced with practical issues to access the OP and the most devastating appears to be the need for international legal aid, as it is currently not available under the UN treaty body system. Consequently, the exhaustion of domestic remedies rule may not be as potentially damaging to the effectiveness of the OP as its face value may portray, but the practical issue of resources may on the other hand limit its potential.

Some of the provisions under the OP are devastating for fulfilling its purpose and effectiveness since they do not seem to be particularly child-friendly. This is most evidently shown by the fact that the OP does not allow any unwritten material to form part of the initial submission. This limits children who want to submit a claim via other mediums, such as audio-visually. More importantly, it restricts the OP's potential in confirming children as autonomous rights holders. The potential of the OP being another building block in this development appears lost. Children are denied the possibility to submit complaints in the shape their needs require. This situation seem even further aggravated given the fact that other Optional Protocols under the UN treaty system do not limit complaints to written format only. Thus, the provision will most likely discredit the effectiveness of the OP and its integrity as a child-friendly instrument. The inclusion of a time limit to submit a complaint is another obstacle for the OP's potential since children may not know about the procedure or may lack the legal capacity to pursue it within the time limit. It also appears to be an unnecessary barrier to the OP as only a few other Treaty's Optional Protocols have a time limit. Hence, the inclusion of a time limit is too strict for a child-friendly OP. Moreover, other alternatives existed, such as the inclusion of a reasonable time period, but were not chosen. This criterion is another reasons for stating that the OP is unlikely to be as effective as it could. The lack of a speedy procedure appears to affect the OP's effectiveness further. A child-friendly procedure needs to ensure that the procedure is as quick as possible since time is of the essence when it comes to child development. Yet the option of including a flexible rule of three to six months was rejected. The OP is further weakened by this limitation. The inclusion of an extra high threshold for interim measures is yet another limit to the OP, as this has the potential to reduce its key function of avoiding irreparable harm to children's right to development.

The lack of a collective complaints procedure demonstrates the flaws of the OP further because the procedure could have had an important function in terms of remedying the restrictive provisions under the individual complaints procedure. Consequently, it is suggested that a collective complaints procedure should be added to the OP. The proposed collective complaints procedure would be built on the ESC model and would be similar to the provisional procedure suggested during the drafting of the OP. The difference would be to not include a threshold of 'grave or systematic violations' and instead have a lower threshold of 'violations of rights of multiple victims' because it is lower and found under the ESC. The procedure should neither include the majority of the admissibility criteria that applies to the individual complaints procedure, as this would frustrate the proper functioning of the procedure.

The inclusion of a collective complaints procedure would be of invaluable importance to children as it provides for at least one avenue for children to effectively access the OP. In conclusion, the OP needs to be amended in order to ensure that its aim of providing access to child-friendly justice is not lost.