

# Three decade of the United Nations Convention on the Rights of the Child: Reflection on the right to an effective remedy for children \*

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## 1. Introduction

While next year will mark the 30th anniversary of the adoption of the Convention on the Rights of the Child (CRC), I think it is timely to reflect the impact of the CRC on the lives of the children in the world this year in 2018 on the occasion of the 70th anniversary of the adoption of the Universal Declaration of Human Rights (UDHR). It is because the CRC, like other United Nations human rights treaties, has emerged from the proclamation by the UDHR that human rights inherently and universally belong to all the people of the world and taken shape as a specialized human rights treaty for children. The entitlement of human rights stipulated in article 2 of the UDHR which states that “everyone is entitled to all the rights and freedoms set forth there in, without distinction of any kind” did not exclude children<sup>1</sup>. Nonetheless it took four decades for the international community to clearly and specifically recognize that children are the subjects of human rights by adopting the CRC in 1989. Another three decades have passed and we will celebrate the 30th anniversary of its adoption next year. But how much has the international community accomplished realization of the human rights of all the children of the world? To what extent, are their rights respected, protected and fulfilled?

The child demographics and socio-economic and political conditions surrounding children in the world has changed significantly over the past three decades. There will be assessments on progresses achieved, remaining and new challenges to the rights of children from various perspectives. But in this paper, I would like to highlight one issue – the right to an effective remedy, which is missing in the text of the CRC despite its recognition in the UDHR and other human rights treaties. In view of the reality of continuing violations of children’s rights, it would be meaningful to reflect on the right to an effective remedy for children.

## 2. Right to an effective remedy in the international human rights treaties

### 2.1 Implementation measures of the international human rights treaties

It is widely known that the UDHR was adopted as a non-legally binding document. However, the record of the discussions in its drafting process shows the strong emphasis by the drafters put on the importance of the implementation measures, which may be striking to the students of the UDHR today. As a matter of fact, the plan of the Commission on Human Rights, the United Nations body that drafted the UDHR, also included drafting the International Covenant on Human Rights as a legally binding document and the implementation measures.<sup>2</sup> While the Commission on Human

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<sup>1</sup> Under the UDHR and the International Covenants on Human Rights, everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind (preamble of the CRC).

<sup>2</sup> William A. Schabas, ed., *The Universal Declaration of Human Rights: The travaux préparatoires* (New York: Cambridge University Press, 2013), p.1340.

Rights decided to give priority to drafting the UDHR, the critical importance of the implementation measures was repeatedly highlighted by drafters of the UDHR throughout its drafting process<sup>3</sup>.

Setting a common standard of human rights and creating implementation measures have been inseparable components of the new regime of the international protection of human rights that has been developed by the United Nations. Indeed, the implementation measures and the committees for monitoring implementation by States parties are the common features of nine core international human rights treaties that were adopted by the United Nations stemming from the UDHR<sup>4</sup>.

These committees are often called as treaty bodies or treaty monitoring bodies. The Committee on the Rights of the Child (CRC Committee) is one of them established as the monitoring body for the CRC. Upon ratification of the Convention, it is the responsibility of the State party to implement the international legal obligation under the CRC in its jurisdiction. Realization of all rights in the CRC for all children in the country can be possible only by States parties conscious and continuing efforts and actions, in cooperation with civil society. Article 4 of the CRC requires States parties to take “all appropriate legislative, administrative and other measures” for implementation of the rights recognized in the CRC. This national implementation is the key. The mandate of the CRC Committee is to monitor the implementation by the States parties through reviewing their initial and periodic reports submitted to the Committee under article 44, paragraph 1 of the CRC, identifying the gaps in implementation and making recommendations to each States party in the concluding observations.

## 2.2 States parties’ obligation to provide effective remedies as part of implementation measures

An unfortunate reality is that the international recognition of the human rights and establishment of implementation measures do not stop violations of human rights. When human rights are violated, providing remedies to the victims is the only way of realization of their rights. National courts have special roles in providing judicial remedies. In the light of this reality, it is significant that the UDHR recognizes a right to remedy in article 8, which reads that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”<sup>5</sup>.

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<sup>3</sup> For example, Report of the Third Session (24 May to 18 June 1948) of the Commission on Human Rights Lake Success (E/800), paragraph 16, states that “the Commission recognized that in approving the Draft International Declaration of Human Rights it had not completed its task of preparing an International Bill of Human Rights, which consists of a Declaration, a Covenant, and Measures of implementation. It agreed that the Declaration would form only part of the International Bill of Human Rights, and that completion of a Covenant, containing measures of implementation, is essential.” *Id.*, p. 1967.

<sup>4</sup> For the list of nine core international human rights treaties, see the United Nations Office of High Commissioner for Human Rights (OHCHR), *The Core International Human Rights Treaties* (2014). Its updated list together with the respective monitoring bodies is also available at the OHCHR website, “The Core International Human Rights Instruments and their monitoring bodies.”

<https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx>

<sup>5</sup> Graziani refers to articles 7, 8 and 10 of the UDHR as the provisions in which the right to a remedy is recognized. Laurene Graziani, “Access to Justice: A Fundamental Right for All Children” in Ton Liefwaard and Julia Sloth-Nielsen, eds., *The United Nations Convention on the Rights of the Child – Taking Stock after 25 Years and Looking Ahead* (Leiden; Boston: Brill/Nijhoff, 2017), p.125. Article 8 most explicitly provides the right to remedy in the UDHR and thus is referred as the provision for the right to remedy in the academic literatures and the United Nations documents. See the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles) (A/RES/60/147, Annex, preamble) and Dinah Shelton, *Remedies in International Human Rights Law, Third Edition* (New York: Oxford University Press, 2015), p. 64. The author is of the view that article 7 of the UDHR which provides the equal protection of the law against any discrimination in violation of the Declaration is also relevant to the right to remedy.

Human rights are realized by the acts of States parties to respect, protect and fulfill them. In the first place, implementation by the States parties is to take legislative and administrative measures to harmonize their national laws and policies with the international standards under the treaties or adopt national laws and policies to fulfill the human rights under the treaties. It is also the obligation of the States parties to provide effective remedies to the victims when violations of the human rights under the treaties occur.

### 2.3 Right to an effective remedy in the core international human rights treaties

The right to a remedy is explicitly recognized in five out of nine core international human rights treaties: article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965); article 2 of the International Covenant on Civil and Political Rights adopted (ICCPR) (1966); article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984); article 83 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adopted (1990); and articles 8 and 22 of the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) (2006).

Among the other four core international human rights treaties, the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979) does not use the term “remedy” but its article 2 (c) provides the obligation of the States parties “to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.” General recommendation No. 28 (2010) of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) on the core obligations of States parties under article 2 of the CEDAW interprets that article 2 establishes an obligation of States parties to provide appropriate remedies for women who are subjected to discrimination contrary to the Convention.<sup>6</sup> Similar to article 2 of the CEDAW, article 5 of the Convention on the Rights of the Persons with Disabilities (CRPD) (2006) provides the obligation of States to “guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.”

## 3. Right to an effective remedy in the CRC

### 3.1 Article 4: general measures of implementation

As mentioned earlier, article 4 of the CRC provides the States parties’ obligation of general implementation measures. However, this article is silent on remedies. It is difficult to infer the intention of the drafters as the legislative history of the CRC contains no record indicating any discussion on the right to a remedy in case of violations of the rights recognized under the CRC.<sup>7</sup> The silence may be the reflection of the perception of non-justiciable nature of economic, social and cultural rights that was still prevalent at the time of adoption of the CRC, which contains not only civil and political rights but also economic, social and cultural rights. It is true that article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) on implementation measures is also silent on remedies. In earlier days of the development of the

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<sup>6</sup> Paragraphs 17, 32, 34 and 35 elaborate the obligation of States parties to provide remedies under the introductory sentence of article 2 and article 2 (b), (c) and (e). The CEDAW Committee also adopted general recommendation No. 33 (2015) on women’s access to justice, which contains detailed recommendations with regard to provision of remedies.

<sup>7</sup> Sharon Detrick, ed., *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”* (Dordrecht ; Boston : M. Nijhoff Publishers, 1992), pp.150-157. Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child, Volume I* (New York and Geneva: United Nations, 2007), pp. 349-356.

international human rights law, a difference of States parties' obligation under articles 2 of the ICCPR and ICESCR was emphasized and a view that economic, social and cultural rights are not justiciable and thus judicial remedies are not conceivable for those rights was predominant. As a matter of fact, article 4 of the CRC lowers the States parties' obligations of implementation measures with regard to economic, social and cultural rights "to the maximum extent of their available resources and, where needed, within the framework of international co-operation."

However, this issue has been already overcome. General comment No. 3 (1990) of the Committee on Economic, Social and Cultural Rights (CESCR) on the nature of States parties' obligations interpreted "appropriate means" under article 2, paragraph 1 of the Covenant for the implementation of the economic, social and cultural rights to include "the provision of judicial remedies".<sup>8</sup> The CESCR further elaborated the right to a remedy in its general comment No. 9 (1998) on the domestic application of the Covenant. It argues that article 8 of the UDHR reflects the principle of international law on remedies and in the light of this principle, a failure of a State party to provide any domestic legal remedies for violations of the rights under the Covenant cannot be justified unless such remedies are not "appropriate means" or unnecessary in view of the other means used.<sup>9</sup> Furthermore, the adoption of the Optional Protocol to CEDAW (1999) and the Optional Protocol to the ICESCR (2008) contributed in a significant way to strengthen the right to remedies for violations of economic, social and cultural rights by establishing individual communication procedures under the CEDAW and ICESCR, both of which cover these categories of rights.

### 3.2 Article 39: Recovery and reintegration of child victims

The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles) refers article 39 of the CRC as the provision recognizing a right to a remedy for victims of violations of international human rights law.<sup>10</sup> Likewise, Shelton mentions article 39 of the CRC as a provision referring to specific forms of reparations for children.<sup>11</sup> Article 39 of the CRC sets forth the right of a child victim to physical and psychological recovery and social reintegration, similar to article 14 of the CAT. Recovery and social reintegration, referred to as "rehabilitation" in other international human rights documents,<sup>12</sup> are recognized forms of remedies and as Detrick pointed out, the scope of the application of article 39 of the CRC is rather broad.<sup>13</sup> Nonetheless, we cannot ignore its limited scope in other aspects.

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<sup>8</sup> The CESCR states "among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable." CESCR, general comment No. 3 (1990), paragraph 5.

<sup>9</sup> CESCR, general comment No. 9 (1998), paragraph 3.

<sup>10</sup> UN Basic Principles, *supra* note 5, preamble. UN Basic Principles originates from work of Theo van Boven, Special Rapporteur of the UN sub-Commission on Prevention of discrimination and Protection of Minorities in 1990s. His final report of study concerning the rights to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms (E/CN.4/Sub.2/1993/8, 2 July 1993), in its paragraph 32, refers article 39 of the CRC in the section of international human rights norms (global and regional human rights instruments).

<sup>11</sup> Shelton, *supra* note 5, p.65. The reference to article 39 of the CRC in Dinah Shelton, third edition, seems to be influenced by the UN Basic Principle (2005), as the first edition of her book (1999) has no such reference.

<sup>12</sup> Article 14 of the CAT, article 24, paragraph 5 of the CPED and the UN Basic Principles use the term "rehabilitation." The original proposal of article 39 of the CRC also used the term "rehabilitation." However, after the discussion at length on the use of the term "rehabilitation," "physical and psychological recovery and social reintegration" were suggested and agreed upon. Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (The Hague; London: Martinus Nijhoff, 1999), p. 671.

<sup>13</sup> Article 39 of the CRC applies to a child victim of "any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishments; or armed conflicts" and thus its scope of application is broader than article 14 of the CAT, which applies to the victims of only torture. *Ibid.*, p.669.

Firstly, this article applies to a child victim of violations of certain categories of the rights of the child, namely, articles 19 and 32 to 38 of the CRC. Secondly, article 39 of the CRC, unlike article 14 of the CAT, does not recognize the right of the victim to compensation.<sup>14</sup>

### 3.3 Reflection of the perception and reality of child victims?

I suspect that the lack of provision explicitly recognizing the right to a remedy in the CRC may be the reflection of the perception that it is not realistic for child victims to pursue remedies, in particular, judicial remedies. It is imaginable that the drafters of the CRC did not even think of the right to a remedy for child victims as in many jurisdictions, children do not have legal capacities to initiate the judicial proceedings as parties without the consents of the parents or legal guardians.<sup>15</sup> The fact that article 39 of the CRC did not include the right to compensation shows a different treatment of child victims from that of adult victims. Would this lack of clear recognition of the right to an effective remedy in the CRC be indicative of the perception that the status of children as the rights holders are lower than the adults?<sup>16</sup>

It is undoubtedly accepted that the CRC changed the way children are viewed and treated from as passive objects of care and charity but as rights holders.<sup>17</sup> However, when it comes to the specific question on the right of child victims whose rights are violated, it seems that the international community was yet to provide them with the equal right to seek effective remedies. UNICEF, which participated in the drafting process of the CRC and is given the special recognition of its role in the implementation of the CRC,<sup>18</sup> in its annual report “The Status of the World’s Children 1989” featured the adoption of the CRC. The following paragraph in the report illustrates a weaker approach to violation of children’s rights at that time.

*“By its very nature, it cannot be enforced in the same way as domestic laws are enforced by domestic courts. Its effectiveness therefore depends on the mobilizing of public opinion in both industrialized and developing worlds to create a new awareness of children’s rights and a new sensitivity – on behalf of press and public and politicians – to violations of those rights.”*

Why does the effectiveness of the Convention have to depend only on the awareness raising instead of obliging States parties to enforce the Convention in the national courts? What needs to be done in response to violations of children’s rights? Should child victims be provided remedies and access to

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<sup>14</sup> The CRC Committee has not elaborated States parties’ obligations to provide remedies other than recovery and reintegration under article 39 in two relevant general comments: general comment No. 8 (2006) on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia), paragraph 37 and general comment No. 13 (2011) on the right of the child to freedom from all forms of violence, paragraph 52 and 53. The latter refers article 39 in the relation to “treatment” and “follow-up.”

<sup>15</sup> Research conducted by the UNICEF Innocenti Research Centre on the right of children to be heard based on the examples of laws and practices of 52 countries found that “the law of many countries provide in general terms that all persons have a right to a legal remedy to protect their rights. But the traditional requirement that children take legal action through their parents or other legal representative often limits their access to such remedies.” Daniel O’Donnell, *The right of children to be heard: Children’s right to have their views taken into account and to participate in legal and administrative proceedings*, Innocenti Working Paper (Florence: UNICEF Innocenti Research Centre, 2009), p.27

<sup>16</sup> In the drafting process of the Optional Protocol to the CRC on a communications procedure, it was noted that “many States still failed to provide effective remedies, as they considered children as objects rather than subjects of rights.” 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 (A/HRC/13/43, issued on 21 January 2010), paragraph 42.

<sup>17</sup> UNICEF website, CRC page, <https://www.unicef.org/crc/>

<sup>18</sup> CRC, article 45

justice for seeking remedies? Where are the roles of children themselves in acting to realize their rights? Do we share such view after three decades of the adoption of the Convention?

### 3.4 General comments of the CRC Committee

While the CRC does not have a provision clearly recognizing the right to a remedy for violations of rights, the CRC Committee addressed this issue. The guidelines for the States parties' periodic reports adopted in 1996 requested the information on "judicial decisions applying the principles and provisions of the Convention" and the information on "remedies available in cases of violation of the rights recognized by the Convention" as part of the information on implementation measures.<sup>19</sup>

The CRC Committee formally pronounced its position on the right to a remedy in general comment No. 5 (2003) on general measures of implementation of the CRC (arts. 4, 42 and 44, para. 6). This general comment contains five important points on the right to a remedy under the CRC. First, it clarified that the right to an effective remedy exists under the CRC by interpreting that "for rights to have meaning, effective remedies must be available to redress violations" and "this requirement is implicit in the Convention."<sup>20</sup> Second, the general comment highlights the need of special consideration for child victims. It states that "children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights" and recognizes the need to ensure "effective, child-sensitive procedures available to children and their representatives, ..., child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance."<sup>21</sup> Third, the general comment explicitly recognizes the right to "appropriate reparation, including compensation" as one of the elements of right to an effective remedy.<sup>22</sup> Fourth, the general comment confirms that remedies should be available for the victims of violations of economic, social and cultural rights, emphasizing the interdependence and indivisibility of all human rights and stating that "economic, social and cultural rights should be regarded as justiciable."<sup>23</sup> Fifth and lastly, the general comment emphasizes that "it is essential that domestic law sets out entitlements in sufficient detail to enable remedies for non-compliance to be effective."<sup>24</sup>

Since the adoption of general comment No. 5, the CRC Committee has continued to mention remedies in a number of general comments on specific rights or themes.<sup>25</sup> In particular, general

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<sup>19</sup> General guidelines regarding the form and contents of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention (CRC/C/58, 11 October 1996), paragraphs 15 and 16.

<sup>20</sup> General comment No.5, paragraph 24, states that "it is essential that domestic law sets out entitlement in sufficient detail to enable remedies for non-compliance to be effective." Couzens suggests a different view on the silence of the CRC on the right to a remedy citing Murphy's argument that the distinction in wording is deliberate and means that States are not obliged under international law to guarantee judicial remedies of all rights violations. Murphy SD, "Does international law obligate states to open their national courts to persons for the invocation of treaty norms that protect or benefit person?" In Sloss D, ed, *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge: Cambridge University Press, 2009), pp. 61-119, cited in note 72 of Meda Couzens, "CRC Dialogues: Does the Committee on the Rights of the Child 'Speak' to the National Courts?" in Liefgaard and Sloth-Nielsen, *Supra* note 5, pp.114-115.

<sup>21</sup> General Comment No. 5, paragraph 24.

<sup>22</sup> *Ibid.*

<sup>23</sup> General comment No.5, paragraphs 6 and 25. Paragraph 6 points out that "there is no simple or authoritative division of human rights in general or of Convention rights into the two categories" of civil and political rights and economic, social and cultural rights.

<sup>24</sup> *Ibid.*, paragraph 25.

<sup>25</sup> General comment No. 12 (2009) on the rights of the child to be heard, general comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, general comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31), general comment

comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights contains the section on "remedies and reparation"<sup>26</sup> and general comment No. 21 (2017) on children in street situations contains the section "access to justice and remedies."

#### 4. Developments of the right to a remedy for children in the Optional Protocols to the CRC

The right to a remedy for the victims of children's rights was strengthened normatively and procedurally by the adoption of Optional Protocols to the CRC.

##### 4.1 Right to a remedy in the OPSC

A significant normative development of the right to a remedy for child victims was achieved by the recognition of extensive rights of the child victims in articles 8 and 9 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC) (2000). Article 8 obliges States parties to take measures during the criminal justice process such as informing child victims of their rights, providing support services to them, protecting their privacy and identity, protecting the victims and their families, avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims. Article 9 provides the right of the child victims of the offences under the Optional Protocol to social integration and recovery as well as "access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible."

##### 4.2 Individual communication procedures

The other notable development occurred to the procedural aspect of the right to a remedy by the adoption of the Optional Protocol of the Convention on the Rights of the Child on Communications Procedures (OPIC) (2011), which introduced individual communication procedures for the CRC and its Optional Protocols. Under this procedure, child victims can submit communications to the CRC Committee, if their rights under the CRC or its Optional Protocols were violated and remedies were not provided at the national level. The CRC was the only core international human rights treaty that did not have individual communications procedures and the adoption of the OPIC filled this gap. Pinheiro, advocating the establishment of individual communications procedures for the CRC, eloquently argued for the long waited and legitimate need to address this unequal treatment of child victims in the international human rights law as follows:

*"To me, filling this very obvious gap in the armoury of human rights instruments is in itself a necessary confirmation of full acceptance by States of the child as a rights holder, with the essential ability to seek remedies, including through external, international procedures, for violations of their rights."<sup>27</sup>*

##### 4.3 Limited scope and impact

These are undoubtedly positive developments strengthening the right to a remedy for child victims. However, we should be aware of their limited scope and impact on the access to a remedy for all child victims of all categories of rights under the CRC. The rights of child victims including access to procedures to seek compensation recognized in the OPSC are available only for the child victims of offences under the OPSC. Individual communication procedures are available only for child

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No. 21 (2017) on children in street situations and joint general comment No. 22 (2017) on the general principles regarding the human rights of children in the context of international migration are examples.

<sup>26</sup> CRC Committee, general comment No. 16 (2003), paragraphs 30 and 31. General comment, CRC Committee, general comment No. 21 (2017), paragraph 22.

<sup>27</sup> Paulo Sérgio Pinheiro, Reasons and timing to elaborate a communications procedure under the Convention on the Rights of the Child (A/HRC/WG.7/1/CRP.4, issued on 10 December 2009), p.4.

victims of violations of the rights under the CRC or its Optional Protocols “within the jurisdiction of a State party” to the OPIC.<sup>28</sup> So far only 41 States have ratified or acceded the OPIC.<sup>29</sup> Even children in those 41 States, before submitting communications to the Committee, have to first exhaust all available domestic remedies, in principle by going through judicial or administrative procedures for remedies in the country.<sup>30</sup> Time is essentially critical for child victims, as time during childhood is much more significant than for the adult. Lengthy procedures for remedies under the national law and then under the OPIC would make the redress for child victims meaningless if achieved only after many years. Therefore, realizing the right to a remedy for child victims at the national level is crucially important. The right to a remedy should be realized for child victims of violation of all rights under the CRC in its all States parties.

#### 4.4 Right to a remedy at the national level

While it is important to increase States parties to the OPIC to provide access to remedies at the international level for more children in the world, it is imperative to enable child victims in all States parties to the CRC to have access to remedies at the domestic level. Encouraging States parties to develop appropriate national mechanisms to this end is one of the aims of the OPIC.<sup>31</sup> Pinheiro also stressed this expected positive impact of the OPIC stating the following:

*“I believe that the existence of the procedure will very importantly provide a new pressure on States Parties to the Convention on the Rights of the Child – and we hope that they will very soon be all Member States – to provide children and their representatives, at local and national level, with access to effective remedies for any violations of their rights.”<sup>32</sup>*

As he rightly pointed out, the debate on the proposal for the OPIC drew attention in the 20th anniversary year of the adoption of the CRC to “the need to provide effective remedies for breaches of children’s rights.”<sup>33</sup> In the drafting process of the OPIC, lack or insufficiency of access to effective remedies at the national level was repeatedly mentioned.<sup>34</sup> However, since then how much progresses have been achieved in providing child victims with access to remedies at the national level? The reality of the access of children to justice and remedies is still far from what should be.

The research project conducted by Child Rights International Network (CRIN) on access to justice for children in 197 countries revealed obstacles in terms of the legal status of the CRC, the legal status of the child and remedies. It was found that only 48% of all countries allow the CRC to be directly enforced in courts, enabling children to challenge laws or practices that violate their rights under the CRC. Furthermore, while States almost universally recognize the right of children to bring a case in their own name, the ability of children to engage with the legal system is severely

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<sup>28</sup> OPIC, article 5.

<sup>29</sup> The number of the States parties to OPIC as of 6 November 2018. The latest status of ratification can be found at the website of the United Nations Treaty Collection, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-d&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&clang=_en)

<sup>30</sup> Communications will be considered inadmissible when all available domestic remedies have not been exhausted except for the case where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief. OPIC, article 7, paragraph 1 (e).

<sup>31</sup> OPIC, preamble.

<sup>32</sup> Pinheiro, *Supra* note 27, p.4. Newell expressed a similar view. Peter Newell, submission to Open-ended Working Group of the Human Rights Council, considering the possibility of elaborating an Optional Protocol to provide a communications procedure for the Convention on the Rights of the Child (A/HRC/WG.7/1/CRP.2, issued on 9 December 2009), paragraph 3.

<sup>33</sup> Pinheiro, *supra*, note 27, p.4. Newell also confirmed such impact of the debate on more detailed consideration of children’s access to national remedies. *Ibid.*, paragraph 3.

<sup>34</sup> For example, *supra*, note 16, paragraph 18.



hampered around the world due to the requirement to approach the courts through a litigation guardian or similar person.<sup>35</sup> These findings confirm the need of addressing the inadequate realization of children's right to an effective remedy in all countries more vigorously.

## 5. Toward realizing the children's right to an effective remedy

### 5.1 Reporting procedures

Reporting procedures of the CRC Committee, the core of the international implementation measures for the CRC, is a strong mechanism to find the gaps and recommend necessary measures in realizing effective remedies for children at the national level in each State. The CRC Committee included the request for the information on "remedies available and accessibility to children, in case of violation of the rights recognized by the Convention" as general measures of implementation in the revised reporting guidelines for the periodic reports (2005).<sup>36</sup> However, the reporting guideline, since its third version (2010), has left the issue of remedies totally to the common core document which is used for the review by all treaty bodies.<sup>37</sup> This change occurred along with the adoption of the harmonized guidelines on reporting under the international human rights treaties, including guidelines on a core document and treaty-specific documents.<sup>38</sup> However, core documents are often outdated. Therefore, relying on the information on remedies in core documents and not requesting such information in the treaty-specific reports under the CRC have a risk of resulting in no information on remedies available for the review of the States parties reports by the Committee. Furthermore, information provided in core documents is general in nature and may not be sufficient to address the special difficulties children are faced in seeking remedies.

A study on the review of periodic reports of eight States parties<sup>39</sup> conducted by the CRC Committee at its 74th session (16 January 2017 to 3 February 2017) revealed the following findings: Core documents of five States were outdated for almost or more than twenty years<sup>40</sup>; Core documents of

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<sup>35</sup> Child Rights International Network, *Rights and Remedies: A Global Report on Access to Justice for Children* (2016), <https://www.crin.org/en/library/publications/rights-remedies-and-representation-global-report-access-justice-children>

<sup>36</sup> General guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention (CRC/C/58/Rev.1, adopted on 3 June 2005), paragraph 14.

<sup>37</sup> Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child (CRC/C/58/Rev.2, issued on 25 November 2010), paragraph 7 and treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child (CRC/C/58/Rev.3, issued on 3 March 2015), paragraph 7.

<sup>38</sup> Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a core document and treaty-specific documents contains a question "what remedies are available to an individual who claims that any of his or her rights have been violated, and whether any systems of reparation, compensation and rehabilitation exist for victims" and the request for information on "the nature and scope of remedies provided in their domestic legislation against violations of human rights and whether victims have effective access to these remedies" (HRI/MC/2006/3, issued on 10 May 2006), paragraphs 42 (e) and 59. The guidelines were adopted by the 18th meeting of chairpersons of the human rights treaty bodies. Report of the chairperson of the human rights treaty bodies on their eighteenth meeting (A/61/385, issued on 25 September 2006), paragraphs 22 and 47.

<sup>39</sup> Second periodic report of Barbados, second periodic report of Central African Republic, combined third to fifth periodic reports of Democratic Republic of Congo, combined second to fourth periodic reports of Estonia, fourth periodic report of Georgia, combined third to fifth periodic reports of Malawi, combined second and third periodic reports of Saint Vincent and the Grenadines and combined second and third periodic reports of Serbia

<sup>40</sup> Core document of Barbados (HRI/CORE/1/Add.64/Rev.1) was submitted on 12 September 1996, core document of Central African Republic (HRI/CORE/1/Add.100) was submitted on 15 April 1998, core document of Estonia (HRI/CORE/1/Add.50/Rev.1) was submitted on 7 June 2001, core document of Georgia

three States submitted after the adoption of the treaty-specific reporting guidelines contain information on remedies. While core documents of two States contain rather detailed information on remedies in the section of “effective remedies,” no child specific information is included.<sup>41</sup> On the part of the CRC Committee, the issue of remedies was addressed in the list of issues for five States parties<sup>42</sup> and in the concluding observations for four States parties,<sup>43</sup> two of which were the States parties who also received questions on remedies in the list of issues.<sup>44</sup>

It appears that the issue of remedies has been receiving comparatively more attention in the reporting procedures by other treaty bodies. Unlike the CRC Committee, most of other treaty bodies request information on remedies in relation to the rights recognized in the respective treaties in the treaty-specific documents in addition to the general information on remedies in the core document.<sup>45</sup> For all above eight States reviewed by the CRC Committee at its 74th session, many other treaty bodies

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(HRI/CORE/1/Add.90/Rev.1) was submitted on 12 November 1999 and core document of Saint Vincent and the Grenadines (HRI/CORE/1/Add.36) was submitted on 13 October 1993.

<sup>41</sup> Core document of Democratic Republic of Congo (HRI/CORE/COD/2013, submitted on 18 March 2013), paragraph 57. Core document of Malawi (HRI/CORE/MWI/2014, submitted on 25 June 2014), paragraphs 133-137. Core document of Serbia (HRI/CORE/SRB/2010, submitted on 30 November 2010), paragraphs 315-327. Compare with the reports of the research by CRIN on access to justice for children in these countries, which contain detailed information. CRIN, Access to justice for children: Democratic Republic of Congo (2015), [https://www.crin.org/sites/default/files/drc\\_access\\_to\\_justice.pdf](https://www.crin.org/sites/default/files/drc_access_to_justice.pdf). CRIN, Access to justice for children: Serbia (2014), [https://www.crin.org/sites/default/files/serbia\\_access\\_to\\_justice.pdf](https://www.crin.org/sites/default/files/serbia_access_to_justice.pdf). CRIN, Access to justice for children: Malawi (2015), [https://www.crin.org/sites/default/files/malawi\\_access\\_to\\_justice\\_0.pdf](https://www.crin.org/sites/default/files/malawi_access_to_justice_0.pdf)

<sup>42</sup> List of issues for Central African Republic (CRC/C/CAF/Q/2), paragraph 15 (c) and list of issues for Democratic Republic of Congo (CRC/C/COD/Q/3-5), paragraph 17 (d) ask information on redress and compensation given to victims of sexual violence. List of issues for Malawi (CRC/C/MWI/Q/3-5) paragraph 7 (c) contains a question on effective remedies to victims of sexual abuse and exploitation. List of issues for Saint Vincent and the Grenadines (CRC/C/CAF/Q/2) paragraph 3 contains a question on remedies to child victims of violation of their rights by the activities of the private sector. List of issues for Serbia (CRC/C/SRB/Q/2-3) paragraph 5 contains a question on available access to remedies for victims of violence against children.

<sup>43</sup> Concluding observations for Central African Republic (CRC/C/CAF/CO/2) paragraph 41 (d) on conflict-related sexual violence, exploitation and abuse. Concluding observations for Georgia (CRC/C/GEO/CO/4) paragraph 14 (b) on children’s rights and business sector, paragraph 15 (b) on non-discrimination and paragraph 20 on Torture and other cruel, inhuman or degrading treatment or punishment. Concluding observations for Malawi (CRC/C/MWI/CO/3-5) paragraph 12 (b) on children’s rights and business sector. Concluding observations for Saint Vincent and the Grenadines (CRC/C/VCT/CO/2-3) paragraph 31 (d) on violence against children and paragraph 35 (g) on abuse and neglect.

<sup>44</sup> These two States parties are Central African Republic and Malawi.

<sup>45</sup> Guidelines on treaty-specific document to be submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights (E/C.12/2008/2, adopted on 18 November 2008), Annex, paragraph 3 (c), Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights (CCPR/C/2009/1, issued on 22 November 2010), paragraphs 10, 26, 29, 32, 38, 45, 49, 61, 63, 71, 72 and 80, Guidelines for the CERD-specific document to be submitted by States parties under article 9, paragraph 1, of the Convention (CERD/C/2007/1, issued on 13 June 2008), paragraphs 8 and 19, Compilation of guidelines on the form and content of reports to be submitted by States parties to the international human rights treaties (HRI/GEN/2/Rev.6, issued on 3 June 2009), paragraph A.4.2, Guidelines on the form and content of initial reports under article 19 to be submitted by States parties to the Convention against Torture (CAT/C/4/Rev.3, issued on 18 July 2005), paragraphs 22, 23 and Part II (b) (iii), Guidelines on treaty-specific document to be submitted by states parties under article 35, paragraph 1, of the Convention on the Rights of Persons with Disabilities (CRPD/C/2/3, issued on 18 November 2009), paragraphs A.3.2 (f), A.4.2 and A.4.4, Committee on Enforced Disappearance, Guidelines on the form and content of reports under article 29 to be submitted by States parties to the Convention (CED/C/2, issued on 8 June 2012), paragraphs 17 and 23.

made recommendations on remedies sometimes in a detailed and extensive manner.<sup>46</sup> This general trend of increasing focus on effective remedies among all treaty bodies is beneficial to child victims as other international human rights treaties equally apply to children. A further positive development is that some treaty bodies pay particular attention to the effective remedies for children. For example, Human Rights Committee in its general comment No.31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant elaborates that:

*“Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children.”<sup>47</sup>*

The CEDAW Committee also recognizes the specific barriers faced by girls to gaining access to justice due to lack of the social or legal capacity to make significant decisions about their lives in areas relating to education, health and sexual and reproductive rights.<sup>48</sup>

## 5.2 Use of other international and regional mechanisms for remedies by children

In the drafting process of the OPIC, experts advocated a communications procedure for the CRC but also presented the information on the actual and possible use of other international and regional mechanisms for remedies by children.<sup>49</sup> Even by a quick look at the recent jurisprudence of the Human Rights Committee, some individual communications containing claims violations of children’s rights can be found.<sup>50</sup> Actually many of other core international human rights treaties for which communications procedures exist have provisions for children’s rights<sup>51</sup> in addition to the

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<sup>46</sup> For Barbados, CCPR/C/BRB/CO/3 (issued on 11 May 2007), paragraph and CERD/C/BRB/CO/16 (issued on 27 March 2007), paragraph 14. For Central African Republic, CCPR/C/CAF/CO/2 (issued on 27 July 2006), paragraphs 6, 8 and 12, CEDAW/C/CAF/CO/1-5 (issued on 24 July 2014), paragraph 15 (b) and (g). For Democratic Republic of Congo, CEDAW/C/COD/CO/6-7 (issued on 30 July 2013), paragraphs 9 (e), 10 (g), 22 (b) and (c), E/C.12/COD/CO/4 (issued on 16 December 2009), paragraphs 8, 25 and 26. For Estonia, CAT/C/EST/CO/5 (issued on 17 June 2013), paragraphs 4 (c), 11 (c) and 23, CCPR/C/EST/CO/3 (issued on 4 August 2010), paragraphs 8 and 9, CEDAW/C/EST/CO/4 (issued on 10 August 2007), paragraphs 8 and 9, CERD/C/EST/CO/10-11 (issued on 22 September 2014), paragraphs 15 (b) and 16. For Georgia, CCPR/C/GEO/CO/4 (issued on 19 August 2014), paragraphs 5, 9 (b), 10, 11, 12 and 18, CEDAW/C/GEO/CO/4-5 (issued on 24 July 2014), paragraph 21 (b), CERD/C/GEO/CO/6-8 (issued on 13 May 2016), paragraph 9 (a). For Malawi, CCPR/C/MWI/CO/1/Add.1 (issued on 19 August 2014), paragraphs 8 (d), 15 (a) and 19 (a), CEDAW/C/MWI/CO/7 (issued on 24 November 2015) paragraph 21. For Saint Vincent and the Grenadines, CERD/C/63/CO/10 (issued on 10 December 2003), paragraphs 6 and 11. For Serbia, CAT/C/SRB/CO/1 (issued on 19 January 2009), paragraphs 18, 21 and 23, CCPR/C/RB/CO/2 (issued on 20 May 2011), paragraphs 6, 9, 10 and 12, CEDAW/C/SRB/CO/2-3 (issued on 30 July 2013), paragraph 13 (b), CERD/C/SRB/CO/1 (issued on 13 April 2011), paragraphs 14 and 22, CRPD/C/SRB/CO/1 (issued on 21 April 2016), paragraphs 10, 21, 24, 29, 34 and 36, E/C.12/COD/CO/4 (issued on 16 December 2009), paragraphs 8, 15, 25 and 31. Other treaty bodies use the terms “remedies” “compensation” “reparation” and “redress” when addressing the issue of remedies.

<sup>47</sup> Human Rights Committee, general comment No. 31 (2004), paragraph 15.

<sup>48</sup> General recommendations No. 33 (2015) on women’s access to justice, paragraph 24.

<sup>49</sup> Newell, *supra* note 32, paragraph 20 (with regard to the communications procedure under the CRPD) and paragraphs 34 – 48 (with regard to the regional human rights mechanisms). The European Court of Human Rights was the first international body to recognize the child’s procedural capacity, to which the first petitions were lodged by children in the 1970s. Graziani, *supra* note 5, pp. 129-130.

<sup>50</sup> For example, M.P. vs Denmark (No. 2453/2015), N.K. vs Netherlands (No. 2326/2013), Vyacheslav Berezhnoy vs Russian Federation (No. 2107/2011)

<sup>51</sup> Articles 6, 14, 23 and 24 of the ICCPR, articles 10 and 12 of the ICESCR, article 16 of the CEDAW and article 7 of the CRPD are some examples.

general application of rights under these treaties to children. More thorough research of the jurisprudence of other treaty bodies and regional human rights mechanisms will present a comprehensive picture on the frequency and scope of the use of these mechanisms by or on behalf of children. Considering larger numbers of States parties to the Optional Protocols to the ICCPR and other international and regional human rights treaties which provide remedies mechanisms,<sup>52</sup> the potential benefit children may receive from the use of these procedures and mechanisms in seeking remedies cannot be overlooked. Therefore, the information on the availability of other communications procedures and the regional mechanism for children to seek remedies should be also disseminated.

## 6. Conclusion

Approaching to the 30th anniversary of the adoption of the CRC and the 5th anniversary of the entry into force of the OPIC next year, it is absolutely timely to scale up our efforts to realize the right of the child to effective remedies including access to justice<sup>53</sup>. It is more so, as the Sustainable Development Goal 16: providing access to justice for all<sup>54</sup> will be reviewed in depth at the High Level Political Forum on Sustainable Development also next year.<sup>55</sup> Children should not be left behind from access to justice.<sup>56</sup> In this regard, it is significant that the Human Rights Council took up this issue and adopted the resolution on rights of the child: access to justice for children (A/HRC/RES/25/6) on 27 March 2014. The resolution, in particular, called upon States to ensure that “their national legal systems provide effective remedies to children for violations and abuses of their rights, and that children have the possibility to initiate legal proceedings in cases of violations of their rights.”<sup>57</sup>

As to the role of treaty bodies, while children may benefit from the general trend of increasing attention to the right to effective remedies and the particular focus on child victims by other treaty bodies, it is critically important that the CRC Committee continues to address the issue of effective remedies for children highlighting their special need and difficulties for them. In view of still existing gap in the elements of access to justice for children such as the direct enforceability of the CRC, the ability of children to initiate the judicial actions in many countries,<sup>58</sup> the CRC Committee should consistently pay attention to these issues in all States parties in the reporting procedures.<sup>59</sup>

I would like to end with the powerful quote of Pais, United Nations Special Representative of the Secretary-General on Violence against Children, in 2009:

“The right to an effective remedy was proclaimed more than 60 years ago as a core dimension of the Universal Declaration of Human Rights and remains an essential

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<sup>52</sup> As of 14 November 2018, the Optional Protocol to the ICCPR has 116 States parties, the Optional Protocol to the CEDAW has 109 States parties, the Optional Protocol to the CRPD has 93 States parties,

<sup>53</sup> Access to justice refers to the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards. Access to justice for children, Report of the United Nations High Commissioner for Human Rights (A/HRC/25/35, issued on 16 December 2013), paragraph 4.

<sup>54</sup> Target 16.3 specifically aims to promote the rule of law at the national and international levels and ensure equal access to justice for all

<sup>55</sup> <https://sustainabledevelopment.un.org/hlpf/2019>

<sup>56</sup> The annual report of Leandro Despouy, the Special Rapporteur on the independence of judges and lawyers (2007) contains the analysis on access to justice, in which children are identified as one of the groups who are experiencing greater difficulties in access to justice (A/HRC/8/4, 13 May 2008).

<sup>57</sup> A/RES/HRC/25/6, paragraph 13 (a).

<sup>58</sup> CRIN, *supra* note 35. Barriers to children’s access to justice in the report of the UN High Commissioner for Human Rights, *supra* note 53, paragraphs 8-12.

<sup>59</sup> Couzens points out the inconsistency of the CRC Committee in addressing the direct application of the CRC by courts in the reporting procedures. Couzens, *supra* note 20, pp. 111-112.

component of any system of accountability for the rights of the child. It provides the bridge between theoretical recognition and meaningful enforcement.”<sup>60</sup>

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<sup>60</sup> Human Rights Council Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure (A/HRC/WG.7/1/CRP.7, issued on 14 December 2009), p.2