

The Third Optional Protocol to the Convention on the Rights of the Child: Preliminary case law assessment for the effective promotion and protection of children's rights

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Abstract: *On the occasion of the thirtieth anniversary of the United Nations Convention on the Rights of the Child, the locus standi of the child could be considered among its key elements. CRC has also been strengthened by the adoption of the Third Optional Protocol (Optional Protocol to the Convention on the Rights of the Child on a communications procedure) introducing the communication mechanism under the mandate of the CRC Committee. The decisions released by this monitoring body interestingly exemplify how the mechanism functions. The reasoning the Committee takes on in cases related to the best protection of the rights of claimants is examined in this contribution. In order to understand the operational relevance of the mechanism, different categories of cases so far handled by the CRC Committee will be explored: for instance, communications that have either been declared inadmissible, discontinued or examined and decided on in order to take measures against the states directly concerned. The investigation will be supplemented by referencing pending cases, as described by the CRC Committee in its latest published report about the communications still under examination. Starting from the rights under examination and the recognition of the locus standi in favour of the child, the ultimate aim of the contribution is to assess how the communication mechanism is relevant in terms of advanced guarantees. Additionally, the article will explore whether, although different from judicial reasoning, it remains a relevant mechanism for the promotion and protection of children's rights at the maximum level.*

Key words: *Convention on the Rights of the Child; Third Optional Protocol; communication procedure; best interests of the child; children's rights*

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1 Introduction

On the occasion of the thirtieth anniversary of the United Nations Convention on the Rights of the Child (CRC), some questions are often raised concerning the role and mandate of the Committee on the Rights of the Child (CRC Committee). In fact, the body over time has provided an important contribution by monitoring country situations, releasing General Comments and promoting children's rights during the days of general discussion and awareness-raising actions among the public, states, professionals, civil society and academia. These activities must also be related to the consolidation of two aspects: the protection of children involved in armed conflicts, as well as the prevention and persecution of the sale of children, child prostitution and child pornography, as provided by the two Optional Protocols to the Convention, which in 2020 will celebrate the twentieth anniversary of their adoption and entry into force.

However, little research is dedicated to the active role played by the holder of the rights and freedoms enshrined in these legal instruments. Indeed, the *locus standi* of the child is the real added value of CRC, which has been strengthened only when the negotiation for the compilation and adoption of the Third Optional Protocol was initiated, ultimately resulting in the introduction of the communication mechanism under the mandate of the CRC Committee. The decisions released by this body, which exemplify both the function of this mechanism and its assessment of some cases related to the best protection of the rights of claimants, are examined in this contribution. In order to understand the operational relevance of the mechanism, the article will specifically explore different categories of cases so far handled by the CRC Committee: communications that have been declared inadmissible, communications that have been considered discontinuous, and communications that have been examined and decided on so as to take measures against the states directly concerned. Finally, the investigation will be supplemented by a reference to pending cases, as described by the CRC Committee in its latest report published on the state of the communications under examination.

Starting from the rights under examination and the recognition of the *locus standi* in favour of the child, the ultimate aim of the article is to preliminarily assess (due to the limited case law) the extent to which the communication mechanism is relevant in terms of advanced guarantees. Additionally, the article will explore whether, although different from judicial reasoning, it remains a relevant mechanism for the consolidation of the promotion and protection of children's rights at the maximum level.

2 Some preliminary remarks on the Third Optional Protocol to the Convention on the Rights of the Child

The need to provide CRC with a mechanism for accessing its Committee, whose mandate is to receive communications directly from rights holders and to adopt decisions stopping violations while restoring the correct application of the Convention, is a fundamental step (Cantwell 1992; Doek 2011). The introduction of such mechanisms in the key human rights treaties is provided in the same texts or otherwise in Optional Protocols. For CRC this option was assumed both during the negotiation and the compilation of the first two Optional Protocols (Detrick 1992). However, primary attention was paid to the formulation of provisions of the Convention so that strictly procedural aspects were taken into account.

It was only in 2008 that the General Assembly, fuelled by pressure from civil society, accepted the request by several associations to set up an open-ended working group involving representatives of member states interested in drafting the Third Optional Protocol to CRC on Communications (A/HRC/8/NGO/6, 26 May 2008). The official establishment of this Working Group is contained in the Human Rights Council (HRC) Resolution 11/1 of 17 June 2009. The Working Group met in December 2009 to discuss the contents of the Optional Protocol, receiving many contributions from all the involved actors, that is, member states (members and non-members of the HRC), international governmental and non-governmental organisations (NGOs), civil society and CRC Committee components (A/HRC/13/43, 21 January 2010). The renewal of the mandate of the Working Group through a further HRC resolution allowed its members to draft a preliminary version of the text (A/HRC/RES/13/3, 14 April 2010). At this stage the mechanism included the double reference to the communications that can be formulated and submitted to the CRC Committee by individuals as well as groups of individuals which was appreciated by the members of the Committee (A/HRC/WG.7/2/3, 13 October 2010) (Lee 2010).

Nevertheless, during negotiations at the beginning of 2011, the collective dimension was removed by the inclusion of an opt-in clause: Ratifying states would be allowed to decide whether to declare the competence of the CRC Committee to receive and consider communications from individuals and groups of individuals (A/HRC/WG.7/2/4, 13 January 2011). A wide and articulated debate within the Working Group has contrasted the two main views. On the one hand, a large number of state representatives were in favour of the individual *locus standi* of the communication, thus excluding the collective *locus standi* or opting-in clause. On the other hand, associations, experts and the members of the CRC Committee stressed the value of keeping both the individual and collective *locus standi* as part of the mechanism (A/HRC/17/36, 16 May 2011).

The final document, adopted by HRC Resolution 17/18 on 14 July 2011 and sent to the General Assembly for adoption and opening for signature (GA/11198, 19 December 2011), however, only provides for individual communications. Following the celebration of the signing at the Human Rights Council on 28 February 2012, the Third Optional Protocol entered into force on 14 April 2014, having so far been signed and ratified by 46 state parties (Grover 2015).

2.1 Legal framework: Substantive contents of the Third Optional Protocol

The Third Optional Protocol consists of four parts. The first section (articles 1-4) defines first of all the competence of the CRC Committee in terms of admissibility of the communication, the acknowledgment of presumed violated rights and the accession of the alleged state to the Third Optional Protocol. The body must operate by ensuring full respect for the principle of the best interests of the child and the right to be heard, adopting special rules of procedure that ensure that children are not influenced and manipulated by adults and that they are effectively protected.

The second part (articles 5-12) describes the communication mechanism itself. As far as the admissibility of the communication is concerned, some key legal components are introduced: the *ratione personae* parameter (individuals, groups of individuals or their representatives) and the possibility for the state to take temporary measures to avoid further harm to the child. In conformity with article 6, so-called interim measures may be required by the CRC Committee before its determination, excluding that they imply a decision on the merits of the communication. The state concerned, for example, could receive a request for the adoption of necessary measures in extraordinary circumstances to avoid any negative effect on the victim of the alleged violations. As per article 7, the admissibility of the communication is proved according to the lack of anonymity and written submission; cases other than those governed by the Convention or Optional Protocols; the fact that the communication has already been examined by the Committee or is pending before another international body; the exhaustion of domestic remedies, provided that they are not particularly lengthy or have not solved the case within one year after the submission of the communication; a manifest ill-founded basis; and, finally, according to the presumed violation prior to the entry into force of the Protocol (unless its effects have continued even after its entry into force). If the above requirements are met, the formal submission of the communication must take place within the following six months. The CRC Committee may propose a friendly solution to the parties. Otherwise it will proceed with the analysis of the case in a timely and confidential manner. If the state is requested to take temporary measures, the handling of the communication must be even more timely.

The procedure ends with the adoption and sharing of the opinion and recommendations to the parties, which then are tracked in the following six months by a state's report on the implementation of all requested measures. The CRC Committee is also entitled to pose further questions to the state for more detailed clarification. This procedure takes on the same features with regard to inter-state communications, given that both states concerned have recognised the Committee's competence to receive and examine such documents.

The third part (articles 13-14) describes the CRC Committee's competence to conduct investigations in cases where the information received indicates serious and systematic violations of the rights set out in CRC and its related Optional Protocols, provided that the relevant State has previously declared that it accepts this competence. In such circumstances, it is essential for the State to effectively cooperate with the CRC Committee – even when one member or more wishes to visit the territory and neighbouring areas across national borders. The results of the investigation subsequently are to be translated into a final document, including recommendations sent to the state concerned for a reply within six months, possibly indicating what measures have been taken to respond to the CRC Committee's comments.

The fourth and final part (articles 15-24) introduces the procedural provisions concerning assistance and cooperation activities as well as information on the Third Optional Protocol. This includes the signature, ratification and accession processes, while highlighting that entry into force only occurs after the tenth ratification.

2.2 Functioning of the communication mechanism provided by the Third Optional Protocol

Beyond the provisions of the Third Optional Protocol, a detailed overview of the functioning of the mechanism is here provided, as planned in the Rules of Procedure adopted by the CRC Committee at its 62nd session (14 January to 1 February 2013; CRC/C/62/3, 16 April 2013). For the best management of communications, the CRC Committee has established a dedicated Working Group on communications in compliance with Rule 6. The Working Group is composed of nine members, who contribute to its mandate in line with a biannual rotation principle concerning four or five of the members. It is required to adopt its decision by majority, with the exception of decisions concerning the above-mentioned interim measures, which demand the support by at least three members of the Working Group and which should be adopted within a time frame of 24 hours.

When the Secretariat (Petition Unit) receives a communication, it forwards it to the Working Group, which appoints one of its members as

case rapporteur, who is tasked not only with the analysis of all information included in the case file, but also with the collection of further data by doing additional research. The final duty of the case rapporteur is to formulate draft recommendations on the admissibility and the merits of the case, which is then shared with the other members of the Working Group for their reactions and comments. The last step on behalf of the case rapporteur is to prepare a consolidated draft decision on the admissibility and the merits of the case that is then forwarded to the CRC Committee for adoption either by consensus or by majority. The Working Group could also benefit from consultations with independent experts or other CRC Committee members, who have expert knowledge and specific experience in aspects related to the specific case law under examination.

With regard to the analysis of the functioning of the communication mechanism, there is a further relevant difference between communications submitted by children and communications submitted by adults acting on behalf of children. In the first case, the communication should be forwarded immediately from the Secretariat (Petition Unit) to the Working Group, even if it were considered *prima facie* inadmissible. Using child-friendly language, the Secretariat should inform the claimant in a timely fashion that the communication was duly received. Conversely, if the communication is submitted by an adult, the Secretariat must first screen the communication so as to check if it is in compliance with formal requirements. Such requirements include that the communication is not submitted anonymously; that it is not manifestly unfounded; that it refers to children's rights as provided for by CRC and related Optional Protocols; and, finally, that the defendant is a state party of the Third Optional Protocol. If the communication is found not to be compliant, the Secretariat should reject it. Finally, if the communication is submitted by adults acting as representatives of children, the task of the Working Group is to assess if the children have been subjected to inappropriate pressure.

Compared to the communication mechanisms of other core treaties, the Third Optional Protocol faces the same weaknesses, as pointed out by academics and civil society (Buck & Wabwile 2013; Smith 2013; Hunt-Federle 2017). First of all, although containing detailed and practical recommendations addressed to the attention of the relevant state, the CRC Committee decisions are not binding. The mechanism only requires states to pay 'proper attention' to the recommendations and supplement this attention by a further report indicating legislative and operational actions taken. Furthermore, there is a lack of awareness about the communication procedure among individuals, groups of individuals and their representatives (including legal representatives) while the difficulty to meet all the communication requirements for admissibility by the CRC Committee presents a major obstacle. For these reasons, the factual relevance of the Third Optional Protocol has been limited: At the very

beginning the number of communications was rather small and linked to the rejection of communications for reasons of inadmissibility. However, there are some cases of admissible communications where the CRC Committee has done truly progressive work to protect children's rights (Liefwaard & Doek 2015).

The three categories of communications, as set out above, will be closely examined in the following parts. First, inadmissible communications concerning three main state parties (Denmark, Spain and Switzerland) will be evaluated on the basis of the rights of CRC and its Optional Protocols. Second, so-called 'discontinuous' communications will be analysed via the example of three main country cases (Denmark, Germany and Spain). With regard to admissible communications, one part will also provide a careful argument based on the child rights violated and the state parties concerned (Belgium, Denmark, Spain and Switzerland). Finally, attention will briefly be devoted to cases pending before the CRC Committee.

3 Case law of the CRC Committee: Inadmissibility

For inadmissible communications submitted by claimants to the CRC Committee, Rule 21 of the Rules of Procedures states as follows:

- (1) Where the Committee decides that a communication is inadmissible, it shall, through the Secretary-General, without delay, communicate to the extent possible in an adapted and accessible format its decision and the reasons for that decision to the author(s) of the communication and to the State party concerned.
- (2) A decision of the Committee declaring a communication inadmissible may be reviewed by the Committee upon receipt of a written request submitted by or on behalf of the author(s) indicating that the reasons for inadmissibility no longer apply.

As such, the investigation is based on a thematic parameter with primary reference to three country-wide systems, notably, Denmark, Spain and Switzerland.

3.1 Danish case law (7/2016, 32/2017 and 33/2017)

Given that the Third Optional Protocol entered into force on 7 January 2016, the claimants (adults acting on behalf of children) noted that the Danish institutional system in charge of verifying applications for refugee status or the granting of a residence permit on humanitarian grounds did not take due account of the best interests of the child nor of their physical safety.

In case 7/2016 (CRC/C/78/D/7/2016, 9 August 2018) the deportation of the claimant and his children to Afghanistan were presented as being

in breach of several articles of the Convention (articles 1, 2, 3 and 19). However, the CRC Committee pointed out that the statements and evidence submitted by the claimants at national level were in part appropriately examined by the competent national bodies. Indeed, they exhausted all domestic remedies and ensured the protection of the principles of the best interests of the child and of *non-refoulement*. The evidence presented by the claimants, however, did not match the motivations introduced in the communication submitted to the CRC Committee. The argument that returning the children in question to Afghanistan would expose them to Taliban forces and further endanger them due to their conversion to Catholicism were deemed not to be strong enough to legitimate their stay in Denmark. The declaration of inadmissibility under articles 7(e) to (f) of the Third Optional Protocol was motivated by the partial and thus satisfactory exhaustion of domestic remedies, as well as the substantive grounds offered by the communication. The declaration, however, was followed by the state's decision to suspend the transfer order of the claimant and his children to Afghanistan.

Conversely, in cases 32/2017 (CRC/C/82/D/32/2017, 24 October 2019) and 33/2017 (CRC/C/82/D/33/2017, 8 November 2019) the claimant's request to the CRC Committee to assess the reasons for the refusal of the competent Danish bodies to accept the claimant's application for a residence permit on humanitarian grounds so as to avoid deportation to Albania was examined. In contrast to the previous case, the CRC Committee highlighted the fact that domestic remedies had not been exhausted. Viewed from a children's rights-based approach, there also were not sufficient substantive reasons to uphold the national decision. The case thus was referred to the concomitant competence of the UN Committee for Human Rights. However, it also noted the irrelevance of the evidence brought forward by the claimant, thus ultimately concluding the communication to be inadmissible under articles 7(d) to (f) of the Optional Protocol. This case clearly illustrates the difficulties faced by a claimant to produce proper evidence as well as the *locus standi* of the child as separate from the status of the parents – a dimension clearly stated in General Comment 23 (CMW/C/GC/4-CRC/C/GC/23, 16 November 2017) (Kilkelly 2020).

3.2 Spanish case law (1/2014 and 14/2017)

As far as inadmissible communications in relation to Spain are concerned, two main issues may be mentioned. On the one hand, the age and status of the claimant as an unaccompanied minor (official acronym UAM) were deemed inapplicable by the Spanish competent authorities. On the other hand, reconciling the needs of children in an unstable family context with the quality of admissible evidence presented for the protection of the best interests of the child can present significant obstacles. In cases 1/2014

(CRC/C/69/D/1/2014, 8 July 2015), 8/2016 (CRC/C/78/D/8/2016, 11 July 2018) and 14/2017 (CRC/C/80/D/14/2017, 14 August 2019) the CRC Committee found the communications inadmissible for several reasons. In the first case, the communication was submitted prior to the entry into force of the Third Optional Protocol in Spain (*ex article 7(g)* of the Third Optional Protocol), which immediately excluded the communication. In the second and third cases, references were made to age assessment procedures, guardianship, European Union (EU) as well as international principles granting special protection of children in such conditions. This evaluation of the facts combined with the statements made by the claimant as to their truthfulness led the CRC Committee to rule on the inadmissibility of the communication under article 7(c) of the Protocol.

In case 14/2017 the contribution from a third party (namely, the French Ombudsman) also supported the CRC Committee's reasoning. This was possible because the opportunity to include third party interventions in the communication mechanism of the Third Optional Protocol is established in Rule 23, paragraph 1 of the Rules of Procedure. It has also been outlined in *ad hoc* guidelines prepared and adopted by the CRC Committee. Indeed, the Working Group on communications may decide to ask for third party interventions or to accept information and documentation submitted by third parties. However, the CRC Committee must send a formal written request to the relevant third party via the Petitions and Urgent Actions Section of the Office of the High Commissioner for Human Rights, describing the setting and explaining why the request has been forwarded for attention. Also, the specific time frame and formal criteria are provided by the CRC Committee so as to facilitate support from the third party. With the prior consent from the claimant, the third party is charged by the Committee to get in contact with the claimant in order to collect relevant documents on the case file. The third party is obliged to neither disclose all information contained in the documents nor to divulge sensitive data concerning the child or children in question. The CRC Committee could disregard the contribution of the third party if these requirements are not respected. In the end, the third party intervention is shared both with the claimant and the state concerned for written comments in reply, if feasible. The intervention and the replies are taken into appropriate account by the CRC Committee in formulating its final decision on the case.

3.3 Swiss case law (2/2015)

In cases 2/2015 (CRC/C/73/D/2/2015, 26 October 2016) and 13/2017 (CRC/C/81/D/13/2017, 17 June 2019) the CRC Committee was called upon to address the issue of strengthening the implementation of the principle of the best interests of the child. Its decisions in these cases were based on two concrete factors, namely, (i) detailed evidence that one of the two parents were removed from the family and placed in a state other

than the one where the child resided (Switzerland); and (ii) that the Swiss jurisdictional system ensures that it takes note of the case and rules on its merits. A close consideration of these factors led the CRC Committee to reject both communications pursuant to article 7(f) of the Third Optional Protocol.

4 Case law of the CRC Committee: Discontinuity

When the CRC Committee positively assessed the preliminary admissibility of a communication, which then eventually is followed by the adoption of measures by the defendant state aimed at protecting children's rights, the possibility remains that the communication can be discontinued. Rule 26 of the Rules of Procedure is the key legal basis for this discontinuity, providing for the disruption of the function of the CRC Committee. It explicitly states that '[t]he Committee may discontinue the consideration of a communication, when, inter alia, the reasons for its submission for consideration under the Convention and/or the substantive Optional Protocols thereto have become moot'.

It should be added that at its 81st session the CRC Committee deliberated on the inclusion of a motivated reasoning for discontinuing decisions. Case 43/2018 (CRC/C/82/D/43/2018, 1 November 2019) concerning the situation of an Iranian family (parents and three children) deals with the rejection by the competent Danish authorities of the application for asylum and the consequent displacement of the family to Italy on several occasions. With the repeated rejection of the application paired with the extreme physical and mental health situation of one of the parents, the impact on the safety and well-being of the children was clear. Consequently, the competent Danish authorities reopened the asylum application procedure leading to the granting of refugee status to the claimants, thus making the action required by the CRC Committee unnecessary. The communication subsequently was discontinued. A similar outcome was reached in case 35/2017 (CRC/C/78/D/35/2017, 11 July 2018) which concerned a Syrian claimant, who had previously received the authorisation for reunification with his relatives in Germany. However, the reunification was delayed for procedural reasons.

In some instances within the Spanish system (for instance, Case 18/2017, CRC/C/77/D/18/2017, 8 March 2018; Case 39/2017, CRC/C/78/D/39/2017, 12 June 2018; and Case 54/2018, CRC/C/82/D/54/2018, 13 November 2019) it can be noted that claimants complained about the inaccuracies around age assessment, which led to the placement of children in adult reception centres. These children also were not officially listed as unaccompanied foreign minors (UAM), which led to their inability to gain access to measures dedicated to their protection and general assistance.

The intervention of Spanish authorities to correct these errors, however, gave the CRC Committee good reason to declare the case discontinued.

5 Case law of the CRC Committee: Admissibility and related decisions

According to Rule 20 of the Rules of Procedures, the admissibility of communications is provided for as follows:

- (1) The Committee shall as quickly as possible, by a simple majority and in accordance with the following rules, decide whether the communication is admissible or not under the Protocol.
- (2) The decision to declare a communication admissible may be taken by a working group established under the present rules provided that all its members so agree.
- (3) A working group, established under the present rules, may declare a communication inadmissible provided that all its members so decide. Its decision is to be transmitted to the Committee plenary, which may confirm it without formal discussion, unless a Committee member requests such discussion.
- (4) Where a communication is brought to the Committee on behalf of a child or a group of children without evidence of her/his/their consent, after consideration of the particular circumstances of the case and the information provided, the Committee may decide that it is not in the best interests of the child(ren) concerned to examine the communication.

Rule 27 is also relevant in this regard:

- (1) In the event that the Committee finds that the state party has violated its obligations under the Convention or its substantive Optional Protocols to which the state is party, it will make recommendations on the remedies for the alleged victim(s), such as, *inter alia*, rehabilitation, reparation, financial compensation, guarantee of non-repetition, requests to prosecute the perpetrator(s), as well as indicate the time limit for their application. The Committee may also recommend that the state party take legislative, institutional or any other kind of general measures to avoid the repetition of such violations.

Where the protection of children's rights is concerned, the CRC Committee's case law is particularly relevant when considering the admissibility of communications – especially in relation to defendants who are state parties to the Third Optional Protocol (Geary 2013).

5.1 Belgian case law (12/2017)

In a case concerning Belgium (12/2017 (CRC/C/79/D/12/2017, 5 November 2018) the CRC Committee argued its decision on admissibility

in a complex manner (Erdem Türkelli & Vandenhole 2018). In the case there are two parents as claimants, one of Belgian nationality and the other of Belgian/Moroccan nationality. Following a ruling by the court of first instance in Marrakesh recognising the *kafala* scheme, they applied for a visa for their child. However, since the *kafala* was not considered an official legal family relationship in Belgium, the visa application was refused on grounds of family reunification. In fact, they refused it on many occasions in 2012, 2014, 2015, 2016 and 2018. Between 2016 and 2018 the parents submitted the communication to the CRC Committee, noting a breach of articles 2, 3, 10, 12 and 20 of CRC. They also pointed out that Belgium's position did not comply with the obligations set out by the Hague Convention on Parental Responsibility and Protection of Children – a convention to which Belgium of course is also a contracting party. The CRC Committee's reasoning was based on procedural and substantial matters. Procedurally, the claimants lodged their communication while still awaiting a reply from the Belgian authorities regarding an application for a visa for family reunification. This could very well have led to the case being deemed inadmissible. However, the CRC Committee pointed out that previous appeals lodged by family members had already exhausted domestic remedies. As for the substantial aspects, the CRC Committee found that although articles 2 and 20 had not been violated, articles 3 and 12 in fact clearly had been violated – regardless of any consideration of the child's age, the degree of maturity and level of understanding. Additionally, article 10 had also clearly been violated in that the legal definition of the *kafala* has developed significantly, thus amounting to a *de facto* family setting. This particularly is the case if it is related to the need for rapid and effective management of family reunification situations dictated by migratory conditions. This is in line with General Comment 14 (CRC/C/GC/14, 29 May 2013) as well as General Comment 23 and the Belgian case law of the European Court of Human Rights (European Court) (*Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, 12 October 2006, para 55; *Chbihi Loudoudi v Belgium*, 16 March 2015).

5.2 Danish case law (3/2016)

The CRC Committee addressed a very sensitive issue in Case 3/2016 (CRC/C/77/D/3/2016, 8 March 2018, commented by Sloth-Nielsen 2018). In this case the claimant was a pregnant mother from Somalia, who requested Danish authorities to accept her application for asylum in order to avoid deportation back to her country where her newborn child would run the risk of being subjected to the practice of female genital mutilation (FGM), which is a common practice in her home region Puntland. The CRC Committee and the Danish authorities had a tough exchange of views on issues such as the expulsion ban (carried out by the Danish authorities), the adoption of interim measures (denied by the CRC Committee) and the request for discontinuity of the communication (denied by the Committee,

although at the time of its formulation the Danish authorities justified its scope in the absence of the mother and daughter on Danish territory for reasons not further specified by their lawyer).

With regard to the alleged breach of articles 1, 2, 3 and 19 of the Convention, the CRC Committee reasoned that the evidence presented by the claimant under article 2 was manifestly unfounded. The Committee, however, considered the communication's claims based on articles 1, 3 and 19 to be admissible, emphasising the serious risk of the child being subjected to FGM if the mother were expelled and returned to Somalia (referring also to General Comment 6 (CRC/GC/2005/6, 1 September 2005) and General Comment 18 (CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014). They also noted that there were limited reporting data and legislative measures in Puntland to ensure the protection of the child – especially when the child would then only be protected by the parent's ability to resist family and social pressures.

At this point it is worth highlighting the aforementioned interim measures, which were adopted by the CRC Committee (see Guidelines for Interim Measures under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure). The option for interim measures is established in article 6(1) of the Third Optional Protocol:

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.

So far, interim measures have been used in order to achieve several goals. For one, they are aimed at enhancing the protection of children from severe harm while also preserving the legal conditions to prevent any further violation during the examination of a complaint by the CRC Committee. The interim measures are also instrumental for the integrity and effectiveness of the decision to be adopted by the CRC Committee on the merits of the case, ensuring that the decision itself does not cause harm. Additionally, these measures facilitate the implementation of the final views and the related reparations. Hence, the interim measures are connected to the following conditions, as defined in the above-mentioned Guidelines:

- (a) 'exceptional circumstances' refers to a grave impact that an action or omission by a state party can have on a protected right or on the eventual effect of a pending decision in a case or petition before the Committee;

- (b) 'irreparable damage' refers to a violation of rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation. This also implies that, in principle, there is no domestic remedy that would be available and effective.

Furthermore, the interim measures require that the risk of threat to the child should be imminent and tangible, as well as supported by strong evidence. For instance, well-supported evidence would require the inclusion of relevant facts about alleged violations, which are then to be assessed on a case-by-case basis. Furthermore, the interim measures could be adopted at various stages – that is, either at the beginning of the process, during the course of the communication procedure, or afterwards when the communication is reviewed in light of new information provided. Finally, if the state concerned does not implement the interim measures, this non-compliance amounts to a violation of article 6 of the Third Optional Protocol.

5.3 Spanish case law (4/2016)

There are many cases in which the CRC Committee has declared admissible the communications submitted by claimants following the violations of children's rights by Spain. Here, Case 4/2016 (CRC/C/80/D/4/2016, 15 May 2019, commented by Morlacchetti 2019) is interesting as an example, since it can also be compared to several other cases where the CRC Committee has reached similar decisions. (See, for example, Cases 11/2017 (CRC/C/79/D/11/2017, 18 February 2019, commented by Dorber & Klaassen 2019); 16/2017 (CRC/C/81/D/16/2017, 10 July 2019); 17/2017 (CRC/C/82/D/17/2017, 5 November 2019); 22/2017 (CRC/C/81/D/22/2017, 9 July 2019) and 27/2017 (CRC/C/82/D/27/2017, 5 November 2019)). The main topic of these communications relates to entry into Spanish territory, which necessitates the implementation of age assessment procedures, the placement of children in reception facilities, guardianship appointments as well as children's access to the national system for examining asylum applications for refugee status. In the case law mentioned above, regardless of questions related to the nationality of the (alleged) child (Mali, Côte d'Ivoire, Algeria, Cameroon, Guinea) the CRC Committee noted the violation of those children's rights enshrined in the Convention in articles 3, 8, 12, 20(1), 24 and 37, which is in line with Committee's General Comment 6 (CRC/GC/2005/6, 1 September 2005), General Comment 22 (CMW/C/GC/3-CRC/C/GC/22, 16 November 2017) and General Comment 23 (CMW/C/GC/3-CRC/C/GC/23, 16 November 2017). These violations concern the inappropriate identification of the child, the exposure to risks due to the lack of access to assistance and physical safety measures in reception centres, and the lack of procedural efficiency by the Spanish authorities (excluding the contested ruling that the territories of Ceuta and Melilla, through which children also enter into the Spanish territory, are not subject to national jurisdiction).

5.4 Swiss case law (47/2017 and 61/2018)

Finally, the CRC Committee handled two cases concerning Switzerland (Cases 47/2017 (CRC/C/81/D/47/2018, 28 June 2019) and 61/2018 (CRC/C/81/D/61/2018, 28 June 2019)). Here the CRC Committee pointed out that the status of the claimants (Angolan and Eritrean nationals respectively) as asylum seekers should necessarily imply a careful examination of the application by the competent Swiss authorities in order to prevent them from being returned to their state of origin. It should also include full guarantees for family reunification in Switzerland. The CRC Committee thus declared the communication itself discontinuous.

6 Cases pending before the CRC Committee

Looking at the information collected by the CRC Committee in March 2020 on the communications submitted as admissible, a mere quantitative analysis reveals that the mechanism is more widely used by claimants in specific countries, including Belgium, Denmark, Spain, Switzerland, France, Finland, Germany, Georgia, Ireland, Slovenia, Argentina and Chile. These submitted communications often are associated with violations of children's rights and freedoms as these relate to migration and asylum applications, critical family situations, children in conflict with the law, health conditions (FGM, corporal punishment in the family and at school) (Spronk 2014), and the general protection of the best interests of the child (Alston 1994). A first case of multiple communications has been forwarded to the CRC Committee involving several states (104/2019, Argentina; 105/2019, Brazil; 106/2019, France; 107/2019, Germany; 108/2019, Turkey). In this instance the claimants saw themselves as victims of climate change, highlighting the violation of articles 3, 6, 24, and 30 of CRC. They noted that the poor measures taken by states to limit pollution not only led to a high percentage of CO₂ emissions harmful to their health, but also damaged the future of younger generations.

7 Conclusion

The entry into force of the Third Optional Protocol to CRC should be considered a significant step for international human rights law, since as the most globally-ratified Convention it has been given a procedural mechanism to ensure greater protection of the rights and freedoms set out in it. The CRC Committee's mandate involves primarily to receive communications – categorised as inadmissible, discontinuous or admissible – from individuals and groups of individuals complaining of the violation of one or more of the rights enshrined in CRC. The recent progress report on the functioning of the communications mechanism, released by the CRC Committee in October 2019, contains relevant

information that allows the assessment of its scope. This report not only is limited to the position of the CRC Committee on the violation of children's rights, but has also facilitated a constructive dialogue with the state parties concerned in order to evaluate whether the CRC Committee's decisions have been fully or partially implemented. With regard to the latter, it is necessary to receive further and more updated information on the follow-up by states in order to assess whether or not they act in line with the CRC Committee's requests.

On a general note, the follow-up to the views adopted by the CRC Committee has special added value, particularly in relation to admissible case law where the monitoring body has ascertained violations of CRC and related Optional Protocols. The procedure is described in detail in Rule 28 of the Rules of Procedure. Apart from common features with other UN treaty bodies with individual and collective communication mechanisms, the uniqueness of this procedure is the designation of a rapporteur or working group to follow up on the views of the CRC Committee:

- (1) The Committee shall designate for follow-up on views or decisions closing the consideration of a communication following a friendly settlement in accordance with article 11 of the Protocol a rapporteur or working group to ascertain the measures taken by the state party to give effect to the Committee's views, recommendations or decisions closing its consideration following a friendly settlement agreement.
- (2) A rapporteur or working group may make such contacts and take such action as may be appropriate for the due performance of their assigned functions and shall make such recommendations for further action by the Committee as may be necessary.
- (3) ...
- (4) A rapporteur or working group shall report to the Committee on follow-up activities at each session of the Committee.
- (5) The Committee shall include information on follow-up activities and, where appropriate, a summary of the explanations and statements of the state party concerned and the Committee's own suggestions and recommendations in its report under article 44, paragraph 5, of the Convention and article 16 of the Protocol.

Following the recent assessment released by the CRC Committee with respect to the case law concerning Denmark, Spain and Switzerland, it has expressed partial appreciation for the first two and positive appreciation for the third. The common thematic approach of the CRC Committee's views remains on migratory issues, encompassing *inter alia* the principle of *non-refoulement*, age determination of unaccompanied migrant children and family reunification matters, but with some innovative sights.

As per the Danish case law, it is undoubtedly significant that the threat of FGM is deemed reasonable grounds to demand asylum. This takes

into account a twofold consideration in relation to the implementation of the Third Optional Protocol (which had just been ratified and entered into force in the country concerned). These two considerations are (i) the necessity to create the proper conditions in order to hear from the child; and (ii) the difficulties in managing a good defence of the victim (despite adequate contact and communication with the counsel) due to the refusal to include in its drafting process a collective complaint procedure. Meanwhile, the complexity of the migratory issue and the search for a legal balancing between private and public interests has powered a lengthy reply by the domestic asylum management system and, on a general note, a partial fulfilment of the reception of the Third Optional Protocol for the appropriate procedural functioning of the national machinery. This also depends upon the wording adopted by the CRC Committee for its views, which is vague enough to guide the relevant state to report information about the measures adopted and to ensure the dissemination of the views. In this sense the remedy is neither innovative, concrete and effective enough to achieve the targeted results in this specific case, nor can it have an indirect impact on similar future cases so as to ensure that the violations of CRC provisions are not repeated.

With regard to the Spanish case law, the position of the CRC Committee highlights the country's faulty management of migratory and asylum procedures involving foreign unaccompanied children. Previous communications have dealt with different aspects of the same issue, such as the lack of access to asylum proceedings, inaccurate medical testing for age determination, detention in migratory centres for adults, and the denial of legal recognition of children as migrant and asylum seekers. In the case under examination, another aspect was recognised as a violation of CRC, namely, the push-back practices carried out by border control agents and coastguards to prevent people from entering and seeking international protection in the territory. These people are forced to return immediately to their country of origin without any guarantees. Hence, the CRC Committee's views confirm international and national reports and investigations into the situation of migrant children in Spain. These views also are in line with the observations formulated by the same CRC Committee during the interactive dialogue held with the Spanish delegation during its last periodic report in March 2018. This stance equally emphasises the relevance of the fundamental standards of CRC interpreted by the CRC Committee in its General Comments 6, 22 and 23. However, the substantive and formal significance of the CRC Committee's views lies in their urgent and unequivocal call to end the automatic push-back practice of children by Spanish authorities by adopting necessary legislative measures as well as administrative tools and procedures to protect children's rights in those special circumstances.

The Swiss case law in turn could be considered a good practice impacting on structural and procedural domestic features within the country – the management of migratory issues concerning migrant accompanied children being a primary example. Indeed, the reasoning of the CRC Committee's views has been translated into a review of the case discussed in this contribution. However, a comprehensive reassessment of neither the legal framework and related proceedings governing the release of residency permits, nor the protected and safe return of migrants to their countries of origin occurred.

It is a matter of fact that landmark positions expressed by the CRC Committee in its views of the above-mentioned cases offer substantial and formal solutions that need to be adapted and corrected for an authoritative impact at the national level. The next step will be to consider whether the Third Optional Protocol, with a double reference to case law and the implementation of the CRC Committee's views, should in fact in future years be considered a crucial instrument for the effective promotion and protection of children's rights.

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