The Individual Complaints Procedure under the United Nations Convention on the Rights of the Child

The Optional Protocol to the Convention on the Rights of the Child on a communications procedure from the German Legal Perspective

Legal study

prepared on behalf of Kindernothilfe e.V. in cooperation with the National Coalition Germany – Network for the Implementation of the UN Child Rights Convention

by

Dr. Mehrdad Payandeh, LL.M. (Yale)

Assistant Professor for Public Law and Public International law

Heinrich-Heine-University of Düsseldorf

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Summary

1. With the introduction of the individual complaints procedure through the Third Optional Protocol (OP), the Convention on the Rights of the Child (CRC) was brought in line with the other treaty-based human rights regimes established within the United Nations system. The individual complaints procedure is a mechanism for implementing and monitoring the obligations arising from both the Convention on the Rights of the Child and the first two Optional Protocols. It reaffirms that the child is taken seriously by the international legal system and recognized as an independent and self-determined legal person.

2. An individual complaint is brought before the Committee on the Rights of the Child, a panel consisting of eighteen independent experts. The Committee is supported by a secretariat which handles all communications with the complainant.

3. The procedure is initiated through a communication by either the child concerned or his/her representative. The preliminary examination is followed by a written procedure and possibly an oral hearing. The Committee examines the admissibility and merits of the complaint. Once a decision has been made, it may be pursued by a follow-up procedure.

4. The individual complaints procedure is guided by the principle of the best interests of the child and consideration for the rights, interests and well-being of the child concerned.

5. The complaint is only admissible vis-à-vis States which have ratified the Third Optional Protocol.

6. The complaint must fulfill certain formal requirements. It must be submitted in writing, anonymous communications are not accepted. It should be compiled in one of the three working languages used by the Committee (English, French or Spanish).

7. The complaint may be submitted by either an individual or a group of individuals. An adult may also submit a complaint pertaining to a violation of his/her rights experienced during childhood. Representation is permissible.

1 Art. 43 CRC.
2 Art. 5, para. 1 OP.
3 Art. 2 OP.
4 Art. 1, para. 3 OP; Rule 16, para. 3 lit. a) Rules of Procedure OP.
5 Art. 7 lit. b) OP; Rule 16, para. 3 lit. d) Rules of Procedure OP.
6 Art. 7 lit. a) OP; Rule 16, para. 3 lit. c) Rules of Procedure OP.
7 Art. 5, para. 1 OP.
with the consent of the victim concerned. There is no collective complaints system in place for non-governmental organizations. However, a non-governmental organization may support a victim’s individual complaint or help to initiate an inquiry procedure.

8. In order to have standing to lodge a complaint, the complainant must assert a violation of his rights under either the Convention on the Rights of the Child or one of the first two Optional Protocols. The complainant must establish that he is personally and currently affected by a violation attributable to the actions of the State. The right to complaint is limited to violations committed by a State after the coming into force of the Optional Protocol and to violations which continue after said point in time.

9. Prior to submitting an individual complaint, all available domestic remedies must be exhausted. According to this rule, the claimant must have resorted to all available administrative and legal remedies and the case must have passed through all judicial instances without success, including the lodging of a constitutional complaint with the Federal Constitutional Court. Exceptions to this requirement apply when the application of such domestic remedies is unreasonably prolonged or unlikely to bring effective relief.

10. An individual complaint is inadmissible in as far as the same matter has already been examined by the Committee on the Rights of the Child or has been or is currently being examined under another procedure of international inquiry or settlement. These include, in particular, regional human rights courts, such as the European Court of Human Rights (ECHR), and other United Nations human rights committees. Parallel handling of the case or successive handling of the case in multiple instances is only admissible in cases where the protective standards under a monitoring instrument deviate considerably from the guarantees set down in the Convention on the Rights of the Child.

11. The complaint must be submitted within one year after all domestic remedies have been exhausted.

12. The submission of the complaint must not constitute an abuse of the right of submission.

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8 Art. 5, para. 1, para. 2 OP; Rule 13, para. 2 Rules of Procedure OP.
9 Art. 13 OP.
10 Art. 5, para. 1 OP.
11 Art. 7 lit. g), Art. 20 OP.
12 Art. 7 lit. e) OP; Rule 16, para. 3 lit. g) Rules of Procedure OP.
13 Art. 7 lit. d) OP; Rule 16, para. 3 lit. f) Rules of Procedure OP.
14 Art. 7 lit. h) OP; Rule 16, para. 3 lit. j) Rules of Procedure OP.
15 Art. 7 lit. c) OP; Rule 16, para. 3 lit. e) Rules of Procedure OP.
13. The individual communications procedure can be used to submit a complaint referring to the violation of any provision of the Convention on the Rights of the Child or the first two Optional Protocols in as far as such a complaint is based on the violation of a subjective right of an individual. Whether a provision only contains an objective State obligation or can be considered to also contain an individual right, must be established for each individual provision by way of interpretation.

- The complainant may base his/her claim on the traditional rights of freedom and the principle of non-discrimination contained in the Convention on the Rights of the Child.
- Complaints regarding a State’s infringement of its duty to protect can also be submitted. However, consideration should be given to the fact that the State parties are granted a certain margin of appreciation with regard to the measures to be taken and only violate their duty to protect when they either do absolutely nothing or adopt measures that are obviously insufficient.
- Complainants can assert that their rights to participation have been violated.
- Complaints may also be submitted with regard to economic, social and cultural rights as representing fundamental individual rights. In particular, an individual may claim that a State did not grant such rights in a discrimination-free manner or violated the very essence of these rights.
- In as far as the Convention on the Rights of the Child commits the State parties to take legislative action or to engage in international cooperation, it does not establish individual rights.
- The obligation to take the best interest of the child as primary consideration (Art. 3, para. 1 of the Convention on the Rights of the Child) contains an individual right, i.e. complaints may be based on a violation of this provision.

14. The Committee on the Rights of the Child makes a decision based on the information provided by the complainant, the victim and the respective State party. The Committee may also use information provided by other organizations and may also schedule an oral hearing. The complainant is required to provide proof that there has been a violation of his/her rights. With a view to evaluating the case, the Committee may consider softening - or even reversing - the burden of proof at the expense of the respective State party.

16 Art. 10, para. 1 OP; Rule 23, para. 1 Rules of Procedure OP.
15. Should the Committee ascertain that the State party concerned has violated the Convention on the Rights of the Child, it shall officially establish that such rights have been violated and point out ways to remedy the violation. Any such decision, however, has no direct impact within the domestic legal order. Neither is such a decision legally binding. The State party thus condemned must give due consideration to the decision, although it is neither obliged to fully implementing it nor to observing it. Nonetheless, a condemnation by the Committee on the Rights of the Child subjects the respective State party to considerable political pressure.

16. In the follow-up procedure, the Committee on the Rights of the Child examines which measures the respective State party has taken with regard to implementing the decision. This process is aimed at convincing the respective State party to comply with the views and recommendations of the Committee as far as possible, despite the non-binding nature of the decision.

17. From the perspective of the German legal order, potential cases for applying the individual communications procedure can be identified by reviewing the Concluding Observations of the Committee on the Rights of the Child on the State Reports issued by the Federal Republic, by looking at experiences within the German legal practice, and by examining the results of investigations carried out by non-governmental organizations on children’s rights. Even when the Committee on the Rights of the Child has already critically evaluated a specific children’s rights issue in the State Report process, the individual complaints procedure nonetheless presents an additional gain due to its focus on the violation of rights in specific individual cases.

18. The Federal Republic of Germany has a comprehensive system for legal protection. In addition, it is also well-integrated in many European and international legal protection mechanisms. This raises the question of how the individual complaints procedure under the Convention on the Rights of the Child relates to these mechanisms. The following principles can be established:

- All available legal remedies offered by domestic courts must have been exhausted prior to initiating an individual complaints procedure.
- The same applies to the constitutional complaint procedure with regard to the Federal Constitutional Court. However, an individual complaint may

17 Rule 27, para. 4 Rules of Procedure OP.
18 Art. 10, para. 5 OP.
19 Art. 11, para. 1 OP.
be submitted before the Federal Constitutional Court reaches its decision. In individual cases an exception might also be made to the requirement to exhaust all available legal remedies, if the constitutional court proceedings take too long or if the accepted and established legal rulings of the Constitutional Court indicate that there is no chance of success.

- The complainant must decide whether he/she wants to submit an individual complaint to the European Court of Human Rights (ECHR) or to the Committee on the Rights of the Child. The advantages of lodging a complaint with the ECHR are the judicial nature of the court proceedings, the fact that all decisions made by the Court are binding and that all decisions made by the ECHR will, to a large extent, be complied with and implemented due to the implementation mechanisms of the German law system. On the other hand, the procedure in front of the ECHR is lengthy and has, statistically, low chances of success. However, the attractiveness of an individual complaints procedure held before the Committee on the Rights of the Child is limited by the fact that any decision made by the Committee is not legally binding. In addition, the legal finality of domestic court decisions often makes it impossible to implement decisions made by the Committee on the Rights of the Child. On the other hand, the duration of an individual complaints procedure held before the Committee on the Rights of the Child is generally expected to be much shorter than procedures before the ECHR - at least in the initial phase. The chances of success also appear to be better as, on the one hand, the Convention contains specific guarantees pertaining to children's rights and, on the other hand, because the Committee on the Rights of the Child will be inclined to devote its special knowledge, sensitivity and sympathy to carefully handling the protection mandate contained in the Convention.

- In cases where children's rights are concerned, proceedings held before the United Nations Human Rights Committee do not offer any advantages over submitting an individual complaint to the Committee on the Rights of the Child. In as far as a children's rights case also relates to the discrimination of women or persons with disabilities, one should consider submitting a complaint to the Committee on the Elimination of Discrimination against Women (CEDAW) or the Committee on the Rights of Persons with Disabilities (CRPD).
19. The Federal Republic of Germany must take suitable measures to widely publicize the individual complaints procedure.\textsuperscript{20}

20. The commitment to reflect on and discuss the decisions made by the Committee applies to the Federal Republic in its capacity as a subject of international law, as well as to any other domestic office entrusted with exercising governmental authority within its respective jurisdiction. In order to ensure that decisions are observed even in cases where a final decision has already been taken by a German court, thought should be given to the possibility of recognizing, by way of legislation, a decision by the Committee on the Rights of the Child as a reason for reopening proceedings similar to the legal rules applying to decisions made by the ECHR.

21. The introduction of an individual complaints procedure constitutes a reason for considering the establishment of a central, government-level office entrusted with coordinating and monitoring the implementation of the Convention on the Rights of the Child.

22. Based on the model provided by the monitoring office for the Convention on the Rights of Persons with Disabilities (CRPD), the German Institute for Human Rights should be endowed with a mandate to independently monitor the implementation of the Convention on the Rights of the Child.

\textsuperscript{20} Art. 17 OP.
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I. Introduction: From codifying to enforcing children's rights

The Convention on the Rights of the Child from 20 November 1989 (CRC) currently represents the climax of a development in which the child advanced from being an object requiring protection by the international legal system to finally being recognized as a subject with individual rights. The Convention is a legally binding document of international law establishing obligations of States to protect children as well as individual rights of children under international law. The first two Optional Protocols – on the involvement of children in armed conflicts and on the sale of children, child prostitution and child pornography – supplement the rules set down in the Convention on the Rights of the Child. Currently, 193 States are party to the Convention. Only the USA, Somalia and South Sudan have yet to ratify the Convention. The Convention on the Rights of the Child is, therefore, one of the most widely distributed treaties of international law ever drawn up.

However, not a lot is gained by simply codifying State obligations and child rights under international law. Therefore, and as is the case with other treaties aimed at protecting human rights, the Convention not only establishes obligations and rights, but also sets up a Committee on the Rights of the Child consisting of eighteen experts, aimed at monitoring that the obligations set down in the Convention are implemented and adhered to by the State parties. To this aim, the State parties

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25 The United States are party to the first two Optional Protocols. In the meantime, both Somalia and South Sudan have announced their intention to ratify the Convention on the Rights of the Child, see Steinke, Hoffnung für Kindersoldaten [Hope for child soldiers], Süddeutsche Zeitung, 25 November 2013, p. 8.
26 For an overview of the UN human rights system see Buergenthal/Thürer, Menschenrechte [Human Rights], 2010, p. 25 et seq.
27 Art. 43 CRC.
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have committed to regularly\textsuperscript{28} report to the Committee on the measures taken to ensure that the rights set down in the Convention are realized.\textsuperscript{29}

Until the adoption of the Third Optional Protocol, there had been no other mechanisms for monitoring and implementing the obligations under the Convention on the Rights of the Child. In this respect, the Convention differed from all the other human rights treaties developed under the auspices of the United Nations which establish not only a reporting system but also a complaints procedure\textsuperscript{30} through which individuals can submit a complaint.\textsuperscript{31} Moreover, a number of human rights treaties also provide the option for initiating a special inquiry procedure.\textsuperscript{32} As States are generally more prepared to enter into commitments concerning the protection of human rights than to submit themselves to effective monitoring and implementation mechanisms, such mechanisms - instead of being set down in the respective human rights treaty - are often governed by a separate Optional Protocol. These mechanisms are always of a voluntary nature, i.e. a State party must only comply with such an implementation mechanism, if it has explicitly declared its adherence hereto or ratified a separate Optional Protocol.

While negotiating the Convention on the Rights of the Child, it was decided not to discuss implementation mechanisms beyond the reporting procedure – including, in particular, the highly controversial creation of an individual complaints procedure – in order not to jeopardize the adoption of the Convention.\textsuperscript{33}

\textsuperscript{28} The first report must be presented to the Convention two years after the coming into force of the Convention in the respective State, with subsequent reports every five years, Art. 44, para. 1 CRC.

\textsuperscript{29} Art. 44 CRC; for an overview of the reporting procedure see \textit{Dederer, Die Durchsetzung der Menschenrechte [Implementing human rights], in: Merten/Papier (eds.), Handbuch der Grundrechte in Deutschland und Europa, Vol. VI/2, 2009, p. 333 (370 et seq.)}.

\textsuperscript{30} In practice, however, such State complaint procedures have not become relevant.

\textsuperscript{31} For an overview see \textit{Kadellbach, Rechtsschutz durch die Vereinten Nationen, insbesondere nach dem Internationalen Pakt über bürgerliche und politische Rechte [Legal protection through the United Nations, in particular under the International Covenant on Civil and Political Rights], in: Ehlers/Schoch (eds.), Rechtsschutz im Öffentlichen Recht, 2009, p. 25 (27 et seq.).}

\textsuperscript{32} See \textit{Dederer, Die Durchsetzung der Menschenrechte [Implementing human rights], in: Merten/Papier (eds.), Handbuch der Grundrechte in Deutschland und Europa, Vol. VI/2, 2009, p. 333 (380 et seq.)}.

discussions, particularly on the need for an individual complaints procedure, continued nonetheless, were taken up by both non-governmental organizations and the Committee on the Rights of the Child, and resulted in the Human Rights Council passing a resolution to set up a working group with the initial task of examining the possibility of drawing up a respective Optional Protocol and preparing a corresponding draft. This working group put together a report and a draft of the Optional Protocol which went on to be passed without changes by the Human Rights Council on June 17, 2011, with the General Assembly finally adopting it on December 19, 2011. This Third Optional Protocol (OP) was presented for signature in Geneva on February 28, 2012.


39 Human Rights Council, Report of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a complaints procedure, 16 February 2011, UN Doc. A/HRC/17/36. Prior to this, the working group had already passed an initial draft (UN Doc. A/HRC/WG.7/2/2, 1 September 2010) and a revised draft (UN Doc. A/HRC/WG.7/2/4, 18 January 2011).


The Federal Republic of Germany has fully committed itself to the regime embodied in the Convention on the Rights of the Child and has signed and ratified the Convention and the first two Optional Protocols. In the meantime, the Federal Republic has also withdrawn the “reservations” it originally declared with respect to the Convention in its declaration of July 15, 2010. On February 28, 2012, the Federal Republic also signed the Third Optional Protocol. The German parliament also approved the Protocol with a Federal law of December 20, 2012. With the entry into force of the Protocol on April 14, 2014, it is now possible to lodge individual complaints against the Federal Republic of Germany in front of the Committee on the Rights of the Child in Geneva.

This development calls for an examination of the functioning of the individual complaints procedure. The first part of this study describes the procedure, building upon, on the one hand, experiences made in the context of other human rights regimes with individual complaints procedures, and, on the other hand, giving due consideration to the particularities of children’s rights. After first providing a short summary of the procedure (II.), the admissibility requirements will be scrutinized (III.), followed by a discussion of the question of which rights resulting from the Convention on the Rights of the Child can be relied on in the complaints procedure (IV.) and of the legal impact of decisions made by the Committee on the Rights of the Child (V.).


43 See Lorz, Nach der Rücknahme der deutschen Vorbehaltserklärung: Was bedeutet die uneingeschränkte Verwirklichung des Kindeswohlvorrangs nach der UN-Kinderrechtskonvention im deutschen Recht? [After the withdrawal of the German declaration of reservation: What impact does the unrestricted realization of the principle of the best interest of the child as defined in the UN Convention on the Rights of the Child have?], 2010; Lorz/Sauer, Kinderrechte ohne Vorbehalt [Children’s rights without reservations], Menschenrechtsmagazin 2011, p. 5.


45 In accordance with Art. 19, para. 1, the Protocol came into force three months after presentation of the tenth ratification or accession document. Costa Rica was the tenth State to ratify the Protocol on 14 January 2014. Accordingly, the Protocol entered into force on 14 April 2014.

46 In this study, the inter-state complaint procedure (Art. 12 OP), which the Federal Republic has also acknowledged but which is irrelevant in practice, and the inquiry procedure (Art. 13 et seq. OP) are given very little attention.
The second part examines the potential impact of the individual complaints procedure pertaining to the Convention on the Rights of the Child with special regard to the German legal system (VI.). On the one hand, this section provides examples of case scenarios considered potentially suitable for initiating an individual complaints procedure. On the other, it deals with the question of how the individual complaints procedure relates to domestic legal remedies and, in particular, to the individual complaint mechanism of the European Court of Human Rights. Finally, this study examines whether the Federal Republic needs to take legislative or other measures to fulfill its obligations under the Protocol and to ensure that the individual complaints procedure is used effectively.

The study closes with a general outlook (VII.).
II. Overview of the individual complaints procedure pertaining to the Convention on the Rights of the Child

The procedure following the lodging of an individual communication is detailed in Art. 5 to 11 of the Optional Protocol (OP) as well as in the Rules of Procedure under the Optional Protocol (Rules of Procedure OP) \(^{47}\) adopted by the Committee on the Rights of the Child which modify the general Rules of Procedure followed by the Committee (Rules of Procedure). \(^{48}\)

1. Committee on the Rights of the Child

The individual complaints procedure is held before the Committee on the Rights of the Child set up by the Convention on the Rights of the Child. \(^{49}\) This Committee consists of eighteen \(^{50}\) experts, each elected by the State parties for a period of four years. \(^{51}\) Attention must be paid to ensuring a fair geographic distribution and consideration of all the major legal systems when the selection is made. \(^{52}\) Despite the importance of nationality in the selection process, the experts do not act as representatives of the State parties – as is the case in the Human Rights Council – but in their own individual capacity. They are not bound to instructions and are required to carry out their tasks in an independent and impartial manner. \(^{53}\)

As a treaty body set up by the Convention on the Rights of the Child, the Committee on the Rights of the Child is not a United Nations institution. Nonetheless, from an organizational viewpoint it is deeply embedded within the institutional framework of the United Nations. The Secretary-General of the United Nations provides the Committee with support staff and facilities, \(^{54}\) and the emoluments \(^{55}\) of the

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\(^{47}\) Rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communication procedure, UN Doc. CRC/C/62/3, 8 April 2013. It should be generally noted that the Committee has only made extremely limited usage of its possibilities to further develop the procedure through the Rules of Procedure.

\(^{48}\) Rules of procedure, UN Doc. CRC/C/4/Rev.3, 16 April 2013.

\(^{49}\) Art. 43 CRC.

\(^{50}\) Originally, the Committee consisted of ten members. However, due to an increasing workload and in light of the fact that the Convention on the Rights of the Child has now almost been universally ratified, the State parties passed a resolution to increase the number of members to eighteen on 12 December 1995, see UN Doc. CRC/SP/1995/L.1/Rev.1. This treaty amendment came into force on 18 November 2002.

\(^{51}\) Art. 43, paras. 2-7 CRC. Re-election is possible.

\(^{52}\) Art. 43, para. 2, sentence 2 CRC.


\(^{54}\) Art. 43, para. 11 CRC; Rules 29, 31 Rules of Procedure.
Committee members are funded by the United Nations. As the Committee only meets three times a year\(^5\) for a three-week session, the Secretary-General also handles the general administration of the Committee. In practice these tasks are managed by the Committee's secretariat which is institutionally assigned to the United Nations High Commissioner for Human Rights (UNHCHR) as a subdivision of the United Nations secretariat. This secretariat is also responsible for receiving individual complaints and for upholding communications with the complainants.

2. **The procedure**

The procedure is initiated by the submission of a complaint ("communication")\(^5\) by an individual or group of individuals claiming to be a victim of a violation of a right set forth in the Convention on the Rights of the Child or either of the first two Optional Protocols.\(^5\) The complaint must be submitted to the secretariat of the Committee on the Rights of the Child:

<table>
<thead>
<tr>
<th>Committee on the Rights of the Child (CRC)</th>
<th>Human Rights Treaties Division (HRTD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Office of the United Nations High Commissioner for Human Rights (OHCHR)</td>
<td>UNOG-OHCHR</td>
</tr>
<tr>
<td>CH-1211 Geneva 10 (Switzerland)</td>
<td>Tel.: +41 22 917 91 41</td>
</tr>
<tr>
<td>Fax: +41 22 917 90 08</td>
<td>E-Mail: <a href="mailto:crc@ohchr.org">crc@ohchr.org</a></td>
</tr>
</tbody>
</table>

Before the secretariat passes the complaint on to the Committee, it examines whether the complaint fulfills the specified minimum requirements.\(^5\) Should the complaint prove to be incomplete or vague, the secretariat is may require additional information from the complainant.\(^6\) In all other cases, the secretariat passes the complaint on to the Committee.

First of all, the Committee examines the admissibility of the complaint, whereby it can dismiss the complaint as inadmissible without notifying the respective State

\(^5\) Art. 43, para. 12 CRC. The emoluments received by the Committee members constitute compensation for travel expenses and a daily allowance for the duration of the sessions held in Geneva.

\(^6\) Rule 2 Rules of Procedure.

\(^5\) The Optional Protocol uses the term "communication". However, in the following, the more common terms "complaint" or "individual complaint" shall be used.

\(^6\) Art. 5, para. 1 OP.

\(^9\) See the "negative catalogue" outlined in Rule 16, para. 3 Rules of Procedure OP.

\(^6\) Rules 15, 16, para. 2 Rules of Procedure OP.
party. In all other cases, the Committee must transmit the complaint to the State party. The State party then has six months to submit its comments on the complaint. The Committee may also request further statements from either the complainant and/or the State party. Any information provided by either party must always be transmitted to the other party which then has the opportunity of making further submissions. The Committee may also decide to schedule an oral hearing in which the complainant, the child who has suffered the rights violation and State party representatives may make further statements.

The Committee may decide to consider the admissibility separately and have the decision prepared by a working group or make a joint decision on the admissibility and merits of the complaint. The Committee makes its decision based on the written documentation submitted by the complainant and the respective State party, and any other information received as well as the findings of any oral hearing held. It also has the option of requesting statements from other United Nations bodies, other universal and regional organizations, non-governmental organizations and/or national human rights institutions and to use these as a basis for making its decision.

The procedure is concluded with a – legally non-binding – decision in which the Committee sets down its opinion regarding the admissibility and merits of the complaint and in which it can also make recommendations to the respective State party. The decision must be transmitted to both parties. A summary of all the Committee’s decisions must also be included in its Reports to the United Nations General Assembly submitted every two years.

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61 Art. 8, para. 1 OP; Rule 18, para. 1 Rules of Procedure OP.
62 Art. 8, para. 2 OP; Rule 18, para. 1 Rules of Procedure OP.
63 Rule 18, para. 9 Rules of Procedure OP.
64 Art. 10, para. 1 OP; Rule 18, para. 10 Rules of Procedure OP. This rule reflects both the principle of equality of arms and the right to a fair hearing, see Schäfer, Die Individualbeschwerde nach dem Fakultativprotokoll zum Zivilpakt, Ein Handbuch für die Praxis [The individual complaints procedure under the Optional Protocol to the Civil Covenant, a practical guide], 2nd edition 2007, p. 45.
65 Rule 19 Rules of Procedure OP.
66 Rule 18, paras. 6, 7 Rules of Procedure OP. See Rule 21, para. 2 Rules of Procedure OP on the option of reopening the procedure in cases where the grounds which led to the inadmissibility decision no longer exist.
67 Rule 20, paras. 2, 3 Rules of Procedure OP.
68 Rule 23, para. 2 Rules of Procedure OP.
69 Rule 23, para. 1 Rules of Procedure OP.
70 Art. 10, para. 5 OP.
71 Art. 44, para. 5 CRC; Art. 16 OP; Rule 27, para. 5 Rules of Procedure OP.
Once the Committee has determined that there has been a violation of the Convention or one of the two first Optional Protocols and has made recommendations to the respective State party, the follow-up procedure is initiated. The State party is required to give due consideration to the decision made by the Committee and to present a written report within six months on the measures taken or envisaged with a view to implementing the decision. This allows the Committee to monitor the implementation of its decision by the State party. It can request the State party to submit more information and can also include a summary of the action taken by the State party in its reports to the General Assembly.

At the request of any of the parties, the Committee shall make available its good offices with a view to reaching a friendly settlement of the matter at any time during the procedure prior to reaching a decision on the merits.

In addition, the Committee may, at any time during the procedure and prior to reaching a decision on the merits, request that a State party take interim measures to avoid possible irreparable damage. Such decisions on preliminary measures made by the Committee are non-binding and directing such a request to a State party should not be considered to contain an opinion regarding the admissibility or merits of the complaint. Nonetheless, such a request on the part of the Committee on the Rights of the Child can subject a State party to considerable political pressure which may at least stop the State party from establishing a fait accompli during the course of the complaints procedure – for example, through issuing a deportation order – or from undertaking any other steps that may lead to irreparable damage.

### 3. General principles of the procedure

The individual complaints procedure held before the Committee on the Rights of the Child is based on a number of general principles which are prominently set down in the Optional Protocol. These principles greatly influence the procedure and the terms of both the Protocol and the Rules of Procedure and the respective

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72 Art. 11, para. 1 OP.
73 Art. 11, para. 2 OP.
74 Art. 16 OP; Rule 28, para. 9 Rules of Procedure OP.
75 Art. 9 OP; Rule 25 Rules of Procedure OP.
76 Art. 6, para. 1 OP; Rule 7 Rules of Procedure OP.
77 Art. 6, para. 2 OP. This should be stated by the Committee in its request to the State party, Rule 7, para. 3 Rules of Procedure OP.
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interpretation thereof. Art. 2 OP requires the Committee to give due consideration to the rights and views of the child based on the principle of the best interests of the child. In doing so, the Optional Protocol takes up the substantive standards set down in the Convention on the Rights of the Child, such as the establishment of the principle of the child's well-being (Art. 3 CRC) and the consideration of the child's views in all matters affecting the child (Art. 12 CRC), thus declaring them the guiding principles in the individual complaints procedure. These guiding principles are reflected in various provisions of the Optional Protocol, such as the provision that a procedure may not be carried out without the consent of the child concerned.78 They must also be given due consideration both when interpreting the individual provisions and when implementing the complaints procedure. The commitment to ensuring that the procedure is implemented in a child-sensitive fashion must be particularly observed.79

Another guiding principle contained in the Optional Protocol is the protection of the complainant. The Committee can refuse to examine a complaint, if it is of the opinion that this is not in the child's best interests.80 In the case that a procedure is initiated, the State party must protect the complainant from abuse and intimidation.81 Complaints may not be submitted anonymously.82 However, during the course of an individual complaints procedure the identity of the complainant, respectively the victim or other persons collaborating with the Committee, may not be revealed publicly without the prior consent of the individual concerned.83

The Optional Protocol to the Convention on the Rights of the Child also stresses the necessity of ensuring that the complainant is involved in the procedure to as great an extent as possible. The complainant must be informed of the timing and progress of the proceedings.84 The Committee, respectively the secretariat, may also request clarification from the complainant, should the communication be unclear or should further information deemed necessary.85 The scheduling and conducting of an oral hearing also serves this purpose.86 All the above provisions express the recognition

78 Art. 5, para. 2 OP.
79 Art. 3, para. 1, clause 2 OP.
80 Art. 3, para. 2 OP.
81 Art. 4, para. 1 OP.
82 Art. 7 lit. a) OP.
83 Rule 3 Rules of Procedure OP; see also Rule 29 Rules of Procedure OP concerning confidentiality during the procedure.
84 Rule 14, para. 1 Rules of Procedure OP.
85 Rule 15 Rules of Procedure OP.
86 Rule 19 Rules of Procedure OP.
of the child as a legal entity and independent participant during the proceedings. As a result, all communications should be made in a child-accessible format, even in cases where the child is represented by an adult during the proceedings.87

The Optional Protocol is based on the premise that the effective protection of children and the effective implementation of the commitments arising from the Convention on the Rights of the Child cannot be primarily achieved through the individual complaints procedure and the Committee on the Rights of the Child but are best achieved through the respective national legal systems. In the Preamble mention is made several times to the fact that the function of the Optional Protocol is to support and enhance both the national and regional mechanisms already in place. The individual complaints mechanism is aimed at motivating the State parties to establish effective, domestic legal protection instruments. As a direct result of this basic principle, there is a requirement to exhaust all domestic remedies before the Committee on the Rights of the Child can be addressed through the individual complaints procedure.88

87 Rule 14, para. 2 Rules of Procedure OP.
88 Art. 7 lit. e) OP.
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III. The admissibility of the individual complaint

In the Optional Protocol several requirements are stipulated which need to be met for an individual complaint to be admissible. These requirements are set down and explained in more detail in the Rules of Procedure under the Optional Protocol.

1. Respondent State

States are only subject to the control regimes pertaining to the Convention established by the Optional Protocol in as far as they have ratified the Protocol. As a result, an individual complaint is only admissible against a State that is party to the Optional Protocol.89 The Federal Republic of Germany has signed and ratified the Optional Protocol, thus allowing individual complaints against Germany.

2. Formal requirements

The complaint may not be submitted anonymously90 but must be made in writing91 and signed by the complainant.92 Wherever possible, therefore, the complaint should be submitted through the postal system.93 However, this prerequisite only refers to the complaint itself; supplementary documents may, therefore, be submitted to the Committee by alternative methods, for example electronically.94

Complaints are permissible in any language. Nonetheless, submissions should be made in one of the Committee’s three working languages – English, French or Spanish95 – as the need for translation can prolong the procedure and translations

89 Art. 1, para. 3 OP; Rule 16, para. 3 lit. a) Rules of Procedure OP.
90 Art. 7 lit. a) OP; Rule 16, para. 3 lit. c) Rules of Procedure OP.
91 Art. 7 lit. b) OP; Rule 16, para. 3 lit. d) Rules of Procedure OP.
94 See Rule 16, para. 3, lit. d) Rules of Procedure OP.
95 Rule 34 Rules of Procedure.
from any language not amongst the six official United Nations languages96 must be submitted by the complainant at his own expense.97 In the light of the general commitment of acting in the best interests of the child,98 it is conceivable that the Committee would be prepared to make exceptions to this rule and provide translations from languages other than the official UN languages at the expense of the United Nations. Potential complainants and non-governmental organizations should work towards this end in the interests of achieving an accessible complaints procedure, in particular for children.

3. Right to complain

a) Individuals and groups of individuals

Individual complaints procedures serve to enforce individual rights which have been violated. Thus, a complaint can only be submitted by either an individual or a group of individuals claiming to be the victim(s) of a rights violation.99 The Optional Protocol deliberately chose the term individual and does not limit the right of complaint to children: Although the Convention on the Rights of the Child only envisions rights of children100, the broad phrasing of Art. 5, para. 1 OP allows persons who are now of age to assert claims with regard to rights violation suffered prior to their becoming of age.101

Children are entitled to lodge a complaint irrespective of their age. Whether the complainant’s legal capacity is recognized by the domestic legal system of the State party concerned or not is irrelevant.102 It is not mandatory for a child to have legal

96 As is the case for every UN body, the official Committee languages are: Arabian, Chinese, English, French, Russian and Spanish, see Rule 34 Rules of Procedure.
98 Art. 2 OP.
99 Art. 5, para. 1 OP.
100 According to Art. 1 CRC, for the purposes of the Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, maturity is attained earlier; see Schnabl, UN-Kinderrechtskonvention [UN Child Rights Convention], 2nd edition 2013, Art. 1 para. 1 et seq.
101 Löhr, Die Individualbeschwerde zur Kinderrechtskonvention [The individual communications procedure pertaining to the Child Rights Convention], Menschenrechtsmagazin 2011, p. 115 (120 et seq.).
representation which, on the one hand, is to be welcomed as it reflects that children are taken seriously as individual and self-determined legal entities; on the other hand, this means that not in all cases are children who are victims of a rights violation always able to effectively assert their rights or provide sufficient grounds for their complaints. As a result, it is the responsibility of state institutions for the protection of children and of non-governmental organizations to provide children with advice, to represent them if necessary and to help them to find appropriate legal support. In addition, the Committee on the Rights of the Child will need to pay great attention to the special needs of the child and, should the complaint prove to be unclear or not satisfactorily substantiated, will have to submit respective requests for clarification.

b) Representation

Art. 5, para. 1 OP also provides the option of submitting a complaint in the name of an individual or group of individuals. The option of legal representation during the proceedings takes into account the special situation where a violation of children’s rights may involve individuals who are unable to lodge a complaint on their own due to their age. This provision also allows a complaint to be submitted on behalf of children who are unable to assert their right to complaint either due to the special nature of the rights violation or their particular situation.

The Optional Protocol, however, does not further stipulate as to who may submit a complaint on a child’s behalf. Proposals to limit the right of representation to legal representatives determined by the respective domestic legal system were not pushed through – and quite rightly so. This would have meant that a child’s right to complaint would have been considerably limited by the respective domestic regulations; furthermore, the interests of the child do not necessarily align with those of his parents or legal representatives. Such a limitation, would, therefore, have significantly restricted efforts to ensure the legal protection of the children concerned.

The Optional Protocol, therefore, stipulates more generally that any representation must be in the interest of the child and is only permissible with the express consent

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103 Löhr, Die Individualbeschwerde zur Kinderrechtskonvention [The individual communications procedure pertaining to the Child Rights Convention], Menschenrechtsmagazin 2011, p. 115 (120).

of the individual or group of individuals concerned.\textsuperscript{105} Should there be any indication that the consent of the child may have been obtained through the use of improper pressure, the Committee may instruct the secretariat to obtain additional information, possibly from third parties or organizations not involved in the actual procedure.\textsuperscript{106} Should it prove impossible to obtain the express consent of the child concerned – be it due to the child’s particular situation, age or lack of maturity –, a complaint may also be submitted without the child’s consent.\textsuperscript{107} In this case, the Committee must bear the best interests of the child in mind and, wherever possible, give due consideration to the child’s opinion. Should the Committee be of the opinion that a complaint is not in the child’s best interests, it may decline to examine it.\textsuperscript{108}

c) \textit{No collective complaints procedure}

Third parties and organizations may, as we have seen, assert claims pertaining to a violation of rights in the name of the victim(s). The option of submitting a collective complaint\textsuperscript{109} included in the original drafts, however, was not set down in the Optional Protocol.\textsuperscript{110} The collective complaints mechanism would have granted certain institutions – in particular, national human rights institutions, ombudsmen and non-governmental organizations – the right to lodge a complaint with regard to a grave or repeated child’s rights violation without having to specifically name the victims of such a violation. Unfortunately, the supporters of the collective complaints procedure were unsuccessful in their attempts to convince the opponents of the added value of such a procedure, to clearly explain how a

\textsuperscript{105} Art. 5, para. 2 OP; Rule 13, para. 2 Rules of Procedure OP.
\textsuperscript{106} Rule 13, para. 2 Rules of Procedure OP; Art. 3, para. 2 OP.
\textsuperscript{107} Rule 13, para. 3 Rules of Procedure OP.
\textsuperscript{108} Art. 3, para. 2 OP.
\textsuperscript{109} See Art. 7 Revised proposal for a draft optional protocol prepared by the Chairperson-Rapporteur of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure, UN Doc. A/HRC/WG.7/2/4, 18 November 2011.
collective complaints procedure would work and how it would relate to existing implementation mechanisms.\textsuperscript{111}

The lack of a collective complaints procedure, however, does not imply that national human rights institutions and non-governmental organizations have no options for asserting claims pertaining to the violation of children’s rights before the Committee on the Rights of the Child. On the one hand, there is the option of lodging a complaint on behalf of and with the consent of a child who has been the victim of measures taken by the State. On the other, they to bring to the attention of the Committee on the Rights of the Child grave or systematic violations of children’s rights and to thereby suggest the initiation of an inquiry procedure in accordance with Art. 13 OP.\textsuperscript{112}

4. Legal Standing

The admissibility of a complaint presumes that the complainant is able to sufficiently put forward his claim that his rights have been violated by the respective State party. When putting his case forward, the complainant must be able to present the matter in such a way that it appears prima facie to represent a violation of rights pertaining to either the Convention or the first two Optional Protocols.\textsuperscript{113} Should the complaint not be backed up by sufficient grounds, i.e. the case is not sufficiently substantiated, or should the communication itself indicate that the complaint is manifestly ill-founded, the Committee can turn it down as being

\begin{itemize}
  \item \textsuperscript{112} The inquiry procedure serves to resolve grave and systematic violations of children’s rights. It is conducted confidentially and in cooperation between the Committee on the Rights of the Child and the State party concerned (Art. 13 paras. 1-3 OP). The Committee transmits the findings of the examination, together with any comments and recommendations, to the State party (Art. 13, para. 4 OP), which in turn is required to submit its observations (Art. 13, para. 5 OP). The Committee may include a summary account of the results of the proceedings in its report to the General Assembly (Art. 16 OP and Art. 13, para. 6 OP) in order to generate public awareness and exert political pressure on the respective State party. Art. 14 OP also provides for a follow-up procedure which allows the Committee on the Rights of the Child to monitor all further developments and to request information on all measures taken by the State party in response to the Committee’s report, comments and recommendations.
  \item \textsuperscript{113} See \textit{Schäfer}, Die Individualbeschwerde nach dem Fakultativprotokoll zum Zivilpakt, Ein Handbuch für die Praxis [The individual complaints procedure under the Optional Protocol to the Civil Covenant, a practical guide], 2nd edition 2007, p. 71.
\end{itemize}
inadmissible.\textsuperscript{114} If the complaint gives rise to any uncertainties, requests for clarification can be transmitted to the complainant.\textsuperscript{115}

\begin{multicols}{2}
\textbf{a) Claiming a right}

Several questions arise when considering the question of whether a complainant has standing to lodge a complaint: First of all, the right invoked by the complainant must qualify for the individual complaints procedure. On the one hand, this means that the individual concerned must be referring to a right contained in the Convention or in one of the first two Optional Protocols.\textsuperscript{116} A complaint related to a violation of either of the first two Optional Protocols may only be lodged if the State party concerned is actually a party to the respective Protocol.\textsuperscript{117} On the other hand, reference to other human rights which are not codified in the Convention or either of the first two Optional Protocols, is ruled out.

In addition, the question arises as to which provisions of the Convention on the Rights of the Child and the first two Optional Protocols can actually be invoked by the complainant. According to Art. 5, para. 1 OP, the complainant must invoke a right arising from this Convention. However, international treaties, such as the Convention on the Rights of the Child, primarily establish obligations between States. It is generally accepted that human rights guarantees not only establish State obligations but also individual rights.\textsuperscript{118} This change in the structure of the international legal system becomes all the more evident considering the respective enforcement mechanisms, such as the individual complaints procedure, which offer individuals the opportunity of appealing against a violation of their rights at the international level. This does not necessarily imply, however, that all provisions of a human rights treaty embody individual rights. Rather each individual treaty provision must be examined in order to determine whether it constitutes a subjective right.\textsuperscript{119}

\end{multicols}

\begin{itemize}
\item \textsuperscript{114} Art. 7 lit. f) OP.
\item \textsuperscript{115} Rule 15 Rules of Procedure OP.
\item \textsuperscript{116} Art. 1, para. 2, Art. 5, para. 1 OP; Rule 16, para. 3 lit. b) Rules of Procedure OP.
\item \textsuperscript{117} The option of allowing a State party to opt out of the first two Optional Protocols for the purposes of the individual complaints procedure, which was included in the first two drafts, did not prevail. See Löh, Die Individualbeschwerde zur Kinderrechtskonvention [The individual communications procedure pertaining to the Child Rights Convention], Menschenrechtsmagazin 2011, p. 115 (122).
\item \textsuperscript{118} See von Arnault, Völkerrecht [International law], 2012, p. 234 et seq.
\item \textsuperscript{119} See part IV. for more details.
\end{itemize}
b) **Responsibility of the State**

In as far as the complainant invokes a right which qualifies for the individual complaints procedure, his claim must assert that the State, towards which his complaint is directed, has violated such right. An act of violation on the part of a State may result from a State institution or any other individual or organization entrusted with governmental tasks under the domestic legal system.\(^{120}\) It does not make a difference which state institution actually gives rise to a potential act of violation. The State is responsible for all action taken by any of the three branches of government – at federal, regional and local levels.\(^{121}\) Even in areas in which the regional states have been assigned far-reaching competencies, such as in education, the Federal Republic of Germany, for example, assumes overall responsibility for any violations of the Convention on the Rights of the Child. Whether and to what extent a State’s responsibility applies to acts or the failure to act committed outside the State’s territory has yet to be fully resolved.\(^{122}\) However, according to Art. 2, para. 1 CRC, the State parties are required to observe the rights pursuant to the Convention on the Rights of the Child when exercising their sovereign rights. Therefore, the extraterritorial dimension of the Convention has to be recognized at least when a State party wields effective control over a foreign territory and its inhabitants.\(^{123}\)

However, the State cannot be held responsible for the actions of private individuals. In as far as the complainant’s appeal concerns a violation of his rights by a non-State party – be it through the parents or any other individual –, individual complaints proceedings are ruled out. The only exceptions recognized are when the actions of a private person have been directed or controlled by the State.\(^{124}\)

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120 The rules of responsibility under international law are governed by the draft of the International Law Commission on the responsibility of States (ILC Draft), which to a large part reflects customary international law. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, 26 July 2001, UN Doc A/56/10; adopted by the United Nations General Assembly with Resolution 56/83, 12 December 2001, UN Doc. A/Res/56/83; see in particular Art. 4, 5 ILC Draft.
121 **Schröder**, Verantwortlichkeit, Völkerstrafrecht, Streitbeilegung und Sanktionen [Responsibility, international criminal law and sanctions], in: Vitzthum/Proelß (eds.), Völkerrecht, 6th edition 2013, p. 521 (534.)
124 Art. 8 ILC Draft.
when the State has adopted the conduct in question as its own\textsuperscript{125} or when the accusation relates to the State not having fulfilled its obligation to protect, e.g. the commitment set down in Art. 19, para. 1 CRC to take suitable protective measures to protect the child from violence, neglect and sexual abuse through those who have the care of the child.

An individual complaints procedure is restricted to violations committed by a State following the entry into force of the Optional Protocol, respectively following the State becoming a party to the Protocol.\textsuperscript{126} Therefore, it is not possible to lodge a complaint concerning a violation committed by a State prior to its consent to the individual complaints mechanism. However, should a violation of rights persist beyond this point in time, it may be subject to the individual complaints procedure.

c) \textit{The extent to which the complainant himself is affected}

Ultimately, the complainant's claim must assert that he himself is the victim of a rights violation.\textsuperscript{127} In line with established practice at other UN treaty bodies, the individual himself must be adversely affected.\textsuperscript{128} The individual complaints procedure does not represent an actio popularis which could be used pertaining to a general violation of treaty obligations entered into by a State.\textsuperscript{129} Instead, the contentious measure must represent a real burden on the complainant himself.

In addition, the individual must be currently affected by the violation. In as far as the State has already put an end to the violation and ensured an appropriate settlement, the lodging of a complaint is inadmissible. A complaint is also considered inadmissible where it refers to a violation of rights expected to take place in the future or where the violation is purely hypothetical. The only exception to this rule is recognized with regard to situations in which the violation of rights is imminent.\textsuperscript{130} Furthermore, the complainant's rights are not considered to have

\textsuperscript{125} Art. 11 ILC Draft.
\textsuperscript{126} Art. 7 lit. g), Art. 20 OP. With regard to the Federal Republic, the relevant date is the date of the entry into force of the Protocol.
\textsuperscript{127} Art. 5, para. 1 OP.
\textsuperscript{128} On the general practice of the Human Rights Committee and the following, see \textit{Schäfer, Die Individualbeschwerde nach dem Fakultativprotokoll zum Zivilpakt, Ein Handbuch für die Praxis [The individual complaints procedure under the Optional Protocol to the Civil Covenant, a practical guide]}, 2nd edition 2007, p. 72 et seq.
already been violated in cases where a law has the potential of allowing other State bodies to commit a rights violation. Instead, the complainant must wait until his rights have actually been violated through the application of said law before he can lodge a complaint through the individual complaints procedure. Exceptions are made, however, in cases where it cannot be reasonably expected of the complainant to wait, e.g. where the violation of rights would threaten the life of or cause physical injury to the child, or which would result in other irreparable or permanent damage.

5. The exhaustion of all legal remedies

As is the case in other human rights complaints procedures, filing an individual complaints procedure with respect to children’s rights is only permissible after all domestic remedies have been exhausted. Before the complainant can turn to the Committee on the Rights of the Child, all his efforts to obtain legal protection through administrative and judicial remedies must have been unsuccessful. Within the legal system of the Federal Republic of Germany this includes administrative proceedings and, in particular, judicial proceedings including all levels of appeal and a constitutional complaint to the Federal Constitutional Court.

The complainant is expected to carefully make use of all the domestic remedies available. Should domestic remedies prove unsuccessful due to the fact that the complainant has chosen the wrong type of procedure or failed to meet the respective deadlines, he must bear the consequences of these omissions, resulting in the inadmissibility of the individual complaints procedure. However, in as far

131 Art. 7 lit. e) OP; Rule 16, para. 3 lit. g) Rules of Procedure OP.
132 §§ 68 et seq. VwGO [Code of Administrative Court Procedure]; for details on the applicability and procedure of these administrative proceedings, see Hufen, Verwaltungsprozessrecht [Administrative procedural law], 8th edition 2011, p. 62 et seq.
as omissions pertaining to the domestic remedies are due to the specific situation in which the affected child currently finds himself, Art. 2 of the Optional Protocol allows for a more generous handling of these admissibility criteria. Non-governmental organizations may and should work towards ensuring that the Child Rights Committee is willing to accept such arguments.

There are exceptions to the requirement of having to exhaust all available remedies in as far as such domestic remedies are unreasonably prolonged or unlikely to bring effective relief. It is impossible to issue a general statement as to exactly when the application of domestic remedies can be considered to be unreasonably prolonged. This can only be determined with regard to the specific circumstances in each individual case. It is also not necessary to exhaust all the legal remedies where these are unlikely to bring effective relief. An example of such a case would be when a specific legal remedy would have to be rejected on the basis of established case-law.

According to established practice in the Human Rights Committee and other international dispute settlement bodies, it is not the point of time at which the complaint is submitted which is of relevance to the question of the exhaustion of all domestic remedies but the date on which the Committee makes its decision. Accordingly, in cases where the complainant submits a constitutional complaint to the Federal Constitutional Court at the same time as he lodges an individual complaint with the Committee on the Rights of the Child, the individual complaint is not rejected on the grounds of not first having exhausted all legal remedies, if the Federal Constitutional Court decides on the constitutional complaint prior to the Committee on the Rights of the Child reaching its decision. Simultaneously submitting a constitutional complaint and an individual complaint may thereby contribute to bringing the proceedings to a conclusion more quickly.

135 Schäfer, Die Individualbeschwerde nach dem Fakultativprotokoll zum Zivilpakt, Ein Handbuch für die Praxis [The individual complaints procedure under the Optional Protocol to the Civil Covenant, a practical guide], 2nd edition 2007, p. 98.
6. **Non-combination rule**

International human rights protection mechanisms operate on the general assumption that a claim pertaining to a rights violation may only be examined once and only by one monitoring body. The aim of this principle is to ensure that the human rights monitoring institutions are not overly burdened and to avoid contradictory decisions. Consequently, an individual complaint is inadmissible in as far as the same matter has already been examined by the Committee on the Rights of the Child or has been or is currently being examined under another procedure of international inquiry or settlement.\(^{138}\)

Multiple examinations carried out at the same time or successively by a number of different bodies are, however, only ruled out, if the other procedures are comparable to that applied by the Convention on the Rights of the Child in its individual complaints procedure. Parallel proceedings are, therefore, generally only excluded with regard to the individual complaints procedures held before UN treaty bodies (such as the Human Rights Committee, the Committee on the Elimination of Racial Discrimination or the Committee on the Elimination of Discrimination against Women) and regional complaints procedures (in particular, proceedings held before the European Court of Human Rights or within the inter-American human rights system or under the African Charter on Human and Peoples' Rights). On the other hand, not generally included are mechanisms for enforcing human rights not related to the examination of specific individual cases, such as reporting systems\(^ {139}\) or the complaint procedure implemented by the Human Rights Council.\(^ {140}\) In as far as a child rights issue is, or has been, included in a State Report in accordance with Art. 44 CRC, this is not an obstacle to the individual complaints procedure.

Neither the Optional Protocol nor the Rules of Procedure contain more information on what conditions need to apply in order to assume that the "same matter" is involved. In the light of the general procedural principles and established practice

\(^{138}\) Art. 7 lit. d) OP; Rule 16, para. 3 lit. f) Rules of Procedure OP. The individual complaints procedures thereby incorporate the legal principles of *res iudicata* and *lis pendens*.


of other human rights treaty bodies\textsuperscript{141}, a case is only considered to regard the same matter when the parties involved in the proceedings are identical.\textsuperscript{142} Moreover, the claims pertaining to the violation of a specific right must be identical. First of all, this requires that the complaint refers to the very same circumstances and facts on which earlier proceedings held before the Committee or any other inquiry or settlement body were based and that the procedure basically gives rise to the same issues.\textsuperscript{143} In addition, the claim must be based on the violation of the same rights. In this context it is, however, irrelevant whether the different human rights treaties embody the respective right in the same manner; it is sufficient that the rights in question are, in substance, the same rights.\textsuperscript{144}

Attention must be paid to the fact that the Convention on the Rights of the Child incorporates a number of rights also embedded in other human rights treaties: For example, should the complainant submit a complaint pertaining to a violation of his right to freedom of expression in accordance with Art. 13 CRC, the question arises as to whether he can also simultaneously or in succession file proceedings before the European Court of Human Rights with respect to Art. 10 of the European Convention on Human Rights or before the Human Rights Committee with respect to Art. 19 ICCPR. According to the practice of the Human Rights Committee, parallel proceedings are not generally ruled out, if the rights in question are of a different nature.\textsuperscript{145} As the rights granted in the Convention on the Rights of the Child specifically focus on the special circumstances relating to children, it might be argued that these rights cannot be compared with rights set down in other human rights treaties. Accordingly, one may argue that the "same matter" rule only applies when a complaint that has been submitted in parallel proceedings is based on provisions of the Convention on the Rights of the Child in both proceedings.\textsuperscript{146}

\textsuperscript{141} See Schäfer, Die Individualbeschwerde nach dem Fakultativprotokoll zum Zivilpakt, Ein Handbuch für die Praxis [The individual complaints procedure under the Optional Protocol to the Civil Covenant, a practical guide], 2nd edition 2007, p. 69 and p. 89 et seq.


\textsuperscript{145} Human Rights Committee, Decision of 25 October 2000, Communication No. 808/1998, Rogl v Germany, UN Doc. CCPR/C/70/D/808/1998, para.9.4 ("material difference in the applicable provisions in the instant case").

\textsuperscript{146} See Löhr, Die Individualbeschwerde zur Kinderrechtskonvention [The individual communications procedure pertaining to the Child Rights Convention], Menschenrechtsmagazin 2011, p. 115 (122 et seq.).
However, such an approach would thwart the decision deliberately made by the State parties that parallel proceedings before several monitoring bodies should be ruled out: In most cases, complaints submitted, for example, to the ECHR or the Human Rights Committee cannot be based directly on violations of the Convention on the Rights of the Child. In order to initiate parallel or successive proceedings before the Committee on the Rights of the Child and other human rights monitoring institutions, the claimant will therefore have to show that the rights to which his complaint refers in said proceedings materially differ from the guarantees contained in the Convention on the Rights of the Child. Should the guarantees in question be identical, it does not suffice to simply maintain that the Convention on the Rights of the Child pays particular attention to the special needs of the child when granting such rights, i.e. that the freedom of opinion referred to in the Convention on the Rights of the Child is of a "more child-friendly" nature than that contained in the International Covenant on Civil and Political Rights.

Finally, the exclusion of a parallel or successive handling of a case in multiple instances presumes that the matter has actually already been examined by the other respective procedure. The other respective body has to have given consideration to the substance of the matter, regardless of whether this was in connection with the admissibility or the merits of the claim.147

7. Time limit

The complaint must be lodged within one year of exhausting all available domestic remedies.148 However, the Optional Protocol does not stipulate how to actually determine when this period begins. The purpose of setting a one-year limit is to grant the potential complainant sufficient time to decide whether and on what grounds he wants to initiate an individual complaints procedure and thereby contest the final decision reached within the domestic legal system. Therefore, the one-year period starts to run at the moment in which the complainant gains – or could have gained – knowledge of the final domestic court decision and of the grounds on which this decision is based. Against this background, the decisive point in time is not the date the decision is announced but the date the decision and the grounds for the decision are transmitted to the complainant.149 The reason

148 Art. 7 lit. h) OP; Rule 16, para. 3 lit. j) Rules of Procedure OP.
149 ECHR, Decision of 29 September 1997, Communication No. 22714/93, Worm v. Austria, para.22 et seq.
for this is that one can only really assess the chance of success of an individual complaint based on the written grounds for the decision.

There are, however, a number of concerns that need to be taken into account with regard to submitting an individual complaint to the Committee on the Rights of the Child: It is quite possible that children are unaware of the option of submitting an individual complaint or that they are not actually in a position to make use of this legal remedy within the respective time limit. The Optional Protocol pays due consideration to these concerns in that a complaint is still admissible even after the one-year time period when the complainant can demonstrate that it had not been possible for him or her to submit the complaint within the time limit. Such exceptions are justified in order to take the specific situation of the child into account: In as far as a complaint is not submitted on time because the complainant had no knowledge of the option of lodging such a complaint, consideration must be given to the fact that the State parties have undertaken a commitment to make the Protocol widely known, in a form which is accessible to children. In cases where the lack of knowledge on the part of the complainant is due to an insufficient dissemination of the Protocol by the respective State party, the State cannot claim that the complaint was submitted too late. Furthermore, the Committee on the Rights of the Child is expected to consider the special situation of the child when deciding on exceptions to observing the time limit.

8. No abuse of rights

The procedure is inadmissible, if it constitutes an abuse of the right of complaint or is incompatible with the provisions of the Convention or either of the two associated Optional Protocols. Similar versions of such an anti-abuse clause can be found in other human rights protection regimes. The Committee may refer to this clause in order to reject a complaint as inadmissible, if using the complaints

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150 Löhr, Die Individualbeschwerde zur Kinderrechtskonvention [The individual communications procedure pertaining to the Child Rights Convention], Menschenrechtsmagazin 2011, p. 115 (123).
151 Art. 7 lit. h) OP; Rule 16, para. 3 lit. j) Rules of Procedure OP. Other proposals to weaken the time limit requirement, however, have not been accepted. See Löhr, Die Individualbeschwerde zur Kinderrechtskonvention [The individual communications procedure pertaining to the Child Rights Convention], Menschenrechtsmagazin 2011, p. 115 (123).
152 Art. 17 OP.
153 See Löhr, Die Individualbeschwerde zur Kinderrechtskonvention [The individual communications procedure pertaining to the Child Rights Convention], Menschenrechtsmagazin 2011, p. 115 (124).
154 Art. 7 lit. c) OP; Rule 16, para. 3 lit. e) Rules of Procedure OP.
mechanism appears inappropriate or if the complainant does not seem to require legal protection. The UN treaty bodies have asserted an abuse of rights in a number of cases, although, as has been quite rightly pointed out, the practice of the treaty bodies does not provide a clear and coherent picture with regard to the ban on abusive practices.\textsuperscript{155} The Optional Protocol contains a number of specific provisions that, under other treaty mechanisms, are regarded as instances of abuse of rights: the period for lodging a complaint as well as the ban on submitting the same matter to the Committee on more than one occasion.\textsuperscript{156} Beyond these specific provisions, an abuse of the right to complaint is discussed, for example, when a complainant is obviously making a claim concerning an insignificant annoyance\textsuperscript{157} or when a claim gives rise to doubts as to its genuineness\textsuperscript{158}. Furthermore, introducing information, statements or petitions during the course of the proceedings may be regarded as an abuse when it is obvious that the information could already have been presented at the time of submitting the complaint.\textsuperscript{159}

\textsuperscript{155} Schäfer, Die Individualbeschwerde nach dem Fakultativprotokoll zum Zivilpakt, Ein Handbuch für die Praxis [The individual complaints procedure under the Optional Protocol to the Civil Covenant, a practical guide], 2nd edition 2007, p. 70.

\textsuperscript{156} See Schäfer, Die Individualbeschwerde nach dem Fakultativprotokoll zum Zivilpakt, Ein Handbuch für die Praxis [The individual complaints procedure under the Optional Protocol to the Civil Covenant, a practical guide], 2nd edition 2007, p. 68 et seq. with respect to the individual complaints procedure before the Human Rights Committee.

\textsuperscript{157} Human Rights Committee, Decision of 7 November 1991, Communication No. 448/1991, H.J.J. v. Netherlands, para.4.2, CCPR/C/43/D/448/1991. In the case in question, the complainant had considered his human rights to be violated through a fine to the amount of 75 Dutch Gulden for running a vehicle without a valid vignette.

\textsuperscript{158} Human Rights Committee, Decision of 5 November 1991, Communication No. 367/1989, I.J.C. v. Canada, UN Doc. CCPR/C/43/D/367/1989, para.5.2. The Human Rights Committee justified its doubts by stating that the complainant had only submitted general objections with respect to the neutrality and impartiality of the Canadian justice system, without further substantiating them.

IV. Rights qualifying for the complaints procedure

1. General considerations

a) The requirement of an individual right

According to Art. 5, para. 1 of the Optional Protocol, an individual or group of individuals can submit a complaint, if a State party has violated their rights under the Convention or under either of the first two Optional Protocols. Accordingly, only a violation of individual rights established by the Convention and the Optional Protocols can be invoked by the complainant before the Committee on the Rights of the Child. The individual complaints procedure is designed as a remedy for enforcing a claim regarding a violation of one’s own personal rights. It does not provide a mechanism to generally reprimand a State party for not fulfilling its commitments resulting from the Convention on the Rights of the Child.

b) Determining the existence of individual rights under international law

The question whether international human rights only represent objective commitments of the States or actually establish individual rights has dominated international legal discourse for a very long time. In principle, this question has already been answered, especially since the introduction of international mechanisms, such as the individual complaints procedure, that provide the individual with the opportunity to assert a claim regarding a violation of his rights at international level.160 On the other hand, little attention has been paid to the question under which circumstances an international obligation of a State entails an individual right. The established practice of the Human Rights Committee and the ECHR sheds little light onto the matter, as both the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights contain traditional human rights guarantees which unquestionably establish individual rights. More complicated, however, is the situation regarding the Convention on the Rights of the Child: This is due to the fact that the Convention not only contains classic human rights - such as the right of the child to freedom of expression in accordance with Art. 13, para. 1 CRC - the subjective quality of which is unquestionable, but also stipulations, such as the commitment to make the best interests of the child a primary consideration in all measures taken by the State (Art. 3, para. 1 CRC) or the commitment to conclude agreements with other States (e.g. in accordance with Art. 11, para. 2 CRC), which, at least at first glance, are set

down solely as State commitments. In an individual complaints procedure, however, a complaint pertaining to a violation of these provisions can only be submitted, if it not only constitutes an objective State commitment but also a subjective right of the individual.

However, the question, of whether a provision in a human rights treaty establishes an individual right is rarely explicitly addressed. The general practice of human rights treaty bodies is not very helpful in this respect. An example for this deficit can be found in the decision of the UN Committee on the Elimination of Racial Discrimination in the case of Thilo Sarrazin, in which the Committee implicitly accepted an individual right to have another individual criminally prosecuted for the distribution of racist propaganda without explaining the extent to which the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination establish such a subjective right.161

Whether an international legal obligation also establishes an individual right is a matter of interpretation.162 However, as Ralph Alexander Lorz rightly points out, general criteria for such an interpretation have not been established in international law.163 On the one hand, international law does not traditionally acknowledge the individual as an owner of rights, but at best as an object requiring protection; on the other hand, reducing international law to dealing solely with the legal relationships between states no longer accurately reflects the international legal

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161 Committee on the Elimination of Racial Discrimination, Decision of 26 February 2013, Communication No. 48/2010, TBB v. Germany, UN Doc. CERD/C/82/D/48/2010; for a critical evaluation see Tomuschat, Der „Fall Sarrazin“ vor dem UN-Rassendiskriminierungsausschuss [The “Sarrazin Case” before the UN Racial Discrimination Committee], EuGRZ 2013, p. 262 (263); see also Payandeh, Die Entscheidung des UN-Ausschusses gegen Rassendiskriminierung im Fall Sarrazin [The decision of the Committee on the Elimination of Racial Discrimination in the Sarrazin case], Juristenzeitung 2013, p. 980 (982).

162 Geiger, Grundgesetz und Völkerrecht [Constitutional law and international law], 4th edition 2009, p. 160; Lorz, Der Vorrang des Kindeswohls nach Art. 3 der UN-Kinderrechtskonvention in der deutschen Rechtsordnung [The precedence of the well-being of the child according to Art. 3 of the UN Child Rights Convention in the German legal order], 2003, p. 64 et seq.; Herdegen, Völkerrecht [International law], 11th edition 2012, p. 106; BGHZ [Decisions of the Federal High Court in Civil Cases] 169, 348 et seq.; see also Cremer, Die UN-Kinderrechtskonvention, Geltung und Anwendbarkeit in Deutschland nach der Rücknahme der Vorbehalte [The UN Child Rights Convention, validity and applicability in Germany following the withdrawal of the reservations], 2011, p. 7.

163 Lorz, Der Vorrang des Kindeswohls nach Art. 3 der UN-Kinderrechtskonvention in der deutschen Rechtsordnung [The precedence of the well-being of the child acc. to Art. 3 of the UN Child Rights Convention in the German legal order], 2003, p. 65.
system.\textsuperscript{164} In light of the increasing number of international legal provisions in which individual rights are clearly granted, and against the background of the establishment of international implementation mechanisms granting the individual the right to appeal directly against a violation of his rights on the international level, claiming that individual rights are exceptional under international law lacks plausibility. Therefore, a general assumption that subjective rights cannot be established through international law stipulations cannot be confirmed. Neither are there sufficient reasons for assuming the existence of an individual right only when the specific wording of an international law agreement explicitly states that the State parties not only wished to establish obligations between States but also intended to directly grant rights to individuals.\textsuperscript{165} Modern international law places State obligations on a par with individual rights. Individual rights neither represent exceptions to the rule nor do they change the way in which international law is fundamentally focused on interstate relationships.\textsuperscript{166}

As a result, one must conclude that the question of whether an international law provision establishes a subjective right requires interpretation.\textsuperscript{167} Accordingly, the general rules on interpretation set down in Art. 31 to 33 of the Vienna Convention
on the Law of Treaties (VTC)\textsuperscript{168} and acknowledged as reflecting customary international law apply.\textsuperscript{169}

c) Conclusion: The need for a differentiated treatment of the Convention on the Rights of the Child

In the light of the wording of the individual provisions of the Convention on the Rights of the Child and the introduction of the individual complaints procedure, there can be no doubt that the Convention not only entails State obligations, but also establishes individual rights.\textsuperscript{170} However, one cannot simply conclude from Art. 2, para. 1 CRC, according to which the State parties commit to respecting and ensuring the rights set forth in the Convention, that all the provisions of the Convention establish individual rights.\textsuperscript{171} This provision confirms – as does the very existence of the individual complaints procedure – the establishment of subjective rights through the Convention, but does not answer the question as to which of the provisions entail individual rights. As a result, the various provisions of the Convention on the Rights of the Child require a differentiated approach. Each

\textsuperscript{168} Federal Law Gazette 1985 II, p. 927. For an overview of the principles of interpretation in international law, see von Arnauld, Völkerrecht [International Law], 2012, p. 87 et seq. The focus is on the wording, systematic interpretation, as well as aim and purpose of a provision whereas the will of the State parties as expressed during the preparations and conclusion of a treaty play only a subordinate role.

\textsuperscript{169} The decision taken by the International Court of Justice (ICJ) in the \textit{LaGrand} case, in which the Court ruled that the right of a foreign national to consular assistance in case of an arrest (Art. 36 of the Vienna Convention on Consular Relations, Federal Law Gazette 1969 II, p. 1585) constitutes an individual right, can also be read in this manner. The ICJ refers to the wording of Art. 36, para. 1 lit b) sent. 3 of the Convention, which deals with the rights of the individual concerned, and to the context of the provision, i.e. the fact that Art. 36, para. 1 lit. c) sent. 3 of the Convention excludes consular assistance against the will of the individual concerned which implies that this provision is intended to serve the interests of the respective individual. The ICJ, therefore, determines whether the provision contains an individual right by referring to its wording, context and purpose; see ICJ, decision of 27 June 2001, \textit{LaGrand Case, Germany v. United States of America}, ICJ Reports 2001, p. 466 (494).


\textsuperscript{171} But see also Cremer, Menschenrechtsverträge als Quelle von individuellen Rechten [Human rights treaties as a source of individual rights], Anwaltsblatt 2011, p. 159 (160); Cremer, Die UN-Kinderrechtskonvention, Geltung und Anwendbarkeit in Deutschland nach der Rücknahme der Vorbehalte [The UN Child Rights Convention, validity and applicability in Germany following the withdrawal of the reservations], 2011, p. 7 (8 et seq.).
individual commitment must be examined separately as to whether it establishes an individual right.  

2. Individual rights under the Convention on the Rights of the Child

a) Traditional individual rights and the principle of non-discrimination

The traditional individual rights, guaranteed in the Convention and specifically pertaining to children, qualify for the individual complaints procedure. The right to life (Art. 6 CRC), the right to freedom of expression (Art. 13 CRC), the right to freedom of thought (Art. 14 CRC) and the right to freedom of association (Art. 15 CRC), all establish individual rights. The same applies to rights which are structurally comparable to these classic individual freedoms. These rights, some of which are of an innovative nature, include, for example, the right of the child to an identity (Art. 7, 8 CRC), the right not to be separated from his or her parents against the child’s will (Art. 9 CRC), and the right of the child to a periodic review of the treatment provided when placed into care (Art. 25 CRC). The principle of non-discrimination contained in Art. 2, para. 1 CRC – designed as an accessory rights guarantee, i.e. only applicable in connection with another right stipulated in the Convention on the Rights of the Child – also constitutes an individual right.

b) Obligations to protect

The Convention on the Rights of the Child not only incorporates traditional individual rights that protect the individual from infringements by the government. The Convention furthermore acknowledges that a child may not only be adversely affected by the State but also by private individuals, such as his parents, other persons entrusted with caring for the child and other third parties. Against this background, the Convention establishes several State obligations to protect: The States must take measures to combat the illicit transfer of children abroad (Art. 11, para. 1 CRC), they must take general measures to protect children from violence

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172 See Schmahl, UN-Kinderrechtskonvention [UN Child Rights Convention], 2nd edition 2013, introduction, para. 26; Lorz, Der Vorrang des Kindeswohls nach Art. 3 der UN-Kinderrechtskonvention in der deutschen Rechtsordnung [The precedence of the well-being of the child acc. to Art. 3 of the UN Child Rights Convention in the German legal order], 2003, p. 64 et seq.


and abuse (Art. 19 CRC), and in cases where a child is deprived of his family environment, the State shall bear particular responsibility for the protection of said child (Art. 20 CRC).

Despite the fact that these provisions to a large part express an objective legal obligation – i.e. the State is required to take respective measures – obligations to protect may also contain subjective rights.175 The respective stipulations clearly express that the obligations are established in order to serve in the interests of the individual child. The obligations are focused on the child – favoring the child is not simply a reflexive action. One can assume, therefore, that the obligations to protect set down in the Convention establish subjective rights which may be asserted in an individual complaints procedure.

However, one must consider that positive obligations frequently grant the State a certain margin of appreciation when it comes to taking protective measures. Protection requirements often do not commit the State to taking a particular measure.176 Instead, a State is often only then considered to be in violation of its obligations to protect when it either does nothing at all or only takes measures which are obviously inadequate. However, one must observe that the Committee on the Rights of the Child has a much more rigorous understanding of what the protection commitment derived, for example, from Art. 19 CRC entails. In its General Comment No. 13, for example, it emphasizes that the State parties are required under Art. 19, para. 1 CRC to take all suitable measures, implying that they have no leeway at all. The Committee goes on to list a number of – more or less concrete – measures which the State parties need to take to comply with their obligations.177 In as far as a State party does not satisfy these requirements, children affected by such an omission may lodge an individual complaint against a State, claiming that the State has violated its obligation to protect via.

175 See Stahl, Schutzpflichten im Völkerrecht – Ansatz einer Dogmatik [The obligation to protect under international law – doctrinal reflections], 2012, p. 363 et seq.
176 See Stahl, Schutzpflichten im Völkerrecht - Ansatz einer Dogmatik [The obligation to protect under international law – doctrinal reflections], 2012, p. 275 et seq.
177 See the requirements, some of which are extremely detailed, conferred on the State parties by the Committee on the Rights of the Child with respect to implementing their obligations pertaining to Art. 19 CRC, Committee on the Rights of the Child, General Comment No. 13 (2011), The right of the child to freedom from all forms of violence, UN Doc. CRC/C/GC/13, para. 37.
c) **Right to participation and inclusion**

Apart from the traditional liberties and the duty to protect, the Convention on the Rights of the Child also recognizes the right of the child to participate in decision-making processes and community life. This basic principle is set down in Art. 12, para. 1 CRC, which guarantees the child the right to voice his own views in all matters affecting him. Apart from referring to judicial and administrative proceedings (Art. 12, para. 2 CRC), this right also applies to any situation in which a child might find himself, be it in a State, social or family context. Special expressions of this right are also to be found, in particular, in Art. 23, para. 1, Art. 31, para. 1 and Art. 40, para. 2, fig. ii) CRC.\(^{178}\) Not only do these provisions lay down an objective State obligation to ensure that appropriate mechanisms are established to take the special needs of the child into account; these provisions also create individual rights.\(^{179}\) The subjective rights character of the right to participation becomes particularly clear in the wording of Art. 12, para. 1 CRC: This provision not only expressly mentions a right, but also refers to the child in the singular form which implies that the State duty not only refers to the State's obligation to ensure that the decision-making process is structured accordingly, but that the State must also consider the views of the individual child in the particular case. The Committee on the Rights of the Child also quite naturally assumes that Art. 12 CRC not only represents an objective, basic principle of the Convention, but also establishes a subjective right of the child.\(^{180}\)

d) **Economic, social and cultural rights**

Alongside political and civil rights, the Convention on the Rights of the Child incorporates economic, social and cultural rights (ESC rights). In particular, the right to health (Art. 24 CRC), the right to social security (Art. 26 CRC), the right to an appropriate standard of living (Art. 27 CRC) and the right to education (Art. 28, 29 CRC) represent classic ESC rights. The highly controversial and often contested classification of human rights into political and civil rights on the one hand and ESC

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\(^{178}\) On the relationship between these provisions see Schmahl, UN-Kinderrechtskonvention, [UN Child Rights Convention], 2nd edition 2013, Art. 12 para. 24 et seq.


\(^{180}\) Committee on the Rights of the Child, General Comment No. 12 (2011), The right of the child to be heard, UN Doc. CRC/C/GC/12, 20 July 2009, para.9 et seq.
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rights on the other\textsuperscript{181} is not only carried out for analytical purposes, but also means that they are treated differently from a legal perspective.\textsuperscript{182} For a very long time there was considerable debate as to whether economic, social and cultural rights are actually binding rights and whether they are justiciable, i.e. whether a court can actually determine that such a right has been violated.\textsuperscript{183} In the meantime, these questions have been answered affirmatively. The Convention on the Rights of the Child accommodates this development, not only through establishing respective ESC rights, but also by stipulating that they are legally binding.\textsuperscript{184} The Optional Protocol presumes that economic, social and cultural rights are justiciable – evident from the fact that it explicitly provides the option of submitting a claim based on a violation of such a right through the individual complaints procedure.\textsuperscript{185} Through providing the opportunity to invoke such rights, the Optional Protocol also implicitly assumes that ESC rights not only represent State commitments but also individual rights.\textsuperscript{186}

Accordingly, an individual complaints procedure can also be based on the violation of an ESC right. However, these rights differ from traditional freedom rights in the very structure of the resulting obligations: ESC rights include three levels of obligations, summarized by the Committee on Economic, Social and Cultural Rights

\textsuperscript{181} See \textit{Buergenthal/Thürer}, Menschenrechte \textit{[Human rights]}, 2010, p. 29 et seq.; \textit{Riedel}, Menschenrechte der dritten Dimension \textit{[Human rights of the third dimension]}, Europäische Grundrechte-Zeitschrift 1989, p. 9 et seq.

\textsuperscript{182} However, the implications of this differentiation should not be over-estimated, see \textit{Klabbers}, International Law, 2013, p. 110.

\textsuperscript{183} See \textit{Trilsch}, Die Justiziabilität wirtschaftlicher, sozialer und kultureller Rechte im innerstaatlichen Recht \textit{[The justiciability of economic, social and cultural rights under domestic law]}, 2012, p. 44 et seq.

\textsuperscript{184} Art. 4, para. 2 CRC.

\textsuperscript{185} Art. 10, para. 4 OP. The question of justiciability, however, also played a role during the negotiations of the Protocol, see Report of the Open-ended Working Group, UN Doc. A/HRC/17/36, para. 74 et seq.; \textit{Löhr}, Die Individualbeschwerde zur Kinderrechtskonvention \textit{[The individual communications procedure pertaining to the Child Rights Convention]}, Menschenrechtsmagazin 2011, p. 115 (125).

\textsuperscript{186} See \textit{Trilsch}, Die Justiziabilität wirtschaftlicher, sozialer und kultureller Rechte im innerstaatlichen Recht \textit{[The justiciability of economic, social and cultural rights under domestic law]}, 2012, p. 45 et seq.; \textit{Riedel}, Im Zweifel Inklusion: Zuweisung an eine Förderschule nach Inkrafttreten der BRK \textit{[In the case of doubt: Inclusion: Assignment to a special school following the coming into force of the CRPD]}, Neue Zeitschrift für Verwaltungsrecht 2010, p. 1346 (1347 et seq.); and with regard to the right to health \textit{Schmahl}, UN-Kinderrechtskonvention \textit{[UN Child Rights Convention]}, 2nd edition 2013, Art. 24 para. 1.
as "obligations to respect, protect and fulfil". The "obligation to respect" also includes the notion of a negative right: The State is not allowed to interfere with the personal rights of the citizen using measures which burden him, such as restricting access to school education. The "obligation to protect" commits the State to preventing the violation of rights through other private individuals. In this context, the extraterritorial impact of ESC rights is increasingly subject to discussion. Claims pertaining to these rights can be asserted through the individual complaints procedure, just like traditional individual rights.

The most controversial aspect with regard to ESC rights is the "obligation to fulfil". Whereas classic freedom rights, at least in their traditional form, constitute rights against infringements by the State, ESC rights require the State to act and actively work to improve the economic and social situation. In this regard, one must consider the fact that international law does not prescribe how a State has to structure its economic, social and political system. Furthermore, the realization of ESC rights depends to a great extent on the economic capability of the State. In developing countries, in particular, the inability to realize ESC rights is often not due to lack of will on the part of the State, but rather to the presiding economic conditions and cannot be realized without international support. ESC rights, therefore, do not generally demand a certain result but rather a conduct directed

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189 Trilsch, Die Justiziabilität wirtschaftlicher, sozialer und kultureller Rechte im innenstaatlichen Recht [The justiciability of economic, social and cultural rights under domestic law], 2012, p. 11 et seq.

190 For details, see Committee for Economic, Social and Cultural Rights, General Comment No. 3 (1990), The nature of States parties obligations (Art. 2, para. 1), UN Doc. E/1991/23, para No. 8.


192 Buergenthal/Thürer, Menschenrechte [Human Rights], 2010, S. 41.
towards improving the general situation (principle of progressive realization).\(^{193}\) Accordingly, Art. 4 CRC differentiates between the various types of rights: While States are required to undertake all appropriate measures to implement the rights contained in the Convention, they are only required to undertake measures within the limits of their capabilities and resources and, where needed, within the framework of international co-operation, when ESC rights are concerned. With respect to the standard of review of the individual complaints procedure, Art. 10, para. 4 of the Optional Protocol refers to Art. 4 CRC and emphasizes that the State parties may adopt a range of possible measures to realize ESC rights.

In the light of this, one can first conclude that the ESC rights set down in the Convention do not commit a State party to undertake any specific measures. Therefore, the individual complaints procedure cannot, for example, be used to assert a claim that the State has not fulfilled its duty to uphold the right to education because it did not provide enough university places.\(^{194}\)

However, even after taking these limitations into account – i.e. accepting that the States have a rather broad margin of appreciation when it comes to taking measures in order to realize ESC rights and the fact that their respective economic performance also has to be taken into consideration – ESC rights still constitute justiciable State obligations:\(^{195}\) These include the obligation to grant ESC rights without discrimination of any kind:\(^{196}\) when a State provides economic, social or cultural benefits, it may make no distinctions with regard to race, color, sex or any other of the criteria deemed unacceptable according to Art. 2, para. 1 CRC. On the other hand, it is now widely recognized that ESC rights incorporate minimum core obligations, irrespective of the question of resources or the margin of appreciation.

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193 This conceptual difference is expressed quite clearly in both of the UN Human Rights Covenants: While Art. 2, para. 1 ICCPR requires the States to respect and guarantee the rights contained in the covenant, Art. 2 para. 1 ICESCR requires the State parties to undertake measures and use all suitable resources so as to progressively achieve the full realization of the ESC rights. See Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990), The nature of States parties obligations (Art. 2, para. 1), UN Doc. E/1991/23, where the difference between obligations of conduct and obligations of result is relativized.


195 See Buergenthal/Thürer, Menschenrechte [Human rights], 2010, S. 41.

196 See Art. 2, para. 1 CRC, in conjunction with the respective ESC right established in the Child Rights Convention.
Accordingly, the Committee on Economic, Social and Cultural Rights held that a State in which a significant number of people have no access to a minimum amount of food, healthcare, housing or education, is committing a prima facie violation of its obligations resulting from ESC rights. In as far as a State violates its commitment to grant ESC rights without discrimination, or infringes the minimum core obligations under an ESC right, the individual concerned can invoke this individual right and assert his claim in an individual complaints procedure.

It is, however, doubtful whether any further individual rights are established with regard to the States’ obligation to make general efforts to improve the economic and social situation. In as far as ESC rights demand a progressive realization, and a State is more or less at liberty to decide on which measures to take, ESC rights lack a specific normative content for an individual claim. Moreover, it will be hard to argue that an individual is personally affected when he claims that a State is not fulfilling its duty to ensure that ESC rights are progressively realized.

e) Legislative mandates and obligations to cooperate

The Convention on the Rights of the Child contains many examples of legislative mandates as well as provisions encouraging cooperation between States, such as the obligation contained in Art. 11, para. 2 CRC to promote the conclusion of or accession to international agreements aimed at combatting the illicit transfer of children abroad. However, this provision does not oblige States to actually conclude international treaties; neither does it incorporate an individual right. Instead it merely represents an objective State obligation. In addition, the Convention also contains explicit legislative mandates. For example, Art. 32, para. 2 CRC requires the State parties to ensure that children are protected from economic exploitation and inappropriate work by taking appropriate legislative

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198 Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990), The nature of States parties obligations (Art. 2, para. 1), UN Doc. E/1991/23, para No. 10.

199 See also Art. 17 sent. 2 lit. b), Art. 21 lit. e), Art. 22, para. 2, Art. 23, para. 4, Art. 24, para. 4, Art. 27, para. 4, Art. 28, para. 3 CRC.

200 Schmahl, UN-Kinderrechtskonvention [UN Child Rights Convention], 2nd edition 2013, Art. 1 para. 5.
measures. The obligation is further accentuated by the fact that the States must issue regulations governing the minimum age for admission to employment, the hours and the conditions of employment. At first glance there are doubts as to whether these obligations contain individual rights. Legislative measures are taken in the general public interest and are not intended to protect individual interests. An individual has no right to any specific legislative action. However, one must also take into consideration the fact that Art. 32, para. 2 CRC actually expresses a duty to protect human rights: A State must ensure that the rights of the individual - in this case, the right to protection against exploitation - are not compromised by any other private individual. Should a State fail to undertake legislative measures to provide such protection - or should these measures prove unsatisfactory - , this may constitute a violation of the State's duty to protect which may then be submitted for review in an individual complaints procedure by the individual affected.

f) The best interests of the child

Ultimately, the question arises as to whether the fundamental principle incorporated in Art. 3, para. 1 CRC, according to which the best interests of the child shall be a primary consideration in all decision-making processes of the State, establishes an individual right, i.e. whether the individual can lodge an individual complaints procedure arguing that its interests have not been considered properly. The question as to whether Art. 3, para. 1 CRC actually incorporates a subjective right is rarely subject to explicit discussion. At times, the existence of an individual right is confirmed without stating further reasons, or by pointing out that the obligation specifically refers to the interests of the child and not only to a public interest and emphasizes the interests of the child. On the other hand, the Upper Administrative Court of Lüneburg, for example, generally denies that Art. 3, para. 1 CRC contains an individual right, despite, at the end, leaving the question

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201 See Lorz/Sauer, Kinderrechte ohne Vorbehalt [Children’s rights without reservations], Menschenrechtsmagazin 2011, p. 5. (9 et seq.).
202 Cremer, Die UN-Kinderrechtskonvention, Geltung und Anwendbarkeit in Deutschland nach der Rücknahme der Vorbehalte [The UN Child Rights Convention, validity and applicability in Germany following the withdrawal of the reservations], 2011, p. 18.
204 Lorz, Der Vorrang des Kindeswohls nach Art. 3 der UN-Kinderrechtskonvention in der deutschen Rechtsordnung [The precedence of the well-being of the child according to Art. 3 of the UN Child Rights Convention in the German legal order], 2003, p. 64 et seq. Lorz ultimately adopts a differentiated approach.
open,205 while the Federal Administrative Court assumes that it is generally possible to claim a violation of Art. 3, para. 1 CRC in front of domestic authorities or courts.206 The Committee on the Rights of the Child also quite unambiguously assumes that Art. 3, para. 1 CRC incorporates an individual right.207

At first glance, the wording of the provision appears to contradict the assumption that it contains a subjective right as it does not explicitly mention such a right but instead addresses State institutions and other decision-making instances.208 On the other hand, however, it is a rather typical technique for an international treaty to address State institutions. Not all human rights provisions explicitly refer to the individual as a legal entity. Neither are all the rights contained in the Convention on the Rights of the Child expressed in this manner.209 The individual rights character of a legal norm, therefore, cannot simply be rejected because the provision does not contain the term "right" or "claim".210 Instead, the principle set down in Art. 2, para. 1 CRC presumes that individual rights are established by the Convention.

Furthermore, Art. 3, para. 1 CRC not only demands due consideration of the interests of children but of the child. The initial use of the plural form is meant to ensure the broadest possible applicability of the principle: The best interests of children should be given due consideration in all decisions that may potentially

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205 Upper Administrative Court of Lüneburg, decision of 2 October 2012, 8 LA 209/11, paras. 31 et seq. However, this decision is not particularly convincing since the Court simply applies standards of German doctrine. See Lorz, Der Vorrang des Kindeswohls nach Art. 3 der UN-Kinderrechtskonvention in der deutschen Rechtsordnung [The precedence of the well-being of the child acc. to Art. 3 of the UN Child Rights Convention in the German legal order], 2003, p. 65 et seq.
206 BVerwG [Federal Administrative Court], decision of 13 June 2013, 10 C 13.12, para. 22.
207 Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14, 29 May 2013.
208 Upper Administrative Court of Lüneburg, decision of 2 October 2012, 8 LA 209/11, para. 32; see also Lorz, Der Vorrang des Kindeswohls nach Art. 3 der UN-Kinderrechtskonvention in der deutschen Rechtsordnung [The precedence of the well-being of the child acc. to Art. 3 of the UN Child Rights Convention in the German legal order], 2003, p. 66.,
209 See Art. 9, para. 1, Art. 10, para. 1, Art. 16, para. 1, Art. 17, Art. 18 CRC.
210 Cremer, Menschenrechtsverträge als Quelle von individuellen Rechten [Human rights treaties as a source of individual rights], Anwaltsblatt 2011, p. 159 (160).
affect children.\textsuperscript{211} Further on, the provision mentions that the best interests of the \textit{child} must be taken into consideration, thereby implying that the best interests of the child should be given precedence in every single decision involving a child-related matter. Thus, the provision not only serves a general public interest or the interests of children as a whole, but also aims to take the interests of the individual child into account.

Furthermore, the rather vague nature of Art. 3, para. 1 CRC cannot be used as grounds for denying that the provision contains an individual right.\textsuperscript{212} First of all, a conceptual distinction needs to be made between determining whether the degree of certainty expressed in a provision is sufficient and determining whether it contains an individual right, – although a certain level of concreteness must exist in order for a provision to allocate a certain legal capacity to the individual. The supposed uncertainty contained in Art. 3, para. 1 CRC is also the result of the fact that this stipulation is worded as a general clause that demands precedence of the best interest of the child in a wide range of domestic and other decision-making processes. The fact that details as to the actual context in which this provision is to be applied were not established in advance does not imply that the provision is uncertain. Instead, the stipulation specifically states that the child’s well-being must be given precedence in all cases affecting the interests of the child. The fact that it may be difficult in individual cases to actually determine which decision best accommodates the interests of the child does not imply that the provision does not encompass an individual right.

Against this background, the question as to whether Art. 3, para. 1 CRC contains an individual right must be answered in the affirmative. The individual child can make an appeal before the Committee on the Rights of the Child to the effect that a decision taken by a State is in violation of the State’s obligation to give precedence to the best interests of the child as provided for in Art. 3, para. 1


\textsuperscript{212} See Upper Administrative Court of Lüneburg, decision of 2 October 2012, 8 LA 209/11, para. 32; for a different and more convincing view, see Lorz, Der Vorrang des Kindeswohls nach Art. 3 der UN-Kinderrechtskonvention in der deutschen Rechtsordnung [The precedence of the well-being of the child acc. to Art. 3 of the UN Child Rights Convention in the German legal order], 2003, p. 18 et seq.
In as far as another, more specific right contained in the Convention on the Rights of the Child applies, it is not necessary to explicitly refer to Art. 3, para. 1 CRC, although the provision may well be of significance in such cases as it represents one of the fundamental principles of the Convention and therefore may be referred to when interpreting individual rights set down in the Convention or as a guideline to resolving a conflict of rights or other rules under the Convention.

Moreover, Art. 3, para. 1 CRC may be significant in its own right, particularly in cases where none of the other rights stipulated in the Convention on the Rights of the Child apply. This is due to the fact that the obligation to give precedence to the best interest of the child according to Art. 3, para. 1 CRC is very broadly construed and refers to all measures which have an effect on children. Irrespective of any other rights guaranteed in the Convention, all administrative proceedings which involve children's interests must give due consideration to what is in the best interest of the child. A decision that does not evince that such a consideration has taken place therefore violates the provision of Art. 3, para. 1 CRC analyzed. Legal action may be initiated in front of domestic courts based on such a violation. Ultimately, violation a violation of Art. 3, para. 1 CRC may be asserted through the individual complaints procedure to the Committee on the Rights of the Child.

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213 On the domestic effects of Art. 3, para. 1 CRC, in particular, with a view to legal protection and administrative proceedings, see Lorz, Der Vorrang des Kindeswohls nach Art. 3 der UN-Kinderrechtskonvention in der deutschen Rechtsordnung [The precedence of the well-being of the child acc. to Art. 3 of the UN Child Rights Convention in the German legal order], 2003, p. 67 et seq.


215 See Lorz, Der Vorrang des Kindeswohls nach Art. 3 der UN-Kinderrechtskonvention in der deutschen Rechtsordnung [The precedence of the well-being of the child acc. to Art. 3 of the UN Child Rights Convention in the German legal order], 2003, p. 60 et seq.

216 See, in particular, § 114 VwGO [Administrative Court Procedural Code] concerning the judicial review of compliance with the legal limits placed on discretionary powers.
V. The decision and its legal consequences

1. Basis for examination and the procedure for taking evidence

Should the Committee confirm the admissibility of an individual complaints procedure, it proceeds to examine the merits of the case, i.e. the question as to whether the contested State measure conforms with the Convention on the Rights of the Child. In a closed session217, the Committee examines the complaint based on all the documents submitted by the complainant, the victim(s), the State party concerned, any other organization involved, and, where applicable, on the basis of the findings of the oral hearing.218

The complainant is required to provide evidence that the State party has violated his rights.219 The individual must, therefore, with all means at his disposal - such as written statements provided by the victim(s) and witnesses, the presentation of official decisions, documents, medical or psychological opinions or other such documents, reports by international organizations or non-governmental organizations - in order to convince the Committee that the events happened as he described them.220 However, the burden of proof can be lifted off of the complainant due to two considerations: On the one hand, the principle of ex officio investigation applies, at least in as far as the Committee must refer back to the complainant in cases which are unclear or doubtful.221 On the other hand, the respective State party cannot confine itself to denying the complainant’s claim in general. Quite often it is either impossible – or only possible with an unreasonable amount of effort – for the individual to present information which specifically lies within the State’s. Against this background, the Human Rights Committee, for example, assumes an obligation to cooperate on the part of the State party which commits the State party to conscientiously examine the evidence put forward by the complainant and to present any information required to clarify the matter.222 As far

217 Art. 10, para. 2 OP.
218 Art. 10, para. 1 OP; Rule 23, para. 1 Rules of Procedure OP.
219 See Schäfer, Die Individualbeschwerde nach dem Fakultativprotokoll zum Zivilpakt, Ein Handbuch für die Praxis [The individual complaints procedure under the Optional Protocol to the Civil Covenant, a practical guide], edition 2007, p. 55 et seq.
221 Rule 15 Rules of Procedure OP.
222 Schäfer, Die Individualbeschwerde nach dem Fakultativprotokoll zum Zivilpakt, Ein Handbuch für die Praxis [The individual complaints procedure under the Optional Protocol to the Civil Covenant, a practical guide], 2nd edition 2007, p. 57 et seq.
as information that is only available to the State is concerned, the Committee has even reversed the burden of proof so that it lies with the respective State party.223

2. Decision content and the effects thereof

Should the Committee come to the conclusion that the State party has violated a right guaranteed in the Convention, it shall officially confirm that such a rights violation has taken place. In addition, the practice of the human rights treaty bodies shows a tendency towards emphasizing the obligation to remedy a rights violation in line with international law, sometimes even going as far as listing concrete measures for remedying the situation.224 The Rules of Procedure pertaining to the Optional Protocol take up this practice. According to the Rules it is generally expected that the Committee makes such recommendations in cases where a rights violation has been confirmed.225 Moreover, every member of the Committee involved in the decision has the right to include a dissenting opinion which is then published alongside the decision.226 The Rules of Procedure provide the option of communicating the decision to third parties or making it public.227 Summaries of the Committee’s decisions are included in the general reports submitted by the Committee to the General Assembly.228

The impact of a decision in an individual complaints procedure by a human rights treaty body differs significantly from that of a decision made by a domestic or international court. First, international decision-making bodies are generally only permitted to determine that a rights violation has been committed. They do not have the competence to immediately influence the legal situation within the domestic legal order, i.e. they cannot annul administrative or judicial decisions or legal acts, or declare them void - as can a domestic court of law. Decisions made by international dispute settlement bodies do not have any direct impact within the

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223 Schäfer, Die Individualbeschwerde nach dem Fakultativprotokoll zum Zivilpakt, Ein Handbuch für die Praxis [The individual complaints procedure under the Optional Protocol to the Civil Covenant, a practical guide], 2nd edition 2007, p. 57 et seq.
224 Schäfer, Die Individualbeschwerde nach dem Fakultativprotokoll zum Zivilpakt, Ein Handbuch für die Praxis [The individual complaints procedure under the Optional Protocol to the Civil Covenant, a practical guide], 2nd edition 2007, p. 48 et seq.
225 Rule 27, para. 4 Rules of Procedure OP.
226 Rule 24 Rules of Procedure OP.
227 Rule 27, para. 3 Rules of Procedure OP. Even in cases where a decision is published, it is important to ensure the protection of the complainants and victims and to uphold their anonymity where appropriate, see Rule 29, para. 4 Rules of Procedure OP.
228 Art. 44, para. 5 CRC; Art. 16 OP; Rule 27, para. 5 Rules of Procedure OP.
domestic legal order and therefore need to be implemented by the respective State parties.

Secondly, decisions made by the Committee on the Rights of the Child are non-binding from an international law perspective - as are the decisions of any other human rights treaty body established within the United Nations system. The non-binding nature of such decisions becomes apparent when reviewing the wording of Art. 10, para. 5 OP which only grants the Committee the right to transmit its "views" together with its "recommendations" to the parties concerned. These decisions, therefore, differ considerably from the legally binding decisions taken by the European Court of Human Rights which must be observed and implemented by the State parties.

However, that does not necessarily mean that decisions of the Committee on the Rights of the Child in an individual complaints procedure entail no legal consequences. The non-binding nature implies that the Committee does not have the authority to determine a violation of the Convention in a legally binding manner. This authority remains with the State parties which must first decide themselves how the obligations resulting from the Convention on the Rights of the Child are to be interpreted and whether they are acting in compliance with these obligations in each individual case. However, the State parties are not completely free to decide themselves in this respect and must give due consideration to any


Accordingly, State parties are under an obligation to give due consideration to the decisions of the Committee. However, they are not required to strictly observe or implement such decisions. From a purely formal perspective, the State parties are entitled to dispute the statements made by the Committee on the Rights of the Child and to take a different stance, both with a view to the facts established by the Committee as well as to the legal consequences of the statements, and to dispute that a rights violation has actually been committed. However, such behavior gives rise to the objection that the State has submitted itself to the Convention on the Rights of the Child and to the scrutiny of the Committee on the Rights of the Child in a voluntary act of self-determination.\footnote{See Kälin/Künzli, Universeller Menschenrechtsschutz [Universal human rights protection], 2nd edition 2008, p. 236 et seq.} The authority enjoyed by the Committee and the impending loss of credibility on the part of the State party are significant factors that often force a State party into following the views and recommendations of the Committee. In addition, the recommendations of the treaty committees are often taken up by non-governmental organizations and the German Institute for Human Rights with the aim of publicly denouncing irregularities. This practice also exerts pressure on political decision-makers which can increase the willingness to implement and comply with decisions made by the Committee.
3. Follow-up procedure

In order to get the State parties to comply with the decisions of the Committee and to implement them in domestic law despite their non-binding nature, Art. 11 of the Optional Protocol provides for the so-called follow-up procedure. This procedure consists of several components: First, the Optional Protocol establishes the State party’s commitment to submit a written report on any action taken and envisaged by the respective State with a view to implementing the decision within six months.\(^{233}\) Secondly, the Committee can request the State party to provide additional information with respect to implementation measures taken and envisaged and to include these in the State Reports which the State parties are required to submit according to the Convention\(^{234}\) and the first two Optional Protocols\(^{235}, \ 236\) The Rules of Procedure under the Optional Protocol also provide the Committee with the competence to request any other relevant actor to submit information about measures taken by the State party with a view to implementing the decision.\(^{237}\) All information received from the State party shall be transmitted to the author(s) of the communication.\(^{238}\) Thirdly, The Committee can include in its reports to the General Assembly whether the State parties have taken measures to implement the decisions issued in individual complaints procedure.\(^{239}\)

In the past, monitoring the implementation of and compliance with decisions of the UN human rights bodies has proven to be the key problem in the international system of human rights protection.\(^{240}\) Effective implementation is not only hampered by the non-binding nature of the treaty bodies’ decisions, but also by the lack of sufficient UN resources to monitor State measures. In order to facilitate

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\(^{233}\) Art. 11, para. 1 OP; Rule 28, para. 1 Rules of Procedure OP. However, the response should be supplied “as soon as possible”. This provision constitutes a compromise between the supporters of a six-month time limit and those of a three-month limit, see Löhr Die Individualbeschwerde zur Kinderrechtskonvention [The individual communications procedure pertaining to the Child Rights Convention], Menschenrechtsmagazin 2011, p. 115 (125 et seq.) for more information.

\(^{234}\) Art. 44 CRC.


\(^{236}\) Art. 11, para. 2 OP; Rule 28, para. 4 Rules of Procedure OP.

\(^{237}\) Rule 28, para. 2 Rules of Procedure OP.

\(^{238}\) Rule 28, para. 3 Rules of Procedure OP.

\(^{239}\) Art. 16 OP; Rule 28, para. 9 Rules of Procedure OP.

\(^{240}\) Weiβ, Überblick über die Erfahrungen mit Individualbeschwerden unter verschiedenen Menschenrechtsabkommen [Overview of the experience gained with the individual complaints procedure under various human rights treaties], Archiv des Völkerrechts 42 (2004), p. 142 (151 et seq.).
monitoring, the Rules of Procedure under the Optional Protocol provide that the Committee can designate a rapporteur or a working group to monitor the implementation of its decisions.241 This rapporteur, resp. working group, assumes the responsibilities of the Committee. He, resp. it, communicates with the State party, the complainant and any other third party involved242 and reports back to the Committee on the measures taken within the scope of the follow-up procedure.243

The aim of the follow-up procedure is to ensure that, despite the non-binding nature and lack of immediate influence of the Committee's decisions, these are implemented and observed by the State parties to the greatest extent possible. The Committee on the Rights of the Child can neither resort to enforcement mechanisms (as is the case in legal proceedings in the domestic courts) nor can it rely on the authority its decisions would have were they legally binding (as in the case of ECHR or ICJ decisions). The Committee can only refer to the political and moral authority of its decisions which it can only maintain through making balanced, well-reasoned and neutral decisions in line with legal standards. The follow-up procedure offers various opportunities for exerting political pressure on the respective State party, by way of directly approaching the State party or through publishing reports on the measures taken by the State.

241 Rule 28, para. 5 Rules of Procedure OP.
242 Rule 28, paras. 6, 7 Rules of Procedure OP.
243 Rule 28, para. 8 Rules of Procedure OP.
VI. The importance of the individual complaints procedure from the perspective of the German legal system

In the light of the comprehensive legal protection system provided by the Federal Republic of Germany as well as the option of turning to the European Court of Human Rights (ECHR) after the exhaustion of all the available domestic remedies, the question arises as to what added value the coming into force of the Optional Protocol offers complainants who want to challenge measures adopted by the German state. In the following, we will first be providing examples of cases where the individual complaints procedure could potentially be applied (1.) before going on to examine the relationship of the individual complaints procedure to other domestic, European and international legal protection mechanisms (2.). Finally, we will be examining the question of whether the Federal Republic needs to take legislative or other measures in anticipation of the coming into force of the Optional Protocol (3.).

1. Potential cases of application

a) Preliminary considerations

In its latest State Report to the Committee on the Rights of the Child, the Federal Government of Germany assumes that all Federal legislation is in line with the Convention on the Rights of the Child.244 Nevertheless, it is doubtful whether the current legal situation at federal and regional state level with regard to legislation, administrative and judicial fully complies with the provisions of the Convention: An overview of aspects of the current German legal situation and legal practice which are potentially problematic is provided on the one hand in the Concluding Observations of the Committee on the Rights of the Child pertaining to the German

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State Reports,\textsuperscript{245} and on the other hand, by a number of studies carried out by non-governmental organizations engaged in the area of children’s rights\textsuperscript{246}.

The individual complaints procedure also provides an additional means of pointing out deficiencies in the German legal system. For non-governmental organizations, in particular, this represents an opportunity to identify cases which are problematic from a child’s rights perspective and to present these – in close cooperation with the affected child or his representative\textsuperscript{247} – to the Committee on the Rights of the Child. The individual complaints procedure complements the State reporting procedure: While in the reporting procedure the legal situation and practice in Germany is discussed only in general and in an abstract manner, the individual complaints procedure allows for the examination of a child rights violation based on a specific real-life case. Referring to individual cases helps to illustrate abstract legal problems. Even in cases where a particular aspect of the German legal system has already been subject to the State reporting system and condemned by the Committee on the Rights of the Child in its Concluding Observations, the individual complaints procedure offers the opportunity of discussing the same problem from a different angle, i.e. from the perspective that a specific individual right of a child or young person has been violated.

\textsuperscript{245} Committee on the Rights of the Child, Concluding Observations pertaining to the First State Report of the Federal Republic of Germany, UN Doc. CRC/C/15/Add.43, 27 November 1995; Committee on the Rights of the Child, Concluding Observations on the Second State Report of the Federal Republic of Germany, UN Doc. CRC/C/15/Add.226, 30 January 2004. See also the list of potentially problematic issues compiled by the Committee on the Rights of the Child in preparation for the examination procedure in which the Committee directs specific enquiries to the Federal Republic, Committee on the Rights of the Child, List of issues to be taken up in connection with the consideration of the combined third and fourth periodic reports of Germany (CRC/C/DEU/3-4), UN Doc. CRC/C/DEU/Q/3-4, 1 July 2013.

\textsuperscript{246} Also of particular relevance are the so-called parallel reports, i.e. the “Shadow Reports” in which non-governmental organizations, such as the National Coalition for the Implementation of the UN Child Rights Convention in Germany, Kindernothilfe, terre des hommes, Plan International, UNICEF and World Vision in its role as member of the German Coalition to Stop the Use of Child Soldiers, critically examine the State Reports presented by the Federal Republic, which are then submitted to the Committee on the Rights of the Child. See German Institute for Human Rights at www.institut-fuer-menschenrechte.de/de/menschenrechtsinstrumente/vereinbarte-nationen/menschenrechtsabkommen/kinderrechtskonvention-crc.html.

\textsuperscript{247} See III. 3. c) above.
b) **Case study: Unaccompanied minor refugees in asylum procedures or within immigration law**

The potential of the individual complaints procedure can be illustrated by way of the legal problems pertaining to unaccompanied minor refugees and asylum seekers. The personal situation of minor refugees and asylum seekers – often living unaccompanied in the Federal Republic – is particularly precarious.\(^{248}\) This group of individuals, therefore, requires special protection.\(^{249}\) Nevertheless, their legal status and treatment in the Federal Republic is quite problematic.\(^{250}\) Particularly grave is the legal situation with a view to minors who have already reached the age of sixteen.\(^{251}\) Whereas the rules set down in general administrative law and administrative court procedural law link the general capacity to act in legal proceedings to a person's legal capacity, i.e. to reaching the legal age,\(^{252}\) § 80, para. 1 of the Residence Act (**Aufenthaltsgesetz**) and § 12, para. 1 of the Asylum Procedure Act (**Asylverfahrensgesetz**) provide that a foreign national who has reached the age of sixteen is capable of participating in legal proceedings. At first glance, these rules seem to improve the legal status of sixteen and seventeen-year-olds through granting them the capability of acting in legal proceedings which they would otherwise not be granted by the general rules. Accordingly, the Federal Government\(^{253}\) and – with a view to the Residence Act – the Federal Administrative

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\(^{249}\) Committee on the Rights of the Child, General Comment No. 6 (2005), Treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/6, 1 September 2005.

\(^{250}\) For details and critical comments, see Bundesfachverband Unbegleitete Minderjährige Flüchtlinge e.V., Kinder Zweiter Klasse, Bericht zur Lebenssituation junger Flüchtlinge in Deutschland [Second-class children, report on the situation of young refugees in Germany], 2013, p. 2: "Minor refugees are discriminated against in virtually every aspect of life".


\(^{252}\) See § 12, para. 1 VwVfG [Administrative Procedure Act], § 62, para. 1 VwGO [Code of Administrative Court Procedure]; § 2 BGB [Civil Code].

\(^{253}\) See respective reply of Parliamentary Secretary Ole Schröder to the question raised by delegate Josef Philip Winkler, BT-Drs. [German parliamentary paper] 17/1812, p. 20.
Court\textsuperscript{254} – both assume that those legal provisions are in compliance with the Convention. This viewpoint, however, fails to acknowledge the fact that the recognition of the capacity to act in legal proceedings can have an extremely negative effect: Foreign minors living in Germany who are not accompanied by persons with custodial or parental power, may be allocated a custodian or guardian.\textsuperscript{255} However, the capacity to act in residence or asylum proceedings entails that the representative powers of the custodian or guardian do not extend to this area, unless the minor specifically empowers his guardian to this effect.\textsuperscript{256} This results in the situation that sixteen and seventeen-year-old refugees who have entered a country unknown to them following traumatic conditions in their home countries – and quite often an equally traumatic flight – without the company of a family member or other person of trust, with a language they cannot speak and unfamiliar social surroundings, are faced with administrative proceedings, potentially without any assistance whatsoever. Experience has shown that minor refugees are often totally overwhelmed in such a situation and not in a position to act as required by the proceedings.\textsuperscript{257}

In the light of this, the domestic legal situation is in violation of Art. 22, para. 1 CRC in which the State's duty to protect refugee children is set down and which refers, in particular, to the Convention on the Rights of the Child and the Geneva Convention on Refugees and observing the rights therein.\textsuperscript{258} Although the Federal Republic is granted a margin of leeway with regard to fulfilling its obligation to

\begin{footnotes}
\item[254] BVerwG [Federal Administrative Court], Neue Zeitschrift für Verwaltungsrecht 2013, p. 947 et seq.; see also to OLG [Higher Regional Court] Karlsruhe, Neue Juristische Wochenschrift – Rechtsprechungsreport 2011, p. 733 (734 et seq.).
\item[255] See § 1773, para. 1 BGB [Civil Code], § 42, para. 3 sentence 4; § 42, para. 1 p. 1 No. 3 SGB VIII [Social Code VIII].
\item[256] Löhr, Gesetzliche Konsequenzen aus der Rücknahme des Vorbehalts zur Kinderrechtskonvention [Legal consequences of the withdrawal of the reservations pertaining to the Child Rights Convention], Zeitschrift für Ausländerrecht und Ausländerpolitik 2010, p. 378 (379 et seq.).
\item[257] Riedelsheimer, Unbegleitete minderjährige Flüchtlinge in Deutschland [Unaccompanied minors in Germany], in: Bielefeldt and others (eds.), Kinder und Jugendliche – Jahrbuch Menschenrechte 2010, p. 169 (172); Bundesfachverband Unbegleitete Minderjährige Flüchtlinge e.V. [Federal Association for Unaccompanied Minor Refugees], Kinder Zweiter Klasse, Bericht zur Lebenssituation junger Flüchtlinge in Deutschland [Second-class children, report on the situation of young refugees in Germany], 2013, p. 28 et seq.; see also Zito, Zwischen Angst und Hoffnung – Kindersoldaten als Flüchtlinge in Deutschland [Between fear and hope, child soldier refugees in Germany] (ed. by terre des hommes and Bundesfachverband Unbegleitete Minderjährige Flüchtlinge e.V. [Federal Association for Unaccompanied Minor Refugees]), 2009.
\item[258] On the scope of Art. 22, para. 1 CRC, see Schmahl, UN-Kinderrechtskonvention [UN Child Rights Convention], 2nd edition 2013, Art. 22 para. 1 et seq.
\end{footnotes}
protect pertaining to Art. 22, para. 1 CRC,\textsuperscript{259} in view of the grave difficulties that unaccompanied refugee children are facing and the complexity and particular importance of the asylum procedure, the current legal situation, which allows sixteen and seventeen-year-olds to take part in legal proceedings without any representation or support constitutes a violation of the Federal Republic’s obligation to protect. Furthermore, this situation constitutes a form of indirect discrimination as a result of the refugee status.\textsuperscript{260} Apart from residence and asylum law, the reduced age limit with regard to the capacity to act in legal proceedings only applies, as far as one can tell, within social security law.\textsuperscript{261} This means that refugee children and other children are not being treated equally, contrary to the principle of non-discrimination set down in Art. 2, para. 1 CRC, and in particular against the background that Art. 22, para. 2, p. 2 CRC – in as far as it refers to Art. 20 CRC – particularly highlights the need to specially protect children deprived of their family environment. As a result, the provision set down in § 80, para. 1 of the Residence Act and § 12, para. 1 of the Asylum Procedure Act is in violation of the Convention on the Rights of the Child.\textsuperscript{262}

The problems related to the special situation of unaccompanied refugee children in the Federal Republic have already been discussed by the Committee on the Rights of the Child within the State Report proceedings. However, in its Concluding Observations, the Committee on the Rights of the Child has so far confined itself to expressing, in a rather general manner, its concern that the special needs and rights of asylum-seeking children and refugee children are not receiving adequate attention\textsuperscript{263} and recommending the unrestricted application of the provisions set down in the Child and Youth Services Act to all refugee children under the age of

\textsuperscript{259} Over-emphasized by OLG [Higher Regional Court] Karlsruhe, Neue Juristische Wochenschrift – Rechtsprechungsreport 2011, p. 733 (734).
\textsuperscript{260} But see also BVerwG [Federal Administrative Court], Neue Zeitschrift für Verwaltungsrecht 2013, p. 947 et seq..
\textsuperscript{261} § 36, para. 1 p. 1 SGB I [Social Code I].
eighteen.264. In its latest State Report, the Federal Government does not comment on this issue, despite emphasizing in several respects that the situation regarding sixteen and seventeen-year-old refugee children has partly been adjusted to bring it in line with children under the age of sixteen.265 The Committee subsequently requested further information from the Federal Government on measures taken to ensure that refugee children – in particular, those under the age of sixteen – receive adequate advice and legal representation.266

This case-study shows that the individual complaints procedure can play an important role even when a children rights issue has already been discussed within the State reporting procedure. Firstly, the Concluding Observations of the Committee on the Rights of the Child concerning the State Reports tend to include only very general statements. The Committee quite often does not unambiguously conclude whether the Convention on the Rights of the Child has actually been violated, but prefers to revert to non-committal, diplomatic wording, such as that it is "concerned" about a particular situation. In the individual complaints procedure on the other hand, the Committee must put its cards on the table and clearly determine whether the Convention has been violated or not.

Secondly, in a State complaints procedure the legal situation, administrative or judicial practice provides only an abstract frame for debate. An individual complaints procedure, on the other hand, involves a concrete case through which deficits in the law can be clearly demonstrated: It makes a difference, for example, whether the negative consequences resulting from § 80, para. 1 of the Residence Act and § 12, para. 1 of the Asylum Procedure Act are discussed on an abstract level, or whether a concrete case of an unaccompanied sixteen or seventeen-year-old young person can be used to illustrate why a legal provision or its practical application does not comply with the obligation to uphold the rights and ensure the well-being of the child. In light of this, it might make sense to initiate an individual complaints procedure even if the issue at the heart of the case has already been raised in a State Report and discussed by the Committee on the Rights of the Child.

266 See Committee on the Rights of the Child, List of issues to be taken up in connection with the consideration of the combined third and fourth periodic reports of Germany (CRC/C/DEU/3-4), UN Doc. CRC/C/DEU/Q/3-4, 1 July 2013, para. 16.
c) Further potential cases of application

Apart from the specific issues involving § 80, para. 1 of the Residence Act and § 12, para. 1 of the Asylum Procedure Act, a number of other legal provisions or practices within the Federal Republic of Germany raise the question of their compliance with the Convention on the Rights of the Child. These may also become subject of an individual complaints procedure. A few examples are listed below:

- The problems related to minor refugees – in particular when unaccompanied – are not limited to the rules and application of § 80, para. 1 of the Residence Act and § 12, para. 1 of the Asylum Procedure Act. The living conditions of minor refugees in Germany vary considerably from federal state to federal state, for example, with respect to accommodation \(^{267}\) and healthcare. \(^{268}\)
- Also with a view to foreign children who follow their parents in cases where the parents (or one parent) have a residence permit for Germany, § 32, para. 2 of the Residence Act treats children who have already turned sixteen worse than other children. It is doubtful as to whether this provision is compatible with the right to family reunification set down in Art. 10, para. 2 CRC. \(^{269}\)
- Disabled children have the right to special support (Art. 23 CRC) and education (Art. 28 CRC). As stated by the Federal Government in its latest State Report, progress is being made step-by-step with a view to supportive measures and inclusion in school \(^{270}\). At the same time, however, the share of children and young people with special educational needs who actually receive a normal school education remains small. \(^{271}\) The individual complaints procedure may serve to start up discussions regarding selective or structural deficits which may

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268 See Bundesfachverband Unbegleitete Minderjährige Flüchtlinge e.V. [Federal Association for Unaccompanied Minor Refugees], Kinder Zweiter Klasse, Bericht zur Lebenssituation junger Flüchtlinge in Deutschland [Second-class children, report on the situation of young refugees in Germany], 2013; Löhr, Gesetzliche Konsequenzen aus der Rücknahme des Vorbehalts zur Kinderrechtskonvention [Legal consequences of the withdrawal of the reservations pertaining to the Child Rights Convention], Zeitschrift für Ausländerrecht und Ausländerpolitik 2010, p. 378 et seq.
271 In this connection, see the study compiled by Klemm on behalf of the Bertelsmann-Stiftung [Bertelsmann Foundation], Inklusion in Deutschland - eine bildungsstatistische Analyse [Inclusion in Germany - a statistical analysis of the educational sector], 2013.
be the result of the fact that education and school policy falls within the
competence of the federal states. However, in as far as a claim pertaining to
the right to inclusion in the normal school system is to be asserted, one should
note that Art. 24 of the Convention on the Rights of Persons with Disabilities stipulates this right in a much clearer manner, so much so that the submission
of an individual complaint to the Committee on the Rights of Persons with Disabilities should possibly be preferred.

- A child’s right to express his views and his right to participation according to Art. 12 CRC have to a large extent already been accommodated in German
law, in particular where administrative proceedings and procedural law are concerned. Nevertheless, the Children’s Commission of the German
Bundestag calls for a greater participation of children and young people. The Committee on the Rights of the Child also urges that the right to participation in the family, in schools and in the social sphere has to be complied with. Individual cases may be considered as a violation of Art. 12 CRC—which would then qualify as the subject of an individual complaints procedure.

- In the public sector there is no guarantee that decisions that affect children always give precedence to the importance of being in the best interests of the child, as required by Art. 3, para. 1 CRC.

- Cases where minors are placed in custody pending deportation are particularly problematic in the light of Art. 37 lit. d) CRC. Although according to § 62, para. 1 sentence 3 of the Residence Act minors may only be taken into custody pending deportation “in exceptional circumstances” and only as long as can be deemed appropriate with a view to the best interests of the child, the length of

272 See Krajewski, Ein Menschenrecht auf integrativen Schulunterricht [A human right to integrative school education], Juristenzzeitung 2010, p. 120 (124); Schmahl, UN-Kinderrechtskonvention [UN Child Rights Convention], 2nd edition 2013, Art. 23 para. 18.


274 Schmahl, UN-Kinderrechtskonvention [UN Child Rights Convention], 2nd edition 2013, Art. 12 para. 31 et seq.


277 See Lorz, Der Vorrang des Kindeswohls nach Art. 3 der UN-Kinderrechtskonvention in der deutschen Rechtsordnung [The precedence of the well-being of the child acc. to Art. 3 of the UN Child Rights Convention in the German legal order], 2003, p. 47-50.
the custody period pending deportation may theoretically extend to 18 months (§ 62, para. 4 of the Residence Act), which raises the question of compatibility with Art. 37 lit. d) CRC.

2. The relationship with other legal protection mechanisms

A person who regards himself as the victim of a rights violation by the Federal Republic of Germany has to decide where to take his legal claim. Apart from seeking remedies in front of German courts and the Federal Constitutional Court in Karlsruhe, the European Court of Human Rights in Strasbourg and the other human rights treaty committees in Geneva also constitute potential forums for submitting a claim pertaining to a rights violation. The individual complaints procedure before the Committee on the Rights of the Child is, therefore, not the only legal remedy, and in most cases not the primary remedy, for asserting a claim pertaining to the violation of a child’s right. The parallel existence of various legal protection systems raises the question as to how the individual complaints procedure according to the Optional Protocol to the Convention on the Rights of the Child relates to other legal protection mechanisms, and how these various procedures differ. In as far as several appeals can be launched at the same time, the question arises as to which mechanism is best suited to receive legal protection. Despite the fact that the decision as to which of these institutions promises the best chances of success for a specific legal claim always depends on the circumstances of the particular case, there are nevertheless a number of general aspects that should be considered when deciding how to proceed.

a) Legal protection before domestic courts

Before embarking on a path to the Federal Constitutional Court in Karlsruhe, the European Court of Human Rights in Strasbourg or the Committee on the Rights of the Child in Geneva, all remedies offered by the domestic legal system must have been exhausted. Constitutional complaints before the Federal Constitutional Court, complaints pertaining to the Convention before the ECHR and individual complaints before the Committee on the Rights of the Child are all only admissible after the exhaustion of all available domestic legal remedies. The affected individual must, therefore – after having exhausted all administrative legal remedies – file a suit before a court of first instance and use all available options of appeal.

Before the German courts, the individual can claim a violation of his rights under federal and state law, including the fundamental rights guarantees of the German
Constitution. Moreover, he can also claim a violation of his rights under the Convention on the Rights of the Child. Through the federal statute with which the German legislative bodies consented to Germany’s accession to the Convention, the Convention has become part of the German legal order.278 Invoking the provisions of the Convention before a German court is possible in as far as these provisions unfold direct effect. This requires that the respective provision of the Convention is sufficiently specific and suitable for direct application by courts and does not require that the legislator implement or more concretely define the provision through domestic legislative measures.279 Each provision of the Convention must be examined separately with regard to its direct applicability.280 All available domestic remedies must have been exhausted without success before an individual complaint can be submitted to the Committee on the Rights of the Child. Only in the very rare cases in which the German legal system does not provide an adequate remedy, the complainant may lodge an individual appeal directly with the Committee in Geneva.281

b) Taking a constitutional complaint to the Federal Constitutional Court

If the legal claim of the affected individual is not successful within the domestic court system, he can lodge a constitutional complaint with the Federal Constitutional Court. A constitutional complaint is only admissible when the complainant has exhausted all available legal remedies282 and, according to the

278 See Lorz, Der Vorrang des Kindeswohls nach Art. 3 der UN-Kinderrechtskonvention in der deutschen Rechtsordnung [The precedence of the well-being of the child acc. to Art. 3 of the UN Child Rights Convention in the German legal order], 2003, p. 11 et seq.; on the implementation of international law in Germany in general, see Sauer, Staatsrecht III [Constitutional Law III], 2nd edition 2013, p. 82 et seq.


280 Schmahl, UN-Kinderrechtskonvention [UN Child Rights Convention], 2nd edition 2013, introduction, para. 26; Cremer, Menschenrechtsverträge als Quelle von individuellen Rechten [Human rights treaties as a source of individual rights], Anwaltsblatt 2011, p. 139 (162 et seq.).

281 See, for example, Committee on the Elimination of Racial Discrimination, Decision of 26 February 2013, Communication No. 48/2010, TBB v. Germany, UN Doc. CERD/C/82/D/48/2010, para. 2.6 et seq.; see also Payandeh, Die Entscheidung des UN-Ausschusses gegen Rassendiskriminierung im Fall Sarrazin [The decision of the UN Committee on the Elimination of Racial Discrimination in the Sarrazin case], Juristenzeitung 2013, p. 980 et seq.

282 Art. 94, para. 2 sentence 2 GG [Basic Law], § 90, para. 2 sentence 1 BVerfGG [Law on the Federal Constitutional Court].
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...jurisprudence of the Federal Constitutional Court, has taken all other possible measures available to him to prevent, stop or remedy the rights violation. The complainant may only lodge an appeal with the Federal Constitutional Court in cases where a violation of a fundamental right under the Constitution is affected. This means that he cannot directly invoke the rights guaranteed in the Convention on the Rights of the Child in the procedure before the Constitutional Court.

However, the Federal Constitutional Court, in aiming to guarantee compliance with Germany's obligations under international law, also takes account of international human rights guarantees when interpreting the fundamental rights guarantees of the German Constitution, thus indirectly ruling on the compatibility of German legal acts with the European Convention on Human Rights and the decisions taken by the ECHR. Furthermore, according to the Federal Constitutional Court, failure to consider international law may also amount to a violation of the rule of law guarantee (Rechtsstaatsprinzip). Although the constitutional complaints procedure is in general limited to the infringement of constitutional fundamental rights, the complainant may therefore also claim a violation of his rights under the Convention on the Rights of the Child in front of the German Federal Constitutional Court.

The domestic constitutional complaints procedure and the individual complaints procedure to the Committee on the Rights of the Child are not mutually exclusive. An individual complaint is only admissible after the complainant's appeal in Karlsruhe has been rejected. However, the procedure before the Federal Constitutional Court raises questions with regard to its effectiveness: First, proceedings held before the Federal Constitutional Court may take a considerable amount of time. According to information supplied by the Court, 68 percent of all cases submitted between 2003 and 2011 were concluded within one year, with a further 20 percent being closed within a two-year period. Nevertheless, in individual cases proceedings held before the Federal Constitutional Court may take much longer. Against this background, the ECHR has concluded in several

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283 BVerfGE [Decisions of the Federal Constitutional Court] 92, 245 (256); 104, 65 (70); on this problematic principle, see Schlach/Korioth, Das Bundesverfassungsgericht [The Federal Constitutional Court], 9th edition 2012, p. 168 et seq.

284 Art. 93, para. 1 No. 4a GG [Basic Law], § 90, para. 1 BVerfGG [Law on the Federal Constitutional Court].

285 BVerfGE [Decisions of the Federal Constitutional Court] 74, 358 (370); 111, 307 (315 et seq.); 128 (326).

286 BVerfG [Federal Constitutional Court], Neue Juristische Wochenschrift 2007, p. 499 (500).

instances that the right to a fair trial according to Art. 6 of the European Convention on Human Rights had been violated as a result of the prolonged duration of the proceedings before the Federal Constitutional Court.\textsuperscript{288} In the light of this, one can argue in individual cases that proceedings before the Federal Constitution Court are being unreasonably prolonged\textsuperscript{289}, thereby rendering the submission of an individual complaint to the Committee on the Rights of the Child admissible without having to wait for a decision from Karlsruhe.

At the time the individual lodges a constitutional complaint it is, however, impossible to foresee how long the Federal Constitutional Court will need to issue a decision. It is important to note, therefore, that, according to the established practice of the UN treaty bodies, the legal remedies do not need to have been exhausted at the time of the submission of an individual complaint but rather at the time the Committee renders its decision. This opens up the possibility for the complainant to lodge an individual complaint even before the Federal Constitutional Court has come to a decision on the constitutional complaint. Should the decision of the Constitutional Court be rendered during the proceedings in front of the Committee on the Rights of the Child, the requirement of having to exhaust all available legal remedies will be considered to have been complied with. Should a decision from Karlsruhe still be pending, the complainant can then argue in the individual complaints procedure that he cannot be reasonably expected to continue to wait. The Committee must then decide in each individual case whether the constitutional proceedings are being unreasonably prolonged, thus rendering an individual complaint admissible prior to the decision of the Federal Constitutional Court.\textsuperscript{290} Should, however, the Committee reject the complaint as inadmissible on the basis that not all legal remedies have been exhausted, the complainant is free to lodge another complaint with the Committee on the Rights of the Child once the decision of the Federal Constitutional Court has been received.

Secondly, statistically the chances of a constitutional complaint being successful are extremely poor. Of the 200,000 constitutional complaints submitted in the period

\textsuperscript{288} See ECHR, Decision of 6 November 2008, Communication No. 58911/00, Leela and others v. Germany, paras. 63 et seq. (duration of the proceedings eleven years and three months); ECHR, Decision of 22 January 2009, Communication No. 45709/06 and 51115/06, Kaemena and Thönebohn v. Germany, paras. 61 et seq. (duration of the proceedings six years and one month); ECHR, Decision of 13 January 2011, Communication No. 397/07 and 2322/07, Hoffer and Annen v. Germany, paras. 55 et seq. (duration of the proceedings six years and six months).

\textsuperscript{289} See Art. 7 lit. e) OP.

\textsuperscript{290} See Art. 7 lit. e) OP.
between 1951 and 2011, only 2.4 percent were successful.  

Although one cannot generally conclude from the low success rates that the constitutional complaints procedure is a legal remedy which is “unlikely to bring effective relief” – rendering it admissible to submit an individual complaint irrespective of the outcome of the constitutional court proceedings –, in as far as it is obvious in the specific case concerned that the complaint has no chance of success in view of the case-law of the Federal Constitutional Court, one can argue that it does not constitute an effective legal protection mechanism for the complainant, and that therefore the individual complaint should be admissible regardless of the proceedings in front of the Constitutional Court.

c) Taking an individual complaint to the European Court of Human Rights

aa) Children's rights before the ECHR and the relationship to the Committee on the Rights of the Child

After exhausting all domestic remedies, which generally includes lodging a constitutional complaint with the Federal Constitutional Court, an individual complaint can be submitted to the ECHR based on the violation of a right granted by the European Convention on Human Rights. The ECHR, however, is limited to scrutinize whether rights under the Convention have been violated, it therefore cannot directly assess whether the Convention on the Rights of the Child has been complied with. Nevertheless the ECHR regularly emphasizes that the European Convention on Human Rights is a part of international law and that in interpreting the provisions of the Convention, all rules and principles of international law, in as far as they are applicable with regard to the respective State party, must be

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291 See www.bundesverfassungsgericht.de/organisation/gh2011/A-I-1.html. In recent years, the percentage of successful complaints has dropped even further, see www.bundesverfassungsgericht.de/organisation/gh2011/A-IV-2.html.

292 See Art. 7 lit. e) OP.


considered. In light of this jurisprudence, the ECHR has already included the provisions of the Convention on the Rights of the Child in its decisions on several occasions in order to interpret the guarantees provided by the Convention, thus indirectly ruling on the compliance of the State party with its obligations under the Convention on the Rights of the Child.

The relationship between a complaint pertaining to the Convention before the ECHR and an individual complaint before the Committee on the Rights of the Child proves to be rather complex. The complaint to the ECHR does not constitute a domestic legal remedy. However, as a parallel or successive handling of an international investigation or settlement procedure is generally inadmissible, the complainant in general has to decide whether to submit a complaint to the ECHR in Strasbourg or to the Committee on the Rights of the Child in Geneva.

**bb) Comparison of the procedures**

This decision has to take into account the advantages and disadvantages of each of the procedures: Proceedings before the ECHR constitute judicial proceedings, while the individual complaints procedure is only of a "quasi-judicial" nature. Unlike the ECHR judges, the experts of the Committee do not necessarily have a legal background. Neither can they rely on judicial independence. In addition,

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proceedings held before the Committee are not necessarily based on formal, legal rules in the same way as proceedings before the Human Rights Court. Nevertheless, compared with other existing individual complaints procedures, the Optional Protocol to the Convention on the Rights of the Child emphasizes the importance and role of the complainant in the proceedings – exhibited, for example, by the fact that the complainant has to be informed about the progress of the proceedings and the decision regarding his case.\(^{302}\) There is, therefore, no fundamental difference with regard to the formal status accredited to the affected individual within the proceedings.

cc) Comparison of the effects of the decisions

More important differences exist with regard to the effects of the respective decisions. Decisions made by the ECHR are legally binding and must be observed and implemented by the State parties.\(^{303}\) The Court can, however, only determine that there has been a violation of the Convention and not actually remedy the situation itself – e.g. through annulling a judgment of a domestic court or a statute which violates the Convention.\(^{304}\) Nevertheless, the Court has in its recent jurisprudence been increasingly inclined to order that specific measures must be taken by a State party in order to implement a decision,\(^{305}\) and it can also afford just satisfaction to the injured party.\(^{306}\) Furthermore, the State party is under an obligation to put an end to the violation of the Convention and to remedy the situation accordingly.\(^{307}\) The implementation of this obligation in German law is further enabled through the recognition of a constitutional duty to observe the European Convention on Human Rights and all decisions by the ECHR,\(^{308}\) the principle of interpreting all German law in accordance with the Convention as far

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302 Rule 14, para. 1 Rules of Procedure OP.
303 Art. 46, para. 1 European Convention on Human Rights.
304 ECHR, Decision of 13 June 1979, Communication No. 6833/74, Marckx v. Belgium, para. 58.
305 On this development, see Breuer, in: Karpenstein/Mayer (eds.), Europäische Menschenrechtskonvention, Kommentar, 2012, Art. 46 para. 6 et seq.
as possible\textsuperscript{309} and the procedural option of reopening a case, should the ECHR\textsuperscript{310} decide that a violation of the Convention has occurred.

Decisions made by the Committee on the Rights of the Child in an individual complaints procedure, on the other hand, are not legally binding and do not oblige the member State to strictly follow and implement them. The member State only has to give due consideration to the views and recommendations of the Committee.\textsuperscript{311} The fact that the decisions are not legally binding diminishes any success achieved by the complainant in front of the Committee. On the one hand, the Convention on the Rights of the Child allows the Federal Republic – or to be more exact: the Federal Government or any other State institution which is in a position to implement Committee decisions within its area of competence – to take a viewpoint different from the position held by the Committee on the Rights of the Child. The Federal Republic’s interpretation of the Convention on the Rights of the Child may vary from that of the Committee, or it may contest that the Convention has actually been violated in the case in question. Even if it can be assumed that the Federal Government is generally prepared to comply with the decisions made by the Committee to as great an extent as possible, it cannot be ruled out that it may decide to act contrary to the holding of the Committee in a particular case, especially when the legal reasoning of the Committee does not seem to be particularly convincing, or in cases where other actual or alleged State interests prevail.

Secondly, domestic implementation may prove impossible even in cases where the Federal Republic is actually prepared to implement the recommendations made by the Committee: Due to the requirement to exhaust all available domestic remedies, a Committee decision will often be issued based on the legally-binding decision of a domestic court. According to the principle of res judicata, such a domestic court decision cannot be overturned on grounds of a Committee decision and in such cases the German legal system does not provide for the possibility to reopen the

\textsuperscript{309} BVerfGE [Decisions of the Federal Constitutional Court] 111, 307 (317); 128, 326 (366); 131, 268 (295 et seq.).

\textsuperscript{310} See § 359 No. 6 Code of Criminal Procedure and § 580 No. 8 Code of Civil Procedure, referred to by the remaining codes of procedure (§ 153, para. 1 Administrative Court Procedural Code; § 79 p. 1 Labor Court Act; § 179, para. 1 Social Courts Act; § 134 Fiscal Court Ordinance; § 48, para. 2 Act on the Procedure in Family Matters).

\textsuperscript{311} Art. 11, para. 1 OP. See V.2. and 3. above.
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case.\textsuperscript{312} For example, in cases where a custody dispute has already passed through the German courts of last instance and in which the Committee on the Rights of the Child rules on the basis of an individual complaint of the defeated party that the domestic proceedings did not give due consideration to the duty to protect the best interests of the child (Art. 3 CRC), this decision does not automatically overturn the respective domestic custody decision. Decisions made by the Committee on the Rights of the Child during an individual complaints procedure may provide significant political impetus – much the same as the views represented by the Committee in the State reporting process –, and this may well lead to the modification of a statute or of an administrative practice. Nevertheless, compliance with these decisions and their implementation is neither required nor guaranteed. For the individual complainant this may result in the unsatisfactory situation that despite winning his claim in Geneva, it may not actually be implemented at the national level. In this regard, proceedings held before the ECHR represent a more favorable option.

dd) Comparison of the duration of the proceedings

The advantages of proceedings held before the ECHR in comparison to an individual complaints procedure held before the Committee on the Rights of the Child, however, are cast into doubt by the potential length of the proceedings. The statistics provided by the Court illustrate this:\textsuperscript{313} Whereas 8,400 complaints were lodged with the ECHR and allocated to a chamber of the Court in 1999, the number of complaints submitted has continued to rise, with a total of over 60,000 new cases each year since 2010. The Court is no longer able to cope with this huge volume of cases – with around 128,100 complaints now pending before the various chambers of the Court. According to the Court\textsuperscript{314}, it is impossible to assess in general how long the proceedings before the Court will take. The duration of the proceedings is influenced by a wide range of different factors, such as the nature of

\textsuperscript{312} The provisions dealing with an ECHR ruling can also not be applied by way of analogy. There does not seem to be an unintended gap in the law, and ECHR rulings are not comparable to decisions of the UN human rights treaty bodies. Their legally-binding nature clearly distinguishes ECHR decisions from those made by the Committee. Furthermore, one must note that the Federal Constitutional Court itself does not assume that a constitutional or Convention-related legal commitment to providing the opportunity of reopening a case exists with respect to the European Convention on Human Rights. See BVerfG, Decision of 18 August 2013, 2 BvR 1380/08.


\textsuperscript{314} ECHR, Der Gerichtshof in 50 Fragen [The Court in 50 questions], 2012, p. 9 et seq., available at www.echr.coe.int.
the complaint and the facts contained in the submissions and statements of the complainant and respective defendant State, the decision as to whether an oral hearing is to be held, and the decision as to which chamber will handle the case. In addition, the Court does not deal with the complaints in a chronological order but with respect to their urgency (priority policy). Despite the fact that the Court claims to try to process a complaint within a two-year period, the actual proceedings may take a considerably longer time in individual cases. Whether the measures taken by the Court and the State parties to remedy this situation will actually help to make the Court's work more effective and reduce the duration of the proceedings, remains to be seen.

At the moment it is not possible to predict how long and individual complaints procedure before the Committee on the Rights of the Child will take. However, the experiences with other United Nations treaty bodies may provide tentative insights. The duration of an individual complaints procedure may vary considerably. In a 2012 report on strengthening the treaty-based human rights protection mechanisms, the High Commissioner for Human Rights states the following figures: A case before the Human Rights Committee took an average of three and a half years, whereas a case before the Committee against Torture took two and a half years, a case before the Committee on the Elimination of Discrimination against Women two years and before the Committee on the Elimination of Racial Discrimination one and a half years.

On the one hand, one should bear in mind that the committees do not meet on a regular basis and convene only three times a year for a multi-week session. In addition, the committees attribute different degrees of priority to the handling of individual complaints. This is due to the fact that the number of States which have accepted the respective individual complaints mechanisms varies and to the fact that the committees' main focus is on processing the State Reports which each

315 With reference to the ECHR chambers, see Art. 25 et seq. European Convention on Human Rights; for an overview regarding the distribution of competences, see Schaffrin, in: Karpenstein/Mayer (eds.), Europäische Menschenrechtskonvention, Kommentar, 2012, Art. 26 para. 8 et seq.
317 ECHR, Der Gerichtshof in 50 Fragen [The Court in 50 questions], 2012, p. 9, available at www.echr.coe.int.
individual State party is required to submit within regular intervals. In addition, the committees are also concerned with the formulation of general comments.

The Committee on the Rights of the Child faces already a quite considerable workload. The Committee has to deal with a total of 193 State parties – the highest number of Member States compared to all the other UN treaty bodies – which also means it has to handle the highest number of State Reports. The rise in the number of State parties has already led to the number of Committee members being increased from ten to eighteen. Additionally, from 2005 to 2011, the Committee convened in two separate chambers in order to cope with the workload. One can assume that the coming into force of the Optional Protocol with the option of submitting an individual complaint will put further strain on the Committee’s personnel, time and financial resources. One will have to see how this development affects the duration of an individual complaints procedure and whether the Committee and the State parties undertake any measures to increase the effectiveness of the Committee’s work. At least in the initial phase, however, some tentative predictions can be made with regard to the lengths of the proceeding: On the one hand, only a small number of States have so far recognized the individual complaints procedure; on the other, it will take some time before potential complainants become aware of the existence of the complaints mechanism. As a result, the number of individual complaints and the respective duration of the proceedings can be expected to remain manageable during the initial phase.

ee) Comparison of the prospects of success

Finally, the prospects of success offered by each respective procedure need to be considered when deciding whether to lodge a Convention complaint with the ECHR or an individual complaint with the Committee on the Rights of the Child. Statistically, the prospects of success in cases against the Federal Republic submitted to the ECHR are extremely low, amounting to a mere 0.66 percent for the


321 See Schmahl, UN-Kinderrechtskonvention [UN Child Rights Convention], 2nd edition 2013, Art. 43 para. 5, pointing out that the division into two separate chambers could not be maintained for financial reasons. However, in the meantime, funding has been secured to ensure that the Committee on the Rights of the Child can convene in two separate chambers in its preparatory session in June 2014 and its session in February 2015.
period 1959-2010. Currently, it is impossible to predict whether the increase in the number of successful cases to 1.82 percent in 2010, respectively 1.77 percent in 2011, is a sign of a general turnaround.

On the other hand, it is very difficult to make any reliable predictions with regard to the prospects of success offered by an individual complaint before a UN treaty body: So far, individual complaint proceedings against the Federal Republic have only been held in about two dozen cases, and in only three of these has a UN treaty body concluded that the Federal Republic has committed a human rights violation. Due to the very high standards of constitutional rights protection in the Federal Republic as well as the comprehensive system of judicial remedies, one can assume that an individual complaint lodged against the Federal Republic will only be successful under exceptional circumstances.

Nevertheless, the individual complaints procedure before the Committee on the Rights of the Child may provide additional legal protection, both from the viewpoint of the German legal system and in comparison to the protection regime of the European Convention on Human Rights: First, the Convention on the Rights of the Child contains rights which go beyond those contained in the German legal and constitutional framework: These include, for example, the precedence rule contained in Art. 3, para. 1 CRC, as well as the obligation to consider the child's views in all matters affecting the child in accordance with Art. 12, para. 1 CRC.

Secondly, the Committee on the Rights of the Child is an international body which displays great sensitivity and sympathy when it comes to protecting children's rights. Experiences with the other human rights treaty bodies have shown, for example, that the Committee on the Elimination of Racial Discrimination or the

322 The statistical information quoted above is taken from data provided by the ECHR (available at www.echr.coe.int), the BMJ [Federal Ministry of Justice and Consumer Protection] report, 1 June 2012 on the rulings of the European Court of Human Rights and the implementation of its judgments in proceedings against the Federal Republic of Germany in 2011 (available at www.bmj.de), and the contribution by Jestaedt, Der "Europäische Verfassungsgerichtsverbund" in (Verfahrenskenn-)Zahlen [The “European Constitutional Court network” in (key procedural) figures], Juristenzeitung 2011, p. 872.

323 See Jestaedt, Der "Europäische Verfassungsgerichtsverbund" in (Verfahrenskenn-)Zahlen [The “European Constitutional Court network” in (key procedural) figures], Juristenzeitung 2011, p. 872 (878).

Committee on the Elimination of Discrimination against Women are in a much more inclined to promote and enforce anti-discrimination objectives or women’s rights respectively than, for example, the Human Rights Committee which deals human rights in general.\textsuperscript{325} Even where child rights are granted due consideration before the domestic or constitutional courts, the ECHR or the Human Rights Committee, the Committee on the Rights of the Child can be expected to approach a case with a unique knowledge of how a rights violation specifically affects the child, to be particularly open and sympathetic when it comes to the protection of children’s right.

Thirdly, the child-specific nature of proceedings held before the Committee on the Rights of the Child may also prove to be of advantage. Particularly in cases where children are affected by a rights violation, the respective provisions, such as the obligation to ensure the protection of the complainant, respectively the victim (Art. 4 OP), or general provisions concerning the child’s best interests (Art. 2, Art. 3, para. 2 OP), may prove to be of crucial importance.

d) The individual human rights complaints procedure in the United Nations system

A potential complainant is not only faced with the decision as to whether to head for Strasbourg or Geneva, but must also take into account that the Federal Republic has recognized to the individual rights complaints mechanisms under several UN human rights treaties: the International Covenant on Civil and Political Rights,\textsuperscript{326} the International Convention on the Elimination of all Forms of Racial Discrimination,\textsuperscript{327} the Convention on the Elimination of all Forms of Discrimination against Women,\textsuperscript{328} the Convention against Torture and Other Cruel, Inhuman or

\begin{footnotesize}
\begin{enumerate}
\item[325] Weiß, Wäre ein Individualbeschwerdeverfahren auch im Rahmen der Kinderrechtskonvention sinnvoll? [Would it make sense to introduce an individual complaints procedure with respect to the Child Rights Convention?], Menschenrechtsmagazin 2001, p. 85 (95); Löh, Die Individualbeschwerde zur Kinderrechtskonvention [The individual communications procedure pertaining to the Child Rights Convention], Menschenrechtsmagazin, 2011, p. 115 (117); Payandeh, Die Entscheidung des UN-Ausschusses gegen Rassendiskriminierung im Fall Sarrazin [The decision of the UN Committee on the Elimination of Racial Discrimination in the Sarrazin case], Juristenzeitung 2013, p. 980 (988 et seq.).
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Degrading Treatment or Punishment,\textsuperscript{329} the Convention on the Rights of Persons with Disabilities\textsuperscript{330} and the International Convention on the Protection of All Persons from Enforced Disappearance\textsuperscript{331}.

Compared with the individual complaints procedure before the Committee on the Rights of the Child, submitting a complaint to the Human Rights Committee under the ICCPR offers little advantage. On the one hand, the workload facing the Human Rights Committee means that one can generally expect the duration of the proceedings to be longer. On the other hand, the substantive guarantees provided by the ICCPR in general do not extend beyond those covered by the fundamental rights guarantees of the German constitution or the European Convention on Human Rights. Accordingly, proceedings held before the Human Rights Committee can be expected to offer only little added value compared to the domestic or European legal protection systems and promise to be successful only in extremely rare cases. In addition, one cannot expect the Human Rights Committee, which is responsible for the protection of human rights in general, to approach a child-related case with the same degree of sensitivity as the Committee on the Rights of the Child would.

However, there may be some overlap between the protection mechanisms provided under the Convention on the Rights of the Child and the complaints procedures established under the Convention on the Elimination of all Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities. The Convention on the Rights of the Child, for example, includes both a ban on discrimination related to the sex of a child (Art. 2, para. 1 CRC) and rules governing the status of children with disabilities (Art. 2, 23, 25 CRC). Where rights violations concerning girls or children with disabilities are involved, the procedure should be chosen with a view to whether the focus is on a child-related aspect or rather on the discrimination of a child as a result of the sex of the child or a specific disability. Potential complainants should take advantage of the wide range of human rights protection mechanisms established in the United Nations system by

turning to the body that is potentially most open towards their particular legal claim.

e) Summary

Before a complainant can submit an individual complaint to the Committee on the Rights of the Child, he must have unsuccessfully exhausted all available domestic remedies. These include, in general, a constitutional complaint to the Federal Constitutional Court. However an individual complaint can be submitted immediately in cases where established legal practice shows that the constitutional complaint is unlikely to be successful or where the proceedings are expected to be unreasonably long. After having exhausted all available domestic remedies, the complainant is often faced with deciding whether he wants to lodge a Convention complaint with the ECHR or submit an individual complaint to the Committee on the Rights of the Child. Advantages of submitting a complaint to the ECHR are the judicial nature of the proceedings and the binding effect of all ECHR decisions. This means that there is a better chance that a decision of the ECHR is fully implemented in the German legal system. Compared to ECHR proceedings, the non-binding nature of the decisions taken by the Child Rights Committee constitutes a disadvantage. On the other hand, lodging an individual complaint with the Committee on the Rights of the Child means that the proceedings may be concluded more rapidly and that the Committee on the Rights of the Child will approach a legal claim which specifically concerns children’s rights with particular knowledge, sensitivity and sympathy.

3. The Federal Republic of Germany: What needs to be done

When the Federal Republic ratified the Optional Protocol, it opened up the opportunity of lodging an individual complaint against Germany. The individual complaints procedure under the Protocol is conducted exclusively on the international level. Hence, there is no general need to specifically implement the Protocol into domestic law. Nonetheless, the entry into force of the Protocol gives rise to the question whether the Federal Republic needs to take legislative or other measures in order to ensure that the complaints procedure is effectively used by those whose rights are affected.
a) Publication of the opportunity to submit an individual complaint

According to Art. 17 of the Optional Protocol, the Federal Republic is under an obligation to make the Protocol widely known and to disseminate it accordingly. In addition, access to information regarding the views and recommendations of the Committee must be facilitated for children and adults alike, in particular in proceedings where the Federal Republic is directly involved. To date, the Federal Republic has failed to comply with its duty to disseminate said information. It is, therefore, the responsibility of the Federal Government to ensure that information on the individual complaints procedure is broadly distributed (in a child-accessible format) using suitable media and other channels of communication. To achieve this, the Federal Government can built upon the measures it took to disseminate information on the Convention on the Rights of the Child as such.\(^{332}\) Despite the fact that this commitment refers generally to all adults and children, it seems necessary to provide information first and foremost to persons entrusted with the administration of justice, in particular lawyers and organizations actively operating in the field of children’s rights, regarding the options, opportunities and requirements of the individual complaints procedure under the Convention on the Rights of the Child.

b) Measures for implementing the decisions of the Committee on the Rights of the Child

Should the Committee on the Rights of the Child conclude that the Federal Republic has violated the Convention on the Rights of the Child, Germany not under an obligation to either fully implement or observe this decision. However, the Federal Republic has to duly consider this decision and to report to the Committee on the Rights of the Child on all measures taken with respect to implementing said decision. From the perspective of international law, the Federal Republic as a legal subject has to fulfill this obligation. From a domestic point of view, the Federal Government is primarily responsible for considering the

Committee’s decisions. However, as a violation of the Convention on the Rights of the Child may arise at any level and in any government office, the Federal Government must ensure that the Committee’s decision is accordingly passed on to the respective agencies. Due to the domestic validity of the provisions contained in the Convention and the direct effect they have – at least in part –, all administrative authorities and domestic courts, both at the federal and the state level, are under the obligation to apply the Convention, and in doing so, to consider the views and recommendations of the Committee on the Rights of the Child.

In as far as the Committee on the Rights of the Child concludes that a statutory act violates the Convention, the federal, respectively regional state bodies responsible for that legislation are required to at least consider changing the law or issuing new laws accordingly. In cases where an administrative practice is declared to be contrary to the Convention, the respective authorities must consider changing said practice. The same applies to judicial practice. In all these cases, it is impossible to provide general rules for implementing the Committee’s decisions. Instead, each individual case must be examined as to whether it is possible to comply with the Committee’s views. The Federal Government is responsible for explaining to the Committee on the Rights of the Child whether its decisions have been implemented – and if so, to what extent – and to give grounds for non-compliance with specific recommendations.

In specific individual cases, however, implementing a decision made by the Committee may prove problematic. If international law has been violated, there is a general duty to remedy the situation: Ongoing rights violations must be stopped and remedied as far as possible. When deciding whether a violation of the Convention on the Rights of the Child needs to be remedied, the German courts and authorities must consider the views of the Committee on the Rights of the Child. In as far a German court has already issued a legally-binding decision, consideration of the decisions of the Committee may however not be possible, since the principle of res judicata under domestic law is not affected by such a

333 On the distribution of competence between the various bodies involved in foreign affairs, see Sauer, Staatsrecht III [Constitutional Law III], 2nd edition 2013, p. 45 et seq.
decision. This may, therefore, result in the non-fulfillment of the obligation to provide a remedy as provided for under international law.

It may be possible to remedy this situation by introducing a law accepting that a decision of the Committee on the Rights of the Child may be grounds for reopening judicial proceedings, similar to the statutory law applying to decisions made by the ECHR.336 At the moment, however, such a request for changing the law will probably have little chance of realization, especially in view of the fact that this has not been an acute problem in any of the previous decisions against the Federal Republic made by the various United Nations treaty bodies. In the light of this, it will prove extremely difficult to argue convincingly that new grounds for reopening a case are needed. In addition, in the German legal system and constitutional framework, the principle of res judicata plays an important role. The principle of legal certainty is firmly embedded in constitutional law and thereby prevents too far reaching grounds for reopening judicial proceedings.

Within the German legal system, procedural grounds for reopening a case on the basis that the ECHR has found a violation of the European Convention on Human Rights in that case were introduced due to the fact that according to the requirement to exhaust all domestic remedies before a complainant can turn to Strasbourg, ECHR decisions will usually occur only when there is already a legally binding decision of a German court, and that non-compliance with an ECHR decision always constitutes a breach of international law. Due to the non-binding nature of decisions made by the Committee on the Rights of the Child, it is impossible to compare these two cases, although it should be noted that it will rarely prove possible to fulfill the commitment to give serious consideration to implementing the decisions of the Committee on the Rights of the Child in cases where a legally-binding court decision has already been made. In the mid-term, therefore, one should bear in mind the need for introducing procedural grounds for reopening proceedings in cases where the United Nations treaty bodies have established that the Federal Republic is in breach of international law. Should the practical importance of the individual complaints procedure increase, it would be legally and politically unacceptable to see decisions made by the treaty committees not be implemented as a result of the principle of res judicata of domestic court rulings.

336 See Footnote 310.
c) Establishment of an internal government monitoring and coordination office

The obligations set down in the Convention on the Rights of the Child apply to all offices in Germany entrusted with exercising public authority. Violations of the Convention may occur at any level within the government, in any governmental body, through an act of law or by acting or failing to act. However, from an international law perspective, the Federal Republic, represented by the Federal Government, is responsible for any violation of the Convention by any German State agency. Accordingly, the government has the task of ensuring that the Convention is implemented and complied with and that this is accordingly monitored.337

For this reason, the Committee on the Rights of the Child considers the establishment of an institutional mechanism for coordinating and monitoring compliance with the Convention at federal, regional state and local community level as a significant contribution to ensuring that the Convention is widely observed and has encouraged the establishment of such an office in its Concluding Observations on both the First338 and Second State Reports339 submitted by the Federal Republic. Contrary to this, the Federal Government is of the opinion that the Federal Republic already has sufficiently effective structures in place for coordinating child, youth and family policy, a view confirmed in its statements in the Third and Fourth State Reports.340 This means, therefore, that the Federal Ministry of Family, Senior Citizens, Women and Youth (BMFSFJ), which also handles the State Reports submitted by the Federal Republic, is the internal government office primarily responsible for monitoring compliance with the Convention.341 Furthermore, the Federal Government also refers to the conference of ministers responsible for youth and family, the consortium of top-level youth and

337 See Committee on the Rights of the Child, General Comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), UN Doc. CRC/GC/2003/5, 27 November 2003, para. 46: “Self-monitoring and evaluation is an obligation for Governments”.


341 See www.bmfsfj.de/BMFSFJ/Ministerium/aufgaben.html.
family authorities, as well as the Children's Commission and the Committee on
Human Rights of the German Bundestag.

The entry into force of the Optional Protocol provides an opportunity to consider
setting up a centralized governmental monitoring body concerning children's rights.
Children's rights potentially touch upon every political field. Even without
challenging that within the Federal Government, the responsibility for monitoring
the Convention lies primarily with the Federal Ministry of Family, Senior Citizens,
Women and Youth, it nevertheless seems worthwhile to consider setting up a
separate central governmental body to coordinate and monitor the efforts of the
other departments and to support them in implementing the Convention on the
Rights of the Child. The office of the Commissioner for the Affairs of People with
Disabilities, created by the Disability Discrimination Act\(^\text{342}\), can serve as a blueprint
for such a governmental body. The commissioner must be consulted by the Federal
ministries in all matters involving or touching on the integration of disabled
people.\(^\text{343}\) In much the same way, the office of a commissioner for children's rights
could contribute to making the various ministries more aware of matters concerning
children's rights, could enhance communication between the respective agencies
with a view to implementing the decisions of the Committee on the Rights of the
Child and, possibly in close cooperation with the respective regional state
authorities, work towards achieving a higher level of implementation and
compliance with the Convention on the Rights of the Child at all levels of
governance. Locating such an office at Federal Government level seems justified by
the fact that, from an international law perspective, the Federal Republic is
responsible for any violation of the Convention on the part of the regional states or
local communities.

d) Setting up an independent monitoring body

Going beyond the scope of such a governmental monitoring and coordination
mechanism, the Committee on the Rights of the Child, in its Concluding

\(^{343}\) § 15, para. 2 Disability Discrimination Act.
Observations on the Second State Report\textsuperscript{344}, proposes the creation of a central, independent institution with the mandate to comprehensively monitor compliance with the Convention and competent to process individual complaints submitted.\textsuperscript{345} Despite the fact that the Federal Republic has had its own independent national human rights institution, working in accordance with the Paris Principles, the German Institute for Human Rights, in place since 2001\textsuperscript{346} and that this institute was also set up as an independent monitoring body by the Convention on the Rights of Persons with Disabilities,\textsuperscript{347} it has neither been equipped with an appropriate mandate for dealing with issues concerning the Convention on the Rights of the Child nor with sufficient funds to be able to comprehensively monitor compliance with the Convention within the Federal Republic – not to mention being able to accept individual complaints pertaining to a violation of the Convention.\textsuperscript{348}

The entry into force of the Optional Protocol makes setting up a central, independent monitoring body much more urgent for two reasons: Firstly, the option of the individual complaints procedure will increase pressure on the Federal Republic to comply with the requirements of the Convention on the Rights of the Child from both a legal and a factual perspective. In future, deficits in implementing

\begin{itemize}
\item \textsuperscript{344} In the Concluding Observations on the First State Report of the Federal Republic reference is made to an “effective coordination and monitoring mechanism for the implementation of the Convention” (para. 14 and para. 23). However, it is not clear whether the Committee on the Rights of the Child is referring to a governmental body or an independent institution created by the State. The Committee on the Rights of the Child only distinguishes between a governmental coordination body (paras. 11 et seq.) and an independent monitoring body (para. 15 et seq.) in its Concluding Observations to the Second State Report.
\item \textsuperscript{345} Committee on the Rights of the Child, Concluding Observations pertaining to the Second State Report of the Federal Republic of Germany, UN Doc. CRC/C/15/Add.226, 30 January 2004, para. 5 and paras. 15 et seq.; see also Committee on the Rights of the Child, General Comment No. 2 (2002), The role of independent national human rights institutions in the promotion and protection of the rights of the child, UN Doc. CRC/GC/2002/2, 15.11.2002.
\item \textsuperscript{347} On the role of national human rights institutions, see Rudolf, “Bringing Human Rights Home”, Zur Rolle nationaler Menschenrechtsinstitutionen, [The role of the national human rights institutions], Vereinte Nationen 2013, p. 161; Bölscher, Nationale Menschenrechtsinstitutionen als Akteure für Schutz und Förderung der Kinderrechte [National human rights institutions as players in protecting and promoting children’s rights], 2013.
\item \textsuperscript{348} For information on the work of the monitoring body, see German Institute for Human Rights, Monitoring - unverzichtbarer Beitrag zur staatlichen Umsetzung der UN-Behindertenrechtskonvention [Monitoring - indispensable contribution to State implementation of the Convention on the Rights of Persons with Disabilities Nr. [position paper No.] 1/2010. The Federal Republic was obliged to set up such an independent monitoring body under Art. 33, para. 2 of the Disability Rights Convention.
\end{itemize}
the Convention will not only be discussed in the State reporting procedure but will be subject to individual complaints proceedings. In cooperation with and in addition to the work carried out by non-governmental organizations\textsuperscript{349}, an independent human rights institution could be helpful in identifying legal regulations as well as administrative and procedural practices that potentially conflict with the Convention on the Rights of the Child and may facilitate remedying such a situation before it comes to an individual complaint.

Secondly, the introduction of the individual complaints procedure not only makes it necessary to undertake measures to implement the Convention but also to implement the decisions of the Committee on the Rights of the Child in the individual complaints proceedings. Although there is no formal obligation to comply with and implement the decisions of the Committee on the Rights of the Child, the commitment to give due consideration to the Committee's decisions, coupled with the political necessity of ensuring compliance wherever possible, implies that mechanisms for monitoring the implementation process are required. The setting up of a central, independent institution for comprehensively monitoring the Convention may also be useful in identifying potential measures for implementing a decision. The independent office could act as a partner to the Committee on the Rights of the Child in the follow-up process, supporting and supplementing the work of the non-governmental organizations during this process. By taking such a step, the Federal Republic would furthermore indicate to the Committee on the Rights of the Child and to all other State parties that it takes its commitments under the Convention and the Optional Protocol seriously and that it is prepared to carefully consider implementing any decisions made in the individual complaints procedure.

In the light of this, it seems advisable to extend the mandate of the German Institute for Human Rights according to the example of the establishment of the monitoring body under the Convention on the Rights of Persons with Disabilities\textsuperscript{350}. On the one hand, the Institute should be equipped with a comprehensive mandate for monitoring compliance with the Convention on the Rights of the Child, including

\textsuperscript{349} The director of the German Institute for Human Rights also emphasizes that the work of the national human rights institutions and the work of other civil society actors complement each other, see Rudolf, "Bringing Human Rights Home", Zur Rolle nationaler Menschenrechtsinstitutionen, [The role of the national human rights institutions], Vereinte Nationen 2013, p. 161 (166).

\textsuperscript{350} See National Coalition for the Implementation of the UN Child Rights Convention in Germany (ed.), series of publications on monitoring the UN Child Rights Convention in Germany: Der nächste Schritt [The next step], 2012.
the measures resulting from the implementation of decisions made by the Committee on the Rights of the Child in the individual complaints procedure. On the other hand, the Institute should be provided with the human and financial resources required to effectively complete this task. Accordingly, the Committee on the Rights of the Child, during the most recent State reporting process\textsuperscript{351} and at the suggestion of the German Institute for Human Rights\textsuperscript{352} encouraged such an upgrade of the Institute.

\textsuperscript{351} German Institute for Human Rights, Suggested topics to be taken into account for the preparation of a list of issues by the Committee on the Rights of the Child on the implementation of the Convention on the Rights of the Child in Germany, 13 May 2013, Recommendation No. 4.

\textsuperscript{352} See Committee on the Rights of the Child, List of issues to be taken up in connection with the consideration of the combined third and fourth periodic reports of Germany (CRC/C/DEU/3-4), UN Doc. CRC/C/DEU/Q/3-4, 1 July 2013, para. 2: “Please provide updated details on measures, if any, taken to provide its National Human Rights Institution with a mandate, along with adequate human, technical and financial resources, to monitor the implementation of the Convention and receive complaints on its violations.”
VII. Summary and outlook

With the entry into force of the Third Optional Protocol, the Convention on the Rights of the Child has been supplemented with the enforcement mechanisms of the individual complaints procedure, an inter-State complaints procedure and investigative proceedings. This development has brought the Convention in line with the standard of protection offered by the other human rights conventions within the United Nations framework. In particular the individual complaints procedure has the potential to play a significant role in enforcing and monitoring the commitments arising under the Convention on the Rights of the Child and the first two Optional Protocols. The procedure enables those who are directly affected by a child rights violation to petition not only domestic courts but also an international independent panel of experts. Thereby, the individual complaints procedure serves to protect individual rights, despite the fact that the deficits illustrated above, such as, in particular, the non-binding nature of the decisions of the Committee and the potential obstacles to implementing the Committee's decisions, may impact the attractiveness of this mechanism for the individual concerned. Furthermore, the individual complaints procedure may draw attention to general and systematic deficits within the German legal system and legal practice which go beyond the protection of the individual. Finally, the existence of the individual complaints procedure increases the pressure on the Federal Republic and on all public agencies to take the guarantees of the Convention seriously and to fully comply with Germany's obligations under international law.

Germany has not have many experiences with the individual complaints procedures established within the various UN human rights treaty regimes. Their marginal relevance is partly due to the well-established domestic legal protection system and the integration of the Federal Republic in the regime of the European Convention on Human Rights, and partly due to the fact that the individual complaints procedure is a relatively new legal remedy and hardly known even amongst experts. The first decisions of the Human Rights Committee, the Committee on the Elimination of All Forms of Racial Discrimination and most recently the Committee against Torture against the Federal Republic offer the opportunity to disseminate more information on the work of the committees and the individual complaints procedure.

Whether the individual complaints procedure pertaining to the Committee on the Rights of the Child will eventually develop into a successful protection instrument – one that is also important in Germany – and take on a permanent role in the repertoire of legal remedies and complaints mechanisms in human rights law,
depends to a large extent on whether and in what manner the Federal Republic complies with its obligation to publicize the individual complaints procedure, and on how individuals and non-governmental organizations will make use of these options. In any event, non-governmental organizations are prompted to identify suitable cases for submitting individual complaints, academics and the German Institute for Human Rights should monitor the work of the Committee on the Rights of the Child critically fashion, and in the case of a decision of the Committee in a case concerning Germany, the political institutions as well as administrative agencies and the judiciary should show that they take the Committee's decisions seriously and are willing to do everything within their power to see that these are observed and implemented.