

## International News: Children’s Rights to Access to Justice and Remedy - Recent Developments

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### *Editorial Note:*

*This first International News feature in Youth Justice reflects on recent developments in international children’s rights regarding access to justice and remedies. It is indeed fitting that this new feature is presented from a truly global perspective, exploring two cases brought as individual complaints to the Committee on the Rights of the Child, and the potential for this procedure to bring about systemic reform in youth justice systems. We are grateful that Professor Skelton, a renowned global expert in youth justice and chair of the United Nations Committee on the Rights of the Child has authored the first edition of International News.*

Ten years ago, in a resolution on children’s rights, the Human Rights Council (2013: para 4) described children’s access to justice as ‘the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards’. It is also acknowledged as a ‘fundamental right in itself, and an essential prerequisite for the protection and promotion of all other human rights’ (Human Rights Council, 2013: para 3). Earlier, in its General Comment No. 5 on General Measures of Implementation, the Committee on the Rights of the Child (2003: para 24) had underscored that ‘[f]or rights to have meaning, effective remedies must be available to redress violations’.

There is some connectivity between access to justice and ‘youth justice’, but the concepts should not be conflated (Human Rights Council, 2013: para 6). Whereas the concept of youth justice specifically addresses the situation of children ‘alleged as, accused of, or recognized as having infringed the penal law’ (UNCRC: art.40), access to justice for children is a much broader concept. It encapsulates the idea that children can use justice mechanisms towards the realization of all their human rights, and that they can do this as actors, initiating cases. It goes beyond a focus on child-friendly justice, which focuses on children who find themselves in the courts for criminal or civil matters.

In January 2024, the Committee on the Rights of the Child announced its decision to dedicate its 27<sup>th</sup> General Comment to children’s rights to access to justice and effective remedies (2024). A concept note was issued, which aims to ‘provide authoritative guidance to States Parties to undertake all appropriate legislative, administrative and other actions to ensure children’s right to access justice and effective remedies for the full realization of all their rights’ (Committee on the Rights of the Child, 2024: para 16). There will be opportunities for all stakeholders, including children, to make submissions during the drafting of the General Comment.<sup>1</sup>

Besides General Comments, the Committee also develops its jurisprudence through the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC). The Optional Protocol was adopted on 19 December 2011 by the United Nations General Assembly. However, it only entered into force on 14 April 2014, 3 months after the 10<sup>th</sup> State ratified it (Skelton, 2019: p.65). 2024 marks 10 years of OPIC coming into operation. The reach of OPIC is by no means universal, as only 52 State Parties have ratified the Optional Protocol, and regrettably the United Kingdom has not taken any action in this regard.<sup>2</sup> The main goals of OPIC are to ‘reinforce and complement national and regional mechanisms allowing children to submit complaints for violations

of their rights’ (OPIC: preamble, para 6) and to encourage ‘State parties to develop appropriate national mechanisms to enable a child whose rights have been violated to have access to effective remedies at the domestic level’. (OPIC: preamble, para 8).

In 2023, the UN Committee on the Rights of the Child adopted two views under OPIC in which the themes of youth justice and access to justice are intertwined. The case *Camila v Peru* (Communication No. 136/2021),<sup>3</sup> was brought by Camila, an indigenous Peruvian girl, who had been sexually assaulted by her father since the age of 9 and became pregnant at the age of 13. Although Camila repeatedly told the local hospital’s medical staff that she did not want to continue with the pregnancy, she was simply advised about how to have a ‘healthy pregnancy’. The Peruvian Ministry of Health technical handbook, read with the criminal code, permits the therapeutic abortion up to the 22<sup>nd</sup> week where a medical diagnosis shows that the expectant mother’s life is at risk or where required to prevent serious and lasting harm to her health. None of the health or social work professionals she came into contact with considered whether her pregnancy could be interpreted to fall within this legal definition. 4 months into the pregnancy, Camila arrived at hospital with severe abdominal pain, and after receiving medication to prevent loss of the pregnancy, she was diagnosed with ‘spontaneous rupture of membranes with significant loss of amniotic fluid and transvaginal bleeding’ (Communication No.136/2021: para 2.11). Despite this diagnosis, the prosecution service decided to bring a charge against Camila on a count of ‘self-abortion’(Communication No.136/2021: para 8.17). Already traumatized by her abuse and the pregnancy, Camila was already suffering depression and was threatening suicide. And now, to add to her suffering, she had to appear in court to defend herself. Despite being legally represented, she was convicted. Her lawyers immediately took her case on appeal, and the conviction was set aside later by the High Court. But this clearly did not make amends for all the injustices that had occurred.

Her lawyers thus filed an individual communication under OPIC. After considering the facts, and the written arguments by Camila’s lawyers and the State, the Committee found that Camila had been revictimized by the State’s actions and omissions and noted the aggravating factor that instead of being protected, she was criminalized. The Committee noted that ‘this in itself constituted a form of violence and resulted in her conviction for self-abortion’ (Communication No.136/2021: para 8.17). The Committee concluded that Camila’s prosecution for self-abortion constituted a form of differential treatment based on gender, as she was denied access to an essential service for her health and was punished for not complying with gender-based stereotypes relating to her reproductive role. This fact resulted in a finding of a violation of the right to non-discrimination in Article 2 of the UNCRC. Having reached that conclusion (among others), the Committee stated that ‘given that the author should never have been charged with self-abortion, the Committee does not consider it necessary to examine whether the author’s prosecution also violated article 40 of the Convention. There was a minority decision that differed from the majority on this last point (Communication No.136/2021: Annex II), which found, firstly, that Camila’s article 40 rights were violated on the grounds that she was treated as an offender and not a victim, and her dignity and worth were not considered. Secondly, her rights to have her matter determined without delay as it took almost a year from her conviction to the outcome from the appeal, and thirdly, that she was pressured to plead guilty to a lesser crime.

The remedy in this case is interesting, as it includes both specific and systemic aspects. The Committee concluded that Peru should provide Camila with effective reparations for the violations suffered, including adequate compensation for the harm suffered and support to enable her to rebuild her life. In addition, the Committee requested that Peru should adopt a set of systemic measures,

including the decriminalization of abortion in all cases involving child pregnancy (Communication No.136/2021: para 9).

The case *D.E.P v Argentina* (Communication No. 89/2019),<sup>4</sup> is another example of an individual case that has potential to change the system for other children. The case was brought by an Argentinian who had received a 15-year prison sentence for a crime he committed when he was a child. The author argued that the sentence imposed, the lack of periodic review, and the lack of an appropriate child justice system in Argentina violated his rights under articles 3,4, 37(b), and 40 of the UNCRC. In this case, the Committee noted that the State Party must demonstrate that deprivation of liberty is being used as a measure of last resort and that the duration of the sentence does not extend beyond what is necessary to achieve the sentence's objectives. In the end, the Committee concluded that the Argentinian justice system was not aligned with the provisions of the UNCRC. The Committee therefore requested Argentina provide effective reparations to the author of the complaint, for the violations he had personally suffered. It also requested that Argentina adopt several very specific measures, including replacing legislation on juvenile justice with a new code, compliant with the UNCRC and General Comment 24 (Committee on the Rights of the Child, 2019). This would include ensuring a regime that extends protection to convicted persons who were under the age of 18 at the time of the offence but have since turned 18, a guaranteed periodic review of sentences, and a strengthening of non-custodial measures.

These cases demonstrate how the broader application of access to justice and remedy can have a direct effect on the reform of youth justice systems. Although OPIC permits only individual communications (brought by or on behalf of a child or specific group of children), the remedies under OPIC are showing that the outcomes of the cases can lead to systemic reform (Liefwaard, 2023: 494). This offers opportunities to children, and those working with and for them, to use appeals and review processes at the domestic level as a first step towards reforming systems. If those efforts do not succeed at the national level, then the door is open to come to the Committee on the Rights of the Child, via OPIC, to seek remedies that include just outcomes for the individual child, but also to secure recommendations for the reform of the youth justice system. There are limits to this mechanism, as only children living in the jurisdiction of the 52 states that have ratified OPIC can avail of this avenue. Furthermore, because the Committee is not a court, some states might not carry out the recommendations, and while the Committee does undertake follow up procedures, there are no significant sanctions if they fail to do so. Nevertheless, this access to justice mechanism, specifically for violations of rights under the UNCRC, has been in operation for 10 years. The Committee has registered 238 cases, finalised 137 decisions, and found violations of rights in 45 of those, as of 1 February 2024 (OHCHR, 2024).<sup>5</sup>

#### Notes

1. See the CRC website for more details: <https://www.ohchr.org/en/documents/general-comments-and-recommendations/draft-general-comment-no-27-childrens-rights-access>.
2. Kazakhstan became the 52nd state to ratify, on 7 Feb 2024. For an updated table of ratifications: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-d&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&clang=en)
3. Camila is not the real name of the author, but the author (petitioner) brought the case using this fictitious name, which had already been used by media stories reporting the case in Peru.

4. An official version not available at time of writing, copy on file with the authors. See summary at OHCHR, Treaty Bodies Jurisprudence Highlights. Petitions and Urgent Actions Section CRC 93rd & 94th sessions, CRPD 29th session, CEDAW 85th session (PUAS/2023/03). Page 3.
5. A conference to mark the 20<sup>th</sup> anniversary will take place at Leiden University on 10 and 11 April 2024. For more details: <https://www.leidenlawconference.nl/legal-courses/2024/10-years-of-opic-pathways-of-access-to-justice-for-children/>.

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