



Access to justice for children in alternative care

Submission to the UN Committee on the Rights of the Child for its Day of General Discussion on Children's Rights and Children in Alternative Care

Written by Prof. Dr. Ton Liefwaard and Jessica Valentine (LL.M)¹

Leiden Law School, Leiden University

29 June 2021

1. Introduction

We are pleased to contribute to the reflections of the Committee on the Rights of the Child during its Day of General Discussion. This document focuses primarily on the point for guidance in the Concept Note: *Measures to prevent and address abuse of children in care, and to provide access to justice, with appropriate accountability and reparations*. The aim of this submission is to suggest ways in which the concept of access to justice for children in alternative care can be made more concrete. We believe that conceptualising and contextualising the concept of access to justice for this group of children has the potential to not only enhance state accountability and implementation of the UN Convention on the Rights of the Child (CRC), but also to ensure that the rights of this group of children have practical meaning.

2. Access to justice for children

Access to justice refers to the right of the child to access justice systems to seek legal protection of their rights. The UN High Commissioner for Human Rights has defined access to justice for children as 'the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards'.² The UN High Commissioner has observed that access to justice 'is a fundamental right in itself and an essential prerequisite for the protection and promotion of all other human rights'. According to Liefwaard, '[t]his suggests that access to justice for children should be understood both as a fundamental right and as a means to safeguard the enjoyment of just and timely remedies in relation to the protection of substantive rights of the child'.³ In this sense, access to justice refers to both the **ability to seek remedies** in the case of (alleged) rights violations, and also encapsulates the right to **initiate claims** in relation to the enjoyment of rights more broadly. In other words,

¹ Professor Ton Liefwaard is Vice-Dean and UNICEF Chair in Children's Rights, Leiden Law School, Leiden University, The Netherlands and Jessica Valentine is a researcher / teaching staff member at Leiden University's Department of Child Law and previously represented children in alternative care placements in Victoria, Australia.

² UN Human Rights Council, Access to justice for children. Report of the United Nations High Commissioner for Human Rights, OHCHR 2013 A/HRC/25/35 para 4 with reference to UN Common Approach to Justice for Children, UNICEF, 2008: 4.

³ Ton Liefwaard, Access to Justice for Children. Towards a Specific Research and Implementation Agenda, *International Journal of Children's Rights*, 2019, 27:2, p. 198.

children are entitled to access justice not only in response to a rights violation, but also to lodge an appeal or seek a claim for the protection of their rights.

Although the CRC does not explicitly contain a provision providing children with a right to effective remedies, it is now a rule of customary international law that everyone has the right to an effective remedy in the case of violations of fundamental human rights (see also art. 2 (3) International Covenant on Civil and Political Rights and the CRC Committee's General Comment No. 5, para. 24). Furthermore, the CRC provides for legal remedies in certain contexts that may also be relevant to children in alternative care, for example in the context of deprivation of liberty (right to *habeas corpus*, art. 37 (d)), juvenile justice (right to appeal, art. 40 (2)(b)(v)) and alternative care (right to periodic review, art. 25).⁴

Access to justice for children entails corresponding obligations for states and is therefore closely tied to (the concept of) **accountability**. For children to access remedies, states must be held to account for rights violations or for disregarding obligations under international law. There has been growing attention for accountability of non-state actors,⁵ such as private care providers in the context of children in alternative care. In this regard, we point at the inquiry procedure under the Optional Protocol on a communications procedure (OP3) against Chile, which shows the particular vulnerability of children in alternative care serviced by private care providers.⁶

Another concept connected to access to justice is **sustainable development**. UNICEF, for example, suggest that access to justice must be considered in the context of entrenched issues and the need for transformative reform.⁷ This is significant in the context of children in alternative care who are often from disadvantaged socio-economic situations, have disabilities (see also the right to access to justice under the Convention on the Rights of Persons with Disabilities, art. 13) and may face discrimination or stigma in society. Furthermore, access to justice is included in Sustainable Development Goals, which provide that 'the rule of law' be promoted and that 'equal access to justice for all' should be ensured (target 16.3).

⁴ Ibid, p. 198-9.

⁵ Noting that under art. 20 CRC the State is ultimately responsible for children deprived of parental care. UN Committee on the Rights of the Child, *General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights* (2013), CRC/C/GC/16. UNICEF, UN Global Compact & Save the Children, *Children's Rights and Business Principles*, June 2010: <https://www.unicef.org/documents/childrens-rights-and-business-principles>; UN 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*, CRC/C/GC/14, 29 May 2013, para 26.

⁶ Informe de la investigación relacionada en Chile en virtud del artículo 13 del Protocolo facultativo de la Convención sobre los Derechos del Niño relativo a un procedimiento de comunicaciones CRC/C/CHL/INQ/1 2018. See also: Espejo Yaksic, Report of the investigation in Chile under article 13 of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, CRC/C/CHL/INQ/1, Case Note 2018/2, Leiden Law School. Available on the Leiden Children's Rights Observatory: <https://childrensrightsobservatory.nl/case-notes/casenote2018-2>.

⁷ UNICEF In Focus: Access to Justice for Children (Switzerland: UNICEF 2017).

3. A need for access to justice for children in alternative care

Children in alternative care may be involved with justice systems in a number of ways. They may be caught up involuntarily in justice systems as victims of rights violations that occurred in alternative care, they may be witnesses to the violation of others' rights or be accused as violating the rights of others. Children may also seek involvement in claims as interested parties seeing access to, for example, basic services or opportunities or protection of their fundamental rights.

Children in alternative care are often in a vulnerable position and access to justice forms a vital element of their rights protection. Children in alternative care are deprived of parental care, which enhances their particular vulnerability and underscores the need for granting them access to justice, independently from their parents or legal guardian. In addition, children in alternative care globally are often denied access to basic services and opportunities for their development and are therefore more at risk of rights violations. These children therefore require additional safeguards to ensure they can access justice systems. Institutionalised children, are at a much higher risk of multiple rights violations than those under parental, foster or kinship care.⁸ This risk is even higher if the institutionalization amounts to deprivation of liberty.⁹

For a child in alternative care, access to justice is relevant at various stages where decisions about the child are made, including (and not limited to) decisions concerning:

- the involvement of family support services to prevent the child from entering alternative care;
- the child's initial placement in care as well as any amendments to care arrangements;
- the appointment or change of the child's legal guardian;
- the child's contact with parents, siblings, extended family members and other people of importance (CRC art 9 (3), 10(2); see also Guidelines on Alternative Care, para. 17);
- the child's education, health, religion or culture;
- reviews of the care plan (right to periodic review art. 25 CRC).

Such decisions may be made through administrative or informal (e.g. via family arrangement without involvement of the state), as opposed to judicial, processes. It is important therefore to underscore that access to justice goes beyond safeguarding access to judicial tribunals.¹⁰

4. Barriers for children accessing justice and specific challenges facing children in alternative care

⁸ UN Global study on children deprived of their liberty, 2019, <https://undocs.org/A/74/136>

⁹ Ibid. Access to justice in the context of deprivation of liberty serves as a protective mechanism regarding the deprivation of liberty as such (art. 37 (d) CRC), as well as regarding the treatment of children while being deprived of liberty; see Liefwaard in Kilkelly & Liefwaard (eds), 2019 T (eds) International Human Rights of Children, Springer.

¹⁰ Francioni, 2007 3-4 and Shelton, 2015 96 in Liefwaard 2019 200.

Children face distinct challenges in accessing legal systems, some of which can be exacerbated due to the certain circumstances facing children in alternative care.

- Children lack information about their rights, remedies and the implications of involvement in legal systems
 - o *Children in alternative care may be less likely to receive this sort of information, particularly if they are already lacking access to basic services and opportunities such as education and health care.*
- Justice systems are not child sensitive ('child-friendly'): they are complex and children often depend on an adult to bring their claim and assist throughout the process
 - o *Children in alternative care may not have access to someone whom they perceive to be a reliable, trustworthy or independent adult.*
- Justice systems can also be costly
 - o *Children in alternative care are generally more likely to lack resources due to their socioeconomic situation.*
- Children are generally denied legal capacity or legal standing or a lawyer in their own name
 - o *Children deprived of their liberty are likely to face additional obstacles in accessing justice, e.g. physically accessing a court, or contacting a legal representative may be more difficult.*
- Cultural and social norms can stand in the way of accepting that children should have access to justice and certain groups of children face exclusion and discrimination in justice systems
 - o *Children in alternative care are often from stigmatised groups of society, children in institutions may be more likely to have a disability or struggle with developmental issues or be from a minority group.*
 - o *Girls in alternative care require special attention.*
 - o *State authorities do not always show the required level of rigour to effectively investigate allegations of rights violations.¹¹*

6. Key recommendations to the UN Committee on the Rights of the Child

The Committee, through its Day of General Discussion, reporting system and Views issued under the OP3, has a leading role to play in offering specific guidance to States Parties towards access to justice for children in alternative care. In doing so it is recommended that the Committee underscore the following points of departure:

- Access to justice is a fundamental right for all children in alternative care and critical for the protection of these children against rights violations;
- Access to justice extends beyond formal justice systems to administrative and informal justice systems;
- Children in alternative care face specific obstacles in accessing justice and therefore require additional safeguards to ensure they can make complaints and access justice;

¹¹ E.g. European Court of Human Rights, *X and others v. Bulgaria*, 22457/16, 2 February 2021.

these include access to information, legal and other appropriate assistance in their own name and access to child-friendly remedies;

- States Parties must enforce the right to access to justice for children in alternative care at the domestic level through legislative and policy reform, which includes legal avenues to seek effective remedies, awareness raising and training of professionals and measures to secure accountability of private care providers involved in alternative care for children.

Moreover, it is recommended that the Committee:

1. Highlight the barriers facing children and the significance of access to justice for children in alternative care in its dialogue with States Parties;

2. Underscore the need for the children in alternative care to be able to access justice and the fact that this group of children requires additional safeguards to ensure they can make complaints. States Parties should undertake measures including:

- providing this group of children with relevant **information** adapted to the child's level of maturity, understanding and special needs. Information should be legally empowering and relevant to the child's circumstances, encouraging them to engage or even initiate justice proceedings.
 - o If the child enters justice proceedings, information should be provided from the beginning of proceedings onwards and address the options available to them and possible outcomes, the right to enforcement of any remedies awarded and the right to appeal. The UN Guidelines on Alternative Care¹² assert the importance of providing information to a child in alternative care (paras 6, 57) but are regrettably silent on the child's right to appeal (cf. adult family members: para. 47); art. 25 of the CRC grants children the right to periodic review. Information in relation to the principles of 'necessity' and 'suitability' enshrined in the Guidelines on Alternative Care is relevant for children in alternative care seeking to contest their placement.
- providing children in alternative care, or at risk of being placed in alternative care, with an entitlement to **legal assistance** (see Guidelines on Alternative Care para. 57) as well as **legal capacity** to take action in justice systems in response to rights violations or to bring a claim in their own name
- ensuring children have access to independent, anonymous **complaints mechanisms**, including the power to apply to a complaints mechanism for review of a case plan or any other decision made by the state concerning the child. These complaints mechanisms should be heard by independent bodies with the legal authority to issue legally binding decisions.
- ensuring that justice systems, including complaints mechanisms are **child-friendly** (child-sensitive or adapted to children): this requires that children be able to **participate effectively** in the justice proceedings. Children in alternative care, who

¹² UN General Assembly, *Guidelines for the Alternative Care of Children*, A/RES/64/142, 24 February 2010 (hereinafter 'Guidelines on Alternative Care').

may be distrustful of justice systems or adults, may require additional support in being able to fully express themselves throughout proceedings.¹³

- ensuring that there are appropriate accountability mechanisms for alternative care providers including **inspections and monitoring by independent bodies**. Independent monitoring is a vehicle to support the provision of effective remedies and access to justice to children. The OP3 Inquiry procedure (Article 13) gives the Committee itself the mandate to reach out to alternative care facilities. Inspections and monitoring by independent bodies is equally, if not more, critical in the case of private providers, particularly privately run institutions.¹⁴

For States party to the Optional Protocol to the Convention against Torture, the Committee could promote the work of the Subcommittee on the Prevention of Torture. Similarly, for States Parties to the Council of Europe, the Committee could promote the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) and the role it can play in monitoring children deprived of their liberty.¹⁵ Monitoring and complaints bodies stand to benefit from guidance from the Committee on a child-friendly approach and standards to monitoring children in alternative care, including children in institutions depriving them of liberty.

- **training** relevant actors in alternative care and justice systems. Training could highlight the significance of access to justice and address cultural or social norms towards children that feed into a lack of willingness to accept that children have rights that must be enforced, particularly those in alternative care who may face discrimination or be stigmatised in justice systems.
- elaborating on the specific types of **remedies** that should be available to children suffering from rights violations in alternative care and insisting on the development of ‘children’s rights based remedies’.

3. Enhance understanding of children’s rights based remedies. The Committee could elaborate on the significance of remedies that are effective and conducive to the realisation of children’s rights in its Views under the OP3 as well as in its dialogue with States Parties. At a minimum, such a framework for children’s rights based remedies could:

- Include the child(ren) involved in the claim;

¹³ Guidelines on Alternative Care recommend the child to be consulted on important decisions relating to them: see, e.g. paras 6, 57 and 65.

¹⁴ Evidenced by the Committee’s findings in its Inquiry into Chile: supra note 6.

¹⁵ The CPT visits places of detention on an ad-hoc or periodic basis and assesses how those deprived of their liberty are treated with a view to preventing ill-treatment. A number of standards have emerged from the CPT’s reports, which have contributed to international human rights jurisprudence concerning the treatment of children in detention. See: Kilkelly and Casale, Council of Europe Report on Children’s rights and the European Committee for the Prevention of Torture, 2012, p7. The European Court of Human Rights has used the CPT’s reports as a source of information on detention conditions: See e.g. The European Court of Human Rights, *Rahimi v Greece* 8687/08. Although the CPT does not process individual complaints, the CPT can raise individual cases with the authorities (with the consent of the person concerned) and request that an investigation into allegations of ill-treatment be carried out by the competent investigative authority.

- For example, consistently consider the child's individual position and involvement in proceedings, what is the child's individual claim and what are her or his expectations in this regard?
- Consider a pedagogical orientation and the value of this, also from the child's perspective;
 - For example, how has the child's development, education and best interests been affected or is likely to be affected by the (alleged) rights violation, bearing in mind the child's developmental stage.¹⁶
 - The Committee has recommended the psychological assistance/psychosocial support under the OP3 (even once as an interim remedy). In future, the child(ren)'s views in relation to this sort of remedy could be made clear.
- Ensure the individual remedy granted to the child is timely to reflect the fact that the passage of time affects children differently than it does to adults.
- Ensure the enforcement of the remedy is subject to rigorous evaluation and follow up, e.g. recommending a timeline and roadmap for implementation of remedies, including an incentive to report back to the Committee, in the Views.

4. Encourage States Parties to ensure **children's rights education** extends to include the concept of access to justice for children; the need to access remedies in terms of rights violations.

5. The Committee could ensure that its operation through the OP3 better reflects the key elements of access to justice (whether pertaining to children in alternative care or otherwise). For example, this could be done by ensuring there is always an independent assessment of the child's claim even when the claim is brought by adults on the child's behalf. Conducting oral hearings involving children directly, should they wish to be involved, would be a significant step towards ensuring that the child is directly heard and meaningfully participates in proceedings. Online communication tools could be of assistance in this regard. Views could also be produced in age-appropriate language or made 'child-friendly' which would also be easier for media and civil society to digest and disseminate, thereby potentially enhancing the visibility of the complaints procedure, also to children. It is furthermore recommended that the Committee produce a child-friendly version of the Optional Protocol,¹⁷ which could be of benefit to both children and adults seeking to bring claims on their behalf.

6. Utilise the DGD to clarify the meaning of certain articles of the CRC in the context of children in alternative care and access to justice. For example, what does a review under Article 25 entail; can, and if so how and when could a child request a review? What safeguards need to be in place to guarantee that a child can make a request for a review (whether this be periodic

¹⁶ See e.g. in the context of migration: P. Ceriani Cernadas, *Communication 16/2017: A.L. v. Spain et. al.*, Leiden Children's Rights Observatory, Case Note 2020/2, 18 May 2020 available at: <https://childrensrightsobservatory.nl/case-notes/casenote2020-2>

¹⁷ See e.g. Spronk, (2014) *The right to health of the child: an analytical exploration of the international normative framework*. Intersentia, Cambridge, UK 269. Also see Child Rights Connect's resources for children relating to OPIC: <https://opic.childrightsconnect.org/resources-for-children/>.

or spontaneous)? Although Article 25 provides for periodic review of alternative care, some states already empower children to initiate a review at any time.¹⁸

7. Encourage academics and civil society to conduct further research towards conceptualising and contextualising the concept of access to justice for children in alternative care. For example, researching the perceptions of children in alternative care towards justice systems and ‘effective’ remedies that find their basis in children’s rights.

8. Ensure States Parties must know their **responsibilities in times of emergency, including pandemics** and that during such times, vulnerable children such as those in alternative care continue to need to access justice.¹⁹

¹⁸ E.g. In Victoria, Australia section 333 of the *Children, Youth and Families Act* (2005) empowers children or parents to apply to a tribunal for the review of a case plan or any other decision made by the relevant child protection authority concerning the child. See also the submission of Jaap Doek & Ton Liefaard on article 25 CRC in preparation of this DGD (submitted separately).

The Guidelines on Alternative Care recommend that removal decisions be regularly reviewed (para. 14).

¹⁹ See, UNICEF, *Access to Justice for Children in the era of COVID-19: Learnings from the Field*, New York, UNICEF, 2020: <https://www.unicef.org/media/92251/file/Access-to-Justice-COVID-19-Field-Notes-2021.pdf>. See also: <https://data.unicef.org/resources/the-impact-of-covid-19-on-childrens-access-to-justice/>.