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Can the Child Speak? Possibilities of Direct Communication with the UN Committee on the Rights of the Child

¿Puede el niño hablar? Posibilidades de comunicación directa con el Comité de las Naciones Unidas sobre los Derechos del Niño

Peut-il l'enfant parler? Possibilités de communication directe avec le Comité des Nations Unies Concernant les Droits de l'Enfant

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SUMARY: I. *Introduction.* II. *The Committee's System and its Contributions for the International Human Rights Law.* III. *The Challenges for the Individual Scope as Subject to International Law.* IV. *Can a Child Speak? The International Active Subjectivity of the Child on the Committee on the UN Children's Rights and Criticism on the Current System.* V. *Conclusion.* VI. *References.*

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RESUMEN: El presente artículo tiene como objetivo analizar la subjetividad activa del niño en el ámbito del Comité de las Naciones Unidas sobre los Derechos del Niño. De este modo, será discutida la posición de subalternidad del niño como sujeto de la sociedad, a partir de la visión teórica de Gayatri Spivak y de algunos otros autores que abarcan el debate acerca de la constitución del sujeto, buscando profundizar el principio de “voz y participación”. Así, serán presentados los mecanismos y actividades de los trabajos en equipo e de las sesiones del Comité relacionadas a las nuevas posibilidades con la llegada del Protocolo Facultativo de 2014. En este sentido, las discusiones serán abordadas relacionadas con el derecho internacional y los derechos del niño en el sistema internacional global de protección de los derechos humanos.

Palabras clave: derecho internacional de los derechos humanos, subjetividad activa, derechos del niño, Organización de las Naciones Unidas (ONU), subalternidad.

ABSTRACT: This present article has the objective to analyze the child's active subjectivity under the UN Committee on the Rights of the Child. In this, it will be discussed the position of the child's subalternity as a subject in the society, based on Gayatri Spivak's theoretical view and some other authors that brings out a debate of the subject's constitution, seeking to further the principle of “voice and participation”. Therefore, mechanisms and activities from team works and Committee sessions will be presented related to new possibilities in the advent of the “Optional Protocol of 2014”. In this respect, discussions will be addressed related to international law and the children's rights in the international and universal system of protection of human rights.

Keywords: international law of human rights, active subjectivity, child's rights, United Nations (UN), subalternity.

RÉSUMÉ: Cette article cherche à analyser la subjectivité active de l'enfant dans le cadre du Comité des Nations Unies en ce qui concerne les Droits de l'enfant. Pour cela, on discutera la position de subalternité de l'enfant autant que sujet dans la société à partir du regard théorique de Gayatri Spivak et d'autres auteurs qui débattent de la constitution du sujet à fin d'approfondir le principe de “voix et participation”. Ainsi, on présentera les mécanismes et les activités des travaux d'équipe et des séances du Comité portant sur les nouvelles possibilités à partir de l'avènement du Protocole Facultatif de 2014. À ce propos, les discussions développées sont mises en rapport avec le droit international et les droits de l'enfant dans le système international global de protection des droits humains.

Mots-clés: droit international des droits de l'homme, subjectivité active, droits de l'enfant, Organisation des Nations Unies (ONU), subalternité.

I. INTRODUCTION

The Committee on the Rights of the Child was created with the establishment of the Convention on the Rights of the Child in 1989; its institution is known as an improvement because it adds the idea of the States' obligation regarding the implementation of public policies towards the child population, acting as a channel of communication between what is being done by the state in relation to the compliance of the pre-established rights in the Convention.¹

The main activity of the Committee is the evaluation of reports as well as the interpretation of the regulatory text, such as the Convention on the Rights of the Child. This competence is favorable to expanding and spreading the literature on the International Human Rights Law and, in a more specific way, the child's rights in the international sphere.

The reality discussed so far is one of submission, reception and analysis of reports from the States, therefore, there is a new way, coming from the child's direct communication, with the use of the "Optional Protocol of 2014". This possibility resists to the idea of the State being the only subject of the International Law (holder of rights and liabilities within the international community, *par excellence*)² along with international organizations; in a pluralistic world,³ the individual is, also, a subject of International Law.⁴

The discussion that will be analyzed in this study corresponds to the purpose of the child's "voice and participation" in the UN Committee on the

¹ Monaco, Gustavo Ferraz C., *A proteção da criança no cenário internacional*, Belo Horizonte, Del Rey, 2005.

² Notion held after "Peace of Westphalia", in 1648, when the reasoning of the Interdependent State is inaugurated, with no superior authority. This was a current perspective until the end of Second World War (1939-1945), having the state-centered view missed place to the human rights internationalization concept and, therefore, the individual gains a new status, denying almost exclusiveness the state as a subject.

³ Categorization given to a world with new actors and international law subjects looking towards a recognition and protection of human rights.

⁴ Ribeiro, Dilton Rocha F., "Indivíduos como sujeitos de direito internacional em um mundo pluralista", *Cadernos de Ciências Sociais Aplicadas*, Vitória da Conquista, n. 13, 2013, p. 33-58, available at: <http://periodicos.uesb.br/index.php/cadernosdeciencias/article/viewFile/1974/1712>, access in January 10th, 2017.

Rights of the Child, emerging from the perception that man,⁵ in addition to States and international organizations, has also the status as a subject of International Law.

It is important to point out the new perspectives about the individual regarding international conflict solutions because it will bring legitimacy to others. This individual will be viewed according to his abilities, obligations and rights in the international law as well as his subjectivity. As a result, there will be a change of subalternity from the woman⁶ perspective to a child perspective, bearing in mind the adult-centered conditioning discourse.⁷ This perception is based on Gayatri Spivak's ideas whose article's title is a paraphrase of the book's title "Can the subaltern speak?".

The article's main objective is discussing the new possibilities created from the international legislation's perspective and its implications for the child and the human rights universal protection, therefore there will be a way out of their subalternity.

II. THE COMMITTEE'S SYSTEM AND ITS CONTRIBUTIONS FOR THE INTERNATIONAL HUMAN RIGHTS LAW

The election of the committee as a space for the execution of mechanisms to monitor the affirmation of rights and guarantees of conventional root is a tendency on international legal instruments like the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, etc. This is part of the most active movement for control and observation of the actions of states, which begun in the 1960s. The nature of this mechanism is conventional, that is, it is linked to a Convention, from its genesis (legal prediction), its field of action and its addressees —the signatory States and

⁵ Use of the word "man" to indicate man as an individual, human being. There is no intention of excluding any gender.

⁶ This category "woman" and "child" will follow throughout the article.

⁷ A word used to denote the vision in which the adult and his actions are the center of society, monopolizing and excluding the child. Prout, Alan, "Participação, políticas e as condições da infância em mudanças", in Müller, Fernanda, *Infância em perspectiva: políticas, pesquisas e instituições*, São Paulo, Cortez, 2010, p. 21-41.

their people—, in general, it does not collide with States Parties, because it avoids the “exit” from this Convention. There is a search for the implementation of specific guarantees envisaged in the norm, and therefore its attributions are limited to this, which comes to restrict the possibilities of expanding its operation and the matter of interest.⁸

Unconventional mechanisms, on the other hand, include a multivariate nature of issues, and have the power to conflict with States more forcefully, in view of the fact that there is no link with the contracting state will of a particular Convention. Its legal basis for action, in turn, comes from the Resolutions of the UN’s system organs; its choice may be based on “the absence of specific conventions on the violated right, in the absence of ratification by the violating State... In the existence of a strong public opinion favorable to the adoption of measures to combat violation”.⁹

Although there are such differentiations and the inclination to point to non-conventional mechanisms as better or more effective,¹⁰ conventional ones also have their place of relevance in the international system. The committees, institutions of conventional mechanism, play an important role for the observance of the Conventions’ provision. The UN Committee on the Rights of the Child is composed of eighteen independent experts,¹¹ that is, people who have formal and practical knowledge about the subjects concer-

⁸ Piovesan, Flávia, *Direitos Humanos e Direito Constitucional Internacional*, São Paulo, Max Limonad, 2002.

⁹ *Ibidem*, p. 217.

¹⁰ Steiner, Henry J. and Alston, Philip, *International Human Rights in Context. Law Politics Morals*, 2nd. ed., Oxford, Oxford University Press, 2000.

¹¹ These are divided into working groups and subgroups according to their thematic affinities and approach to the cause, see United Nations High Commissioner for Human Rights, “Working Methods of Committee on the Rights of Child”, available at: <http://www.ohchr.org/EN/HRBodies/CRC/Pages/WorkingMethods.aspx>, access in 06 January 2017.

Nowadays (until January 2017): Amal Salman Aldoseri, from Bahrain; Suzanne Aho Assouma, from Togo; Hynd Ayoubi Idrissi, from Morocco; Jorge Cardona Llorens, from Spain; Bernard Gastaud, from Monaco; Peter Gurán, from Slovakia; Olga A. Khazova, from Russia; Hatem Kotrane, from Tunisia; Gehad Madi, from Egypt; Benyam Dawit Mezmur, from Ethiopia; Yasmeen Muhamad Shariff, from Malaysia; Clarence Nelson, from Samoa; Wanderlino Nogueira Neto, from Brazil; Sara de Jesús Oviedo Fierro, from Ecuador; Maria Rita Parsi, from Italy; José Angel Rodríguez Reyes, from Venezuela; Kirsten Sandeberg (Relator), from Norway; and, Renate Winter, from Austria. United Nations High Commissioner for Human Rights, “Membership of Committee on the Rights of Child”, available at: <http://www.ohchr.org/EN/HRBodies/CRC/Pages/Membership.aspx>, access on 06 Jan. 2017

ning the universes of childhood, without any link to governments or institutions that may bias the analysis of the documents and the positioning on the recommendations. Among these, one will be the Rapporteur, currently Kirsten Sandeberg,¹² who plays a role of directly questioning the state delegation under evaluation, initiating a debate around the information that was made available and the doubts that arose between the members of the organ. The committee's system is thus a step forward in the process of affirming human rights on a global scale, since it is a space for dialogue between States, scholars on the subject (members of the Committee), international and non-governmental organizations and civil society.

III. THE CHALLENGES FOR THE INDIVIDUAL SCOPE AS SUBJECT TO INTERNATIONAL LAW

Until the late nineteenth and early twentieth centuries, there was a predominance of the view that the state would be an end in itself, it would not need other actors to perform functions and propose international standards and to meet them. After this period, other actors enter this scene and the personification of the State as the only subject of International Law was overcome.¹³

This new step is given more substantially by the proliferation of international organizations, that is, when legal persons, with supranational qualities who have their own permanent organs, have rights and obligations. The creation of these institutions in the current form derives from the commodities free trade agreement in Canada and Europe in the nineteenth century; then with customs unions and trade cooperation plans in the twentieth century, which flowed into the contemporary models of organizations.¹⁴

The great favoring for the recognition of other subjects is perceived in the foundation of the United Nations, whose purpose is to ensure peace and in-

¹² Profesor from the International Law Department of the University of Oslo, Norway.

¹³ Cançado Trindade, Antônio A., "A personalidade e capacidade jurídicas do indivíduo como sujeito de direito internacional" In Annoni, D. (org.), *Os novos conceitos do novo direito Internacional. Cidadania, democracia e direitos humanos*, Rio de Janeiro, América Jurídica, 2002, p. 1-32.

¹⁴ De Oliveira, Odete M., *Relações Internacionais. Estudos de introdução*, 2a. ed. Curitiba, Juruá, 2011.

ternational security¹⁵ and, consequently, give greater visibility to humanistic and humanitarian causes. For three centuries, the individual was already a point of interest in the area of International Humanitarian Law, even before the creation of the International Committee of the Red Cross (ICRC) and was reaffirmed when it was founded.¹⁶

It is therefore a matter of opening the way for the understanding of the individual in this perspective of subject, to the efforts in the fields of International Human Rights Law and International Humanitarian Law,¹⁷ men and women are subject to rights both domestically and internationally.¹⁸ However, there is still resistance to this concept, given that human beings do not have some of the qualities of States.¹⁹

Through such a movement of human rights affirmation, there is a tendency to overcome this tension among the recognition of this category, although one should bear in mind that “this possibility of participation of the individual is only a transference of the exercise of a right, which, in practice, continues in the ownership of the State”.²⁰ The differences between the sub-

¹⁵ The literature shows that international security and the guarantee of defense strategies would be the main points of the UN’s creation proposal and not the elevation of the common goods to humanity, properly. One possibility would be to verify this in the very wording of the Charter of the United Nations when it does not define “human rights” —there is recognition of these as universal and this is a positive point to highlight— because these would be accessories rather than the main issue, although expressly delegated to the General Assembly studies and debates on development, well-being and ECOSOC. See Belli, B., *A politização dos Direitos Humanos: O Conselho dos Direitos Humanos das Nações Unidas e as Resoluções sobre países*, São Paulo, Perspectiva, 2009.

¹⁶ Bory, Françoise, *Génesis y desarrollo del derecho internacional humanitario*, Ginebra, Comité Internacional de la Cruz Roja, 1982.

¹⁷ On the divisions, complements and similarities between international law of human rights law (ILHR) and international humanitarian law (IHL), the following theories are presented: I) integrationist theory: IHL is a derivation, a subdivision of the IHRL, being linked and inseparable; II) separatist theory: they are isolated areas, according to their purpose and origin, since IHL arises and is applied in a situation of war and the IHRL to normalize in times of peace, having no communication between them; III) complementarity theory: it recognizes the particularities of the two and autonomy, but it shows that the end is the same, that is, human protection, therefore, do not compete or do not cancel, because they have common objectives. He is enrolled in this last dissertation. See Thürer, Daniel, *International Humanitarian Law: Theory, Practice, Context*, The Hague, The Hague Academy of International Law-Brill, 2011.

¹⁸ Cançado Trindade, Antônio A., *op. cit.*

¹⁹ For example, sovereignty and the celebration of Treaties.

²⁰ Bicalho, Luis F., “A personalidade jurídica do sujeito: a realidade em face da fundamentação positivista”, *Revista Jurídica da Presidência*, vol. 14, n. 103, Brasília, 2012, p. 444, available

jects are sensitive and acceptable because they are the capacities and functions of states, organizations and individuals.

This idea of man as a subject of International Law is reaffirmed by the steps taken since the Universal Declaration of Human Rights of 1948, with the right to access to justice, and its procedural capacity is recognized. This perspective must be interpreted in judicial and non-judicial terms (as in the case of committees), since this would be the very genesis of the international litigation of human rights.²¹

The access to international persons for the protection and monitoring of human rights by individuals is based on two assumptions: I) having rights and obligations established by international law, and II) and having the possibility of having sanctions by international jurisdiction, meeting these two requirements the persons would be recognized as subjects of international law.²²

This possibility of recognition reveals itself as a revolution in the legal environment, not only in the internationalist environment, but in general, since it translates into a contribution to the affirmation of human rights.²³ It should be emphasized that in the regional protection systems, that is, in the Inter-American (Inter-American Court of Human Rights and the Inter-American Commission on Human Rights), the European (Court of Human Rights and the European Commission on Human Rights) and the African (the African Commission on Human Rights and Peoples' Rights and the Court of Human Rights)²⁴ contexts, this possibility of individual participa-

at <https://revistajuridica.presidencia.gov.br/index.php/saj/article/viewFile/99/91>, access on 10 Jan. 2017.

²¹ Cançado Trindade, Antônio A., *op. cit.*

²² *Idem.*

²³ In this sense, it is not enough simply to enact, to enact norms containing mentions of human rights, but to seek their effectiveness in society, see Bobbio, Norberto, *L'età dei Diritti*, Torino, Einaudi editore, 2014; Carrillo Salcedo, Juan A., "Algunas reflexiones sobre la subjetividad internacional del individuo y el proceso de humanización del derecho internacional", in Leão, Renato, *Os rumos do direito internacional dos direitos humanos: ensaios em homenagem ao professor Antônio Augusto Cançado Trindade*, t. 1, Porto Alegre, Sérgio Antônio Fabris, 2005, p. 277-338.

²⁴ Concerning individual petitions and their peculiarities in the African human rights protection system: "A relatively complex problem concerns the acceptance by the African Commission of the known «individual petitions». The text of the Banjul Charter, unlike what occurs in the inter-American system, does not make explicit (express) the possibility for individuals to petition the African Commission. Two arts. 47-54, the African Charter regulates the possibility for a State to sue another State before the Commission. Two arts. 55-59 —Section entitled

tion is more consolidated than in the universal protection system. This is due to the proposal of approximation of the reality of the people who compose the system to propose more feasible solutions and reparation to the victims.

However, in order for this advance to continue and to be rooted in the universal system, it is necessary for States to make this access possible for their people; in this way, the argument is that there should be an acceptance of the substantive conventional obligations and mechanisms for monitoring, controlling and preventing violations.²⁵

Under the Peace of Westphalia in 1648, there is proximity of sovereignties, with monopoly of ownership of states and individuals as secondary figures subject to their protection and will. The exclusion of man as recipient and the human condition as the genesis for the order and its application.²⁶

Such concentration around the States did not prevent a number of cases of deliberate violence from occurring; on the contrary, the State itself sponsored the violation either by omission or commission of acts against the population (in its territory or in others). Evidently, examples can be raised, such as the “Armenian genocide” (1915) and the two great wars (in addition to violence during the Stalinist dictatorship after World War II in the Soviet Union), whose negative experience with totalitarianism led to a critical reflection on the conception of the individual within the international protection system.

The new dimension given to the ownership of rights, in which the international order based on sovereignty gives space for human solidarity, unveils new possibilities for the individual to enter the international community.²⁷ The Universal Declaration of Human Rights (UDHR) of 1948, as stated

led «Other communications»— the Banjul Charter merely states that other communications «which do not emanate from the States Parties to this Charter» may be sent to the Secretary of the Commission, who shall make a list of communications received and, before each session, shall inform the members of the Commission, who may take cognizance of its content «and submit it to the Commission» (article 55, paragraph 1)”. Mazzuoli, Valério de Oliveira, *Os sistemas regionais de proteção dos direitos humanos: uma análise comparativa dos sistemas interamericano, europeu e africano*, São Paulo, RT, 2011, p. 87 and 88.

²⁵ Cançado Trindade, Antônio A., *op. cit.*

²⁶ Cançado Trindade, Antônio A., “Las cláusulas pétreas de la protección internacional del ser humano: El acceso directo a la justicia internacional y la intangibilidad de la jurisdicción obligatoria de los tribunales internacionales de derechos humanos”, in *O Direito Internacional em um mundo em transformação: ensaios, 1976-2001*, Rio de Janeiro, Renovar, 2002, p. 537-626.

²⁷ *Idem.*

above, boosted access to international justice and with it a re-reading of contemporary international law itself.

In the body of the thirty UDHR articles one does not intend to exhaust all recognized rights and freedoms, since this document is a gateway to new perceptions and interpretations of human rights. This opens up the possibility for other instruments and mechanisms if they turn more specifically to the issues such as the mentioned committees and their respective Conventions. This set in the 1948 Declaration serves as support for future normative texts at both the international (universal and regional) and domestic levels.²⁸

Thus, the doctrine of the reserved domain of States or of exclusive national competence is eclipsed (the protection of human rights influences and distances the idea of the justification of violations by the factor of sovereignty)²⁹ by the idea of the individual as subject of international law, that is, both from the point of view of standardization in solemn documents and regarding the procedural capacity. The latter surrounds the subject's subjectivity and will be better explained at this moment, within the useful parts for the object of this study.

The demand for implementation of human rights protection is now of great relevance. The face of this new dimension of International Law drawn up so far is to shorten the distance between the diplomatic channel (intermediary of the State) and the list of rights, which are asserted in the Conventions.³⁰ Thus, the recognized right to represent a claim before an international court or before non-contentious organs becomes an expression of what was held by the founders of the law of nations (terminology used before contemporary international law): the concentric position of the human being.

The recognition of the right of individual petition alongside the understanding that States have an objective obligation to protect human rights is

²⁸ Annoni, Danielle, *Direitos humanos e acesso à justiça no direito internacional: Responsabilidade internacional do Estado*, Curitiba, Juruá, 2003.

²⁹ Taiar, Rogeiro, *Direito internacional dos direitos humanos: Uma discussão sobre a relativização da soberania face à efetivação da proteção internacional dos direitos humanos* (doctoral thesis), Universidade de São Paulo, 2009.

³⁰ See Pinto, Mónica, "Apuntes sobre la subjetividad internacional del individuo", in Leão, Renato, *Os rumos do direito internacional dos direitos humanos: ensaios em homenagem ao professor Antônio Augusto Cançado Trindade*, t. 1, Porto Alegre, Sérgio Antônio Fabris, 2005, p. 323-338.

emancipatory to man, since it enables him to have a voice in the face of violations, both at the heart of conventional mechanisms and in non conventional ones.³¹ It is thus an active international subjectivity, that is, the procedural capacity to sue in its own behalf for some violation of law provided for in the Convention or in resolutions.

Access to justice is the assured right of others, because it is the channel of materialization of these;³² in the international arena, whose access by petition (similar to what occurs in national jurisdictions) in the international courts and which can generate the accountability of the violating State, and access to non-jurisdictional control.

The latter is called the petitions system and is seen in Conventions (it is worth noting that the focus is the universal system of protection) that create its monitoring body, that is, the committee. This institution, as discussed above, analyzes the activities of States through the reports; with this system, the petitions processing also examines the state's conduct, but in a way that is closer to the victims, credible, which allows for the issuance of recommendations with more consistency and which can meet the reality of the subjects with violated rights.

Despite this possible approximation of man to international bodies, there is a chain of procedures and stages, which in any case makes international justice more inaccessible than domestic justice.³³ However, despite these bureaucratic obstacles, it is necessary to strengthen the culture of conducting individual demands before international jurisdictional and non-jurisdictional bodies.

In the first section of this article there is a demonstration of conventional non-contentious mechanisms, their flaws and positive points; it can be seen that, despite the problems pointed out, there is more positivity than otherwise. We argue that when it is possible for the individual, as a subject of international law, to have possibilities of voice in this space.

In the next topic the discussion will be held around a specific subject: the child. This will address the constitution and representation of the child and then the procedures of direct communication of this in the UN Committee on the Rights of the Child.

³¹ Cançado Trindade, Antônio A., "Las cláusulas pétreas...", *cit.*

³² Annoni, Daniel, *op. cit.*

³³ Pinto, Mónica, *op. cit.*

IV. CAN A CHILD SPEAK? THE INTERNATIONAL ACTIVE SUBJECTIVITY OF THE CHILD ON THE COMMITTEE ON THE UN CHILDREN'S RIGHTS AND CRITICISM ON THE CURRENT SYSTEM

The process of pluralization of rights in the system of protection of rights agenda brought the need for recognition of categories other than the state as to be also subjects. In this way of allocating the individual as subject of law, there is simultaneously the tendency to embrace the peculiarities and specifications of certain groups, since those who have particular rights are also victimized by certain violence.³⁴

The aim is to assign to these people the insertion in the international system of protection so that their rights have a special outline in the face of the conditions of vulnerability and the need for specialized treatment in normative texts, in international jurisprudence, by intergovernmental and state institutions. Such a method does not present itself as discriminatory; on the contrary, it sees to equalize the positions of disadvantages to the detriment of those that are of privilege.

This discussion about the minority groups is done, due to the urgency of visibility of those that compose these categories; in this context, we cite the child as a marginalized subject in social relations, subject to the conditioning factors of an adult-centered³⁵ society. In this sense, challenges are raised so that the child leaves this place of subjection to the Other³⁶ and becomes subject in its fullness (with its subjectivities, rights and obligations).

The constitution of the status of the subject rests on the “discovery of subjectivity” in the dimensions of everyday life, of the forms of production and of private life, so there are new ways of perceiving them as individuals and their interaction with society. The child goes through these

³⁴ Piovesan, Flávia, “Sistema internacional de proteção dos direitos humanos: inovações, avanços e desafios contemporâneos”, in Menezes, Wagner, *Direito Internacional contemporâneo*, Curitiba, Juruá, 2003.

³⁵ Prout, Alan, *The future of childhood*, New York, RoutledgeFalmer, 2005.

³⁶ The word in this case is initialed with a capital letter, since it indicates the process of completion between the opposing poles, which cancels and excludes one at the expense of another.

emergency practices as a subject when he/she gains prominence in the collective body of the lineage.³⁷

The notion of subject, especially the child, is linked to the norms of civility, coexistence and expression of feelings. The orbit of these control characters is that of conforming with the established social patterns, thus, submitted to the interventions, since it categorizes the conduct, the way of acting and of thinking, being, therefore, “subject of responsibility and obligations, subject of law, Singular subject, the *homo rationalis* is placed as object of study and intervention”.³⁸ The genesis of such placements is that, as already exposed in previous lines, the child must be shaped to be full as an adult, for this is the stage of human completeness.

The proper place for the (con) formation of the child to be an adult would be through teaching in schools, because this imposes the grammar of civility; in this model there is a planning of behaviors, these being inserted in a social order, of common values that bring new meanings to the child.³⁹

In this sense, educating was not intended to teach,⁴⁰ *par excellence*, but was a civilizing mission to the uncivilized group: the child. The wild child, an image constructed from the view that they are practically free of conditions for social coexistence, and school is the effective means to put appropriate set of rules for the “future civilized man”. Childhood is normalized; the child is given the subject status.

However, this vision is prospective, it is that of training for tomorrow and not for the child itself; this is a symbolic act coming from a process of denial of child’s condition as a subject by adult centrism.⁴¹ The school brought, together with modernity, a space of separation between the child and the adult, because the child cannot exercise its will, being constantly controlled and put as a citizen of the future.⁴²

³⁷ Smolka, A. L. B., “Estatuto do sujeito, desenvolvimento humano e teorização sobre a criança”, in Freitas, M. C. and Kuhlmann Jr., M., *Os intelectuais da história da infância*, São Paulo, Cortez, 2002.

³⁸ *Ibidem*, p. 104.

³⁹ *Idem*.

⁴⁰ Ariès, P., *L'enfant et la Vie familiale sous l'Ancien Régime*, Paris, Editions du Seuil, 1975.

⁴¹ Childhood, in this sense, “owes its difference not to the absence of characteristics (presumably) of the adult human being, but to the presence of other distinctive features”. See Sarmento, Manuel, “Visibilidade social e estudo da infância”, in Vasconcellos, V. M. R. and Sarmento, Manuel (orgs.), *Infância (in)visível*, Araraquara, Junqueira & Martin, 2007, p. 35.

⁴² *Idem*.

This is in line with the term “infant”, the one who does not speak, who is in silence,⁴³ given that it continues to be lateralized, marginalized. The title of this section and also of this article is a paraphrase of Gayatri C. Spivak’s “Can the subaltern speak?” (2014), an Indian teacher who gives a critical reading of the subalternity in her country. The “voice” of the child⁴⁴ subject and the female subject (figure analyzed by the author) is narrowed down to the understanding that this is not a biological, but a political and, therefore, emancipatory act.⁴⁵

The erasure of the Other’s subjectivity can be overcome with openness to his speech, which is not biological, but political and emancipatory in its turn. The subaltern subject for the author has a locus: the Indian woman, especially the one who participates in the *sati*, which is an ancient process of self-immolation, in which the woman throws herself on the pyre with her husband’s dead body. This event is conceived by the English as absurd and thus is criminalized. It is worth noting that this process clearly demonstrates the female subordination to the man in India, and because it is compulsory, the woman is subaltern not only in life, but also after the death. With the trivialization of the conduct, there is a double subordination, I) by the man and other II) by the colonizer.⁴⁶

In this sense, considering the proviso made by Spivak, who states that not every subject is conceived as subordinate, an analytical shift has been made in this article to the subordinate condition of the child in relation to the equally imperative, sometimes adult-centered, discourse.

In the search for the dialogical space, in which the subject speaks without the intervention of third parties (relationship of “speaking by” and “re-presenting”) and is heard, surpassing the condition of subordination, the same is true for the voice of child. As placed, being subject, brings the influxes of the adult universe and this is the model followed here; however, in the perspective of childhood studies, especially the Sociology of Childhood and

⁴³ Gomes, Ana María, “Outras crianças, outras infâncias?”, in Sarmento, Manuel and Gouveia, M. C. S. (orgs.), *Estudos da infância: Educação e práticas sociais*, Petrópolis, Vozes, 2008, p. 93.

⁴⁴ Evidence of the subordination of the child: “The existence of a group that is socially subordinate due to its age condition is, therefore, essential to the definition of childhood. There is childhood insofar as historically the age category was constructed as difference and that this difference generates inequality”, Manuel Sarmento.

⁴⁵ Spivak, Gayatri C., *Can the subaltern speak?*, New York, Columbia University Press, 2010.

⁴⁶ *Idem*.

confluence with Psychology, through the constructivist approach,⁴⁷ the child jumps the obstacles and becomes subject, producer of cultures⁴⁸ and of their universe.

Starting from the last illation, the child as the protagonist of its own set of meaning and signifiers, an active participant in society and also the builder of social⁴⁹ structures; being categorized as subject, in this sociological sense, also becomes visible through the Law. With this paradigmatic modification of reasoning around childhood (its conception as social construction) is the design of a new form of expression of citizenship and child subject in the 1989 Convention on the Rights of the Child.⁵⁰

This new place brings with it a multitude of representations of the child, with fragmentations and ambiguities. However, the global place achieved becomes more strongly influenced by the international community and puts the interest of the child (and for the childhood) on the international level, it should be emphasized that “social reality does not transform itself by simple effect of publication of legal rules; inequalities and discrimination against (and among) children are based on the social structure”.⁵¹

Once recognized as a subject in the normative sphere since 1989 with the Convention, the child becomes part of the new actors in the international order and this crystallizes the possibility of the individual being a petitioner in the international organs of monitoring mechanisms. However, while the primary function of these mechanisms is to prevent and to combat the violation of human rights, some Conventions do not recognize the human being’s ability to actively participate as a claimant.

Prior to the issuance by the UN General Assembly of the Optional Protocol on Direct Communication (called the “Optional Protocol of 2014”), only States parties could dialogue directly with the Committee on the Rights of the Child through reports. Criticisms of non-contemplation of human beings in these institutions were made in the sections above; not giving voice

⁴⁷ Corsaro, William A., *The Sociology of Childhood*, Thousand Oaks, Pine Forge Press, 2005.

⁴⁸ Cohn, Clarice, *Antropologia da criança*, Rio de Janeiro, Zahar, 2005.

⁴⁹ Corsaro, William A., *op. cit.*

⁵⁰ Carmona Luque, María del Rosario, *La Convención sobre los Derechos del Niño: Instrumento de progresividad en el derecho internacional de los derechos humanos*, Madrid, Dykinson, 2011.

⁵¹ Sarmento, Manuel and Pinto, Manuel (orgs.), “As crianças e a infância: definindo conceitos, delimitando o campo”, in *As crianças: Conceitos e identidades*, Braga, Universidade do Minho, 1997, p. 9-30.

to the individual breaks the path of affirmation and expansion of International Law of Human Rights.

Not placing the children of States Parties as entitled to communicate the conduct (omissive or commissive) by their countries in the Committee, while the Convention is based on “The best interest of the child” and “the voice and participation”, generates an inconsistency and this is part of the ambiguities of the document, which limits and favors the development of childhood.

New debates state that the child’s voice be pleaded —punctuated in art. 12 of the CRC/ 1989— in December 2011, the Optional Protocol to the Convention on the Rights of the Child is signed (effective as of April 14th, 2014). This measure extends the possibilities for the realization of the very purpose of the Convention and its guiding principles. This document presents 24 (twenty-four) articles whose wording reaffirms the objectives and explains the procedures for access of the interested parties and the *modus operandi* of its members.

The first point to be highlighted who could show in the active pole of this communication relationship with the Committee; as already mentioned, individuals are contemplated in this legal instrument, however, they must have their States bound to this document⁵². By fulfilling this requirement of legitimacy, the child, also conceived as a possible claimant, can report the violations incurred.

This procedure must be carried out in a manner that does not involve the use of abusive, violent, degrading means that force the communication or are applied after the report, and the State is given the duty of care and prevention to its children. This is based on the principles of respect for the child’s opinion, the right to life (moral, physical and psychological integrity) and development and, of course, the best interest of the child.⁵³

According to the child’s maturity, he/she may make the communication him/herself or, if there is any impediment of this nature (serious weaknesses or little age), a third party may do so, presenting the consent of the violated subject. In addition, any practice of manipulation or persuasion of the interested party⁵⁴ to act is prohibited, and there must be free will.

⁵² Art.1, 3.

⁵³ Torrecuadrada García-Lozano, Soledad, “El interés superior del niño”, *Anuario Mexicano de Derecho Internacional*, vol. XVI, 2016, Jan. 2016, available at: <https://revistas.juridicas.unam.mx/index.php/derecho-internacional/article/view/523/12413>.

⁵⁴ Arts. 4 and 5 of the Optional Protocol in 2014.

The rules of inadmissibility (underlined) are set out in art. 7 of the Protocol and some will be pinched and criticized here:

- I) Anonymity: If the child, in his/her state of vulnerability aggravated by the situations involved, informs the name, he/she may be the victim of persecution by the violating agents (even if such information is guarded by members of the Committee);
- II) Whether the matter has already been analyzed or is under review by the Committee or by another international body: It is understood that there is a high volume of reports, many legitimized (all States that are party to the 1989 Convention) and few formal sessions (three times a year in a four-week period), but not listening to a complaint is a violation of the principle of the child's best interest. However costly and time-consuming, and the right to be analyzed (formal analysis) is examined, observing the cases themselves would be pertinent, since this means of containment may render more effective policies of the States impossible; and,
- III) It is presented without exhausting all domestic remedies available (from the States themselves): This proviso is relevant, given the preference for domestic jurisdiction,⁵⁵ however, the institutional environment of the State should be observed, whether or not there are conditions for developing a transparent case investigation work. In art. 7 (e), it is pointed out that there are exceptions if there is an extension of the internal remedy or if it is probable that the reparation is ineffective, both possibilities are flawed because they are largely subjective and therefore imprecise, after all, what would be the reasonable length of internal procedures? If it is in accordance with domestic law, would this be a fair time in the face of the harm done and the consequences to the child? And what is the parameter to assert the probability of an ineffective restorative state action? If the State is the violating agent, how to affirm that the decision is not biased and that it is the most appropriate for the case? Such inquiries are in line with the international system's obstacles to responding to the victims of human rights violations,⁵⁶ and

⁵⁵ The nature of the Committee is non-contentious, so two jurisdictions are not strictly speaking.

⁵⁶ Annoni, Danielle, *op. cit.*

its functioning is criticized for being an alien entity and awaiting the national measures taken.

In consultation with Committee deliberation⁵⁷ CRC/C/66/2, adopted at its sixty-sixth session, which deals with working methods for the participation of children in the body, it has been noted that points deserve to be highlighted as negative and positive, as had been done in the normative text above.

The whole procedure occurs with the efforts of the experts divided into groups of works; this is due to the low number of meetings of the Committee during the year, it is in this context that the children are heard and welcome to expose the problems incurred. This sequence of activities should be (presuppositions): transparent, voluntary, respectful, inclusive and adapted to children (with specific adult training and methodology for dealing with children).⁵⁸

The methods of participation seek to optimize the child's abilities and skills, namely: I) communication of the child individually or through NGOs; II) oral presentation during the working group meetings or before the sessions of the Committee; III) private meetings with the Committee's expert members; IV) participation through videoconferences; and V) participation in plenary sessions.

The communication can occur through various audiovisual resources, whether these are drawings, reports, photos, films, provided that they are on the part of the child⁵⁹ (the organ's attempt to observe the principle of voice and participation) or by NGOs that perform functions in the near future of children, what is criticized, therefore, in this possibility, is that it is not the children directly who inform the Committee.

This contact is carried out in advance with the working groups, since in the meantime the information presented in the reports of the States and verified with the NGOs and with the children themselves are analyzed. Prior

⁵⁷ United Nations High Commissioner for Human Rights, "Working Methods for the Participation of Children in the Reporting Process of the Committee on the Rights of the Child", available at: <http://www.ohchr.org/EN/HRBodies/CRC/Pages/WorkingMethods.aspx#a2a>, access in 10 Jan. 2017.

⁵⁸ *Idem*.

⁵⁹ Visibility of the universe of children without crossing the adult. This is relevant because it avoids the presence of external and influential interventions to the opinion of the child.

to the sessions, which occur only three times a year, these checks are carried out so that discussions and “final remarks” are more consistent.

In this format, with the advent of the “Optional Protocol of 2014”, so that issues posed by children are heard without the interference of external audiences to the Committee, only representatives of the organ, NGOs and UNICEF share space with the boys and girls. This is important, since there is, as already said, the presence of adult speech, the facts will, therefore, heard from the perspective of the child.

In order to have small children join the pre-sessional meetings, it is necessary to register with the Committee secretariat. This factor is not conducive to the condition of the child, since he/she is required to have sufficient discernment for writing the letter, referrals (operationalization for the sending) and the support of an adult; this point is flawed because if the situation of the child is precarious, without access to the media, he/she is orphan or was abandoned by the legal guardians, there will be no request to the Committee to hold the meeting.

However, the NGO Child Rights Connect, an institution founded in 1983 to assist in the promotion of the Convention on the Rights of the Child, turns to working together with the Committee on the Rights of the Child;⁶⁰ seeks to better organize mechanisms to support the creation and operation of NGOs for the protection of children. In this way, there is an intermediary between the individual (child), the local institution (national and regional NGOs) and the Committee. This model is criticized here because it would be an indirect way for the child to plead for participation in the meetings, since it involves a previous filtering of the NGO (linked to the United Nations) and of the groups representing children.⁶¹

There is a possibility of having private meetings with Committee members or representatives of their country before the sessions, if children prefer (accompanied by adults who have assisted in the writing of the letter/petition to the Committee for the request for a complaint). There is a misunderstanding of the second possibility, since if the individual is having his rights violated by the State, meeting with government agents may incur pressure, manipulation, inducement to quit or persecution, path to a procedure with addictions or that results in harm to the child.

⁶⁰ Child Rights Connect, available at: <http://www.childrightsconnect.org/about-us/what-we-do/>.

⁶¹ By reading the Resolution of the Committee about its methodology of work, it was interpreted that it would be a set of children that represented another community as a child.

The central point of the Committee's functioning lies under the influence of parliamentary models and child of Korczak,⁶² in listening to the voice of the child when presenting the situations in the meetings, being the children the main interlocutors, because the adults who accompany them are not allowed to speak or express opinions about the dialogue built between the participants. It is the children themselves who explain and interpret, from their point of view, the facts that have occurred. It is the duty of adults to care for the child's well being from the trip to the headquarters in Geneva, Switzerland, as well as during the meetings of the working groups and sessions.

To the detriment of the difficult conditions for the trip to the Committee building, both for the costs of travel and lodging and for the child being placed in war zones, it is possible that dialogue takes place through video-conference or through another technological resource that allows the communication with the members of the body in meetings with the groups or in the plenary sessions.

There is an effort to involve the child, and this procedure was not seen until the advent of the "Optional Protocol 2014". The negative points were listed and criticized, not only in what concerns the procedural part (rules of admissibility and competence of the Committee), but also in what concerns its *modus operandi* (failures and correctness).⁶³

V. CONCLUSION

From the above discussions, we show a reflection of the new possibilities of reaching the global place of the child with regard to participation in the issues that concern him/her. As was already noted, prior to the "Optional Protocol of 2014", the child was only a subject capable of summoning the State, indirectly, through the reports, this quality not being provided to the individual.

⁶² Marangon, A. C. R., *Janusz Korczak, precursor dos direitos da criança: Uma vida entre obras*, São Paulo, UNESP, 2007.

⁶³ All the information given regarding the internal procedures for the participation of the child in the Committee was extracted from Res. CRC/C/66/2, so throughout the pages there were few citations from other references, since the main source analyzed was the mentioned resolution.

This picture illustrates a mismatch with the path to recognition and implementation of rights. From the incongruities cited, not having access to justice is, in fact, a serious violation, because, as said before, this is a right that opens doors for the affirmation of others. It was understood that the monitoring system of the committees meant a step forward in the verification and monitoring of the international community of the States' policies with respect to the guarantees chosen in the conventional texts.

More specifically, the role of observer and examiner of state reports is given to the Committee on the Rights of the Child, which is not sanctioning, but recommendatory, in order to discuss mechanisms for violations. However, there is still a breach, since the voice of the child is not contemplated until 2014.

It was pointed out that there are still challenges to be faced for the recognition of the human being as subject of International Law, but following the perspective of Professor Antônio Augusto Cançado Trindade and others that align with this vision, the individual enters this category. In this way, if there is a correspondence to a process —always continuous— of humanization of International Law, and its voluntarist vocation has broken out.

The child as subject, in this sense, faces, besides this frontier of recognition, that of the adult-centered discourse that places him/her in a position of subordination —by Gayatri Spivak—, therefore, the child does not present the same characteristics of the adult. Such a perception needs to be unbounded and boys and girls have their locus recognized, since they hold their own cultures and qualities, and more so: they can speak and be heard. The moment this Protocol is in force, new formal possibilities are opened up not only for the petitioner's admissibility, but also for the format and methodology of work, and therefore the results for local situations.

One difficulty for the extension of this new facet of the Committee in relation to the participating subjects lies in the resistance to the signature of the Protocol by the States. As it is a recent legal instrument, there is a great deal of quantitative distinction between the number of states parties to the Convention and the Optional Protocols of 2000. Not only that, but the same demands by international bodies for violations have been shown to be a greater exposure of the weaknesses of States.

Therefore, a political pro-activity to mobilize the signature and ratification of the document would be positive for the extension of the culture of "petitioning" individuals to international bodies, thus creating a dialogical

space in which there are no interlocutors (States Emissaries of reports) but rather the children speaking for themselves—in the sense attributed by Spivak—and jumping from their position of subordination.

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