Institutional Flexibility and Evolution: Evidence from the Committee on the Rights of the Child*

Rachel J. Schoner†
Andrea Vilán‡

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Abstract

How do institutional design changes and expanded access affect international organizations? We present a theory of institutional flexibility in which entrepreneurial actors participate in international organizations reflecting two structural conditions: (1) emerging crises and (2) exiting fora for these issues. Flexible international institutions can evolve to reflect these changing conditions when actors explore whether new institutions can help them achieve favorable outcomes. We apply this theory to the Convention on the Rights of the Child, which expanded access to victims of human rights abuse twenty-one years after treaty adopted. We argue that this expanded access altered the topics considered by the organization in unanticipated ways, yet is still in line with the intention and purpose of the institution. We find support for this argument using a variety of qualitative and quantitative evidence, including negotiation archives, ratification patterns, text analysis of Committee on the Rights of the Child documents, and interviews with key actors including former and current Committee expert members, civil society organizations, and lawyers representing victims before the Committee. This research speaks to literatures in international relations regarding institutional design and evolution, regime complexity, and non-state actor access.

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†Assistant Professor, Department of Political Science, Tulane University. rschoner@tulane.edu

‡Assistant Professor, Department of Justice, Law & Criminology, School of Public Affairs, American University. avilan@american.edu

1 Introduction

The Convention on the Rights of the Child (CRC) is a broad, comprehensive treaty covering myriad of issues affecting children's lives including children's right to be heard, to choose a religion, to peacefully assemble, and to an education. The treaty also covers issues including adoption, physical and verbal violence, the preservation of identity, birth registration, health, and an adequate standard of living. Yet since the Committee on the Rights of the Child (the overseeing body to the Convention) began accepting children's legal complaints on violations of their rights, a staggering proportion, nearly three-quarters, have focused on international migration.[1] What explains the overwhelming focus of petitions on this singular issue despite the broad range of issues covered by the treaty?

Motivated by this empirical puzzle, we explore how changing institutional design to expand access to individuals and non-state actors alters international organizations. We develop a theory of institutional flexibility in which entrepreneurial actors participate in international organizations reflecting two structural conditions: (1) emerging crises and (2) existing fora for these issues. Institutional flexibility allows institutions to evolve, sometimes in ways unanticipated by the designers. The structural conditions we highlight—emergent needs coupled with the lack of justice in existing institutions—can push actors to take an entrepreneurial approach, exploring whether new institutions can help them achieve favorable outcomes.

We apply our general theory of institutional flexibility in the human rights regime to the Convention on the Rights of the Child. Broad human rights treaties with individual access are flexible organizations, allowing complaints from victims from a wide range of violations. We argue that the focus on migration in the Committee on the Rights of Child was not anticipated by the designers and States Parties. Opening access to victims of abuse altered the topics considered by the organization in unforeseen ways, putting new issues on

[1] As explained in Schoner and Vilán (2025) in detail, we define "migration" as cross-border movement including asylum and threat of deportation, and excluding custodial battles between parents.

the agenda. We hypothesize that the use of the CRC Optional Protocol on a Communications Procedure (OPIC) responds to the emergence of new crises and individuals' lack of access to justice in other fora, including domestic courts, regional human rights courts, and other treaties specifically focused on migration.

We develop theoretical expectations consistent with this argument and test it with a variety of qualitative and quantitative evidence. First, if the migration focus of the petitions was unanticipated, we expect a difference between the intention of designers and the usage of the institution. Second, we expect entrepreneurial litigators to respond to emergent needs and lack of justice at other institutions by creatively making use of the new broad access offered. Lastly, we expect to find that the creative usage also changes the broader institution.

We use data from *travaux préparatoires*, elite interviews, ratification patterns, and text analysis of UN committee documents and find evidence supporting our expectations. We study the archival evidence of the negotiations of the CRC OPIC at the United Nations and find no evidence that the negotiators expected to receive petitions on migration. Instead, our analysis reveals that debates were dominated by procedural concerns rather than substantive issues. To complement this qualitative data, we interview key personnel involved in the negotiation process, as well as former and current CRC Committee members and staff, to reconstruct the negotiation process. These data shows that when specific rights and issues were of concern, migration was not one of them. Moreover, if State Parties did not foresee how the OPIC would be used in migration cases, we would expect to see states that receive many migrants to be as likely to ratify the optional protocol than others. Hence, we analyze which countries have ratified the OPIC and show that migration patterns do not explain the select 50 countries that allow these communications.

Second, we interview lawyers and staff from organizations that represented children in communications to the Committee on the Rights of the Child. These actors reveal why they turned to a relatively new institution to respond to the emerging migrant crisis. Their strategic litigation reveals how they dealt with the uncertainty and the needs to defend

children's rights.

Finally, we look at different, non-petition documents produced by the Committee on the Rights of the Child to explore the prevalence of issues discussed. These documents include statements, concluding observations, press releases, and other official documents written by the Committee. We find that migration was not one of the dominant issues before the OPIC. Rather, migration features much more prominently in the petitions than other Committee documents. Interestingly, we find suggestive evidence that after the Committee decided on rights violations for migrant children, it was more likely to address the migrant crisis in their non-petition documents as well, suggesting how the entrepreneurial usage by lawyers and children can transform institutions in unanticipated ways.

This paper makes three major contributions to literatures on institutional design and evolution, non-state actor access, and regime complexity. First, we contribute to the institutional design and evolution literature by exploring flexibility in human rights petition mechanisms. We distinguish this neutral unexpected usage from sometimes negatively viewed unintended consequences (e.g., St. John 2018), where this usage is in line with the designers' intent but rather the distribution of topics was different than expected. Second, we analyze expanding non-state actor access in international organizations, which has received growing scholarly attention as international organizations continue to broaden to include more voices. We find that empowering victims of human rights abuse, who are marginalized actors, can change the institution and policy outcomes in unexpected ways. Third, we find that regime complexity can result in specialization across institutions when some overlook certain issues. As actors forum shop and seek favorable outcomes from a variety of institutions, new institutions provide an opportunity to address topics overlooked by existing institutions.

This paper proceeds as follows. We first develop a theory of institutional flexibility, where institutions are designed to allow for variety of human rights crises, including unanticipated situations. We discuss how flexibility and usage varies across the human rights regime, in large part due to institutional design differences and the make up of these bodies. These two

structural factors, emerging crises and existing access to justice in other institutions, create an opportunity for entrepreneurial litigators. We then apply our theory to the Committee on the Rights of the Child, arguing that the focus on migration was not anticipated, although in line with intent, designers and member states. We develop theoretical expectations in line with this, focusing on negotiations, state ratification, and topics under consideration in other, non-petition committee activities. We discuss our research design and empirical results using a range of qualitative and quantitative evidence before considering implications of this research for the human rights regime.

2 Institutional Design, Flexibility, and Crises

Institutional design varies significantly across organizations. There is a strong line of research that argues that states rationally design institutions to reflect their own interests and further their own goals (Koremenos, Lipson and Snidal 2001). Many scholars, however, disagree with the functionalist assumptions and rational design perspective, differentiating intentions and effects of institutions. We discuss this literature, in which international institutions can be used in unintended ways and produce anticipated results. Then, we present a theory detailing how opening access, or altering the institutional design, can bring forth new issues and alter the institution in unforeseen ways.

We build upon work that differentiates the intentions and effects of institutions, pushing back against the rationalist, functionalist design. Scholars argue that international institutions can be used in unexpected ways leading to unintended results, and much of this work looks at explaining the design of a specific institution. We focus on non-state actor access in the human rights regime, which is a fundamentally flexible institution. We are less interested in explaining the institutional design of individual access in the United Nations, and specifically the Convention on the Rights of the Child, and more focused on the usage and effects of the institutional design. In some ways, the choice of institutional design is not particularly puzzling here, given that since the International Covenant of Civil and Political Rights'

added an Optional Protocol in 1966 allowing individual communications, many other UN treaties have borrowed its language. Rather, we argue that *change* in institutional design—in which the change itself was foreseen and not surprising—results in unexpected usage by political entrepreneurs, or "creative rule-users" (Búzás and Graham 2020), and evolution in the institution's focus.

2.1 Theorizing Non-state Actor Access in Human Rights

Individuals, as victims of human rights abuse, have standing in numerous international human rights institutions to bring complaints alleging violations of treaty provisions against governments. However, non-state actors did not always have standing to bring complaints to international institutions; in fact, individuals' access has been a hard-won struggle. After World War II, individual access was granted in the European Convention on Human Rights, allowing standing in the European Court of Human Rights. This access was debated across states, without uniform support, because it increased enforcement (Moravcsik 2000). As the United Nations established legally binding treaties, beginning with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), both adopted in 1966, individual access was once again up for debate. Unlike the European Convention on Human Rights, these core treaties did not include individual access. The ICCPR separated this access to an Optional Protocol, allowing states to opt-in to this increased enforcement mechanism separately from treaty ratification. The ICESCR, however, did not add similar access until over 50 years later, in 2018. Since the two core covenants, the UN human rights treaty system has proliferated adding treaties focused on more narrow topics and marginalized actors, including the Convention Against Torture (CAT), Convention on the Elimination of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC). Table 1 shows the core UN treaties, date of adoption, its individual petition mechanism, and date of the individual petition mechanism adoption.

The UN treaties, alongside the regional bodies—European, Inter-American, and African—

Table 1: Individual Petition Mechanisms Across UN Core Treaties

UN Treaty	Adoption Year	Petition Mechanism	Mechanism Year
International Covenant on Civil and Political Rights	1966	Optional Protocol	1966
International Convention on the Elimination of All Forms of Racial Discrimination	1965	Declaration	1965
International Covenant on Economic, Social and Cultural Rights	1966	Optional Protocol	2008
Convention on the Elimination of All Forms of Discrimination against Women	1979	Optional Protocol	1999
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	1984	Optional Protocol	2002
Convention on the Rights of the Child	1989	Optional Protocol	2011
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	1990	Declaration	1990
International Convention for the Protection of all Persons from Enforced Disappearance	2010	Declaration	2010
Convention on the Rights of Persons with Disabilities	2006	Optional Protocol	2006

compromise the global human rights regime which provides individual access.[2] This system is comprised of overlapping institutions, creating opportunities for forum shopping (Pauselli and Schoner 2024; Voeten 2016; Helfer 1999). It is important to note that states selectively allow individual petitions to each treaty separately from each other and also separately from the treaty. In Table 1, we include the year the mechanism was open for ratification/acceptance, but countries can ratify/accept any time afterwards, provided that they have ratified the corresponding treaty.

We argue that individual access is a flexible mechanism which allows entrepreneurs to litigate cases from a variety of contentious issues. The range of issues, of course, varies across treaties, as some treaties have broader scope and breadth than others. Regardless, access opens the door for complaints across a range of issues. This access, however, is not uniformly attractive to aggrieved parties. The likelihood of usage depends crucially on two structural conditions: (1) crises and unfolding violations in relevant countries that have granted access, and (2) lack of effective available remedies in other fora in the global human rights regime. These conditions create an opportunity for entrepreneurial litigators to bring new issues to new institutions.

International law is inherently flexible. International law is more permissive than political science often acknowledges. This flexibility stems in large part from imprecision (Abbott et al. 2000), which is strategically written to accommodate a wide variety of future scenarios, all of which are impossible to predict at the time of negotiations (Chayes and Chayes 1993). More recently, Putnam (2020) explores this "semantic indeterminacy" arguing that "legal rules are formulated for general use, which means their provisions lack determinate meaning in relation to the full range of facts they may be applied to." At the same time, scholars have begun to explore the concept of *emergent flexibility*, where flexibility was not intended by designers but later discovered, activated, and accessed by creative rule-users

[2] This list is not exhaustive, as other institutions, such as the UN Special Procedures and Human Rights Council, also allow individual submissions. However, we exclude these bodies from our analysis, focusing on the judicial (court) and quasi-judicial bodies (commissions and treaty monitoring bodies).

(Búzás and Graham 2020; Pérez-Liñán, Brocca and Orizaga Inzunza 2024). We differentiate from the concept of emergent flexibility by arguing the design itself, from the beginning, is flexible and allows for unanticipated usage, by creative agents, still in line with the designers' intent. For human rights, this design allowed for unforeseen crises and emerging issues.

Imprecision in human rights law makes actors continually interpret text and apply it to new pressing issues. For example, Jurkovich (2020) explores how the right to food was established using multiple UN covenants, especially the International Covenant on Economic, Social, and Cultural Rights. Moreover, treaty bodies are continually interpreting treaty provisions as they apply to new issues (Reiners 2021). General comments (or general recommendations in the case of the Committee on the Elimination of Discrimination against Women) are used to provide more detail and interpretation of the rights and freedoms protected under law. The Committee on the Rights of the Child, in General Comment 10, expanded and clarified children's rights in juvenile justice, or the rights of "children in conflict with the law" (UN Committee on the Rights of the Child 2007).

Because international law is open for interpretation, different institutions can interpret certain rights more or less permissively. There are known, notable differences across the global human rights regime, in which certain institutions are more progressive while others are more conservative with their interpretations and applications. Interviews with petitioners and various committee members reveal, for example, that the Committee Against Torture is more conservative than the more progressive Human Rights Committee (overseeing the ICCPR). The perceived likely outcome, including whether the institution will decide on the merits of the case, are important drivers in petitioners'—both the victims themselves and legal representation, if present—decision of forum.

The larger context is often missing from rational design and institutional usage research. As an important exception and advancement in this area, Copelovitch and Putnam (2014) explores the absence of existing and prior agreements in "new cooperation." We contribute to the small but growing research which highlights the importance of relationships across

institutions. We argue that existing fora, given their current interpretations and precedent, create differential justice outcomes across issue areas. More conservative institutions, which interpret provisions more narrowly, are less likely to accommodate new and emerging issues. Therefore, actors seek out more progressive institutions, when available, hoping for accommodating interpretations.

Among the international human rights regime, institutions vary significantly in their perceived progressiveness and outcomes. The influence of government preferences and politics more generally can play deferential roles. Some, notably the European Court, are beholden to political pressures while others are relatively more insulated from politics. These differences are largely due to differences in institutional design (Pauselli and Schoner 2024). Research has shown that politics plays a role in European Court decisions. By contrast, UN treaty bodies, comprised of "expert members" rather than judges, are perceived as more objective and insulated from politics. There, is however, significant variation across these committees (Reiners 2021).

In recent years, the European Court has attracted negative attention for its unwillingness to rule on migration, a global crisis that has resulted in large number of migrants in Europe. The European Court has overlooked these cases and either not wanted to rule or produced unfavorable decisions on migration issues. Yildiz (2023) writes: "A look at the Court's recent jurisprudence indicates that the Court catered to state sensitivities about irregular migrants, asylum seekers, and refugees while also following a more progressive line with respect to other issue areas" (179). Similarly, Ford (2022) explores the increase in complaints by asylum seekers and immigrants in Nordic states in UN treaty bodies. She explains, "Another significant institutional shift concerns the decline in access to the European Court of Human Rights, which has likely displaced some cases toward other venues for accountability, such as the UN treaty bodies. Other scholars have noted the narrowing role of the European Court, with the increasing use of the margin of appreciation and deference to domestic courts, meaning that the Court is less likely to intervene in the immigration decisions taken by

liberal democratic states" (Ford 2022, 57). Additionally, the President of the European Court in 2011 "released a press statement emphasizing that the Court is not an 'immigration appeals tribunal,' and noted that the number of requests in deportation scenarios had seen 'an alarming rise' between 2006 and 2010" (Ford 2022; Council of Europe 2011). Following member state pressure in the Izmir Declaration, the Court defers to states and minimally intervenes in cases related to asylum and immigration.

A recent study by Çalı, Costello and Cunningham (2020) explores how UN treaty bodies and the European Court interpret the concept of *non-refoulement*, which prohibits the return of individuals to a country where they may face persecution and harm. They focus on this salient migration issue because "*Non-refoulement* is the single most salient issue that has attracted individual views from UNTBs since 1990" (Çalı, Costello and Cunningham 2020). They challenge the dominant view that treaty bodies, as "soft courts" are more progressive than regional, hard courts. UN treaty bodies are, at times, more progressive in this area, but at other times, follow the ECtHR's interpretation, or even more restrictive. Interpretation is only one of many key differences, as actors decide where to file cases, including interim measures—immediate actions to delay action (such as deportation) while the case is being considered (interview with petitioner).

Time is also a major consideration for entrepreneurial litigators, as the European Court takes much longer than the treaty bodies. When considering a migration case, the European Court with a tendency to provide unfavorable outcomes, without interim measures, with a long time frame, is in many cases not a suitable option.

The lack of justice across institutions, notably the European Court of Human Rights, and an underlying human rights crisis creates an opportunity for entrepreneurial litigators to advance their issue in international institutions. International human rights litigation is not uniformly likely across all issues. Broad treaties, including the International Covenant on Civil and Political Rights, receive concentrations of complaints given not only the selection of countries allowing these complaints but also the specific human rights issues in these countries.

There are significant costs of filing complaints, especially the information barrier (finding out about this international remedy) and the fear of retaliation (Schoner 2024). These costs, of course, vary across countries, as do repressive practices and underlying violations of human rights (and unwillingness to provide remedies) resulting in these complaints.

Information is scarce in this space as the UN treaty body petition system is not well known. NGOs and lawyers working in these spaces are more likely to know about these remedies than their clients, as marginalized victims of human rights abuse (Schoner 2024). While not a requirement to file a complaint to the UN, legal representation is common as organizations assist individuals throughout this process. Lawyers/law firms and nongovernmental organizations connect victims to the UN across a variety of issues areas, most often when there is prior connection through the domestic judicial institutions. For example, lawyers representing a large number of individuals on death row in the Caribbean (notably Jamaica and Trinidad and Tobago) filed complaints in the Human Rights Committee. In a similar vein, lawyers are connected and provided to migration cases in many countries.

3 The CRC's Optional Protocol

We apply this broad theory of institutional flexibility to the Committee on the Rights of the Child, which added an individual petition mechanism in 2011, twenty-one years after the convention was adopted. We first provide necessary background of this institution before presenting our theoretical expectations about the CRC.

3.1 Background on OPIC

Nearly all UN member states have ratified the Convention on the Rights of the Child (CRC), the most of all UN human rights treaties. Only the United States has not ratified the CRC, opting only to sign the Convention. The CRC was adopted on 20 November 1989 and subsequently went into force on 2 September 1990. Given the popularity of the Convention, two Optional Protocols were negotiated and adopted in 2000: the Optional Protocol on the involvement of children in armed conflict and the Optional Protocol on the

sale of children, child prostitution and child pornography. These Optional Protocols gained widespread support and haves been ratified by the vast majority of member states.[3]

After the adoption of these two optional protocols, discussions of an Optional Protocol on a communications procedure resurfaced within the UN. Communications, also called petitions or complaints, allow direct participation and access as victims of treaty violations can submit formal, legal complaints to the overseeing monitoring body. The idea of a complaint mechanism had been on the agenda throughout the history of the CRC (Lee 2010, 568), but it reemerged in earnest as the 20th anniversary of the CRC approached. Even though children have a longstanding indirect participation of children in the Committee on the Rights of the Child—for example, children are invited to participate in the state self-reporting process, days of general discussion, and commemorative events[4]—there was a sense among the Committee on the Rights of the Child, and particularly the new Chairperson Lee, that a communication procedure that was tailored to children was needed.

Following a two-year drafting and negotiation process, the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC) was adopted by the UNGA resolution 66/138 on 19 December 2011 and opened for signature on 28 February 2012. Fifty countries are States Parties to the CRC Optional Protocol on a communications procedure. Figure 1 shows these countries are clustered in Latin America and Europe. Additionally, Table A.1 in the Appendix lists the countries and dates of ratification or accession (excluding signatories).

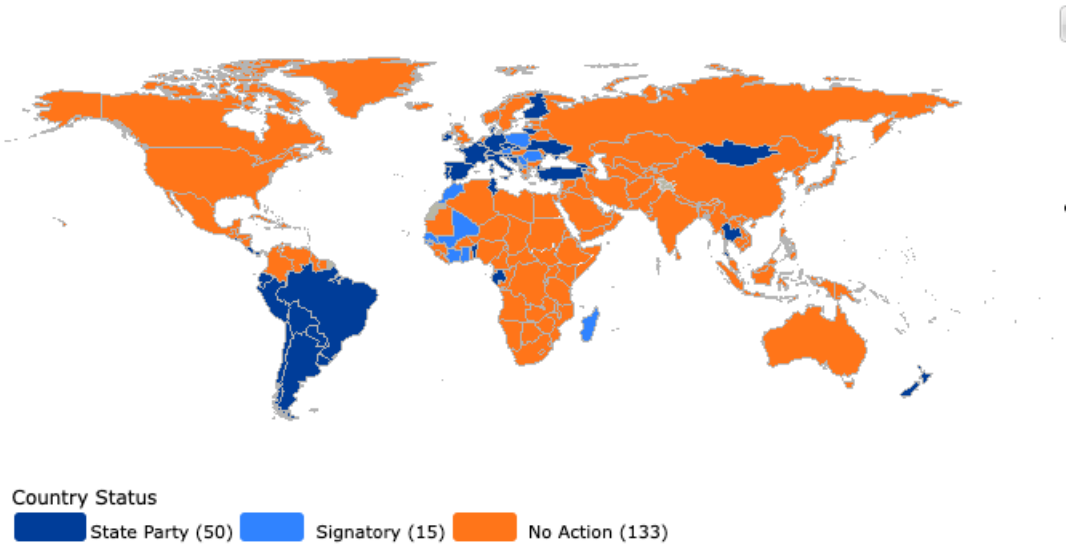
3.2 OPIC Usage

In the first ten years of the OPIC, a staggering three-quarters of petitions submitted to the Committee on the Rights of the Child have concerned migration. We read and coded 109 petitions, including information on petitioners, their representation, their nationality,

[3] The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict has 173 States Parties and 17 signatories. The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography has 178 States Parties and 7 signatories.

[4] Methods to participate are detailed here.

Figure 1: Optional Protocol to the Convention on the Rights of the Child on a communications procedure



the substantive and procedural matters raised by the case—including whether it concerns migration or not—, and the Committee's final decision. Children have filed 109 petitions against 19 countries focused in Latin America and Europe, with the following states receiving the most petitions: Spain, Denmark, Switzerland, Belgium, and Finland. These data show that the majority of the petitions come from child migrants, especially from children fleeing North Africa to European destination countries. Notably, only one petition concerning migration is outside of Europe, filed against Argentina. The overwhelming focus on migration is surprising given the breadth of the treaty; the CRC is a broad, comprehensive treaty covering a myriad of issues affecting children's lives, including children's right to be heard (Article 12), to choose a religion (Article 14), to peacefully assemble (Article 15), to an education (Article 28), and many other civil, political, economic, and social rights. Yet nearly three-quarters of the petitions concern displaced children.

We define migration as the cross-border movement (or threat of movement) of the victim and/or the victim's family, including asylum cases, deportation, and *non-refoulement* and excluding custody battles between parents, even if they are in different countries. Many of the complaints describe horrific practices of age determination that violate the rights of the

child. After treacherous journeys, displaced children do not always have official documents verifying their age. Even when they do, government officials often claim that these documents cannot be trusted and opt for their own verification practices, including the use of dental, wrist, or clavicle X-rays to determine the age of the child. These practices are especially discriminatory because they often ignore the physical variability of children from different social, economic, and ethnic backgrounds (Bhabha 2014, 261). Ignoring children's official documents and using discredited and discriminatory age verification procedures, governments deny children the special protection measures they are entitled to.

3.3 CRC Theoretical Expectations

We argue that when the CRC OPIC was negotiated, the Committee on the Rights of the Child and UN member states did not foresee how the individual petition mechanism would be used in practice to advance migrants' rights. Furthermore, when states signed and ratified the CRC OPIC, they did not anticipate how it would be used to denounce human rights violations in their territory. Instead, opening access to victims of abuse altered the topics considered by the organization in unforeseen ways. In our study of the evolution of the CRC OPIC, we first explore the actions of the actors who negotiated and drafted the treaty, namely representatives and officials at the UN and state actors. Once access to justice had been adopted by the UN General Assembly, non-state actors like children and their representatives used this mechanism to file petitions. Children, as victims of human rights abuse, work alongside other actors, such as lawyers and advocacy organizations, who support their cause to remedy violations and improve respect for human rights. These more established actors better understand legal systems, both domestic and international, and often have attempted to achieve justice for children in other fora. These two actors work together to file petitions through the CRC OPIC.

The focus on migration, we argue, was not specifically anticipated by states or members and staff of the institution. Because of the broad treaty, migration is one of the many subject matters considered by the Committee on the Rights of the Child. We expect that migration

was not a dominant issue of the Committee before the OPIC, both in terms of negotiations and other Committee activity. First, we expect little to no discussion of migration during OPIC negotiations. Instead, we expect other substantive issues that featured prominently in the negotiations of the CRC treaty, such as the definition of the child, to have also emerged heavily in these discussions. We also expect debates of issues that have arisen in other communications procedures such as collective or individual victims, that is, who specifically can file on behalf of what individuals.

If states did not foresee petitions' focus on migrations, ratification of the OPIC would not be driven by migration patterns, as states did not consider the main costs of the OPIC to be related to migration issues. If countries believed the mechanism would be used by migrant children to denounce human rights violations, countries that receive large numbers of migrants, those considered "destination countries" for migrants, would be wary of ratifying the OPIC. Since we hypothesize that migration was not a dominant issue at the outset of the OPIC, we do not expect that states anticipated the CRC OPIC would be used in this way, so we do not expect to find a relationship between migration and OPIC ratification. We argue that countries that receive many migrants and thus could expect a heavy political cost of a legal document focused on migration, still ratify the OPIC. Migration flows then, should not explain ratification patterns.

Second, we expect that actors involved in filing petitions not only discuss the migration crisis resulting in the human rights violations but also other international remedies in explaining why they chose to file the complaint in the Committee on the Rights of the Child. We can directly test these theoretical mechanisms by asking petitioners and their representations on their choice of forum given they have multiple available options.

Third and finally,, we expect that migration did not dominate the Committee activity prior to OPIC. The Committee, tasked with monitoring compliance with the Convention, was active in reviewing state reports and publishing "concluding observations" as comments and recommendations for each state's respect for children's right in a periodic cycle. We

expect that when migration was discussed in Committee sessions and documents such as general comments and concluding observations, it was one of many topics under consideration, reflecting the breadth of rights detailed in the Convention.

Opening access and inviting a new form of participation can invite new issues and focuses of Committee activity. This may be, in part, due to the select states that allow individual communications. Only a subset of States Parties to these treaties invite petitions as an additional form of monitoring and oversight. Out of the States Parties to the treaties, only some invite this additional form of monitoring and oversight. These petitions can reflect a specific issue that has been overlooked thus far in the Committee itself or broader human rights institutions. Petitions can reveal new information and shine a spotlight on an issue that might not receive as much attention given the Committee's large task of monitoring compliance for a very broad treaty with new universal participation. Additionally, these victims may fear retaliation from governments that have already violated their human rights. Civil society organization and lawyers play a crucial role in reducing both of these costs, assisting and protecting individuals throughout this process (Schoner 2024).

Because the CRC OPIC is a new institution, actors considering submitting a communication are uncertain about how the Committee will decide on their case. Choosing the right forum is important because many institutions will observe whether the victim's case has been examined by another national or international court. Given this uncertainty, we theorize that actors who had no expectation of a favorable outcome in other fora turned to the CRC OPIC. The broad topics covered by the Convention were not uniformly attractive to children and activists who serve as their legal representation due to the multiple fora previously available for human rights complaints. Many topics are adequately covered by other international bodies, both regional and global. However, migration issues have largely been either overlooked by other institutions or failed to provide justice to victims.

Furthermore, the quasi-judicial nature of the Committee on the Rights of the Child, like all UN human rights treaty monitoring bodies, differs significantly from other judicial

institutions. The European Court of Human Rights is comprised of 46 judges—one from each member state. Instead, the Committee on the Rights of the Child is comprised of "18 independent experts who are persons of high moral character and recognized competence in the field of human rights" (Office of the High Commissioner for Human Rights 2024). CRC members come from various backgrounds including academics, activists, social workers, prosecutors, and government bureaucrats. Interestingly, Reiners (2021) finds that, for the 2008-2020 period, the proportion of members with a law background is smaller for the Committee on the Rights of the Child than for other treaty bodies like the Human Rights Committee or Committee on Enforced Disappearances (30), which might increase even further the difference in how the CRC and other judicial bodies respond to cases involving migrant children. Given the European Court's more conservative reputation, these strategic actors, as entrepreneurial litigators, saw a new opportunity for a more progressive institution that would be more favorable to migrant issues which are stagnant in other fora.

Here, we summarize the theoretical expectations from our argument:

1. **Expectation 1:** We expect to observe a difference between the intention of the drafters and the usage of the institution. Specifically, we expect to observe that although migration did not feature heavily as a topic during the negotiations or affected states' commitment to the OPIC, the usage of the petition system by children and their representatives is heavily focused on migration.
2. **Expectation 2:** We expect entrepreneurial litigators to discuss the severity of the migrant crisis, as well as lack of available options to seek justice for their clients, when explaining their choice of the OPIC.
3. **Expectation 3:** We expect to see the committee activity change over time. Specifically, we expect to find that although migration did not dominate Committee activity prior to OPIC, the usage of the OPIC by rule-users changes the institution, meaning that migration becomes more relevant in non-petition activity after the Committees' decisions on migration.

4 Research Design

To test our argument, we collect a combination of qualitative and quantitative evidence to compare the intention of the drafters of the Convention on the Rights of the Child's Optional Protocol on a communications procedure with how the institution has evolved in practice. We systematically analyze Committee on the Rights of the Child documents, including archival documents of the negotiations on the CRC OPIC, individual petitions, general comments, and ratification data available in the UN Treaty Collection. We complement these archival and bureaucratic data with interviews with key participants, including expert members of the CRC Committee (past and present), individuals involved in the OPIC negotiations, and petitions staff working on the CRC. Analyzing archives and interviews with those present for negotiations present an opportunity to test the theoretical expectations, providing insight into the decision-makers and their motivations (Wendt 2001, 1028-1029).

Some of the interviews were conducted in-person in Geneva and others have been virtual. In the interviews we have conducted so far, we have learned that although interviewees are willing to talk candidly about the petition system, many believe it is easy to attribute citations in prior research on the human rights treaty system. Therefore, to protect the identity of our interviewees, we do not list them by name, position, or organization. Additionally, we have decided not to keep track of which quote is attributable to each interviewee (e.g., by listing interview 1 after a quote or having a table in the appendix with the distribution of interviewees per position). As we conduct more interviews, we will continue discussing with our interviewees how best to attribute their quotes. We plan to conduct more interviews with other stakeholders, such as lawyers, representatives of children's advocacy organizations, and migrant children.

In the following section, we present the empirical results chronologically, starting with treaty negotiations, followed by ratification patterns, and a comparison of the topics discussed by the Committee on the Rights of the Child before and after the CRC OPIC went into

effect.

5 Results

5.1 Finding 1: Difference between Intent and Usage

5.1.1 Negotiations

To explore the negotiation of the CRC OPIC, we begin by analyzing primary sources of treaty negotiations, specifically the *travavux préparatoires* of the CRC OPIC, including official documents from United Nations working groups, the UN General Assembly, and the Committee on the Rights of the Child. We complement the negotiation records with information from advocacy organizations that helped spearhead the campaign, statements from key participants—such as Yanghee Lee, who chaired the Committee during the initial drafting of the protocol—, interviews, and secondary literature. We find no mention of migration or related issues such as asylum or *non-refoulement*.

We find that negotiation discussions were driven by procedural matters, including the functioning of the petition system and the work load of the Committee on the Rights of the Child. One procedural issue that negotiators were concerned about was children's agency. To provide access to justice, children would need to submit individual complaints, but many of the procedures are not child-friendly. Moreover, some state delegations raised the issue that, given "the vulnerable status of children, there is an objective risk that children may be manipulated when submitting a complaint" (Human Rights Council 2010, 14). However, other participants noted that treaties protecting women and other disadvantaged groups already had a communications procedure, so children's evolving capacities should not stop the UN from having a communications procedure for children. For example, in the joint submission by non-governmental organizations (NGOs), they note that "[r]ather than presuming that a child is incapable and incompetent, the new communications procedure should comply with the CRC assertion of a child's evolving capacities" (Human Rights Council 2009, 14).

The negotiators also seemed concerned that the CRC OPIC would overwhelm the

system and significantly increase the workload of the Committee. It should be noted that the CRC Committee is also charged with monitoring states' implementation of the CRC. Given the near-universal ratification of the CRC, the CRC Committee is one of the treaty bodies with the heaviest workload. Also, negotiators mentioned that delays caused by a heavy workload would be especially problematic for the CRC given that stakeholders "graduate" once they turn eighteen. The records show that negotiators were worried about "the fact that the complainant might no longer be a 'minor' within the meaning of the Convention before the completion of the procedure" (Human Rights Council 2010, 15).

Another theme that emerged in our review of the negotiation records is that states and civil society organizations did not always agree on the wording of the CRC OPIC. For example, in the issue of whether the optional protocol should allow for the submission of collective complaints, many of the participating NGOs wanted to allow for this possibility. The CRC Committee also supported this idea, along with different children's rights experts who were invited to address the working group that was drafting the optional protocol. In the end, however, the possibility of collective complaints was not allowed.

The tension between states and NGOs is also evident in the discussion of domestic remedies. As with all UN communications procedures, the OPIC requires victims to first exhaust domestic remedies. However, there was a move by many states—including many European states, China, and Canada—to temporally limit the ability of individuals to submit a petition to the CRC Committee. They referenced the ECtHR's requirement that petitions are submitted within six months of exhausting domestic remedies and suggest here one year. Here again, the Committee members, the NGOs, and even the International Court of Justice made statements against the limitation. The final, adopted version of the OPIC has this temporal limit. Article 7 section h reads: "The communication is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit."

To the extent that some specific violations of rights were mentioned, other issues were brought up, such as access to education. For example, during the first session of the working group that drafted the CRC OPIC, Yanghee Lee, Chairperson of the CRC Committee, noted:

> [S]o many children are still not in school, do not receive quality education, lack access to quality health services, not registered at birth, caught in the middle of conflict, die due to preventable deaths, violated and abused (Lee 2009).

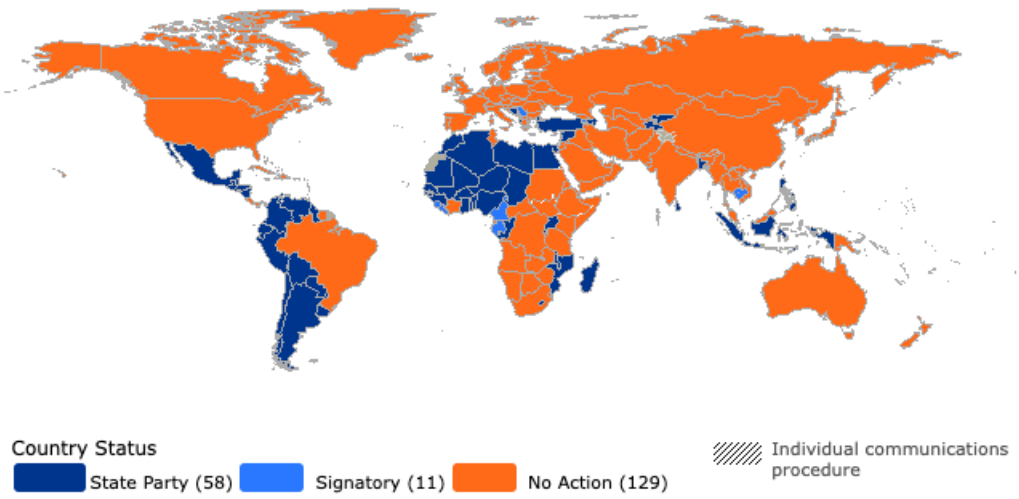
These issues were mentioned in the document to justify the need and timing of the CRC OPIC. Again, we do not find migration mentioned in the *travaux préparatoires* for the CRC OPIC. In one interview, a UN staff member confirms that migration was not present in the preliminary discussions of a communications procedure, in negotiations, or early ratification discussions. When countries considered which subjects would attract the most petitions, it was family and custody law. While there have been family and custody issues in petitions thus far, the numbers pail in comparison to those of migration.

The scant secondary literature that exists on the negotiations of the CRC OPIC confirms that the debates between states were dominated by procedural concerns regarding children's ability to submit complaints, the possibility of a collective complaint procedure, and other non-substantive issues (Lee 2010; Vandenhole, Türkelli and Lembrechts 2019). However, there did not appear to be an expectation that the Optional Protocol would be used to address migration concerns.

In sum, our exploration of the negotiation records confirm that migration was not heavily discussed during the negotiations of the CRC OPIC. The debates did not focus heavily on the substantive issues that states debated in the CRC (e.g., the definition of the child), but rather explored mostly procedural matters.

As another piece of evidence to gauge the intention of states that negotiated the OPIC, we analyze the patterns of ratification of the OPIC, analyzing why states have or have not allowed individual petitions to the CRC. We find that migration patterns do not explain ratification, and instead other issues have been cited for lack of ratification. Some states were

Figure 2: International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

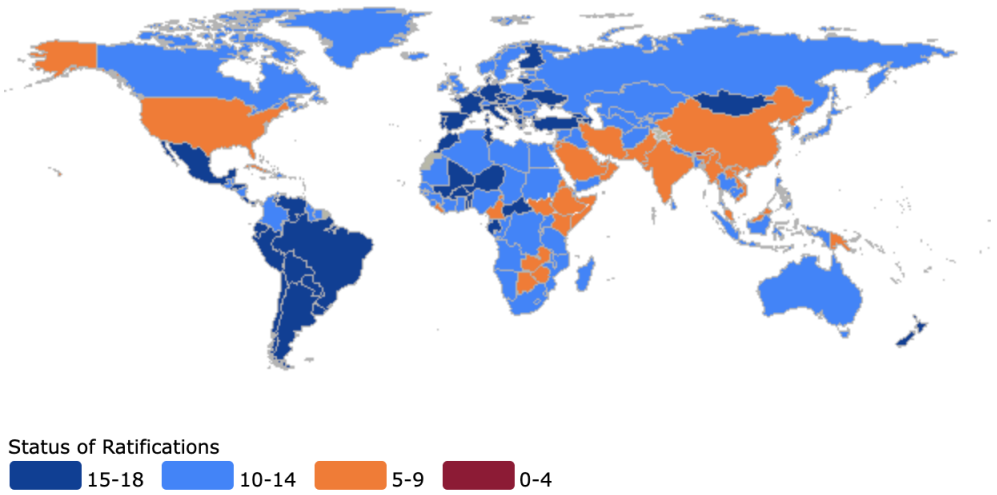


concerned about how empowering individuals would restrain the state in issues other than migration. Heyns, Viljoen and Murray state: "In Poland, reluctance to accept this complaint mechanism stems from a fear that it would lead to a questioning of restrictive domestic laws on, for example, abortion and contraception. South Africa advanced the sufficiency of its domestic legal system to justify not becoming a party" (20).

Comparing the OPIC ratification pattern in Figure 1 with a migration-focused treaty shows a stark difference. Figure 2 displays state ratification of the International Covenant on the Protection of the Rights of All Migrant Workers and Members of their Families. Ratifiers are concentrated heavily in the Global South, and only one European country has ratified the Covenant: Bosnia and Herzegovina. Two other Balkan countries have signed but not ratified: Serbia and Albania. No major destination country has ratified this treaty but many origin countries have. Migration patterns explain the ratification of this migration treaty but not the CRC OPIC.

Instead of migration patterns, participation in other UN human rights treaties seems to help explain which countries have ratified the young CRC OPIC. Figure 3 shows the broader pattern of state participation in UN human rights treaties, specifically ratification of 18

Figure 3: Participation in UN Human Rights Treaties



treaties (9 core treaties and their additional instruments, including the CRC and its Optional Protocols). Before any statistical analysis, the 50 States Parties to the CRC OPIC are those that are generally most active by broad ratification, although there are some exceptions.

5.2 Finding 2: Entrepreneurial Litigators

Many factors influence the decision of victims and their representatives on where to file a complaint. Some of these can be described as "formal" or jurisdictional in nature, as opposed to more strategic factors influencing the decision-making process. For example, different forums might be more appropriate for different substantive issues—violations of children's rights, for example, might be better covered by a specialized forum for children. Our interviews suggested that this was the case. One person, for example, said that there were issues that you could only take to a UN Committee and others that you could also take to a regional body like the ECHR. Another interview highlighted the importance of exhausting domestic remedies, in which international institutions require showing that the matter has been attempted in domestic courts first. Different institutions may have different thresholds to meet this requirement.

In addition to these formal, jurisdictional issues such as the substantive match between the complaint and the focus of the court or institution, our interview data suggests that

litigators submit petitions to the UN Committee on the Rights of the Child for strategic reasons. Given that many of the OPIC parties are in Europe, this importantly includes deciding between submitting to the Committee on the Rights of the Child or the European Court of Human Rights (ECtHR). One interviewee said deciding whether to go to the ECHR or the Committee on the Rights of the Child is "the big question to resolve."

We found evidence, for example, that actors choose to turn to the UN Committee on the Rights of the Child given what they perceive as a denial of justice in other forums. Another interviewee said:

> "One of the factors is that I think there is a certain bias at the ECHR in favor of Council of Europe member states. Quite hard if you have a case, like an asylum case, that concerns a Council of Europe member states... it is quite hard to win them. And I think the UN system doesn't distinguish... they don't have like first class and second class countries, it's just everyone is a country potentially in violation of human rights.[...] I think that the European Court is a bit of... a difference in treatment depending on which states are concerned."

Another interviewee who interacted with the Committee early on described dealing with uncertainty about how the Committee would decide the case but judging it could be worth it. We were told: "first, I thought: 'we've never gone to the Committee. I will try it, we won't lose anything.' [...] So I thought 'okay, I will try it,' and it was simply that. I did not think it about for a long time, and I said 'let's try the Committee out.' And it worked out".

In addition, there are also pull factors that draw litigators to submit complaints in the Committee of the Rights of the Child. Another interview ventured that perhaps, because the Committee is not made of jurists, they have a more "social" orientation and implied that could benefit the type of cases that were candidates for submission. Two other interviews suggested that the possibility of obtaining interim measures—which the Committee is required to decide upon within 48 hours—is a big reason why they decided to submit the complaint to the Committee on the Rights of the Child.

In sum, all of these reasons describe strategic behavior on behalf of the representatives of litigators when they decided to put OPIC to the test.

5.3 Finding 3: Committee Activity

The third and final component of the empirical strategy analyzes CRC documents to measure the prevalence of different topics and issue-areas over time. We do not expect migration to dominate Committee activity prior to the OPIC.

As a first step, we look at official documents, separate from the petitions mentioned earlier, released by the United Nations Office of the High Commissioner for Human Rights, which can be found here. Importantly, these official documents are labeled by the UN and categorized by entity (e.g. Human Rights Council), category (e.g. events, press releases, and statements), subject matter, location (states), and dates. They are primarily press releases but also include a variety of other documents including concluding observations, statements, and stories.

In our search, we narrowed the entity to the CRC. Then, we narrowed down the search by dates to explore whether the topics covered by the CRC Committee have changed over time. The CRC OPIC entered into force on 14 April 2014—before then, children could not submit petitions to the Committee. Thus, we divide our search into two periods, one before the CRC OPIC entered into force (and starting on the date the CRC was adopted, 20 November 1989), and the other from 14 April 14, 2014, until August 26, 2024. For each period, we searched by "subject." The list of potential subjects includes migrants, climate change, civil society, education, gender mainstreaming, food security, and violence against children.

Table 2 lists how many CRC documents we found by topic and period out of a total of 2213 results for the CRC. The subject term with most entries is "children's rights," but given the vagueness of this subject term, it is hard to know exactly what is encompassed by it. Table 2 displays search results for other top categories, including the sale of children, sexual exploitation of children, and children in armed conflicts. Comparatively, migration

Table 2: CRC Committee Activity by Topic

	Pre-2014	Post-2014	Total
Children's rights	1158	485	1643
Sale of children	56	25	81
Sexual exploitation of children	59	30	89
Economic, social, and cultural rights	60	1	61
Children in armed conflicts	135	44	179
Internally displaced persons	0	5	5
Migration: General	0	4	4
Migration: Migrant workers	0	9	9
Migration: Nationality	0	7	7
Migration: Refugees	0	3	3
Migration total	0	28	28

does not feature prominently among the issue-areas identified in the CRC documents. The UN categorizes the documents for different migration subjects, such as refugees and migrant workers. We add up five migration-related topics (internally displaced persons, migrants, migrant workers, migration and nationality, and refugees) into a single "migration total" row at the end of the table. Out of 2213 documents, only 28 concern migration. This preliminary exploration shows that migration is not a singular major topic of CRC activity, supporting our theoretical expectations. This is contrasted with the overwhelming focus of petitions filed in the first ten years on migration.

We find support for our empirical expectation, suggesting that since the entry into force of the CRC OPIC, the migration documents have increased. Before 2014, there were no documents for any of the migration subjects, but after 2014 there is an increase in all of the five migration categories. Although 28 documents are still less than the 44 identified for children in armed conflicts, for example, adding up the categories reveals that migration as a whole could be comparable to the documents on the sale of children, for example. This suggests a possible connection between how the petition system might have changed the broader work of the CRC Committee, including in general comments, statements, and concluding observations.

Moving forward, we plan to analyze all CRC documents, including concluding observations, general comments, and press releases. Using the original documents will allow for cleaner analysis of the topics compared to the above basic grouping and labeling from the UN website (such as the very broad "children's rights" topic). We have collected the documents, and we will use text analysis to examine the topics under consideration in the Committee over time. This will also allow us to compare issues covered in broader treaty activity and the petitions themselves (which we have already collected and coded).

6 Discussion and Conclusion

The CRC is one of the most ratified human rights treaties in the world; only the United States has failed to commit to its legal standards. However, despite this broad acceptance, the human rights of children are trampled on in many parts of the world. The United Nations Children's Fund (UNICEF) estimates that 17 percent of children live in poverty and a third of children suffer from malnutrition (United Nations Children's Fund 2021). Children are also unable to access education, are victims of war, exposed to violent conflict, and deal with other problems that violate their rights and harm their development. Migrant children are among some of the most vulnerable people in the world. The CRC OPIC, by giving children victims of human rights violations direct standing, has the potential to realize children's rights. Hence, it is important to understand how it is being used by children around the world and how international organizations respond to their complaints.

In this paper, we explore how the CRC OPIC has been used by children to seek redress for rights violations. Motivated by the empirical puzzle that most petitions concern migration, we present a theory of institutional flexibility where strategic actors, including lawyers and advocacy organizations, use this new mechanism given emerging crises and lack of justice in other institutional forums. We argue that the focus on migration was not expected by negotiators or states parties, but still is in line with the designers' intention. We find evidence in line with our argument, including the fact that migration was neither discussed during the negotiations of the CRC OPIC nor a prominent topic in the wider work of the CRC

Committee before the OPIC, and migration did not drive the OPIC ratification. We support our findings with interviews of current and former CRC expert members and actors with CRC litigation experience.

Our findings do not imply that migration will continue to be the dominant issue moving forward and over the entire usage of the CRC OPIC. Instead, our research suggests that the institution may continuously evolve, particularly if and when more countries ratify the OPIC, or as other topics become more pressing, such as climate change. It is possible that in the future, strategic actors will continue to use the CRC to litigate issues that are difficult to achieve effective justice in other fora, both domestic and international.

While understanding whether the petitions change government behavior is beyond the scope of this paper, we hope to explore this question in a follow-up paper. To this end, we have also begun collecting information on the interim measures adopted by the CRC Committee as well as its final decisions on each case. We hope to link these data with information on domestic legislation and regulations to understand whether the petition system had an impact on government behavior.

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A Appendix

Table A.1: CRC OPIC States Parties

State Party	Date
Albania	29 May 2013
Andorra	25 Sep 2014
Argentina	14 Apr 2015
Armenia	24 Mar 2021
Belgium	30 May 2014
Benin	19 Aug 2019
Bolivia (Plurinational State of)	2 Apr 2013 a
Bosnia and Herzegovina	17 May 2018
Brazil	29 Sep 2017
Chile	1 Sep 2015
Costa Rica	14 Jan 2014
Croatia	18 Apr 2017
Cyprus	11 Sep 2017
Czech Republic	2 Dec 2015
Denmark	7 Oct 2015 a
Ecuador	19 Sep 2018
El Salvador	9 Feb 2015
Finland	12 Nov 2015
France	7 Jan 2016
Gabon	25 Sep 2012 a
Georgia	19 Sep 2016 a
Germany	28 Feb 2013
Ireland	24 Sep 2014
Italy	4 Feb 2016
Liechtenstein	25 Jan 2017
Lithuania	3 Oct 2022
Luxembourg	12 Feb 2016
Maldives	27 Sep 2019
Marshall Islands	29 Jan 2019 a
Monaco	24 Sep 2014 a
Mongolia	28 Sep 2015
Montenegro	24 Sep 2013
New Zealand	22 Sep 2022 a
Panama	16 Feb 2017 a
Paraguay	20 Jan 2017
Peru	6 Jan 2016
Portugal	24 Sep 2013
Samoa	29 Apr 2016 a
San Marino	26 Sep 2018 a
Seychelles	7 Jun 2021
Slovakia	3 Dec 2013
Slovenia	25 May 2018
Spain	3 Jun 2013
State of Palestine	10 Apr 2019 a
Switzerland	24 Apr 2017 a
Thailand	25 Sep 2012
Tunisia	14 Dec 2018 a
Türkiye	26 Dec 2017
Ukraine	2 Sep 2016
Uruguay	23 Feb 2015

Note: Accession rather than ratification is noted in with "a" after the date.