

**2ND SESSION OF THE OPEN-ENDED WORKING GROUP
ON AN OPTIONAL PROTOCOL TO THE CONVENTION
ON THE RIGHTS OF THE CHILD**

**WRITTEN COMMENTS RECEIVED FROM
DELEGATIONS ON ARTICLE 2**

AUSTRIA

Comments on Article 2 (1):

- While we deem it important that children themselves may submit a complaint to the Committee, we would like the Rules of Procedure to provide more detail on how the child will be assisted when submitting such a complaint.

Comment on Article 2(4)

- Austria is of the opinion that exceptions to the consent of the child should only be considered in precisely circumscribed cases in order to ensure that the child is not being instrumentalized by the group or individual acting on her or his behalf. Therefore, the consent of the legal guardian or in its absence the consent of a competent tribunal shall be obtained.

4. Where a communication is submitted on behalf of an individual or group of individuals, this shall be with their consent, the consent of their legal guardian or in its absence the consent of a competent tribunal, unless the author can justify acting on their behalf without such consent.

Comment on Article 2 (5):

- Given the specific vulnerability of children and their real difficulties to express themselves, especially in the case of disabled, detained or very small children, the CRC should hear these children. Therefore, Austria supports the proposal made by the European Disability Alliance which is as follows:

5. Where the author of a communication is acting on behalf of a child as defined in article 1 of the Convention, or a group of children, the Committee shall determine whether it is in the best interests of the child or group of children concerned to consider the communication. ADD: In making this determination, particularly with respect to children with disabilities, detained children, young children, and others, the Committee will seek and take into account the views of the child or group of children who have consented to the representation.

CHINA

Article 2

(1) In paragraph 1, to avoid manipulation of the communication mechanism, "or on behalf of an individual or group of individuals" should be replaced with "*a child or a group of children or the legal guardians of the child or children*";

(2) Paragraphs 2&3 shall be retained as it is;

(3) Paragraph 4 shall be amended as "Where a communication is submitted by the legal guardians of the child or children, this shall be with the consent of the child or children unless the author can justify acting on their behalf without such consent."

FRANCE

France :

Article 2.1 Nous comprenons bien ce qui a amené le Président à utiliser le terme de "particulier" : prendre en compte les cas dans lesquels les victimes qui étaient enfants au moment où la violation a été commise n'ont pu épuiser les voies de recours internes avant d'avoir 18 ans.

C'est dans l'esprit des commentaires du Comité des droits de l'enfant que nous proposons de préciser la notion de particulier en ajoutant entre parenthèse tout de suite après ce mot la phrase suivante :

(c'est à dire les enfants au moment de la violation alléguée, leurs parents ou leurs représentants légaux)

Article 2.2 Nous partageons l'avis du Comité des droits de l'enfant : aucun des droits protégés par ces instruments ne doit être exclu du champ d'application de la procédure de communication car ces droits sont indissociables, interdépendants et indivisibles. Exclure l'un de ces droits équivaut à établir une hiérarchie entre eux.

Article 2.5 Ce para a été ajouté pour prendre en compte les préoccupations de certains Etats au sujet de la manipulation possible d'enfants.

Nous saluons l'introduction de la notion de l'intérêt supérieur de l'enfant dans le projet de protocole. Cependant, afin d'atteindre l'objectif du président de prendre en compte les préoccupations des Etats, il nous semble qu'il conviendrait de préciser clairement ce cas de figure d'un nouvel alinéa

6. Le Comité prévoit dans son règlement intérieur les procédures adéquates permettant d'éviter toute manipulation des enfants et de garantir les droits des enfants dans la procédure (nouveau).

GERMANY

Art. 2 § 1:

It has to be clarified that children have to be represented by an adult regardless of their age or their stage of development.

We would suggest to include a provision to the effect that the Committee shall determine whether the representation is in the best interest of the child.

This because:

The child should not be exposed to a procedure, which is not child-friendly at all.

Representation is also necessary for the effective protection of the child and that the proceedings are followed through correctly.

Art 2 § 4

We think that it is necessary to restrict the circle of persons entitled to submit a complaint on behalf of a child to avoid misuse.

We think, furthermore, the article should clearly establish the criteria when "acting on behalf of the child without consent" is justified so as to avoid that a child is misused or becomes a tool.

In this matter it could be considered that the Committee shall also determine whether the action on behalf of the child without consent is in the best interest of the child as laid down in Art. 2 § 5.

Art. 2 § 5

We would suggest to add a special provision regarding the child's age or stage of development.

Afternoon-Statement

Art. 2

Once again we would like to emphasize the protection aspect of a necessary representation of a child regardless of age:

We think the right of the child to be heard and to participate in the procedure should be explicitly laid down in the OP. But this is an entirely different matter from the question of the necessary representation of the child:

We do think that only a representation guarantees the child's freedom of opinion. The representative ensures that the child's opinion will be clearly stated.

The child needs help in such a procedure. We have to make sure that an adult stands by the child that this representative supports the child in all his interests.

MEXICO

ARTICLE 2

Any person or group of persons, or any nongovernmental entity legally recognized in one or more states, may lodge petitions with the Committee containing denunciations or complaints of violation of the Convention of the Rights of the child and/or its protocols) by a State Party.

Article 2

Individual communications

1. Communications may be submitted by or on behalf of an individual or a group of individuals, within the jurisdiction of a State Party, claiming to be victims of a violation by that State Party of any of the rights and obligations /or/ provisions set forth in/ALT rights deriving from:
 - (a) the Convention;
 - (b) the Optional Protocol to the Convention on sale of children, child prostitution and child pornography;
 - (c) the Optional Protocol to the Convention on the involvement of children in armed conflict.
3. Any State Party having made a declaration in accordance with paragraph 2 of the present article may, at any time, amend or withdraw this declaration by notification to the Secretary-General of the United Nations which will take effect within three months/immediately.

Sur l'article 2, paragraphe 1 : Comme d'autres délégations qui se sont exprimées ce matin, la Suisse a aussi des réserves par rapport à ce paragraphe en raison de sa conception des droits économiques, sociaux et culturels qui ne sont pas justiciables dans notre ordre constitutionnel ainsi que dans la jurisprudence actuelle de notre Tribunal fédéral.

Sur l'article 2, paragraphe 5 : Nous pouvons soutenir la formulation actuelle de ce paragraphe. Pour les détails, nous faisons pleinement confiance au Comité des droits de l'enfant dans l'élaboration de ses règles de procédure pour identifier les meilleures façons de garantir l'intérêt supérieur de l'enfant dans des cas concrets.

Je vous remercie de votre attention.

INTERNATIONAL DISABILITY ALLIANCE

Article 2

Individual communications

1. Communications may be submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a State party, claiming to be victims of a violation by that State party of any of the rights set forth in:
 - (a) The Convention;
 - (b) The Optional Protocol to the Convention on the sale of children, child prostitution and child pornography;
 - (c) The Optional Protocol to the Convention on the involvement of children in armed conflict.
2. A State party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in subparagraph 1 (b) and/or (c) of the present article.
3. Any State party having made a declaration in accordance with paragraph 2 of the present article may, at any time, amend or withdraw this declaration by notification to the Secretary-General of the United Nations.
4. Where a communication is submitted on behalf of an individual or group of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.
5. Where the author of a communication is acting on behalf of a child as defined in article 1 of the Convention, or a group of children, the Committee shall determine whether it is in the best interests of the child or group of children concerned to consider the communication.

Comment:

Draft article 2 (5):

This provision should mention explicitly that, in examining the best interests of children, their views should be sought and taken into account, particularly including children with disabilities and other children whose views may be overlooked or who need extra support to make their views known.

The revised text would read:

2 (5) Where the author of a communication is acting on behalf of a child as defined in article 1 of the Convention, or a group of children, the Committee shall determine whether it is in the best interests of the child or group of children concerned, to consider the communication. In making this determination, particularly with respect to children with disabilities, detained children, young children, and others, the Committee will seek and take into account the views of the child or group of children who have consented to the representation.

Alternatively, IDA would suggest the deletion of Articles 2(4) and 2(5).

ICJ

With respect to articles one and two, the ICJ associates itself with the statement of the NGO Group and a number of delegations in emphasizing the importance of retaining an explicit reference to the principle of "best interests of the child", which should always guide the Committee for the Rights of the Child in its adjudication of communications. We would call for additional language emphasizing the right of a child to participate and to be heard, as suggested by the Committee on the Rights of the Child in its submission. We would reject the quite patronizing notion that has been expressed that children should not be involved in legal proceedings. Children, have full legal personality and an equal right to access to justice, including the right to be heard

Regarding the scope of the Optional Protocol, the ICJ considers it inappropriate to provide for either opt out possibilities in respect of the two existing optional protocols. To subject only certain obligations assumed and not others to a communication procedure would lead to an unacceptable hierarchy of rights, an approach that was rejected by states when discussions took place on the Optional Protocol to the ICESCR. Of course, if an individual were to make a communication concerning an instrument to which the object state is not a party, it would necessarily be declared inadmissible, and such language should be made explicit in the Protocol.

Finally, with respect to draft paragraph 2(4), the ICJ considers it inappropriate to add specific criteria as to the possibility of justification of acting without the consent of an alleged victim. Such a determination should best be made by the Committee itself on a case-by-case basis.

Thank you Mr. Chairman.

NATIONAL HUMAN RIGHTS INSTITUTION - NORWAY

Article 2 - Individual Communications

- In January 2010, we had registered concern that States and NGOs in their proposals were restricting standing to "children" rather than individuals who had been victims while they were children.¹ Such an approach risked excluding many or the majority of victims. By the time most cases reach the Committee, most victims are likely to be an adult as they lacked litigious capacity or consciousness of a violation when a child. We are pleased to see that this temporal limitation on victims is no longer present and Article 2.1 focuses on individuals.
- However, the inclusion of Article 2.2 is problematic *on its face*. Opting out of substantive obligations in *international* complaint procedures has not previously been permitted. However, it is logical that States which are not parties to the protocols on sale of children, prostitution and pornography and armed conflict should not be expected to defend individual complaints concerning violations of them. One drafting compromise could be specifying in Article 2.1 that these two protocols can only be invoked by victims when ratified by the respondent State.

• The Committee has recommended deleting Article 2.5 which requires the Committee to assess whether a representative is acting in the child victim's best interest. They argue that consent by the child should suffice and the provision duplicates Article 1.2 by repeating the best interests of the child. However, we are more sympathetic to the inclusion of this clause. Since children, particularly younger children, have limited autonomy, it may be worth emphasising that the Committee must examine the best interests of the child in considering whether the claim should proceed. This has been a particular concern in custody-related cases. One alternative would be to lower the clause's mandatory nature by changing "shall" to "should". Article 4 of OP to ICESCR adopts a similar approach: it adds discretion for the CESCR Committee to find a case inadmissible where the degree of harm is not significant.

¹ See *The New Kid on the Block: A Complaints Procedure for the Convention on the Rights of the Child*, Working Paper No. 1, SERP, Norwegian Centre for Human Rights, University of Oslo, January 2010. Forthcoming in *Forthcoming in the Nordic Journal of Human Rights*, Vol. 38, Nos. 3/4 (2010).



ngo group for the crc

Regarding Article 2:

On the issue of the scope of the communications procedure:

We strongly support the position of the Committee on the Rights of the Child and of many delegations to delete the opt-out option for the two existing Optional Protocols currently envisaged in the draft text in order to ensure that the communications procedure does indeed apply to all the children's rights obligations accepted by a State party and to avoid any differentiation between rights.

On the representation of the child:

We believe that the Committee on the Rights of the child will be in the best position to determine whether representatives are acting in the best interests of the child victim and support the positions of several delegates who stressed that this matter should be reserved to the Rules of procedure of the Committee.

1 See list of members at the end of the statement

We would also like to stress that the notion of "legal capacity" only exists at the national level and any insertion of such terminology in the draft Optional Protocol would produce a contradictory situation where a child would be envisaged as an object rather than a subject of rights under his special communications procedure, while he or she enjoys unrestricted access under all other existing communications procedures.

Art. 2,4 as it is currently drafted is essential to ensure that all children, including babies or young children, who cannot consent or give authorisation, may be represented. Also; in cases of a conflict of interest between the parents and the child, or the legal guardian and the child, the current draft would ensure the child can be represented by another actor, such as a social worker, under the communications procedure if their rights are violated.

In such cases, Art. 2,5 offers the necessary safeguards by giving the Committee the power to assess whether the communication is submitted in the best interests of the child.

Thank you.