



A Complaints Procedure for the Convention on the Rights of the Child: Commentary on the Second Draft

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Introduction

The Convention on the Rights of the Child is the only core international human rights treaty to lack a complaints mechanism. Since July 2009, the UN Human Rights Council has moved with considerable speed in developing a protocol to allow allegations of concrete violations of rights under the treaty to be heard by the quasi-judicial Committee on the Rights of the Child. In August 2010, the Chair of the Council's Working Group issued a draft protocol¹ which was discussed by States and others in December 2010. In January 2011 a revised draft was issued.²

This commentary analyses this second draft of the text³ in light of existing international law and the need to ensure a balance between making the procedure effective for children and maintaining the normative legitimacy of the international human rights system. We argue that there are some welcome and ground-breaking developments in the draft but that some provisions need to be amended to protect the rights of both children and the interests of States.

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¹ *Proposal for a draft optional protocol prepared by the Chairperson-Rapporteur of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure*, Human Rights Council Working Group on an optional protocol to the Convention on the Rights of the Child, Second session, 1 September 2010, U.N. Doc. A/HRC/WG.7/2/2.

² *Revised proposal for a draft optional protocol prepared by the Chairperson-Rapporteur of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure*, Human Rights Council Working Group on an optional protocol to the Convention on the Rights of the Child, Second session, 13 January 2011, U.N. Doc. A/HRC/WG.7/2/4.

³ For our analysis of the first draft, see <http://www.jus.uio.no/smr/english/people/aca/malcolml/crc-op-commentary-firstdraft.pdf>

Analysis and Recommendations

Articles 1– 4 – Competence

- It is critical that important procedural rights of children, contained in the Convention on the Rights of the Child, are integrated in the complaint process. The procedure needs to be child-sensitive to be effective: indeed, one of the possible explanatory variables for the lack of child rights litigation under other international procedures is the lack of child-orientation in the design of complaint procedures. Moreover, the child's use of the procedure must be genuine - in keeping with their interests and autonomy - and should not be abused by their representatives. The first draft of the protocol integrated the 'best interests of the child' as a *procedural* principle in Article 1.2. However, this was insufficient: the right to effective participation could also be added.
- The second draft has largely taken account of these considerations. The new Art. 2 sets out "General principles" to guide the functions of the Committee. These include two of the four guiding principles of the CRC⁴: the best interests of the child and the right of the child to be heard and implicitly. A third of these principles 'protection', the original Article 13 of the first draft, has been moved up to become Art. 4. However, the principle of non-discrimination is not explicitly mentioned although Article 2 requires the procedure to exhibit "respect for the rights of the child".
- Moreover, we are particularly pleased that the Committee has been encouraged in Article 3 to be innovative in designing its rules of procedure, and they are explicitly mandated in the exercising of their functions to "have regard ... to article 2 ... in order to guarantee child-sensitive procedures."

Article 5 – Publicity

- In Art. 6 of the first draft, a blanket confidentiality clause was imposed on the identity of the author of a communication, whereby the identity of the complainant would not be disclosed to the state party except with the express consent of the applicant. We argued that as much as the intention behind this is to protect vulnerable children, it may in fact be detrimental to both a fair hearing, and the interests of the children it is

⁴ As identified by the Committee in its General Comments 3 and 12.

designed to protect. The State would have faced difficulties in defending the claim, if it lacked the necessary information about the applicant. We also argued that confidentiality of the identity of the complainant makes *amicus curiae* interventions difficult if the proceedings are made even less transparent than they already are. We submitted that the clause should be rephrased to place the burden on the applicant to justify why their identity should be fully or partly made confidential, which would facilitate *amicus curiae* interventions.

- The present draft now makes it clear, in Art. 5 that “the identity of any individual or group of individuals submitting a communications shall not be revealed *publically* without the express consent of the individual or individuals concerned”. The clause now provides the possibility of publicity of the complainants but this is restricted by their consent. There remains a question as to whether the Committee should be a play role though in determining whether the need for consent is appropriate in a particular case. There may be less need for protection for an adult claiming compensation for violations when they were a child in comparison to a child confined to an institution or prison.

Article 6 – Individual Communications

- In January 2010, we 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.⁵ 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 were pleased to see that this temporal limitation on victims was not present in the first draft. Positively, the second draft has taken this further in its express provision for individuals or groups “claiming to have been victims *or to have been victims while they were children*”.
- Article 6.2 remains problematic *on its face*: it allows for the opting out of substantive obligations in *international* complaint procedures, which has not previously been permitted. However, it is logical that States which are not parties to the protocols on

⁵ 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).

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 6.5 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. This provision still remains in the second draft. 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 family custody-related cases. One alternative would be to lower the clause's mandatory nature by changing "shall" to "should".
- State deliberations at the Working Group Meeting in Geneva in December 2010 emphasised a fear of the manipulation of children – an issue that has been floating about since the negotiations began. The inclusion of Art. 6.6 whereby the "Committee shall include in its rules of procedure safeguards to protect the manipulations of children by those who represent them" is welcome in this regard.

Article 7 Collective Communications

- The inclusion of a collective complaint procedure is positive. Such mechanisms are particularly relevant where there are large group of victims, systemic issues are at stake or the victim group lacks organising capacity. While they are open to abuse, clear rules of procedure can ensure that they are used by public interest groupings only when necessary.
- However, the provision in the first draft was the subject of lengthy discussion in the Working Group. The consequence is that the strength of this article has been subsequently diluted in the second draft. The key change is that States must 'opt-in' to the procedure. This requires a specific declaration at the time of ratification. This is disappointing as opt-in procedures are substantially less likely to attract ratifications, possibly through mere oversight in the ratification process. A better approach would

be an opt-out procedure so that the State takes a more conscious and public choice in this regard upon ratification.

- The second draft does, however, make a marginal improvement in the quality of the procedure – and in the direction we had hoped. The first draft limited standing to organisations with ECOSOC status could be problematic. Such organisations tend to be predominantly international NGOs or large national NGOs. The experience from collective complaints before the European Committee of Social Rights indicates that restrictive standing can sometimes create an artificial process where small national organisations must search for an international organisation that is accredited with the Committee. The second draft provides that competence is to be set out in the rules of procedure.
- In the first draft, only violations that were “grave or systematic” were justiciable. This was arguably too restrictive and duplicated the inquiry procedure. At the same time, there needs to be a higher threshold for such collective communications than for claims by individuals and groups of individuals. The Committee on the Rights of the Child has proposed replacing “systematic” with “repeated” violations. But the characteristic of ‘repetition’ may not be relevant; even worse, it could be more restrictive than systematic. We would argue that this proposal does not capture the type of cases that would benefit from collective communications. We would recommend the following: “grave or *systemic* violations or violations that affect a large, dispersed or heavily marginalised group of children”. The Committee’s recommendation was largely accepted with “recurring violations affecting multiple individuals”. This change lessens both the systematic and gravity requirement; however, it may be problematic as it might not cover once-off grave violations. Therefore the wording should be re-examined.

Article 9 - Admissibility

- It was very positive that a time limitation for submission of complaints was not included in the *first draft* of the protocol. The requirement of submitting claims within one year of a violation or exhaustion or domestic remedies, as included in the Optional Protocol to ICESCR, would potentially choke the effective use of the protocol. This is particularly the case where there are no domestic remedies but a victim does not know

that an international complaint procedure is available. In the case of children, particularly in rural areas or poorer countries, this risk is even higher.

- Sadly, such a provision has been included in the present draft. It should be removed.

Article 8 – Interim Measures

- The inclusion of an interim measures provision is crucial, particularly given the potentially lasting effects of violations in childhood and the length of domestic and international procedures. We would not be surprised to see some proposals to restrict this measure: for example, to restrict it to “exceptional circumstances”. The problem with this wording is that it would encourage the trend of restricting the use of interim measures to cases concerning the death penalty and deportation. Arguably, interim measures are relevant to a slightly broader range of cases. Thus “possible irreparable damage” should be the simple and straightforward standard.
- The issue as to whether such interim measures are legally binding is not explicitly addressed in the current draft. While the matter has been the subject of some debate, the clear jurisprudential trend is towards recognizing they are legally binding. Indeed, the International Court of Justice has emphasised the reasoning behind a strict approach to interim measures: “Therefore it must be part of the authority of an international tribunal to take the necessary steps to ensure that the subject of the litigation is preserved until the final judgment is rendered”⁶ Therefore, it may be wise to either include a statement on the measures being legally binding or to make no reference to the issue.

Article 10 – Discretion to decline

- The second draft of the protocol allows the Committee to decline to consider a communication if “it does not reveal that the author has suffered a clear disadvantage” although the Committee can justify hearing such a case if it “raises a serious issue of general importance”. This clause is borrowed from Article 4 of the Optional Protocol to ICESCR, where it was controversially introduced. The provision was supported by some States and some NGOs as a valve for the Committee to control what some feared could be a flood of frivolous or undeserving cases. The potential danger is that

⁶ *LeGrand case (Germany v United States of America)* ICJ Rep 2001, 466, [99].

it allows subjectivity to enter the process – a conservative Committee may not consider a particular violation serious due to traditional or uninformed assumptions about children. Thus it would be advantageous to let cases move automatically to the merits stage where the actual impact could be properly interrogated.

Article 12 – Friendly Settlement

- The inclusion of a friendly settlement procedure is potentially a positive development; it can allow victims to obtain a favourable solution and evidence from other procedures suggests that it increases the likelihood of enforcement. However, there are the long-standing concerns with such procedures. An applicant may possess less bargaining power than states in negotiations and the chance to address systemic issues is lost: not all victims may request broad-ranging measures in a settlement.
- We proposed earlier that these concerns be directly addressed in the design of the friendly settlement procedure in the protocol. We recommended first, that the parties must be required to consider the systemic issues raised by the complaint in their negotiations. This has not been followed up in the text of the second draft.
- Second, we argued that the Committee should play a role in ensuring that there is no abuse of process, that there is follow-up to enforcement and that the case is not finally closed until there has been implementation (on last point see further below under Article 14). In the current second draft, we are pleased to see that a sentence has been added to the second provision – Art. 12.2 – stipulating that the “Committee may, within twelve months after a friendly settlement has been reached, follow-up its implementation.” This is a positive step. We would submit that this could be bolstered by incorporating express steps which the Committee may take, as stated above.
- Third, the Committee should be encouraged to address the systemic issues during its next periodic review of the State and/or take up the topic in a future General Comment. This is currently not included in the draft.

Article 13 – Consideration of Communications

- In our comments to the first draft and in our submissions to the Working group in Geneva in December 2010, we submitted that the continuation of ‘closed meetings’ for individual

communications to UN human rights treaty bodies is disappointing. Art. 13.1 in its current form does not match the procedures for regional human rights mechanisms and this lack of transparency makes *amicus curiae* interventions difficult: potential interveners are excluded from obtaining relevant knowledge of the case. The international investment arbitration regime has been strongly criticised by the human rights community and others for the lack of transparency. The international investment community has responded with a number of procedural innovations. It is time for the international human rights system to do likewise.

- It is positive in Article 13.2 (identical to 8.2 save for the addition of the words “as quickly as possible” after “the present Protocol”) that the Committee can consider documentation that emanates from non-Parties. This can allow the development of an appropriate *amicus curiae* procedure, which will be particularly important in introducing systemic perspectives in individual cases.
- An interesting development in the December 2010 Working Group was the support by some states for a reasonableness standard to be incorporated in the protocol. The United Kingdom advocated that the justiciability test from Art. 8(3) of OP-CESCR should be incorporated in this draft – that similar language is considered, to: assess the “reasonableness” of state measures, and to ensure consistency with the only other complaints mechanism that considers ESC rights. Notably, Sweden took this a step further in proposing that all of the rights in the CRC should be subject to the same test of reasonability and progressive realisation. The ICJ responded with a strong statement that this is both not practicable (how does one separate the rights brought before the Committee in a particular case with precision) and disastrously mistaken as it would create a hierarchy of rights contained in the CRC. We also warned against this by stating that it would subject children’s civil and political rights contained in the CRC to a standard which is not required in any other international human rights treaty.
- In any case, the concerns over economic, social and cultural rights are largely addressed in the CRC itself. Article 4 states that “With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.” The use of the term “such measures” already indicates that States have a margin of discretion in the choice of the appropriate legal and policy interventions to achieve the realisation of

children's rights. Thus, we do not see any need for the introduction of such a test in this treaty.

Article 14 – Follow-Up to the Procedure

- It is positive that the respondent State must provide a written response to the Committee on its views of the decision and action taken on recommendations (Article 9.1). However, relegating the remainder of the follow-up to the period reporting procedure (Article 9.2) is rather limited when viewed against the more innovative procedures being developed at the regional level. The Working Group should discuss more innovative procedures such as: (i) not closing a communication until the Committee is satisfied there has been compliance, particularly in cases of grave or systemic violations; (ii) allowing an expedited re-submission of the complaint where there has not been compliance; or (iii) being permitted to invoke the inquiry procedure when there is insufficient compliance with a decision.

Article 15 – Inter-State Communications

- The drafters of the OP have opted to include this mechanism, as it is included in five other core international human rights treaties,⁷ despite not yet having been used under any of those instruments.⁸ It is included as an opt-in procedure, which may dilute its risk, even despite its established non-utilisation. Given existing practice under other treaty bodies, it is highly unlikely to be used, which can be a result of “the perceived diplomatic and political implications of such an action,” even where it is mandated, as it is in CERD. Nonetheless, we would argue that this provision should be left in the OP as it serves as a political tool:

But even if the interstate procedure would not be (widely) used, its mere existence provides useful tools for international diplomacy and leaves the door wide open for

⁷ The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Art. 10, where it is an optional procedure; articles 41 to 43 of the International Covenant on Civil and Political Rights and also in article 21 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 76 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and article 32 of the International Convention for the Protection of All Persons from Enforced Disappearance.

⁸ It was first provided for in Arts. 26 to 34 of 1919 Constitution of the International Labour Organisation and in Art. 24 of the ECHR in 1950. Prior to its adoption in Art. 41 of the ICCPR it was set down in Art. 8 of 1960 UNESCO Convention Against Discrimination in Education and in Arts. 12 to 19 of its 1962 Protocol, as well as in Arts. 11 to 13 of CERD; see Nowak, M. (2005). U.N. Covenant on Civil and Political Rights: CCPR commentary. Kehl, N.P. Engel. at 756-7.

possible future developments in international human rights litigation. It is better to have it rather than to omit it.⁹

- The current draft has kept the wording of what were previously Arts. 12.1 and 12.2, but has added two sub-provisions. Article 15.3 notably introduces the idea of friendly settlement into inter-state communications, where the Committee “shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of the respect for the obligations set forth in the Convention and its Optional Protocols.”

Article 16 – Inquiry Procedure

- The inquiry procedure is a significant strength of an optional protocol and can be a useful mechanism to ensure the protection of children’s rights. In its comments on the draft, the Committee suggested that the draft adopt instead, the language of “grave and *repeated*” violations as opposed to “grave and systematic” as it can be seen to restrict the ambit of the provision to only those violations that suggests the existence of a deliberate policy of the State. We do not think such an interpretation is justified and “repeated”, as noted above, is equally inappropriate: “systematic” often refers to a violation that is large-scale or structural. Malevolent intention on the part of the State is usually or increasingly not necessary for determining violations of human rights. However, an alternative would be use to the phrases “systemic” or “large-scale” in order to capture the intended cases for the inquiry procedure.

Article 14 – International Assistance and Cooperation

- The replication of this clause from the optional protocol to ICESCR is positive. However, it is not clear that the State’s consent is always relevant for Article 14.2. For example, a concern may be expressed to an international specialised agency that its actions are harmful to the rights of the child. Thus, the basis behind the recommendation or comment to such an agency is not a request for technical advice or assistance but rather a concern with that institution’s own policies. While the receipt of assistance or advice could naturally require a State’s consent it is not clear that other forms of recommendations demand it.

⁹ Ssenjonjo, M. (2010). Economic, Social and Cultural Rights. *International Human Rights Law: Six Decades after the UDHR and Beyond*. M. A. Baderin and M. Ssenjonjo. Surrey, Ashgate: 49-88.83.