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# **A Complaints Procedure for the Convention on the Rights of the Child: Commentary on the First Draft**

5 December 2010

*Malcolm Langford\** and *Sevda Clark\*\**

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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 at remarkable 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 protocol and this commentary takes a first look at the text. We critically analyse the provisions 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 groundbreaking developments in the draft but that some provisions need to be better amended to protect the rights of both children and the interests of States. Some of our comments and proposals accord with those from the Committee on the Rights of the Child; others are the opposite or take different positions.

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\* Director, Socio-Economic Rights Programme, Norwegian Centre for Human Rights, University of Oslo.

\*\* Coordinator, Socio-Economic Rights Programme, Norwegian Centre for Human Rights, University of Oslo.

## Analysis and Recommendations

### Article 1 - Competence

- Integrating the ‘best interests of the child’ as a *procedural* principle in Article 1.2 of the Protocol for the complaint process is welcome. However, the paragraph ignores other potentially important procedural principles that could be derived from the Convention on the Rights of the Child. While protection is included in Article 13 of the draft protocol, the right to effective participation could be added in Article 1.2.
- However, the inclusion of these two core principles in Article 1.2 as such does not provide sufficient justice to the reasoning behind the push for their inclusion. One of the key concerns is that the procedure will not be child-sensitive, one of the possible explanatory variables for the general lack of child rights litigation under other international procedures. We would recommend that specific mention be made of the need for a child-sensitive process during the adjudication. This should also hopefully encourage the Committee to be innovative in designing its rules of procedure.

### 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.<sup>1</sup> 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

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<sup>1</sup> 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).

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.

### **Article 3 Collective Communications**

- The inclusion of a collective complaint procedure is a welcome development. Such mechanisms are particularly relevant where there are large group of victims, systemic issues are at stake or the victim group lacks organising capacity.
- The limitation in Article 3.1 of initial 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. Moreover, the creation of an additional and prior approval process by Committee on the Rights of the Child is cumbersome. We would recommend that the right to take collective communications can be taken by either ECOSOC or other organisations who demonstrate competence in the area. This assessment of competence should take place during the admissibility phase. This is the practice in many national and regional jurisdictions when organisations make collective claims.
- The requirement that violations are "grave or systematic" is too restrictive and duplicates the inquiry procedure. However, 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”. Note that we consider “systemic” to be less demanding than “systematic”.

- Permitting States to opt-out of the collective communications in Article 3.2 is disappointing. However, it is certainly to be preferred to an opt-in procedure.

#### **Article 4 - Admissibility**

- It is very positive that a time limitation for submission of complaints has not been included in this protocol. The requirement of submitting claims within one year of a violation or exhaustion of domestic remedies, as included in the Optional Protocol to ICESCR, would potentially choke the effective use of the protocol.

#### **Article 5 - 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 of Article 5. 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”<sup>2</sup> 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 6 – Transmission of the Communication**

- A blanket confidentiality clause is imposed on the identity of the author of a communication. 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 designed to protect. The State may face difficulties in defending the claim if it lack necessary information about the applicant. Moreover, it makes *amicus curiae* interventions difficult if the proceedings are made even less transparent than they already are. Therefore, the clause should be rephrased to place the burden on the applicant to justify why their identity should be fully or partly made confidential.

## **Article 7 - Friendly Settlement**

- The inclusion of a friendly settlement procedure is potentially a positive development, It can allow victims in obtaining 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 propose that these concerns be directly addressed in the design of the friendly settlement procedure in the protocol. First, the parties must be required to consider the systemic issues raised by the complaint in their negotiations. Second, the Committee should play a role in ensuring that there is no abuse of process, there is follow-up to enforcement and not close the case finally until there has been implementation (on last point see further below under Article 9). Third, the Committee should be encouraged to address the systemic issues during its next periodic review of the State or take up the topic in a future General Comment.

## **Article 8 – Merits**

- The continuation of ‘closed meetings’ for individual communications to UN human rights treaty bodies is disappointing. Article 8.1 in its current form contradicts the

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<sup>2</sup> *LeGrand case (Germany v United States of America)* ICJ Rep 2001, 466, [99].

procedures for regional 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 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 8.2 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.

### **Article 9 – 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 10 - 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.