

A COMMUNICATIONS PROCEDURE ON CHILDREN'S RIGHTS: A PROTOCOL À LA CARTE

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MR. JEAN ZERMATTEN, VICE-CHAIRPERSON OF THE CRC, SHARES HIS THOUGHTS ON THE DRAFT OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON A COMMUNICATIONS PROCEDURE

The final text of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure – providing for individual complaints, inter-state communications and an inquiry procedure – was adopted this February.¹ The CRC Chairperson disappointingly described the text as affirming that children's rights are “mini humans with mini rights”.² What is your view of the outcome document and the process leading to its adoption?



Mr. Jean Zermatten, Vice-Chairperson of the Committee on the Rights of the Child. © OHCHR/Danielle Kirby

The Committee was very involved in the process of drafting the Optional Protocol. We therefore had high expectations, maybe too high, since ultimately the drafting of a human rights instrument is a political, not only a technical, process. Many proposals submitted by the Committee were not fully taken into account. We are disappointed at the outcome because we believe that the text could have been stronger. In particular, the Committee is disappointed at the following:

First, the abandonment of the collective communications procedure. The Committee was unanimously in favour of the possibility to receive and consider collective complaints. An earlier draft of the Optional Protocol included the collective communications procedure with an opt-in possibility. In the end, we have no such procedure at all, not even with the possibility of opting in. The second disappointment is the possibility of States parties to opt-out of the Protocol's inquiry procedure. Thirdly, States parties can make reservations under the Optional Protocol.

While I share the Chairperson's sentiment that the final text conveys the message that children's human rights are “mini rights”, I have the impression that we have lowered the human rights standards for children. Allegorically speaking, we have a “kid's menu”.

Under the Optional Protocol, will children themselves be able to submit complaints in their capacity as individual rights holders?

We had extensive discussions on the capacity of the child to complain.³ Some States were very much in favour while others were strongly against. Those against argued that their domestic legal system does not provide for the possibility of children to act and to complain as individuals; children have to go through parents or legal representatives. Some States held that complaints under the Protocol would have to go through parents. But we know that parents are not always good representatives since they may have been involved in the conflict or are themselves the offenders. Very often the interests of the parents and the child are contradicting, if not directly

¹ Approved and adopted by the Open-Ended Working Group to explore the possibility of elaborating an optional protocol to the Convention on the Rights of the Child to provide a communications procedure, established by the Human Rights Council pursuant to Resolution 11/1 of 17 June 2009.

² CRIN Summary of the third and final working group meeting to draft the communications procedure under the UNCRC (CRIN Summary).

³ The first meeting of the Working Group was held from 16 to 18 December 2009 and the second meeting from 6 to 10 December 2010 (first part) and from 10 to 16 February 2011 (second part).

conflicting. This is important. We cannot impose on children to complain through parents.

The possibility of the child to complain is consistent with the right of the child to be heard.⁴ This means that the child who is capable of forming his/her own views has the capacity to act by him/herself in accordance with age and maturity, and his/her evolving capacities. We have to be consistent also in this Optional Protocol and allow children to act directly. It should also be recalled that other groups in society, such as persons with disabilities or minorities, are in a similar position and are not obliged to go through legal representatives. We have to assist these groups in finding a possibility to complain and seek remedy. In the future rules of procedures, the Committee must offer children the concrete possibility to complain.



Mr. Jean Zermatten with Ms. Katarina Mansson (OHCHR) during the interview. © OHCHR/Danielle Kirby

So, yes, in theory, the Protocol does allow for a child in his or her own right and capacity to complain directly to the Committee. In practice, the vast majority of the complaints are likely to be submitted by representatives of the child, by lawyers, parents and others.

Another weakness in the final text of the Optional Protocol concerns the requirement of written complaints. The possibility to present a complaint through other means was deleted. The Committee is of the view that the written procedure is not always the best one for children. We wanted to extend this possibility and include other means such as video or audio recordings, video-conferences, oral submissions or other means. If we only have the written complaints procedure, we will probably limit the possibility of the child to act directly. This is another issue that the Committee raised and insisted on.

The Committee advocated during the negotiations for the possibility of hearing the child, or children concerned, when examining the merits of individual communications.⁵ Does the Protocol as adopted allow for such child participation, ensuring in

practice the general principle of the right of the child to be heard?

I believe that the text of the current draft is vague enough not to prohibit the possibility for children to be heard by the Committee. The rules of procedure to be drafted and adopted by the Committee will most likely provide for this. To me, it is obvious that, when needed, the Committee must listen to children. We all know at this stage how to interview and listen to children through different technical means – Children of the world should not have to come to Geneva in order to be heard! The reason for not mentioning it in the text was not to make hearings mandatory.

Among the more controversial issues during the negotiations concerned the possibility of a collective communications procedure which would have allowed non-governmental organizations and national human rights institutions to submit complaints to the Committee in the case of recurring violations affecting many children.⁶ This would have presented the Committee with a unique preventive tool, enabling it to address situations affecting the rights of many children in one single procedure.⁷ In your view, why was the procedure not retained in the final text and what are the main arguments why it should have?



Mr. Jean Zermatten on the Optional Protocol: "The possibility of the child to complain is consistent with the right of the Child to be heard". © OHCHR/Danielle Kirby

I believe that one important argument against collective communications is that this is something new. To date, no other UN human rights treaty body can consider collective communications. The experience of the African Committee on the Rights and Welfare of the Child to receive collective complaints cannot be used as an experience because the African Committee has not yet

⁴ Article 12, Convention on the Rights of the Child.

⁵ A/HRC/WG.7/2/3, para. 20.

⁶ Footnote 7 in A/HRC/17/36, p. 12.

⁷ A/HRC/WG.7/2/3, paras. 13-15, and A/HRC/17/36, para. 46.

received a collective complaint.⁸ We have the experience of the European Committee on Social Rights which can receive and consider collective complaints under the Additional Protocol to the European Social Charter.⁹ Under this procedure, the European Committee on Social Rights has considered several complaints dealing specifically with children.¹⁰



Ms. Yanghee Lee, Chairperson of the Committee on the Rights of the Child, Mr. Jean Zermatten and Mr. Peter Newel Expert from the NGO Group on the Rights of the Child during the Second Working Group on an optional protocol to the Convention on the Rights of the Child (6-10 December 2010). © OHCHR/Danielle Kirby

But to date no UN treaty body has this possibility and I believe there is a feeling that “we will not start with children”. This is a *position de principe* for some States. But basically the main arguments against collective communications were two. First, it is impossible because of anonymity. Under this procedure, the victim cannot be identified, which is necessary in order to respond to a communication. Secondly, if the victims are not known, how to determine whether domestic remedies have been exhausted?

⁸ Article 44 of the African Charter on the Rights and Welfare of the Child: “1. The Committee may receive communication, from any person, group or nongovernmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by this Charter”.

⁹ The additional Protocol to the European Social Charter Providing for a System of Collective Complaints was adopted in 1995 and entered into force in July 1998. The following entities can submit collective complaints: International organisations of employers and trade unions; Employers’ organisations and trade unions in the country concerned; and International Non-Governmental Organisations (INGOs) enjoying participatory status with the Council of Europe which are on a list drawn up for this purpose by the Governmental Committee of the Charter for a 4-year period which may be renewed.

¹⁰ Such complaints have concerned, inter alia, child labour in Portugal, educational provisions for autistic children in France, and the absence of effective prohibition against corporal punishment of children in Belgium, Greece, Ireland, Italy and Portugal. See Robin R. Churchill and Urfan Khaliq, “The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?”, in *European Journal of International Law*, EJIL (2004), Vol. 15 No. 3, 417–456.

The discussion was long, a debate between yes and no, without any possibility to find a compromise, or even a start of a compromise. Arguments in favour stressed that a collective communications procedure will help children when we have a very large group of victims: With NGOs or others representing children, their anonymity can be ensured since they don’t *want* to be identified. So it is also a protection issue. For example, sexually exploited children or children who are victims of violations committed in a State institution most likely do not want to be identified.

A collective communications procedure would also have been a very good complementary tool in monitoring implementation of the Convention and its Optional Protocols. It could have allowed for the identification of structural violations or gaps in States parties. The main arguments in favor of the procedure were hence the advantage of anonymity and the complementarity to our existing monitoring mechanism - another avenue to render justice to all children.

Many delegates, experts and observers involved in the negotiations were disappointed at the absence in the final text of a provision prohibiting reservations to be made under the Optional Protocol and the fact that the inquiry procedure in the case of grave or systematic violations of children's rights is optional for States parties. Are there any possibilities to address these and other shortcomings before the Human Rights Council is expected to adopt the Protocol in June?



A State delegate during the Second Working Group on an optional protocol to the Convention on the Rights of the Child (6-10 December 2010). © OHCHR/Danielle Kirby

It is difficult to give a very precise answer. We would appreciate to see a change, because the possibility to make reservations to an Optional Protocol which is procedural and already weak seems very odd. It would be excellent if the Committee could strengthen the Optional Protocol by prohibiting reservations, just like the Optional

Protocol to CEDAW.¹¹ The Committee, however, has very little *marge de manoeuvre* and the final decision lies with States. We can work through rules of procedures but we cannot rule on the substance of the Optional Protocol. NGOs and others concerned can lobby for a strengthening of the Optional Protocol. Maybe the Human Rights Council will ask States to dedicate additional time to amend this draft? Maybe, I don't know. It is a possibility.

In any event, we now have an Optional Protocol, which is certainly a very positive development in protecting and advancing the rights of the child.

Admissibility criteria for individual communications under the Optional Protocol (article 7)

1. The Committee shall consider a communication inadmissible when:

- (a) The communication is anonymous;
- (b) The communication is not in writing;
- (c) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention and/or the Optional Protocols thereto;
- (d) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
- (e) All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief;
- (f) The communication is manifestly ill-founded or not sufficiently substantiated;
- (g) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State party concerned, unless those facts continued after that date.
- (h) 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.

The Protocol aims at reinforcing and complementing national and regional mechanisms allowing children to submit complaints and encourages States parties to develop appropriate national mechanisms to enable children to access effective remedies at the domestic level.¹² To what

¹¹ Article 17 of the Optional Protocol to the Convention on the Elimination of All forms of Discrimination against Women: "No reservations to the present Protocol shall be permitted."

¹² Preamble of the Optional Protocol, paras. 6 and 8. NGOs also expressed hope that the OP will encourage the development of strong

extent do such child-friendly mechanisms and procedures exist today? Do you expect that the Optional Protocol will enhance children's access to remedies at local and national levels?

I am convinced that the Protocol will have this effect indirectly. As States parties will not be too interested in being judged by an international committee, they are likely to establish mechanisms of control at local and national levels in order to deal with the problem domestically. Some countries provide for such possibilities, but in many States parties it is very difficult for children to have direct access to courts and to appeal court decisions. Considerable progress has been made with the system of Ombudspersons, but many Ombudspersons only have a promotional mandate with respect to children's rights and have no judicial capacity to receive and consider complaints. It will be interesting to see how this mechanism will provide impetus for States to establish at domestic level the possibility for children to obtain redress and justice.



Jean Zermatten, member of the Committee on the Rights of the Child since 2005, has been, among many activities, President of the Juvenile Court of the Canton du Valais (1980 - 2005), and President of the International Association of Magistrates for Youth and Family (IAMYF). He is currently Director of the International Institute for Children's Rights, in Sion, and is Dr honoris causa at the Fribourg University (Switzerland).■

TO READ AND LEARN MORE

- ❖ The final text of the Optional Protocol is available in UN document A/HRC/17/37 (2011)
- ❖ See also Comments by the Committee on the Rights of the Child on the proposal for a draft optional protocol in UN document A/HRC/W6.7/2/3 (2010)

and effective national remedies. See statement by Mr. Peter Newell in CRIN Summary.