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Joint Submission presented by International Catholic Child Bureau (ICCB)*, International Save the Children Alliance*, Kindernothilfe*, Plan International, Inc.*, SOS Children's Villages International*, International Federation Terre des Hommes (IFTDH)*, World Vision International *, World Organisation Against Torture (OMCT)* and the Child Rights Information Network (CRIN), the Global Initiative to End Corporal Punishment, the NGO Group for the CRC, Youth Empowerment Alliance, Inc. to the Open-Ended Working Group on an Optional Protocol to the Convention on the Rights of the Child to provide a communications procedure

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INTRODUCTION¹

On 17 June 2009, the UN Human Rights Council adopted by consensus Resolution A/HRC/RES/11/1 entitled “Open-ended Working Group on an Optional Protocol to the Convention on the Rights of the Child to provide a communications procedure”. The mandate of the Open-ended Working Group (Working Group) is to “explore the possibility of elaborating an optional protocol to the Convention on the Rights of the Child to provide a communications procedure complementary to the reporting procedure under the Convention”².

The present joint submission argues for the elaboration of an Optional Protocol establishing a communications procedure.

In response to the Concept Paper for the Working Group presented by the Core Group of States³, this submission addresses the following elements:

- The reasons for the elaboration of a new communications procedure under the Convention;
- The gaps in the protection of the rights of the child under existing national, regional and international mechanisms;
- The complementarity/compatibility of a new communications procedure with other existing international communications procedures and its relationship with domestic procedures;
- The best practices in support of the feasibility of a new communications procedure;
- The status of children as complainants.

¹ We thank Sara L. Austin for letting us use her LL.M. thesis “Strengthening the Enforcement of the convention on the Rights of the Child: A Draft Optional Protocol for a Communications Procedure” to prepare the present Joint submission

² Operative Paragraph 1 of Human Rights Council's Resolution A/HRC/RES/11/1

³ The Concept Paper was circulated on 18 November 2009 to States and other relevant stakeholders

BACKGROUND

The discussion around the possibility of establishing a communications procedure under the Convention on the Rights of the Child (CRC) is not a new idea. It was first discussed informally during the drafting process of the Convention. However, due to lack of consensus on the inclusion of an individual communications procedure, the idea was not included in order to facilitate the finalisation and adoption of the draft Convention⁴. The Committee on the Rights of the Child (the Committee) has endorsed the idea on a number of occasions, including at the 10th anniversary of the Convention and more recently in the build-up to the 20th anniversary⁵.

Twenty years after its adoption, the Convention enjoys near universal ratification and States Parties have demonstrated a high level of compliance with their reporting obligations. Notwithstanding these achievements, significant shortcomings in the implementation of the rights in the CRC persist in all countries. A strong and effective communications procedure would make a significant contribution to overcoming this problem and strengthening the global implementation of the CRC.

There is thus a strong and growing international campaign for a third Optional Protocol to the CRC to provide a communications procedure, which is supported by the Office of the High Commissioner for Human Rights (OHCHR), the Committee on the Rights of the Child, international and national NGOs, human rights institutions, ombudspersons for children and other bodies from all regions⁶.

⁴ At the time (1979 to 1989), communications procedures only existed for the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT).

⁵ See for instance, Report on the 22nd Session of the Committee on the Rights of the Child on the 10th Anniversary of the Convention on the Rights of the Child, U.N. Doc. CRC/C/90, 7 December 1999, para. 291 (j)

⁶ As of 8 December 09, 601 organisations have signed the petition: <http://www.crin.org/petitions/petition.asp?petID=1007>

I – REASONS FOR ELABORATING A NEW COMMUNICATIONS PROCEDURE UNDER THE CONVENTION

Reason 1: To provide a remedy when national systems fail to address child rights violations

In its General Comment No.5 on 'General measures of implementation', the Committee stated that “For rights to have meaning, effective remedies must be available to redress violations”⁷.

However, there is ample evidence, from the reporting process under the Convention and from UN agencies and NGOs' research, that the rights of millions of children are not adequately respected and that States' legal obligations are in many cases not being adequately fulfilled⁸.

Today, when national systems fail them, for instance when the CRC is not applicable by national judges, when national law contradicts the CRC, or simply does not exist, children do not have any means to seek redress for violations of their rights under the CRC⁹.

An international communications procedure for violations of the CRC will provide victims and their representatives with a further avenue to pursue remedies for their rights. For many victims, the simple fact of having access to a procedure that requires the State to respond to the alleged violation and will issue a decision in the light of the relevant human rights will provide some redress.

As the UN High Commissioner for Human Rights confirmed: “[d]espite the fact that Treaty Bodies' decisions in this context are not legally binding, individual complaints procedures have often resulted in individual relief for victims.”¹⁰

Children can already access existing international communications procedures for violations of rights under the other core human rights treaties. However, they still cannot access an international communications procedure for violations of the full range of the rights specifically guaranteed under *their* Convention and before *their* expert Committee on the Rights of the Child, which is the only existing UN body elected for their “recognised competence in the field covered by this Convention”¹¹.

Reason 2: To strengthen the effective implementation of the CRC at national level

The Committee has emphasised that “in the context of the Convention, States must see their role as fulfilling clear legal obligations to each and every child. Implementation of the human rights of children must not be seen as a charitable process, bestowing favours on children.”¹²

Yet, it appears that in many instances the detailed implications of the articles of the CRC and their

⁷ U.N. Doc. CRC/GC/2003/5, 3 October 2003, para. 24

⁸ For further detail, please refer to the Concluding Observations of the Committee on the Rights of the Child on States Parties' reports, accessible at <http://www2.ohchr.org/english/bodies/crc/sessions.htm>, UNICEF publications on children's rights, accessible at http://www.unicef.org/publications/index_pubs_rights.html and CRIN (Child Rights Information Network) 's website at <http://www.crin.org/index.asp>

⁹ Although regional human rights systems may provide some means of redress, as explained under Section II, they do not adjudicate on the CRC itself and do not cover all the rights guaranteed by the CRC.

¹⁰ Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, UN Doc. HRI/MC/2006/2 (2006), para. 15

¹¹ Article 43 (2) CRC

¹² CRC General Comment No. 5, para. 11 (n 8)

inter-dependence are not clearly understood and thus not fully incorporated into national law.

In addition, there is a continuing reluctance to recognise children as holders of rights who must therefore have access to effective remedies.

A communications procedure for the CRC will allow communications from children and their representatives to be dealt with by the international specialist Committee on the Rights of the Child. Furthermore, in considering communications and issuing decisions, the Committee will be able to clarify the provisions of the CRC in real life context and help States Parties to better understand their obligations and how to implement them.

As the OHCHR stated in its 'Fact Sheet No.7/Rev.1 on Complaints Procedures':

“It is through individual complaints that human rights are given concrete meaning. In the adjudication of individual cases, international norms that may otherwise seem general and abstract are put into practical effect. When applied to a person's real-life situation, the standards contained in international human rights treaties find their most direct application. The resulting body of decisions may guide States, non-governmental organizations (NGOs) and individuals in interpreting the contemporary meaning of the texts concerned”¹³.

The development of an effective and accessible international procedure will, where necessary, highlight the need for, and stimulate the development of effective remedies for violations of the rights of the child at local, national and regional levels. In addition, it will assist States Parties in identifying ways to improve children's access to justice.

The creation of an international communications procedure which takes fully into account the special status of children and their need for appropriate representation can also set a standard for other child-sensitive processes at the national, regional and international levels.

It will also provide further encouragement for the effective and full implementation of the Convention at national level.

Reason 3: To develop jurisprudence on the rights guaranteed by the CRC

The lack of a communications procedure for the CRC has resulted in a reliance on “the courts of various States Parties to interpret and implement the provisions of the Convention”¹⁴, which in turn has opened the door “to a wide range of interpretations, including narrow readings that may further limit the rights of the child.”¹⁵

Indeed, while domestic courts and other domestic institutions should ideally be “the first avenue to pursue remedies for violations, ... the success of the case depends in part on the status of the CRC in domestic law.”¹⁶ Consequently, a child’s ability to enjoy the enforcement of their rights has

¹³ Fact Sheet No.7/Rev 1, Complaints Procedures, p.1, accessible at www.ohchr.org/Documents/Publications/FactSheet7Rev.1en.pdf

¹⁴ J Todres 'Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law' (Fall 1998) 30 CHRL Rev 1, 170.

¹⁵ Ibid.

¹⁶ Ibid.

become dependent in part on where he or she lives, and the willingness or lack thereof of the domestic courts in his or her State to apply and interpret the CRC faithfully. If the aim of the Convention is to hold “society legally accountable for meeting the obligations which give meaning to [children’s] rights”¹⁷, there needs to be a communications procedure for the CRC in order to ensure consistency in the interpretation of the high standards of the CRC.

In relation to the first-established communications procedure under the International Covenant on Civil and Political Rights, a commentary suggests:

“Views by the [Human Rights] Committee contribute to the accumulation of case law on the substantive interpretation of the material human rights provisions of the Covenant [on Civil and Political Rights]. Hence they may serve as a source of inspiration and even authority for the domestic courts all over the world by clarifying the evolving meaning of human rights provisions.”¹⁸

Similarly the High Commissioner for Human Rights has emphasised that

“Through the decisions in individual cases, the Committees have also developed a body of jurisprudence on the interpretation and application of human rights treaties, which is referred to more frequently by national and regional courts and tribunals.”¹⁹

A communications procedure for the CRC will enable the Committee on the Rights of the Child to produce decisions which will amount to jurisprudence on the application of the CRC. This in turn will help with the interpretation and effective implementation of child rights at national level, and encourage the development of consistent domestic jurisprudence as national level courts take note of the Committee’s jurisprudence.

Reason 4: To strengthen the status of children as right holders

When the Convention was drafted, the creation of additional rights for children was justified by their special status and in recognition of their particular vulnerability and their need for special protection and treatment²⁰.

Still, children's rights are human rights. Violations of children’s rights must be challenged just like any other violation of human rights²¹.

The existence of a communications procedure under the CRC will confirm and strengthen the status

¹⁷ T. Hammarberg ‘The UN Convention on the Rights of the Child – And How to Make it Work.’ (Feb 1990) 12 HRQ 1, 100

¹⁸ M. Scheinin, ‘The International Covenant on Civil and Political Rights’, in G. Ulfstein *et al.* (eds.), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press, Cambridge, 2007) p. 67

¹⁹ Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body, UN Doc. HRI/MC/2006/2 (2006), para. 15

²⁰ The CRC recognizes this in particular in articles 6,9,11, 16, 19, 20, 22, 23, 24, 27, 32, 33, 34, 35, 36, 37, 38, 39 and 40.

²¹ Women, people with disabilities and migrant workers are also groups identified as needing ‘special protection’. All have been provided with communications procedures allowing petitions to be considered by *their* specialist Committee.

of children as right holders. It will constitute a strong reaffirmation from the international community, reflecting the message of the Convention: that children are not “mini human beings with mini human rights”²².

II – GAPS IN THE PROTECTION OF THE RIGHTS OF THE CHILD UNDER EXISTING NATIONAL, REGIONAL AND INTERNATIONAL MECHANISMS

Gaps in the protection of the rights of the child under national mechanisms

A communications procedure for the CRC would be a means to address a number of gaps in the protection of the rights of the child under existing national, regional and international mechanisms, as detailed in the present Section.

1) Incomplete incorporation of the CRC rights into domestic legislation

In its 'Handbook on Legislative Reform: Realising Children's Rights'²³, aimed at supporting the effective implementation of the CRC, UNICEF observed that although “[d]irectly or indirectly, the CRC reporting process undoubtedly inspired law reform in many States and has drawn political attention to children’s rights”, “in many countries where reforms have taken place, the Committee has found that they do not 'sufficiently reflect the comprehensive rights-based approach enshrined in the Convention,'²⁴ or that the laws enacted 'do not fully reflect the principles and provisions of the CRC' ”²⁵

Indeed, “few States Parties to the CRC have adopted a holistic approach to legislative reform”²⁶. Furthermore, “reform of national legislation has been accomplished in an isolated and scattered manner without taking into account the principle of interconnectedness or indivisibility of rights”²⁷.

In reviewing States Parties' reports, the Committee has therefore consistently stressed the need for review and reform of national legislation to harmonise it with the principles and provisions of the CRC as it frequently observed that domestic legislation was either not in full conformity with the CRC²⁸ or, was not fully implemented in practice²⁹.

This assessment has led the Committee to often recommend that States Parties undertake “comprehensive review of [national] legislation and ensure its conformity with the principles and provisions of the Convention”³⁰, “incorporate all principles and provisions of CRC into domestic legislation and [...] expedite enactment of consolidated law on children's rights”³¹ or “continue

²² M. de Boer-Buquicchio, Deputy Secretary General Council Of Europe, ‘Violence Against Children: trafficking, corporal punishment, and sexual exploitation’ (Speech at the IBRC Conference for the Anniversary of the CRC 20 November 2004)

²³ Handbook on Legislative Reform: Realising Children's Rights, UNICEF, November 2008, accessible at http://www.unicef.org/crc/files/LRIHandbook_-_final.pdf

²⁴ See for instance, U.N. Doc. CRC/C/15/Add.96 (CRC 1998); U.N. Doc. CRC/C/15/Add.99 (CRC 1999)

²⁵ See for instance, U.N. Doc. CRC/C/15/Add.17 (CRC 1994)

²⁶ Handbook on Legislative Reform, UNICEF (n 23)

²⁷ Ibid

²⁸ See for instance, U.N. Doc CRC/C/15/ADD.246 (CRC, 2004), para. 5, U.N. Doc. CRC/C/15/ADD.187 (CRC, 2002), para. 15

²⁹ See for instance, U.N. Doc CRC/C/15/ADD.225 (CRC, 2004), para. 8, U.N. Doc. CRC/C/15/ADD.227 (CRC, 2004) para. 13, U.N. Doc. CRC/C/THA/CO/2 (CRC, 2006) para. 11

³⁰ See for instance U.N. Doc CRC/C/15/ADD.231 (CRC, 2004), para.11, U.N. Doc. CRC/C/15/ADD.118 (CRC, 2000) para. 7

³¹ See for instance, U.N. Doc. CRC/C/15/ADD.129 (CRC, 2000), para. 9

efforts to fully incorporate Art. 3 of the CRC into all legislation and practice relevant to children”³².

The absence of domestic legislation in full conformity with the provisions of the CRC creates greater obstacles to get redress at national level: victims will not be able to ground their claims on specific national rights and national judges will often face difficulties if they want to apply the CRC directly.

2) Difficulties for children to access national courts

The Committee has observed that “for rights to have meaning effective remedies must be available to redress violations”³³. However, since “children’s special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights, States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives.”³⁴

According to UNICEF, “this conclusion echoes the last clause of article 12.2 and recognizes implicitly that, in some circumstances, children lack the capacity to exercise this right personally. Therefore it is legitimate to require that it be exercised on their behalf by a representative”³⁵.

The lack of appropriate representation of children, and consequently the lack of access to national courts where legal capacity is required to lodge a complaint, is especially present in civil matters³⁶.

Some States have established a system of free legal assistance for children in such matters. For instance, in South Africa, the child's right to legal assistance in civil matters has been elevated to the status of a constitutional right³⁷. In most States however, free legal assistance is provided only for specific cases (to challenge residential placement orders in Romania) and parents are often viewed as the natural representatives for children.

As observed by the Committee, legal representation of children is not dealt with in a comprehensive manner in most States Parties³⁸. Such an approach can pose serious obstacles for children to access national courts and, consequently, make it virtually impossible to get an effective national remedy.

Gaps in the protection of the rights of the child under regional mechanisms

Regional human rights mechanisms can be used by children and provide certain opportunities of redress where children's rights are violated³⁹.

³² See for instance, U.N. Doc. CRC/C/15/ADD.203 (CRC, 2003), para. 25

³³ CRC General Comment No. 5, para. 24 (n 8)

³⁴ Ibid

³⁵ D. O'Donnell, “The right of children to be heard: children's right to have their views taken into account and to participate in legal and administrative proceedings”, UNICEF Innocenti Research Centre, April 2009, accessible at http://www.unicef-irc.org/publications/pdf/iwp_2009_04.pdf

³⁶ For more information, please refer to the study of the University of Yale of 2005 on how children can be represented and heard under 250 jurisdictions, accessible at http://www.law.yale.edu/RCW/rcw/juris_main.htm

³⁷ Cited in “The right of children to be heard: children's right to have their views taken into account and to participate in legal and administrative proceedings”, p.50 (n 35).

³⁸ See for instance, U.N. Doc. CRC/C/15/ADD.170 (CRC, 2002), para. 78 where the Committee found that “right of children to legal representation or other appropriate assistance is not always systematically guaranteed”. More generally, such scattered approach has been observed with regard to juvenile offenders, unaccompanied minors and victims of offences under OP-CRC-SC

³⁹ See for instance, European Court of Human Rights, Sahin v. Germany, Grand Chamber judgement, 8 July 2003; Inter-American Court of Human Rights, Villagrán Morales et al. v. Guatemala (also called the ‘Street Children’

However, with the exception of the African Charter on the Rights and Welfare of the Child (ACRWC)⁴⁰, none of the other regional human rights treaties were designed with children in mind. Consequently, the European Convention on Human Rights contains no specific provisions for children and the American Convention on Human Rights only provides one article, Article 19⁴¹, on children's rights.

Therefore, while the European and the Inter-American courts may apply the standards of the CRC in interpreting their respective Conventions, they do not have jurisdiction to adjudicate on the range of children's rights as guaranteed under the CRC. Furthermore, no regional human rights mechanism currently exists for Asia, with the result that a large proportion of the world's children have no access to any regional human rights mechanism.

The situation under the African system is potentially different. The African Committee of Experts on the Rights and Welfare of the Child (ACERWC), established under the ACRWC, can receive communications relating to any matter covered by the Charter. However, the procedure is still relatively new and has only started to review communications in November 2009. Furthermore, it cannot receive communications related to the rights enshrined in the CRC as it only covers the ACRWC⁴².

With its near universal ratification, the CRC covers more countries than all the existing regional mechanisms, including the States that are Parties to the CRC and not Parties to their respective regional mechanisms. Through an international communications procedure, children from all regions in the world will be guaranteed decisions based on the same rights and standards.

Gaps in the protection of the rights of the child under existing international mechanisms

1) Lack of an international mechanism competent to adjudicate on the full range of child rights

While certain rights are guaranteed for “everyone” - including children – in other instruments as well as in the CRC (such as the prohibition of torture and cruel, inhuman or degrading treatment), the CRC often goes further in providing the specific measures needed with regard to the special status of children. For instance, Article 37 specifies that “neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age”.

Therefore although children and their representatives can use the mechanisms already established under other international instruments to pursue many of their rights, those instruments do not cover, separately or together, the full range and detail of rights for children set out in the CRC.

The following list of articles of the CRC provides further examples of rights that only exist under the CRC or contain unique measures for children:

Case), Judgement of 18 November 1999; African Commission on Human and People's Rights, Curtis Francis Doebbler v. Sudan, May 2003

⁴⁰ Entered into force 29 November 1999, OAU Doc CAB/LEG/24.9/49 (1990).

⁴¹ Article 19 of the American Convention on Human Rights provides: “Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the state” .

⁴² Differences between the two instruments include, for instance, criteria used for discrimination, Article 3 ACRWC includes 'fortune' while Article 3 CRC includes 'property' and 'disability'

- Article 3: Best interests of the child to be a primary consideration in all actions concerning children
- Article 12: Obligation to give due weight to children's expressed views in all matters affecting the child; also to provide opportunity for a child to be heard in judicial or administrative proceedings
- Article 6: Obligation to ensure maximum survival and development of the child
- Article 20: Institutions and services etc. for care and protection of children to conform to established standards
- Article 5: Right of the child to know and be cared for by parents
- Article 7: Preservation of the child's identity
- Article 9: Right not to be separated from parents unless in their best interest with judicial review
- Article 11: Obligations to prevent abduction and non-return of children abroad
- Article 29: Detailed aims defined for the education of the child
- Article 34: Specific protection from sexual exploitation and abuse including child pornography
- Article 13: Obligation to ensure the child's access to information and material from a diversity of national and international sources
- Article 19: Right to protection from "all forms of physical or mental violence"
- Article 37: Prohibition of life imprisonment of children without possibility of release; arrest, detention, imprisonment of the child only as a last resort and for shortest appropriate period
- Article 38: Specific limitations on recruitment and involvement of children in armed conflict
- Article 24: Right of access for child to health-care services and obligations to take specific measures for health; protection from traditional practices prejudicial to health
- Article 40: Distinct aims for juvenile justice systems and rights of children alleged as, accused of, or recognised as having infringed the penal law

The two existing Optional Protocols to the CRC add further unique rights and safeguards.

2) Lack of a comprehensive child rights approach

As emphasised by the Committee, the rights under the Convention are interdependent: each of them should be interpreted in the light of the entire Convention. Furthermore, the articles identified as general principles, namely non-discrimination (Art.2); the best interests of the child (Art.3); child's survival and development (Art. 6) and the right to be heard (Art.12) should be given special consideration in any matter concerning a child.

While they can receive communications from children alleging the violation of certain rights, existing Treaty Bodies are limited by the scope of their mandates when they adjudicate on them. For instance,

the Human Rights Committee noted in its General Comment No.17 on the rights of the child :

“In enunciating a right, some provisions of the [ICCPR] expressly indicate to States measures to be adopted with a view to affording minors greater protection than adults. In most cases, however, the measures to be adopted are not specified in the Covenant and it is for each State to determine them in the light of the protection needs of children in its territory and within its

jurisdiction⁴³.

A communications procedure for the CRC would enable the Committee on the Rights of the Child to interpret and adjudicate on those specific measures, in accordance with the provisions of the CRC.

III – COMPLEMENTARITY/COMPATIBILITY OF A NEW COMMUNICATIONS PROCEDURE WITH OTHER EXISTING INTERNATIONAL COMMUNICATIONS PROCEDURES AND ITS RELATIONSHIP WITH DOMESTIC PROCEDURES

1) Complementarity of a new communications procedure with other existing international communications procedures

A new communications procedure for the CRC will not duplicate or overlap with existing procedures since there is no international communications procedure involving a specialist Committee competent to adjudicate over the full range of rights enshrined in the CRC⁴⁴.

Concerning the rights that are potentially guaranteed under two or more international human rights instruments, duplication would be avoided thanks to the well-established international law principle of non-duplication. Thus, if a case can be brought to various bodies, the victim can choose the treaty body to lodge his/her complaint, but can only submit his/her case to one treaty body⁴⁵. It is therefore not possible for the same victim to submit a simultaneous communication on the same legal basis to two or more bodies.

If the new communications procedure comes into force, child victims and their representatives would be more likely to submit their communications under the CRC as it provides a more comprehensive and specific protection of their rights.

2) Relationship of a new communications procedure with domestic procedures

The new communications procedure for the CRC will work in the same way as the existing ones: communications will only be admissible if domestic remedies available to children have been exhausted, unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief⁴⁶.

With regard to children, having an effective domestic remedy does not necessarily mean that they should be able to access courts directly but that, where legal standing is required, there should be an effective representation system to ensure that child victims can access courts through their representatives.

⁴³ CCPR General Comment No.17: Rights of the child (Art. 24), 7 April 1989, para. 2 and 3

⁴⁴ See Sections I and II of the submission

⁴⁵ There is the possibility of an exception whereby matters which involved the same factual basis, but where different legal rights are affected, may be addressed by different bodies without breaching the rule of non-duplication

⁴⁶ For example, where there is an established jurisprudence contrary to the CRC.

IV – BEST PRACTICES IN SUPPORT OF THE FEASIBILITY OF A NEW COMMUNICATIONS PROCEDURE

1) Child-friendly access to the new communications procedure

The Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography is currently working on a child-friendly version of the letter of allegation form. Similarly a child-friendly version of the model communication form for the communications procedure for the CRC could be developed to ensure that children have a good understanding and direct access to their communication mechanism.

Child-friendly access to the new communications procedure will also require an easier way to submit a communication. The Inter-American Commission on Human Rights, for instance, can receive online petition forms. This could also be considered for the communications procedure under the CRC.

2) Child-friendly consideration of communications

Though communications would be presented in a written form, as in any other communications procedures, several adjustments would be necessary to ensure that children can express their views.

Some existing international communications procedures already do contain provisions for oral components .

For instance, Rule 111(4) of the Committee Against Torture, which applies at the merits stage of communications, provides that

“The Committee may invite the complainant or his/her representative and representatives of the State party concerned to be present at specified closed meetings of the Committee in order to provide further clarifications or to answer questions on the merits of the complaint. Whenever one party is so invited, the other party shall be informed and invited to attend and make appropriate submissions. The non-appearance of a party will not prejudice the consideration of the case”⁴⁷.

If applied and extended to the possibility of sending audio or audio-visual materials as well as other non-written materials⁴⁸, such a provision could improve children's participation and thus make the new communications procedure more effective in certain cases.

The Committee on the Rights of the Child will draw from its growing experience of engaging with children⁴⁹ and address those issues in their Rules of Procedure.

3) Examination of communications in a timely manner

It will be essential for children that their communications are processed in a timely manner.

⁴⁷ Rules of Procedure of the Committee Against Torture, U.N. Doc. CAT/C/3/Rev.4, Rule 111 para. 4

⁴⁸ As it is the case before the International Criminal Court, for instance, which accepted around 500 drawings from Darfuri refugee children as contextual evidence to be used in any trial related to the situation in Darfur.

⁴⁹ As it has done through alternative reports and the days of general discussion, for instance.

Although the details of the working methods of the Committee will be provided in its Rules of Procedure, there are already some best practices in that regard from regional and international mechanisms.

If delays in examining communications appear to exceed 'reasonable time', several additional measures could be envisaged such as adopting the views on communications with a majority vote instead of trying to reach consensus, with the possibility of attaching individual opinions⁵⁰, or clustering quasi identical communications⁵¹, or prioritizing certain cases that could have an immediate greater impact.

V – THE STATUS OF CHILDREN AS COMPLAINANTS

1) Children as complainants and legal capacity

In most national legal systems, complainants must have reached the age of majority to represent themselves in court. However, a communications procedure is not comparable to domestic judicial procedures.

None of the existing regional or international mechanisms require the petitioner to be legally capable of lodging a complaint. In fact, international mechanisms are open to any individual “claiming to be victim of a violation of any of the rights set forth in the [relevant] Convention”⁵², the European human rights system is open to “everyone”⁵³, the right of petition to the Inter-American Commission and Court is granted to “[a]ny person”⁵⁴ and “any individual”⁵⁵ can go to the African Court and ACERWC.

And indeed, children have already accessed some of these mechanisms. Therefore, as a matter of principle, a communications procedure for the CRC should allow children who are capable of forming their own views to pursue their complaints independently, in accordance with Article 12 (1) of the CRC.

Case summary of *Tyrer v. UK*⁵⁶: Anthony Tyrer submitted an application to the European Commission of Human Rights on his sixteenth birthday in 1972. The case was referred to the Court, which in its April 1978 judgment found that the judicial birching inflicted on him amounted to degrading punishment in breach of article 3.

The new communications procedure thus needs to be structured in such a way as to accommodate children of varying ages, maturity, and life experience, and children of varying access to financial and other resources to participate in the communications process, as these factors impact on a child’s ability to act independently. Indeed, some children – particularly when they are a part of a group or network – may be more willing and able than others to operate with limited or no adult

⁵⁰ This is already the case in the European, Inter-American and African human rights systems and the Human Rights Committee has started to do so informally.

⁵¹ This is a solution provided under Protocol 14 and Protocol 14 bis of the ECHR, for instance

⁵² See Art. 2 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, for instance

⁵³ Art. 1 of the European Convention on Human Rights

⁵⁴ Art. 44 of the American Convention on Human Rights

⁵⁵ Art. 56 of the African Charter on Human and Peoples’ Rights and Art. 44 of the African Charter on the Rights and Welfare of the Child

⁵⁶ European Court of Human Rights, *Tyrer v. the United Kingdom*, Judgement of 25 April 1978

support⁵⁷.

Rather than presuming that a child is incapable and incompetent, the new communications procedure should comply with the CRC assertion of a child's evolving capacities⁵⁸.

Best national practices⁵⁹

In a number of countries, legislation recognises the right to go to court when the child has reached a certain age, while younger children have the right to complain through a child welfare or other agency.

In some States, children have the right to initiate legal or administrative proceedings and they are entitled to file complaints themselves on the violation of their fundamental rights (Romania and Slovenia, for example). In Northern Ireland, children have the right to seek legal remedies if they are old enough to understand the nature of the proceedings.

In many States, there is an obligation to enable children to express their views in court and administrative proceedings as required by the Convention and in some countries, Russia and Georgia, for example, the legislation requires the consent of children over the age of 10 in matters affecting their legal personality, such as adoption or change of name.

In the case of the new communications procedure, it would be consistent with the Convention not to define any specific lower age limit, but rather leave it to the Committee to determine on a case-by-case basis by applying the Article 12 principle: any child who is capable of forming his/her own views should have the right to submit a communication, and may represent themselves or appoint a representative on their behalf.

2) Children will need support to pursue communications

As is usually the case for adults bringing communications, children are likely to lack the necessary understanding and capacity to pursue communications. Most communications to the existing procedures are made by adults with the support of organizations, lawyers or both. Most children will need exactly the same kind of support.

Children, especially young children, who lack the capacity to draft and submit a communication will need to be fully represented by adults. Lack of capacity cannot be invoked to question the universal recognition of children as right holders and its corollary, the provision of adequate remedies in cases of violation of their rights. Innovative mechanisms, drawing from national and/or regional best practices, will need to be incorporated in the Optional Protocol to ensure that all children can enjoy protection of the full range of their rights.

3) Children complainants and representatives

Depending on the age and maturity of the child, as well as other factors such as the child's level of

⁵⁷ S Austin and K Dorning 'CEO Briefing Number 51: Children's Participation' (World Vision International, 3 September 2002)

⁵⁸ Articles 5 and 12 CRC

⁵⁹ Extracted from "International law and children's rights: a critical review and a wish list", M. Santos Pais, in International Justice for Children, Council of Europe, December 2008

literacy, and their access to financial and other resources, it will be appropriate and indeed necessary for adults in many cases to play an active role in supporting children's participation in the process.

ECHR test for representation of children

To determine whether a person is qualified to represent the interests of a child, the European Court of Human Rights has decided that account must be taken of the link between a child and his/her representative, the object and purpose of the application, and any conflict of interest⁶⁰.

The representation of children is understood by the CRC in the following way: "In all actions concerning children (...) the best interests of the child shall be a primary consideration" (CRC Art. 3).

Therefore to ensure that children's representatives are not instrumentalising their cases, the new communications procedure could require that, when the child cannot give his/her consent to be represented, the representative should justify that s/he is acting "in the best interests of the child", which should be determined by the Committee on the Rights of the Child on a case-by-case basis based on its Rules of Procedure.

Best practices of regional human rights mechanisms

The ECHR allows any individual to petition the European Court of Human Rights, either on their own behalf or as an official representative of a third party⁶¹.

The right of petition to the Inter-American Commission and Court is granted to "[a]ny person or group of persons or nongovernmental entity legally recognized in one or more of the member States of the Organization [of American States]"⁶², and such person(s) may petition the Inter-American system on their own behalf or on behalf of third persons. The key implication for children is that they may petition the Commission or Court, or others may do so on their behalf. In practice, the Inter-American Commission accepted a complaint presented by two NGOs, the Centre for Justice and International Law (CEJIL) and Casa Alianza, on behalf of five deceased children⁶³.

The ACERWC "may receive communications from any person, group or non-governmental organisation recognised by the Organisation of African Unity, by a Member State or by the United Nations, relating to any matter covered by the Charter"⁶⁴.

4) Specific safeguards to ensure children's protection will be needed

In order to ensure children's protection and avoid putting them unnecessarily at risk, the communication procedure will have to be designed with children's safety in mind and allow for specific safeguards for vulnerable petitioners – anonymity provisions, protection from reprisals, etc⁶⁵.

⁶⁰ See for instance S.P., D.P., and A.T. v. UK, 20 May 1996, Application No.23715/94

⁶¹ Art. 34 ECHR

⁶² Regulations of the Inter-American Commission on Human Rights, OEA/Ser.L.V/II.82 doc 6 rev 1 at 103 (1992), Art 23.

⁶³ Villagrán Morales et al. v. Guatemala (n 44)

⁶⁴ Entered into force 29 November 1999, OAU Doc CAB/LEG/24.9/49 (1990), Article 44

⁶⁵ For further details about protection measures, see Practice Standards for Child Participation, The International Save the Children Alliance, accessible at

http://www.savethechildren.net/alliance/about_us/accountability/practicestandardscp.doc

CONCLUSION

Twenty years after the adoption of the CRC, it is critical to provide children and their representatives with an international communications procedure that will reflect and confirm the international community's commitment to recognise children as true right-holders. The Convention on the Rights of the Child is a legal instrument, bestowing legal obligations on States which must be enforceable by children and their representatives.

As the UN High Commissioner for Human Rights stressed at the Annual full-day Meeting on the Rights of the Child on 11 March 2009: “We need to translate our commitment, engagement and work on children's rights into a tangible reality for each and every one of them”.

A communications procedure for the CRC will provide every child with an international remedy making their rights justiciable when national systems fail to address violations of their rights. It will also strengthen the effective implementation of the CRC at national level, notably by developing a child rights jurisprudence consistent with the CRC's high standards,

The campaign hopes that by the end of its first session the Working Group will decide that it should seek a stronger mandate, namely to start the elaboration of an Optional Protocol.

ANNEX

A statement on a communications mechanism from children and young people and child-led organisations that campaign on children's rights, including those that have been involved in the reporting process for the Convention on the Rights of the Child

Twenty years ago, the UN General Assembly made history with the Convention on the Rights of the Child: our own Convention just for us and for every child and young person wherever and whoever they are. Since then, with 193 member states having ratified the treaty, it is the world's most ratified treaty. Almost every country in the world has agreed to safeguard and defend the rights our Convention guarantees, and the change and debates it's caused have helped improve the rights of children and young people the world over. But there's still more to be done: and now, as our Convention turns 20, is the perfect time to make sure children and young people can make sure their rights are properly and fully protected. Whilst the Convention is the world's most ratified treaty, it is the only international human rights treaty which doesn't have a complaints mechanism.

Children and young people need the right to make their voices heard. No one knows what young people think better than young people themselves, and no one is better aware of how well their rights are respected, and how important their Convention is. The complaints mechanism would allow children and young people to appeal to the UN Committee on the Rights of the Child when the state fails to fulfil its obligations under the Convention. Furthermore, it would put extra pressure on States parties to fulfil their obligations on a national level.

We believe that the ability to make your voice heard when your rights are ignored – and to highlight key issues and areas of concern – is of fundamental importance in the fight to ensure that the rights of young people are respected. Complaints mechanisms have played integral roles in other areas of international human rights law, and we believe that – as we mark the 20th anniversary of the Convention on the Rights of the Child – national governments should support the drafting of a third Optional Protocol, and actively support children and young people in helping the UN Committee to form and develop an open, accessible and universal process for children and young people wherever they are. Other international human rights treaties allow children and young people to use their complaints mechanism. We, however, believe that the Committee on the Rights of the Child provides expertise specifically on children's rights which no other Committee is in a position to do.

By giving children and young people a chance to make their voices heard, we can work together to ensure that no one – and no issue – is overlooked, and that national governments are able to do the best they can to make sure that every child and every right is taken into account.

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Child-led organisations

SEARCH – Skill Enhancing and Research Home of the Children, Pakistan
Article 12, Scotland
Lofa Children Press Association, Liberia
Coole Schule, Austria
PRESS - Redd Barna Ungdom (Save the Children Youth), Norway
Red Nacional de ninas, ninos y adolescentes (REDNNA), Peru