

**Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure** **Professor Charlotte Phillips**



**Introduction**

In 2011, the UN General Assembly adopted the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure<sup>1</sup>. This third Optional Protocol provides for a communications procedure with the Committee on the Rights of the Child, by means of which both children and their legal representatives may submit communications concerning violation of children's rights by a Member State.

In this article the history, development and content of the third Optional Protocol will be discussed and its wider implications for States Parties be held to closer scrutiny.

**1. Convention on the Rights of the Child**

After ten years of negotiations, the Convention on the Rights of the Child (hereinafter: CRC) was adopted by the UN General Assembly on 20 November 1989<sup>2</sup>. To date, with a near-universal ratification status, the CRC is the most widely ratified human rights treaty; the only countries that have not ratified the Convention thus far are the United States of America, Somalia and South-Sudan<sup>3</sup>.

The CRC is generally considered to be one of the most important human rights instruments, encompassing as it does all aspects of children's rights. As a complement to the CRC, the following optional protocols were adopted by the UN General Assembly in 2000<sup>4</sup>:

- the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
- the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

In accordance with article 43 CRC, the Committee on the Rights of the Child (hereinafter: CRC Committee) was established in 1991. The Committee's primary objective is to promote and protect the rights enshrined in the CRC and the subsequent Optional Protocols, as well as to examine and monitor the progress made by States Parties in achieving the realisation of their obligations derived from said instruments. Article 44 CRC outlines States Parties' obligation to submit five-yearly reports to the CRC Committee on the status of the protection of children's rights and the progress made on the implementation of the principles of the CRC. Furthermore, States Parties are required to inform the CRC Committee on the measures taken with regard to the Committee's recommendations based on previous reports. In addition to reports from governments, the CRC Committee is authorised to receive shadow reports from UNICEF, NGOs and other competent bodies<sup>5</sup>.

In marked contrast to other human rights instruments containing reporting procedures, the CRC does not provide for individuals, children or their representatives to communicate with the CRC Committee in relation to violations of rights embodied in the Convention, which is considered by many – including several members of the Committee – to be a serious lacuna<sup>6</sup>.

<sup>1</sup> UN General Assembly, GA/11198, 19 December 2011.

<sup>2</sup> UN General Assembly, A/RES/44/25, 20 November 1989.

<sup>3</sup> [Status of ratification](#), accessed on 7 November 2012.

<sup>4</sup> UN General Assembly, A/RES/54/263, 25 May 2000.

<sup>5</sup> Article 45 CRC.

<sup>6</sup> Y. Lee, 'Celebrating important milestones for children and their rights', in: *The International Journal of Children's Rights*, Volume 18, p. 480, The Hague: Kluwer Law International 2010.

## INTERNATIONAL ASSOCIATION OF YOUTH AND FAMILY JUDGES AND MAGISTRATES

In this regard, it is perhaps worth noting the differences between the CRC and its African equivalent, the African Charter on the Rights and Welfare of the Child (hereinafter: ACRWC). In the ACRWC, provisions for communications are explicitly laid down. Article 44 ACRWC empowers the African Committee of Experts on the Rights and Welfare of the Child (hereinafter: ACERWC) to receive communications relating to violations of the rights enshrined in the ACRWC from any individual, including the victimised child and/or its parents or (legal) representatives, witnesses, a group of individuals or NGOs recognised by the African Union, by a State Party or by any other institution within the United Nations system. The Committee may resort to any appropriate form of investigation it deems expedient and may request the State Party concerned to supply all relevant information in order to examine the case to its full extent<sup>7</sup>. In relation to the communications procedure, the ACERWC has issued detailed guidelines, containing, *inter alia*, stipulations on conditions of admissibility of communications and the procedure for the consideration of communications, including provisional measures to prevent any harm to the child or children involved<sup>8</sup>.

In March 2011, the ACERWC took its first decision on the communication submitted by the Institute for Human Rights and Development in Africa (based in the Republic of The Gambia) and the New York-based Open Society Justice Initiative, on behalf of children of Nubian descent in Kenya and against the Kenyan Government. The communication appertained to the violation of a number of rights of Nubian children, namely: the right to birth registration, the right to acquire a nationality at birth, unlawful/unfair discrimination, equal access to education and the right to health and healthcare, including adequate nutrition and safe drinking water. Due to the fact that the Government of Kenya refrained from responding – despite being repeatedly urged to present its viewpoint – the Committee relied on the information and sources provided by the complainants and others, such as the Kenya National Commission on Human Rights, the CRC Committee and the ACERWC itself. It is noteworthy that the ACERWC explicitly refers to the principle that the absence of the State Party in question should not hinder the consideration of a communication.

The Committee's decision reads as follows: "the African Committee finds multiple violations of Articles 6(2), (3) and (4); Article 3; Article 14(2) (b), (c) and (g); and Article 11(3) of the African Children's Charter by the Government of Kenya" (these articles pertain to the aforementioned violations). The Committee recommends that the Kenyan Government takes all necessary measures, legal and otherwise, to bring to an end the violation of these rights and to guarantee the protection of all rights of children of Nubian descent in Kenya<sup>9</sup>.

### **2. History Optional Protocol to the CRC on a Communications Procedure**

During the drafting and negotiation process of the CRC, debate with regard to a communications procedure did take place, but failed to lead to any provisions in the final text of the Convention. The issue was broached again in 1999, once more without any result. At that stage, the focus lay on defining children's rights, rather than on procedural matters<sup>10</sup>.

The initiative for a third Optional Protocol to the CRC originates from a group of children's rights organisations. In 2008, this group called upon the UN General Assembly to establish an Open-Ended Working Group of States to draft a new Optional Protocol, enabling individuals and groups to communicate directly with the CRC Committee in cases of non-compliance with children's rights<sup>11</sup>. By means of a resolution of the Human Rights Council, the aforementioned Open-Ended Working Group was established in 2009; their brief was to explore the feasibility of a third Optional Protocol to the CRC to provide a communications procedure in addition to the existing reporting procedure under the Convention<sup>12</sup>. In December 2009, the Open-Ended Working Group held its first meeting over a period of three days, during which the viability of a communication procedure was elaborated on. Representatives of various countries (both members and non-members of the Human Rights Council), intergovernmental organisations, NGOs and UNICEF were present to discuss contributions from a number of children's rights experts, NGO representatives and the Chair and Vice-Chair of the CRC Committee<sup>13</sup>.

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<sup>7</sup> Article 45 ACRWC.

<sup>8</sup> African Union, ACERWC/8/4, *Guidelines for the Consideration of Communications provided for in Article 44 of the African Charter on the Rights and Welfare of the Child*.

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<sup>9</sup> African Committee on the Rights and Welfare of the Child, Decision: No 002/Com/002/2009, 22 March 2011.

<sup>10</sup> UN General Assembly, A/HRC/13/43, 21 January 2010, p. 7.

<sup>11</sup> UN General Assembly, A/HRC/8/NGO/6, 26 May 2008.

<sup>12</sup> Human Rights Council, Resolution 11/1. Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure, 17 June 2009.

<sup>13</sup> UN General Assembly, A/HRC/13/43, 21 January 2010.

## INTERNATIONAL ASSOCIATION OF YOUTH AND FAMILY JUDGES AND MAGISTRATES

A resolution was passed by the Human Rights Council in March 2010, extending the mandate of the Open-Ended Working Group as well as authorising it to work on a new protocol and to prepare a proposal for a draft text<sup>14</sup>. After completion, the Open-Ended Working Group met for a second time in order to discuss the draft protocol, which contained provisions for both individual and collective communications. A Joint NGO Submission to the Open-Ended Working Group expanded on the significance of collective communications procedures. One of the essential aspects of collective communications was considered to be the fact that the identification of an individual victim is not a prerequisite, offering victimised children extra protection. In addition, collective communications were acknowledged as providing the CRC Committee the possibility to receive accumulated victim evidence; a method which enables the Committee to respond more efficaciously than when utilising the periodic reporting procedure<sup>15</sup>. The CRC Committee explicitly expressed its support for both the individual and the collective communications procedure<sup>16</sup>.

A second draft of the new Optional Protocol was prepared for further deliberations in February 2011. It is noteworthy that with regard to the collective communications, an opt-in clause was added, providing States Parties with the option to declare their recognition of the competence of the Committee to receive and consider collective communications<sup>17</sup>. The addition of this opt-in clause was openly criticised by various parties and experts, primarily on the grounds that this would lead to the collective communications procedures not becoming an integral part of the Protocol, due to the fact that it requires an explicit declaration at the time of ratification; as a result it was deemed ineffective<sup>18</sup>.

During the February 2011 session, the collective communications procedure was discussed extensively. A significant number of Member States openly opposed either the procedure and/or the omission of an opt-in clause, whereas NGOs, children's rights experts and members of the CRC Committee proclaimed their full support for a collective communication procedure without restrictions<sup>19</sup>. To the frustration of the proponents, this eventually led to the deletion of the article on collective communications and the final text of the new Optional Protocol provides solely for individual communications. The then Chair of the CRC Committee, Yanghee Lee, expressed her immense disappointment in a public apology, stating: "I am deeply sorry to every child that we have not succeeded in recognising them fully as rights holders"<sup>20</sup>.

In June 2011, the new Optional Protocol was approved by the Human Rights Council<sup>21</sup> and was subsequently adopted by the UN General Assembly in December 2011<sup>22</sup>. On 28 February 2012 an official signing ceremony was held by the Human Rights Council, during which 20 countries signed the third Optional Protocol<sup>23</sup>. To date, 35 countries have signed and 2 countries have ratified the new Protocol<sup>24</sup>.

### **3. Stipulations Optional Protocol**

The third Optional Protocol contains a Preamble and 24 articles, divided into 4 different sections.

#### **Part I**

The first four articles cover the following aspects:

- The competence of the CRC Committee: the Committee takes cognisance of violations of rights set forth in instruments to which the State in question is party; the Committee does not receive communications with regard to countries which have not ratified the Protocol.
- General principles guiding the functions of the CRC Committee: the best interests of the child is the guiding principle of the Committee; in addition, the views of the child are to be given due weight.
- Rules of procedure: the Committee shall adopt rules of procedure; these rules must include safeguards to prevent manipulation of children by those acting for them.
- Protection measures: Member States are bound to provide protection for individuals in respect of violations of their rights.

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<sup>14</sup> UN General Assembly, A/HRC/RES/13/3, 14 April 2010.

<sup>15</sup> Joint NGO Submission to the Open-ended Working Group on an Optional Protocol to the Convention on the Rights of the Child to provide a communications procedure, October 2010, pp. 5, 6.

<sup>16</sup> UN General Assembly, A/HRC/WG.7/2/3, 13 October 2010, p. 4.

<sup>17</sup> UN General Assembly, A/HRC/WG.7/2/4, 13 January 2011, p. 4.

<sup>18</sup> P.S. Pinheiro, *Submission commenting on the revised proposal for a draft optional protocol to the CRC*, Inter-American Commission on Human Rights, 8 February 2011; M. Langford & S. Clark, *A Complaints Procedure for the Convention on the Rights of the Child: Commentary on the second Draft*, Norwegian Centre for Human Rights (University of Oslo), 7 February 2011; *Preliminary Joint NGO Submission to the Open-ended Working Group on an Optional Protocol to the Convention on the Rights of the Child to provide a communications procedure*, February 2011.

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<sup>19</sup> UN General Assembly, A/HRC/17/36, 16 May 2011, pp. 12, 13.

<sup>20</sup> Complaints Mechanism: Summary of Final Draft Meeting, [find it here](#), accessed on 23/11/2012.

<sup>21</sup> UN General Assembly, A/HRC/RES/17/18, 14 July 2011.

<sup>22</sup> UN General Assembly, GA/11198, 19 December 2011.

<sup>23</sup> [Find it here](#), accessed on 23/11/2012.

<sup>24</sup> [Find it here](#), accessed on 23/11/2012.

## INTERNATIONAL ASSOCIATION OF YOUTH AND FAMILY JUDGES AND MAGISTRATES

### **Part II**

The actual communications procedure is set out in articles 5 to 12.

Article 5 provides that individuals, groups of individuals or their representatives may submit communications to the CRC Committee relating to the violation of rights laid down in the CRC or the Optional Protocols to the CRC by States Parties.

According to article 6, the CRC Committee may urge the State Party in question to take interim measures in order to prevent possible irreparable damage to the child involved.

In article 7 the admissibility of communications is outlined. Communications are inadmissible when they are anonymous, not in writing or when they concern a right that is not covered by the CRC or by any of the Optional Protocols. A communication is also inadmissible when the Committee has already examined the matter, or when an issue has been examined in another international procedure. All available national legal remedies must have been exhausted, unless these remedies are unreasonably prolonged or when they are unlikely to lead to a solution. Furthermore, communications are inadmissible when they are considered to be unfounded or have been insufficiently substantiated. Communications should not concern violations that occurred prior to the Protocol taking effect, unless the violations continued subsequently. Finally, a communication should be submitted to the Committee no later than one year after national remedies have been exhausted, other than situations where submission within this time limit was demonstrably impossible.

Once the Committee has established that a communication is admissible, it is presented to the State Party concerned on the basis of article 8. The State Party must submit a written explanation to the Committee within six months.

Article 9 allows for a friendly settlement as a solution to a communication; the Committee facilitates such solutions wherever possible.

Article 10 prescribes the manner in which communications are dealt with by the CRC Committee. A communication received by the Committee is to be taken into consideration promptly; the examination of all documents takes place behind closed doors.

If interim measures have been taken, as provided for by the aforementioned article 6, the procedure shall be expedited. When confronted with communications relating to the violation of socio-economic or cultural rights, the CRC Committee shall take article 4 CRC into consideration<sup>25</sup>. After examination of the matter, the Committee shall communicate its views and recommendation(s) to the parties involved.

According to article 11, the Member State must respond within six months and include in its response any measures taken or envisaged. The Committee may request further information with regard to these measures.

Article 12 offers States Parties the possibility to recognise the Committee's competence in relation to inter-State communications, whereby a State may submit communications on the violation of a right laid down in the CRC or the Optional Protocols by another Member State, providing that both States have declared their recognition of inter-State communications.

### **Part III**

Articles 13 and 14 deal with the inquiry procedure of the CRC Committee in cases where reliable information is received indicating grave or systematic violations of children's rights. With regard to such violations, the Committee requests the State's full cooperation in the examination of the communication. One or more members of the Committee may conduct an inquiry both in and outside the borders of the Member State in question, the results of which shall be submitted to the Committee. The findings of the inquiry, together with any comments or recommendations, shall be communicated to the Member State, which is required to respond within six months. If deemed necessary, the Committee will request that the State inform it on the measures taken and envisaged in relation to the inquiry.

At the time of signature or ratification of the Protocol, States are given the option to declare non-recognition of the aforementioned competence of the Committee.

### **Part IV**

Articles 15 to 24 contain procedural provisions, covering – *inter alia* – international assistance and cooperation; dissemination of and information on the Optional Protocol; signature, ratification and accession; amendments.

The third Optional Protocol shall enter into force after ratification by ten States Parties.

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<sup>25</sup> Article 4 CRC: States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. 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.

#### 4. Significance of the Optional Protocol

At this point in time, the true significance of the new Optional Protocol for both children and the international community is unclear, as the minimum requirement of ten ratifications has yet to be met. Given that to date 2 countries have ratified and 35 countries have signed the new Protocol, it is impossible to predict the time frame for the required number of countries to ratify the Protocol. To illustrate this point: in December 2008, the UN General Assembly adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. To date, that Protocol has not yet entered into force due to the fact that although 41 countries have signed, only 8 countries have ratified it<sup>26</sup>.

The factual import of the third Optional Protocol also depends on whether States recognise the competence of the CRC Committee concerning inter-State communications (article 12) and whether States utilise the opt-out possibility with regard to the inquiry procedure for grave or systematic violations under articles 13 and 14. For Member States which do not recognise the aforementioned competence of the Committee, the new Protocol only has bearing on communications submitted by a child or its representatives as stipulated by article 5. Whether communications are submitted by the child, its parents or other representatives, such as an NGO, the identity of the child concerned must be disclosed under all circumstances. However, when States do recognise the Committee's competence pertaining to the aforementioned inquiry procedure, the Committee is able to start investigations as soon as reliable information has been brought to its attention and revelation of the child's identity may be omitted.

The Committee's future jurisprudence will play an important role in elucidating the intention of a number of concepts and provisions. For instance: how should "grave or systematic violations" be defined, or when should national legal remedies considered to be exhausted?

With regard to the Committee, it should be noted that recommendations resulting from a communications procedure – as indeed is the case with all recommendations – are not legally binding; an aspect of the Committee's competence that is widely criticised. Nonetheless the value of the Committee's recommendations should not be underestimated as Member States are chary of negative publicity at international level as a result of non-conformity<sup>27</sup>.

#### 5. Conclusion

The lack of a communication procedure was viewed as a considerable breach in the CRC, which led to the drafting and subsequent adoption of the Optional Protocol to the CRC on a Communications Procedure. Initially the new Protocol was meant to provide for both individual and collective communications; after strong criticism from a significant number of countries, however, the stipulation on collective communication procedures was abolished and the adopted Protocol only contains provisions for individual communications.

The value of the Protocol and the manner in which the CRC Committee shall interpret its provisions will become clear in years to come; in this regard, NGOs, parents or other legal representatives and children themselves play a pivotal role. Last but by no means least: one should not overlook the crucial role of governments; not only is it of vital importance that countries ratify the new Protocol as soon as possible, governments should also display the political will to comply with the stipulations of the Protocol and act accordingly.

In the interim, the third Optional Protocol should be valued for what it is: a new instrument to expose violations of children's rights, with a view to phasing these out in future. The topicality of this issue is illustrated by the fact that as recently as 20 November 2012 – the 23<sup>rd</sup> anniversary of the CRC – the current Chair of the Committee, Jean Zermatten, urged governments to ratify the new Optional Protocol, stating: "Accessing to the third Protocol to the Convention on a complaints procedure is essential to strengthen child rights protection and to combat impunity for child rights violations."

The above is based on an article by the author in the Dutch Journal 'Tijdschrift voor Familie- en Jeugdrecht', published in 2012.

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<sup>26</sup> [Find it here](#), accessed on 23/11/2012.

<sup>27</sup> J. Grass, *Monitoring the Convention on the Rights of the Child*, Helsinki: Forum Iuris 2001, p. 136.