

Ways to strengthen the complaints procedures, particularly the individual complaint

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The examination of reports submitted to the CRC Committee is only one way of assessing the implementation of the CRC in the reporting State Party. The examination and assessment of the CRC situation in the State Party concerned takes place at a general level and the resulting recommendations only deal with the various rights in the CRC in a general manner. The Committee's mandate (art. 43 CRC) does not give it the power to receive and to deal with complaints of an individual child or any other individual about the violation of one of the rights recognised in the CRC.

Other treaty bodies – the Human Rights Committee, the Committee against Torture (CAT), the Committee for the Elimination of Racial Discrimination (CERD) and most recently (Dec. 2001) the Committee on the Elimination of Discrimination against Women (CEDAW) – do have (on the basis of an optional protocol) the mandate to deal with individual complaints.

Some consider the creation of such individual complaint procedures at the international level as a crowning piece of the monitoring of the implementation of Human Rights. But some observations should put this approach in perspective.

- Treaty bodies – and in particular the Human Rights Committee – have dealt with individual complaints resulting in very important views on crucial issues.¹
- But the Views of the Treaty Body are not to be understood as strictly binding in law and cannot be enforced. This also applies to the follow-up in case the Committee's views indicate that the State Party should take particular action such as e.g. payment of compensation or release of prisoner.
- The backlog of individual complaints is dramatic. It takes the Human Rights Committee 2,5 yrs to decide that a case is not admissible and 4 yrs from the date of submission of the complaint to determine its final views. The Committee against Torture decides both for inadmissibility and final views within 2 yrs from the date of submission.²

In the light of the above one may argue that the traditional system of monitoring the implementation of the CRC (reports/concluding observations) is missing the necessary teeth. But on the other hand one may question the effectiveness of the traditional complaints procedure as they exist within the framework of some of the treaties.

In terms of priorities I wonder whether at this stage of the implementation of the CRC a lot of energy should be devoted to drafting another optional protocol (keep in mind: the CRC already has two optional protocols) for the introduction of a procedure for individual complaints which can be submitted to and dealt with by the CRC Committee.

In developing an effective monitoring system for the CRC we should, in my opinion, start with promoting the establishment of effective monitoring bodies at the national level. The more effective these bodies are the less there is a need to use international complaint procedures. To avoid misunderstanding: those international procedures remain necessary as a kind of last resort in an otherwise well developed national monitoring system. Because: we should be realistic and assume that those national systems may not be effective or may not exist at all. At the same time it is realistic to assume that States without a national monitoring system are not very likely becoming parties to an optional protocol that would allow its citizens to file

complaints with an (international) treaty body. In conclusion: I'll focus on the possibilities to establish or strengthen complaint procedures at the *national* level and make some remarks on an *international* complaint procedure for violations of children's rights.

2. The need for Children's Ombudspersons or Commissioners

In the discussion on the need for a children's ombudsperson/commissioner is often questioned. Various arguments are put forward like:

- it could create an unnecessary level of bureaucracy, apparently based on the wrong assumption that such body is part of the government;
- the government is responsible for the implementation of the CRC and should not create a separate body to do its work, again wrongly assuming that such body is in charge of implementation. But and on the contrary: this body is the one who *monitors the implementation*; that is: checks whether the one who is in charge of implementation does this job properly;
- many NGO's are already working for children and they are independent from the government as other services are like: child lines, children rights shops etc. Indeed, these organisations and services may be powerful advocates of children's rights, but they lack the formal authority to investigate (that is: hear witnesses, experts and others or consult documents/files etc.) an individual complaint or the formal power to advise parliament/government on legislation and/or policies relevant to children;
- the existing legal procedures provide sufficient tools for addressing violations of children's rights and can provide a (reasonable) compensation. But this fact did not prevent many States to introduce the Ombudsman and this argument overlooks the following realities:
- those procedures are not only often very time consuming and cost (therefor) a lot of money. Many States do not provide for free legal assistance for the poor and if they do the financial support is such that many lawyers are not interested to take on such cases;
- in most jurisdiction the child has no legal standing that is: he cannot initiate a legal procedure (regardless her/his maturity/age) without a formal representation (usually: one of her/his parents);
- class actions on behalf of children are in most jurisdiction not possible or if they are (e.g. for disabled children) again conditions may complicate this kind of collective action;
- children don't vote meaning inter alia that they cannot pursue their interests (e.g. children in institutions) via the political system of the State.

In conclusion: in order to provide the children with effective remedies in cases of violations of their rights³, it is not enough to refer them to existing civil or administrative procedures.

These procedures may be, to a certain extent, useful and effective but in many instances they are not. The crowning piece of a system that provides children with effective tools to respond to violations of their rights is the establishment of a body – like a child ombudsperson or –commissioner – that not only can receive and deal with individual or collective complaints but can also initiate investigation at its own initiative.

3. A monitoring body for children's rights at the national level: competence and responsibilities, procedures and organisation⁴

3a. Competence and responsibilities

With reference to the Paris Principles and the Standards for independent human rights institution for children adopted by the European Network of Children's Ombudspersons (ENOC) I'll limit myself to a summary of the main characteristics of a monitoring body for children's rights (MBCR) in terms of competence and responsibilities⁵

- the MBCR should be established by law, which should include provisions setting out its specific functions, powers and duties relating to children and their rights as enshrined in the CRC;
- the MBCR must be independent from the Government. This can be ensured e.g. via an appointment by Parliament for a term fixed by the law and via the rule that her/his dismissal is only possible on specific grounds set in the law and by e.g. the highest court of the land;
- the mandate of the MBCR should be as broad as possible and include inter alia the right to publicise opinions, recommendations, proposals and reports on its own initiative or at the request of authorities and NGO's on any matter concerning the promotion and protection of children's human rights; the power to receive and investigate complaints on violations of those rights including the right to hear any person and obtain any information and any document necessary for an adequate response to the complaint.

3b. The procedures/accessibility and admissibility

In order to be as effective as possible the MBCR should establish child-sensitive procedures which make it easily accessible for children, their parents or other caretakers and NGO's. This entails inter alia:

- a complaint should not be considered inadmissible solely on the ground that other possible remedies (civil, penal or administrative procedures) have not been exhausted. The MBCR should have the right to consider every complaint. But at the same time, it should have the right to refer the case to the most appropriate body and provide the complainant with the necessary information and support in this regard. In order to prevent the MBCR for being overwhelmed by complaints it is important that in the information about its role other possible remedies are clearly indicated. It should also be underlined that the MBCR is a last resort and that complaints can be referred to other more appropriate authorities.
- this and other information about the MBCR's mandate and powers should be provided to children, parents and other caretakers in a form and language they can understand, with special attention to very young children, children with disabilities and children in difficult circumstances (e.g. street children, working children and children in institutions);
- the staff of the MBCR should be adequately trained in interviewing children and in dealing with parents and other care takers;
- in the handling of complaints particular attention should be given to the privacy of the children involved and to the confidentiality of information;
- the MBCR should seek amicable settlement through conciliation and/or mediation.

3c. The organisation

The MBCR can be a separate organisation but it is also possible that it is a unit within an existing National Human Rights Institution. If the MBCR is part of such a National Institution special guarantees should be given for its effective functioning. It is unfortunately the experience in many countries that when it comes to cutting down expenses, the children are among the first to suffer from it. It is therefore e.g. necessary to define the minimum budget and staff necessary for an effective performing of the MBCR's role which should not be affected

4. Individual Complaints at the International Level

An Optional Protocol to the CRC allowing for the submissions of individual complaints is a necessary component of a strategy aiming at the effective implementation of children's rights. But as I said before: within this strategy priority should be given to the establishment of national MBCR's.

If we consider the introduction of an Optional Protocol for individual complaints (or in the UN jargon: individual communications), it is my hope that this will coincide with a discussion about the necessary improvement of the existing procedures in that regard within other treaty bodies. To quote from the Bayefski study (see note 2, p. 26): "There is substantive overlap in kinds of cases which can go to CAT or to CERD with the jurisdiction of the Human Rights Committee (as well as overlap in the procedures and expertise required of staff members of the OHCHR). Similarly there is overlap on a substantive level between CEDAW and the jurisdiction of the Human Rights Committee (----) Individuals themselves are frequently unfamiliar with all the potential fora.

Recently a "Petition Team" has been created within the OHCHR to deal with the individual communications submitted to the HRC, CAT and CERO (CEDAW has a separate secretariat for its individual communications). Shouldn't we – that is the various treaty bodies – consider a streamlining of the existing procedures in order to deal more efficiently and effectively with the individual complaints submitted under the existing optional protocols to the ICCPR, ICAT, ICERD and ICEDAW? Let me submit the following proposal to start the discussion based on the assumption that under each of the six human rights treaties individual complaints can be filed (not yet the case for the ICESCR and the CRC):

- a working group (any other name is fine) is established of 6 members (one representative of each of the 6 treaty bodies) to which all complaints are addressed. Advantage for individuals: one single address for complaints about Human Rights violations;
- this working group – supported by the "Petition Team" – reviews e.g. every 3 months the individual complaints filed over the past 3 months. This working group has the authority to decide on the admissibility of the case and that decision should be made within 6 months after the meeting of the group;
- if the case is admissible the working group refers the case to one of the six "chambers"; one for each of treaties composed of three members of that treaty body chaired by the member who is also a member of the working group (the composition of these chambers can change every two years);
- one single procedure should be developed for those chambers (with the possibility to have some specific rules depending on the specific nature/content of the treaty in case?) with clear and short time limits which should be applied rigorously;

I am very much aware that this proposal needs more elaboration and that many questions – in terms of formalities and content – can be (and should) be raised.

But if we think that it is important for all human beings to have the possibility to file a complaint about a violation of their human rights at the international level (and it is because national remedies are not always effective or even non-existent) we should make that possibility as efficient and effective as possible.

In conclusion: Monitoring children's rights requires in the first place an effective MCHR at the national level. The filing of individual complaints at the international level is a necessary component of monitoring the implementation of human rights, including those of children but improvement of the existing system is urgently needed.

Notes

¹ See e.g. *Toonen v. Australia* on the rights of homosexual citizens (Communication no. 488/1992; Views of the HK Committee March 31, 1994, UN Doc. CCPR/C/50/D/488/92) and *Faurisson v. France* about the denial of the Holocaust and the freedom of expression/Press (Communication no. 550/1993; HK Committee Views, November 8, 1996; UN Doc. A/52/40 (1999)).

² Anne F. Bayefski, *The UN Human Rights Treaty System: universality at the crossroads*, p. 24,25 (Trans national Publishers Ardsley NY, 2001).

³ I like to note that the CRC does not contain any specific provision regarding the possible actions by or on behalf of the child in case of a violation of her/his rights. But other HR treaties do: Article 2 (3) ICCPR stating that States Parties undertake “to ensure that any person whose rights or freedoms (recognised in the ICCPR) are violated shall have an effective remedy (---)”. See for more about the right to effective remedies Dinah Shelton *Remedies in International Human Rights Law* (Oxford University Press 1999).

⁴ The UN Committee for the Rights of the Child prepares a General Comment (G.C.) on Monitoring Children’s Rights at the National Level. The outline for this G.C. has been discussed at this 29th Session (Jan. 2002) and the (final) draft text of this G.C. will be discussed and hopefully approved at its 30th Session (May/June 2002).

⁵ The Principles relating to the Status of National Institutions (Paris Principle) have been adopted by the General Assembly of the UN; Resolution 48/134 of 20 December 1993. ENOC adopted the Standards at its annual meeting in October 2001.