

Children will soon be seen and heard by the UN ^[1]

Official blog

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EXCERPTS:

One month ago, on 19th December 2011, the UN General Assembly adopted the Third Optional Protocol (OP) to the Convention on the Rights of the Child (CROC). This new international instrument establishes a procedure whereby children whose rights have been violated can bring a complaint to UN Committee on the Rights of the Child (CRC). It is a landmark development in the protection of children's rights.

Until now the CRC was the only treaty committee without jurisdiction to receive complaints about violations of the treaty it is empowered to monitor. Children alleging a breach of human rights could bring a complaint to another treaty committee, for example the Human Rights Committee for a breach of the International Covenant on Civil and Political Rights, but that complaint would not be determined by a committee made up of experts in children's rights and would not involve a process informed by the best interests of the child principle. The new OP means that for the first time there will be a child specific system for responding to alleged violations of CROC.

The new OP will enter into force once it has been ratified by 10 states. Given there are 193 States that have ratified CROC, one would like to think that it will not take too long for 10 of these states to ratify this new instrument. However, the Optional Protocol setting up a complaints procedure for alleged violations of the International Covenant on Economic, Social and Cultural Rights was adopted by the UN General Assembly in 2008 and has yet to enter into force because it has attracted only half of the 10 ratifications needed for it to enter into force. Thus, it may be some time before children can bring a complaint to the CRC pursuant to this new OP.

Many of the provisions in the new OP are similar to those seen in other recent optional protocols including the capacity to request (in exceptional circumstances) that a state take interim measures to avoid a complainant suffering irreparable damage prior to the CRC having the opportunity to decide the complaint on its merits.

Another provision which this OP shares with other optional protocols establishing complaint procedures is the requirement that states report back to the treaty committee on steps taken to give effect to the views and recommendations on the committee. Such a report must be submitted to the CRC as soon as possible, but in any event within six months. This represents best practice when it comes to complaint systems since it allows for some follow-up of the committee's decision, which is, of course, unenforceable.

What sets this OP apart from other UN complain mechanisms is Article 2 which is directed at the specific needs of children. It provides that "In fulfilling the functions conferred on it by the present Protocol, the Committee shall be guided by the principle of the best interests of the child" and that it shall "have regard for the rights and views of the child, the views of the child being given due weight in accordance with the age and maturity of the child". The best interests of the child principle and the right of children to express their views and have them accorded due weight are two of the fundamental principles underpinning CROC. It is too early to know exactly how the CRC will give effect to these mandates, but given that it is a committee composed of experts in children's rights, one can be quietly optimistic that the system will be child-friendly and child centric.

Although the OP represents a giant step towards greater protection of children's rights it does not include all the tools that those advocating for this instrument wanted. In particular, there is no capacity for an NGO or human rights institution to bring a collective complaint on behalf of a class of children suffering systemic violation of their rights. All complaints must be made by named individuals. This requirement is problematic in circumstances where it is not possible or advisable to identify individual complaints e.g. victims of forced marriages or sexual exploitation. It would have been preferable for the OP to follow the example of the African Charter on the Rights and Welfare of the Child which allows NGOs and others to make a complaint without naming an individual child or children (Article 44).

One important effect of the new OP is likely to be a much needed boost to the international jurisprudence surrounding children's rights. There has been a distinct lack of normative development when it comes to children's rights because of the lack of opportunity for decision-makers to elaborate on the provisions of CROC, many of which are vague and imprecise. Case law will provide a welcome supplement to the General Comments published by the CRC which, until now, have been the only opportunity for normative development of children's rights.

The UN communication system is designed to be a last resort when states have failed to provide a remedy for human rights violations. It is not a substitute for a domestic system of protecting children's rights that is strong and effective. Australia has not yet incorporated CROC into domestic law and does not have a Federal Children's Commissioner. In order to improve the promotion and protection of children's rights in Australia, the Federal Government should enact legislation implementing CROC domestically, establish a Children's

Commissioner within the Australian Human Rights Commission and promptly ratify the new OP to CROC. Without these measures, some of the most vulnerable members of our society will continue to face inadequate remedies for human rights violations.

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