

Distr.: Restricted
14 December 2009

English only

Human Rights Council
Working Group on an optional protocol
to the Convention on the Rights of the Child
First session
Geneva, 14–18 December 2009

**Human Rights Council Working Group on an optional
protocol to the Convention on the Rights of the Child to
provide a communications procedure**

**Marta Santos Pais, Special Representative of the Secretary-General on
Violence against Children**

1. Introduction

It is both meaningful and inspiring that the Working Group of the Human Rights Council on an Optional Protocol to the Convention on the Rights of the Child to provide a communications procedure is established during the year of the 20th anniversary of the Convention. This initiative provides a timely opportunity to renew the international community's commitment to the realization of the rights of the child, being guided by the experience and lessons gained over the last two decades and consolidating further the international system of protection of children's rights.

The process of implementation of the Convention has been rich and far reaching. Critical legal and institutional reforms have been undertaken and a process of social change is being generated across nations. In several countries, children's rights have been given constitutional ranking, in many others new children's codes have been adopted and child related legislation enacted in emerging areas. Increasing steps are also being taken to enable children to access justice and to be heard when their rights are violated, through court, child welfare or other agency. Incrementally, national courts are taking a more active role in the safeguard of children's rights, overturning previous laws as a result of their incompatibility with the Convention and filling gaps in the national normative framework by applying the principles and provisions of this treaty. Moreover, there is a growing movement towards the establishment of independent national institutions for children's rights, with a mandate anchored in the Convention, guided by the child's best interests, and acting as spokespersons of children's voices and concerns and as catalysts of the mainstreaming of the rights of the child in the national agenda.

Incrementally, the rights of children have evolved from being an add-on or afterthought in policy making, into gaining a tangible space in national action and public debate. More importantly, a new perception of childhood has started to emerge, with children being envisaged not simply as vulnerable and dependent human beings, or adults in the making, but as citizens and agents of change. The recognition in the Convention of the right of the child to be heard and the requirement to give due weight to the child's views lays the foundation for this remarkable process of transformation.

Overall, the ethos and paradigm shift envisaged by the Convention have been gaining a concrete meaning. And yet, they also stand as a powerful reminder of the many challenges that continue to mark the daily existence of so many millions of children around the world. They remind us of the imperative to act with urgency, and also of the opportunity to make a difference, moving better and faster with the knowledge and skills we have gained along the way, informed by the promising practices developed across nations and organizations, and re-energised by an irresistible sense of ambition.

2. A communications procedure is critical for the protection of children from all forms of violence

This is also the spirit that guides my participation in the Working Group. The call for the development of a communications procedure is of critical relevance to my mandate as Special Representative of the Secretary General on Violence against Children, and it will be instrumental to the effective protection of children from all forms of violence.

The right to an effective remedy was proclaimed more than 60 years ago as a core dimension of the Universal Declaration of Human Rights and remains an essential component of any system of accountability for the rights of the child. It provides the bridge between theoretical recognition and meaningful enforcement. It is relevant for the

implementation of all human rights and gains a special relevance when violence against children is at stake.

The protection of children from violence lies at the heart of the Convention on the Rights of the Child and constitutes an important indicator of genuine national commitment to respect the human dignity of the child at all times. Violence has serious, lifelong emotional and health impact on children's lives, undermining their development and learning abilities, inhibiting positive relationships and provoking trauma and depression. Violence against children knows no geographic, cultural, economic or social boundaries and remains widespread, largely hidden and condoned by society.

For this reason, most children remain invisible in their experience of violence, many lose trust and hope when abused in settings designed to protect them, many fear reporting and reprisals, and those who dare to speak up often see their suffering being forgotten in a pact of silence.

It is urgent to gain a better understanding of the hidden face of violence against children, become better equipped to prevent its occurrence; and develop child sensitive counselling, complaint and investigation mechanisms to address it effectively.

This is why the UN Study on Violence against Children recommended the establishment of an Ombudsperson or Commissioner for children's rights with a clear mandate to monitor the rights of the child and with competence to receive and investigate complaints of violations of children's rights; and also called for the establishment of effective and independent complaints, investigation and enforcement mechanisms to deal with cases of violence in care and justice systems.

In my mandate, these are areas I am committed to continue to promote. Indeed, they constitute core components of the process of follow up to the UN Study and essential dimensions of the comprehensive and well resourced strategy every country is required to develop to prevent and respond to any form of violence against children. I am confident that the process of development of the communications procedure to the Convention on the Rights of the Child will be guided by the findings and recommendations of the UN Study and, more importantly, by the urgency of establishing effective and child sensitive counselling, investigation and redress mechanisms to address any form of violence against children.

3. A communications procedure to further consolidate the protection of children's rights

I warmly welcome the opportunity to support the consolidation of existing children's rights standards, and feel inspired by the prospective of putting in place a truly child sensitive communications procedure, shaped by the principles and provisions of the Convention and informed by our shared experience over the last twenty years.

I was privileged to participate in the drafting process of the Convention on the Rights of the Child and of its two Optional Protocols. I recall the strong sense of commitment, the solid technical expertise, and also the creative search for higher standards for the realization of children's rights. As I look back, I recognise how instrumental this approach has been to uphold children's best interests, to promote children's citizenship, to influence public policy reforms, to lay the foundation for a culture of respect for children's rights in society; and also to fight passivity and indifference and stimulate a dynamic process of change, guided by the highest threshold of fulfilment of children's rights – as members of the human family, children are entitled to all human rights; in view of their

vulnerability and evolving personality they require distinct action and stronger protection for the effective safeguard of those rights.

This is the spirit behind the call made in the Convention for the application of the most conducive norm to the realization of the rights of the child¹, a provision later reaffirmed in the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography,² this is also why the Convention anticipated the need for the development of studies on children's rights topics,³ to capture change and address emerging issues, while keeping the human rights of children at the centre of concerns.

This dynamic and child centred approach laid the foundation for the development of the UN Study on Violence against Children and shapes at present its process of follow up. The same sense of ambition led to the drafting and adoption of the two Optional Protocols to the Convention on the Rights of the Child.

This is the spirit we have the opportunity to renew as we embark in discussions on a third Optional Protocol to the Convention on a communications procedure. Framed by existing standards already adopted for all other human rights treaties, we can develop a strong complaint mechanism in support of the implementation of the Convention on the Rights of the Child. And we have, in addition, a unique opportunity to shape it as a truly child sensitive mechanism.

This is the approach the Human Rights Council has conveyed when, earlier this year, it called on States to ensure that child sensitive procedures are made available to children and their representatives, to enable access to effective remedies for any breaches of the rights recognised by the Convention on the Rights of the Child, through independent advice, advocacy and complaint procedures, including justice mechanisms, and to ensure that children's views are heard when they are involved or their interests concerned in justice procedures⁴.

4. Added value of a communications procedure on the rights of the child

With a communications procedure, an effective remedy for alleged violations of the rights of the child will be introduced, the enforcement of children's rights will be given a genuine meaning and accountability mechanisms for children's rights will be further consolidated.

Being anchored in the Convention, the procedure will preserve the holistic perspective of this treaty. As a result, it will cover all civil, political, economic, social and cultural rights of the child, including specific dimensions which have not been addressed by other human rights treaties.

Moreover, any alleged violation will be assessed through the lens of the indivisibility and interrelationship of children's rights, keeping in mind the multidimensionality of the child and being guided by the analytical framework provided by the general principles of the Convention.

With this approach, the communications procedure will be pursued in conformity with the rights recognised by the Convention and guided by the best interests of the child; it should avoid any risk of manipulation, intimidation, reprisal or re-victimisation of the child,

¹ Convention on the Rights of the Child article 41.

² Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, article 11.

³ Convention on the Rights of the Child article 45 c).

⁴ Human Rights Council Resolution 10/14, paragraph 11.

while protecting the child from any inhuman, harmful or degrading treatment during the proceedings⁵. It will be a critical mechanism to protect the child victim from any form of discrimination, to introduce a gender sensitive approach and ensure a particular attention to the most vulnerable. It will promote the right of the child to life, survival and comprehensive development, and will meaningfully materialise the right to respect the child's views and the right of the child to be heard in judicial and administrative proceedings.

In addition, with the development of this new communications procedure, allegations of violations of children's rights will be examined by a Committee with sound expertise on the human rights of children and on the process of implementation of the Convention on the Rights of the Child. As a result, the communications procedure can build upon and complement the reporting process foreseen by the Convention; and, in the spirit of article 45 of this treaty, can open new avenues to advance implementation through follow-up measures of technical advice and assistance by UN Funds and Programmes, Specialized agencies and other competent bodies. A similar approach has been promoted by the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights⁶ and should be considered by the new Protocol to the Convention on the Rights of the Child.

The strong potential of this process is meaningfully illustrated by the steady attention given by the Committee's Concluding Observations to the follow up to the UN Study on Violence against Children and by its recommendation for technical cooperation with the Special Representative of the Secretary General, UN agencies and other partners.

5. A communication procedure that is child sensitive

As noted above, with the communications procedure, children will benefit from an effective remedy for the realisation of their rights; and the right of the child to be heard in proceedings will be given a renewed value. In this regard, the Protocol can provide significant guidance to States on legislative measures required to recognise children's standing and capacity to access national and international complaint mechanisms.

Moreover, the right of the child to relevant information should be envisaged as an essential prerequisite to this process, with the provisions of the Convention providing the needed guidance to move it forward.⁷

The Convention broke new ground when it recognised States' responsibility to make the principles and provisions of the Convention widely known, to adults and children alike, through and active and appropriate means. This is an area where the implementation process has been particularly rich and where good and promising practices across regions, institutions and international organizations can become an inspiring reference for the drafting of the new Protocol.⁸

⁵ Specific provisions to this effect have been included in the Optional Protocols to the Convention on the Elimination of all Forms of Discrimination against Women (article 11) and to the International Covenant on Economic, Social and Cultural Rights (article 15), and should also be considered for inclusion in the new Protocol to the Convention.

⁶ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights article 14

⁷ See in particular articles 13, 17 and 42 of the Convention.

⁸ This approach has also influenced the provisions in article 9 of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

Indeed, for a communications procedure to be effective and genuinely accessible to children, it needs to be understood and made easily available. For this reason, the new Protocol can include valuable guidance to States on the need to:

- Provide children with relevant information on existing complaint mechanisms and procedures
- Raise awareness of what these instruments mean and how they can be used
- And also to employ child sensitive language, materials and tools in the performance of these tasks
- Moreover, it will be particularly important to include information on these effective remedies in the school curriculum, as a core component of children's rights education

Building upon article 42 of the Convention and the jurisprudence of the Committee on the Rights of the Child, in this area, the text can further recommend that the Protocol itself, once adopted, be issued in a child friendly version. The child friendly version of the UN Study on Violence against Children and the child friendly publication on the UN Guidelines on Justice Matters involving Child Victims and Witnesses of Crime are two crucial processes to keep in mind.

The Protocol should also include guidance for the inclusion of complaint mechanisms and procedures in training curricula and capacity building activities for professionals working with and for children. It is essential to ensure that all relevant actors become knowledgeable and skilful in the use of communications procedures and in the promotion of ethical principles when dealing with and supporting children in this regard.

Relevant public information and education initiatives need, naturally, to be supplemented by concrete and adequate information, counselling and advice for those children who decide to make use of national or international complaints mechanisms and communications procedures. In this process, the Protocol has the opportunity to specifically recognise:

- The right of the child to be informed, consulted and heard at all stages of the proceedings, with due weight being given to the child's opinion and evolving capacities;
- The right of the child to be informed, in a prompt manner and in a form and language adapted to his or her age and level of understanding, of the general progress and the possible outcome of the proceedings, including availability of support services and opportunities for reparation; this should also include relevant information to the child once the communication has been considered and decided upon;
- The right of the child to effective protection, throughout the proceedings, from any pressure or manipulation, discrimination, intimidation or reprisal⁹.

In addition, the Protocol will be particularly well placed to provide guidance to States on the development of national child sensitive mechanisms to support access by children to national and international complaint procedures – in the form of information offices for children's rights, associated with bar associations, welfare institutions or NGOs; through national bodies that may have been established to receive and consider petitions

⁹ Provisions included in the Optional Protocols to the Convention on the Elimination of all Forms of Discrimination against Women (article 11) and to the International Covenant on Economic, Social and Cultural Rights (article 15) should be considered in this regard.

from individuals who claim to be a victim of a violation of a right recognised by the Convention,¹⁰ or through national independent institutions for children's rights.

National independent institutions play a critical role in this process. They raise public awareness on the realisation of children's rights and advocate in favour of effective remedies and redress; they issue information and develop activities to support children, informing them about laws and mechanisms designed to safeguard their rights, giving advice to address children's concerns and extending help to those in need; not less importantly, they act as spokespersons of children's voices and concerns.

In countries where they have been set up, these institutions have gained a unique relevance in process of implementation of the Convention and its Optional Protocols. The Human Rights Council has called for their establishment and strengthening,¹¹ and the Committee on the Rights of the Child has been a decisive advocate in favour of their development – including through its Concluding Observations and General Comments.¹² Formal commitments have also been made to this effect, including at the 2002 Special Session on Children¹³ and again a year ago, in the World Congress III against Sexual Exploitation of Children and Adolescents.¹⁴

Guided by this long and firm experience, the new Protocol can include specific guidance on the role these institutions can play in providing child sensitive information to children and in making the communications procedure become truly accessible to all.

6. A communications procedure supported by strong safeguards

Guided by international standards and the Convention's own principles and provisions, the Protocol should also recognise important legal safeguards associated with the recognition of the child as a subject of rights. These should include, inter alia:

- The child's entitlement to initiate a communications procedure and to be supported in an effective manner throughout the process
- The right of the child to legal counsel and representation and to other appropriate assistance
- The right to legal aid, free of charge
- And the right to expeditious decisions.

Moreover, the admissibility of the communication should be considered in the light of the best interests of the child, waiving the requirement for the exhaustion of all available domestic remedies once the application of such remedies would be unreasonable prolonged

¹⁰ Similar to the bodies foreseen by the International Convention on the Elimination of all Forms of Racial Discrimination, article 14.

¹¹ Human Rights Council Resolution 10/14, paragraph 10.

¹² See in particular the Committee's General Comment n. 2 (CRC/GC/2002/2).

¹³ A World Fit for Children, paragraph 31 b).

¹⁴ The Rio de Janeiro Declaration and Plan of Action to Prevent and Stop Sexual Exploitation of Children and Adolescents, paragraph 63 calls for the establishment by 2013 of independent children's rights institutions in view of their role in advocating for effective legal frameworks and enforcement and in ensuring that child victims have effective remedies and redress, including the possibility of filing complaints.

or unlikely to bring effective relief,¹⁵ and once effective remedies would not exist at the national level.

In addition, the communications procedure should be strengthened by supportive measures, including the following:

- Collective complaints to enable associations or groups not directly affected by the alleged violation, to intervene on behalf of those who may have no voice to move the process forward¹⁶
- Inter State communications¹⁷
- Interim measures to avoid possible irreparable damage to the victim¹⁸
- An inquiry procedure for situations where grave or systematic violations would have occurred¹⁹

7. Conclusion

The development of the new Protocol will no doubt offer opportunities to address in detail these and other critical dimensions of an effective remedy for the realisation of children's rights. It is reassuring to recognise that this process can build upon the strong normative foundation provided by international and regional human rights standards, and the experience gained in their implementation. And it is inspiring to anticipate that, as in the case of the Convention, the most conducive norms will be pursued.

¹⁵ In the light of the Optional Protocols to CEDAW article 4 and to the Convention on the Rights of Persons with Disabilities article 2.

¹⁶ As in the case of the Optional Protocols to CEDAW and ICESCR, article 2.

¹⁷ As in the case of the Optional Protocols to ICESCR, article 10.

¹⁸ As in the case of the Optional Protocols to ICESCR, article 5.

¹⁹ As in the case of the Optional Protocols to ICESCR, article 11.