

NGOs Position on the Chair's draft - Advocacy Brief

Below you will find the key provisions of the Chair's draft¹ which was circulated to all UN missions in August 2010 and our response to each of them, based on the joint submission² prepared by the NGO Group and partner organisations. This brief aims at helping you in your advocacy activities. If you would like to get further details on each of our arguments, please refer to our complete joint submission.

Most of the provisions contained in the Chair's draft are "standard" provisions, i.e. they already exist in similar instruments establishing communications procedures. But some provisions are specific to children and do not exist in other international instruments. These have been marked **[NEW]**.

Note that these provisions are the starting point for the negotiations, not the end product. What is kept in the final draft OP will depend on States' positions. It will therefore be crucial to discuss with your State to know what their position will be on each provision and to lobby for the support of our position and recommendations on key provisions.

Individual communications

Who can submit a communication? (Article 2.1, 2.4 and 2.5 of the Chair's draft)

Chair's draft	NGO Joint position
• Communications can be submitted by or on behalf of an individual or group of individuals	• We support this provision
If a communication is submitted on behalf of an individual or group of individuals, this should be with their consent unless the author of the communication can justify acting on their behalf without such consent	• We support this provision
If the author of a communication is acting on behalf of a child or a group of children, the Committee on the Rights of the Child shall determine whether it is in the best interests of the child or group of children concerned to consider the communication [NEW]	• We recommend amending this point to make sure that the Committee <u>only</u> determines whether a communication is made in the best interests of the child or group of children concerned <u>if</u> it is not satisfied that the child(ren) victim(s) have expressed their consent to be represented. This would ensure the respect of the views of the children who have consented to such representation ! Position shared by the Committee on the Rights of the Child

Note: the term "individual" is used instead of the term "child" to ensure that victims who were children at the time of the violation but could not exhaust their domestic remedies before they reached the age of 18 would still be able to submit communications to the Committee

Grounds for a communication (Article 2.1 and 2.2 of the Chair's draft)

¹ To read the Chair's draft and its explanatory memorandum, go to:

<http://www2.ohchr.org/english/bodies/hrcouncil/OEWG/2ndsession.htm>

² To read the NGO joint submission, go to: <http://www.crin.org/resources/infoDetail.asp?ID=23481&flag=report>

Chair's draft	NGO Joint position
<p>Communications shall claim a violation of any of the rights guaranteed in the CRC and/or in the OPSC and/or in the OPAC [NEW]</p>	<ul style="list-style-type: none"> • We support this provision
<p>•But States can declare that they do not recognise the Committee's competence to examine communications claiming a violation of any of the rights guaranteed in the OPSC and/or in the OPAC. [NEW]</p> <p>This is called an "opt-out option". This means that until the State declares the contrary, it is assumed that communications alleging a violation of any right guaranteed by the CRC and/or the OPSC and/or the OPAC can be brought against that State. The State is however allowed to declare that communications alleging a violation of a right guaranteed by the OPSC and/or by the OPAC can no longer be brought against it. Once it does so, communications can only concern violations of rights guaranteed by the instruments not concerned by the declaration</p> <p>Examples: <i>State A declares that it does not recognise the competence of the Committee to examine communications under the OPSC and the OPAC. Communications brought against State A will therefore be limited to those claiming a violation of a right guaranteed by the CRC.</i></p> <p><i>State B declares that it does not recognise the competence of the Committee to examine communications under the OPAC (and State B ratified the OPSC). Communications brought against State B will therefore be limited to those claiming a violation of a right guaranteed by the CRC and/or by the OPSC.</i></p>	<ul style="list-style-type: none"> • Allowing an "opt-out" effectively closes access to a remedy for certain rights and would undermine the principles of indivisibility, interdependence and inter-relatedness of all rights • We therefore recommend the deletion of the opt-out option to ensure that the communications procedure apply to all the children's rights obligations accepted by a State party and to avoid any differentiation between rights <p>! Position shared by the Committee on the Rights of the Child</p> <ul style="list-style-type: none"> • We also recommend amending the draft to specify that communications can only be based on an instrument that the State has ratified <p>Implications of our recommendations: <i>If State A has ratified the CRC, the OPSC and the OPAC, the communications procedure will cover the rights guaranteed by the three instruments and the State will not be allowed to take an instrument out of the communications' scope.</i></p> <p><i>If State C has only ratified the CRC and the OPSC, the communications procedure will cover the rights guaranteed by the two instruments (and not by the OPAC).</i></p>

Remember: in any case, communications can only be based on an instrument that the State has ratified!

Exception to exhaustion of remedies (Article 4 (d) of the Chair’s draft)

Exhaustion of domestic remedies (and exceptions) – explanation³

As a general rule, before any individual communication can be submitted at the regional and international level, the complainant must, in general, have exhausted all remedies in his/her own State before bringing a claim to a committee. This means that the claim should be first pursued through the national court system until it reaches the highest court before being submitted to a Committee.

There are, however, limited exceptions to this rule. If the exhaustion of domestic remedies would be unreasonably prolonged, or if they would plainly be ineffective (if, for example, the law in your State is quite clear on the point at issue) or if the remedies are otherwise unavailable to the complainant (for example, when legal aid is denied in a criminal case), the complainant may not be required to exhaust domestic remedies and could directly present a communication at the international level.

The provision cited below refers to one of the exceptions to the exhaustion of domestic remedies and specifies that it should be interpreted from the standpoint of a child.

Chair's draft	NGO Joint position
•The Committee shall interpret “unreasonably prolonged” in a manner sensitive to the impact that delays may cause to the child's or children’s well-being and development [NEW]	• We support this provision

Collective communications

Collective communications are communications that do not require the identification of an individual victim to be submitted.

This does not mean that they are pursued out of merely academic or hypothetical interest. On the contrary, such communications are made in the public interest and describe potential or actual violations of rights that have resulted or that will result in victimisation if unaddressed.

They can:

- bring to the Committee's attention situations that would be difficult, if not impossible, to address through individual communications (e.g., victims of child pornography who may not be identifiable);
- allow the Committee to examine violations of children's rights without directly involving individual child victims in the process, thus addressing the concerns over confidentiality, re-victimization and protection of children throughout the procedure

³ This explanation is based on the OHCHR’s “23 FAQ about Treaty Body complaints procedures” at <http://www2.ohchr.org/english/bodies/petitions/docs/23faq.pdf>

Who can submit a communication? (Article 3.1, 3.3 of the Chair’s draft)

Chair's draft	NGO Joint position
<ul style="list-style-type: none"> •National human rights institutions and ombudsman institutions and NGOs with ECOSOC status with particular competence in the matters covered by the CRC and its OPs, which have been approved for that purpose by the Committee, can submit collective communications [NEW] 	<ul style="list-style-type: none"> • We agree with the requirements relating to the competence of the NGOs and the need for the Committee's approval •BUT we are concerned by the ECOSOC status requirement as it would prevent local and national NGOs with specific knowledge and expertise about children's rights violations from submitting collective communications ! Position shared by the Committee on the Rights of the Child •We recommend to follow the practices of the Committee on the Rights of the Child and of the Universal Periodic Review which do not require NGOs to have ECOSOC status to submit information
<ul style="list-style-type: none"> •States can declare that they allow any national NGO without ECOSOC status in their territory, which has particular competence in the matters covered by the CRC and its OPs, to submit collective communications [NEW] 	<ul style="list-style-type: none"> •We are concerned about this provision as States' authorisation for national NGOs without ECOSOC status establishes a requirement unrelated to the competence of the NGO or the relevance of its communication and may unduly politicise the process

Grounds for a communication (Article 3.1 and 3.2 of the Chair’s draft)

Chair's draft	NGO Joint position
<ul style="list-style-type: none"> •Collective communications shall allege “grave or systematic violations” of any of the rights guaranteed in the CRC and/or in the OPSC and/or in the OPAC [NEW] 	<ul style="list-style-type: none"> • The threshold proposed for allowing collective communications, i.e. only about “grave or systematic violations” is too high and unduly restricts the use of this mechanism. For instance, communications alleging systemic or widespread, though serious, would not be allowed ! Position shared by the Committee on the Rights of the Child • We recommend modification of the threshold for violations that can be alleged so as to include any violations of children's rights which may result in harm to multiple victims

<ul style="list-style-type: none"> •But States can declare that they do not recognise the Committee’s competence to examine communications claiming “grave or systematic violations” of any of the rights guaranteed in the OPSC and/or the OPAC [NEW] <p>This is again an “opt-out option” (see the explanation of this option under the section on “Individual communications - Grounds for a communication”)</p>	<ul style="list-style-type: none"> • We recommend the deletion of the opt-out option to ensure that the communications procedure apply to all the children’s rights obligations accepted by a State party and to avoid any differentiation between rights ! Position shared by the Committee on the Rights of the Child • We also recommend amending the draft to specify that communications can only be based on an instrument that the State has ratified
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Competence of the Committee (Article 1.2 of the Chair’s draft)

Chair's draft	NGO Joint position
<ul style="list-style-type: none"> •The Committee shall exercise its functions under the new OP in a manner that respects the rights of the child and ensures that the best interests of the child is a primary consideration in all actions concerning the child. [NEW] 	<ul style="list-style-type: none"> •We welcome the reference made to Article 3.1 of the CRC on the best interests of the child •We recommend the inclusion of an explicit reference to the children's right to be heard in line with Article 12.1 of the CRC ! Position shared by the Committee on the Rights of the Child

Interim measures (Article 5 of the Chair’s draft)

Interim measures are measures taken provisionally to ensure that the right to complain and seek a remedy at the international level is not rendered ineffective through irreparable damage to the complainant.

Interim measures could therefore include the suspension of judicial or administrative decisions (e.g. deportation of illegal migrants) until the Committee can decide whether those decisions were taken in violation of the CRC and/or the OPs.

Chair's draft	NGO Joint position
<ul style="list-style-type: none"> •At any time after the submission of a communication to the Committee and its examination, the Committee can request the State party concerned to take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violations 	<ul style="list-style-type: none"> •We support the possibility of interim measures •We recommend to expressly including in the text a requirement that States parties must implement the interim measures requested by the Committee ! Position shared by the Committee on the Rights of the Child

Procedural provisions (Article 6, 8, 9 and 10 of the Chair's draft)

The communications procedure is constituted of different stages which can each cause delays to the examination of the communication by the Committee.

Chair's draft	NGO Joint position
<ul style="list-style-type: none"> • Time limits are set for several stages of the communication process 	<ul style="list-style-type: none"> • We support the time limits set • To ensure that the communications procedure is as swift as possible and to avoid any unnecessary delay that would be detrimental to children's development, we also recommend to explicitly state the necessity to avoid any unnecessary delay in the communications procedure and to extend time adjustments to each step of the process

Friendly settlement (Article 7 of the Chair's draft)

Chair's draft	NGO Joint position
<ul style="list-style-type: none"> • The Committee shall make available its good offices to the parties with a view to reaching a friendly settlement 	<ul style="list-style-type: none"> • We note that friendly settlements can provide an opportunity to protect the rights of victims without a prolonged examination of their communications by the Committee • However, friendly settlements between a State and an individual are imbalanced and raises concerns about the relative powers of the two parties • We recommend to set additional safeguards to prevent misuse of the friendly settlement procedure, such as using coercion or financial incentives to induce the victim's consent, or not implementing the terms of the settlement • We also recommend to explicitly require that any friendly settlement respects the rights guaranteed in the CRC and/or its OPs • We further recommend that the Committee is given the power to monitor the implementation of any settlement agreed <p>! Position shared by the Committee on the Rights of the Child</p>
<ul style="list-style-type: none"> • An agreement on a friendly settlement closes consideration of the communication 	<ul style="list-style-type: none"> • We recommend enabling the Committee to continue or re-open the consideration of

	<p>communications if it considers that the circumstances justify such a course – if the settlement has not been implemented, for example</p> <p>! Position shared by the Committee on the Rights of the Child</p>
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Inquiry procedure (Article 10.7 of the Chair’s draft)

Inquiry procedures are a key complementary tool to individual and collective communications and are a standard provision in instruments establishing communications procedures. They allow the Committee to take action as soon as it receives reliable information indicating grave or systematic violations of the CRC or its OPs.

Chair's draft	NGO Joint position
<ul style="list-style-type: none"> • States can declare that they don't allow inquiry procedures (opt-out option, see the explanation of this option under the section on “Individual communications - Grounds for a communication”) 	<ul style="list-style-type: none"> • We recommend deleting the opt-out option ! Position shared by the Committee on the Rights of the Child • We recommend replacing it by requiring the State's consent before the Committee undertakes any country visit

Protection measures (Article 13 of the Chair’s draft)

Chair's draft	NGO Joint position
<ul style="list-style-type: none"> • States shall ensure that individuals communicating with the Committee are not subjected to any form of ill treatment or intimidation 	<ul style="list-style-type: none"> • We welcome the inclusion of a provision on protection measures • We recommend that the scope of measures be extended to prevent any retaliatory measures against a complainant or his/her representative

Reservations (Article 19 of the Chair’s draft)

Chair's draft	NGO Joint position
<ul style="list-style-type: none"> • No reservations to the Optional Protocol shall be permitted 	<ul style="list-style-type: none"> • We support this prohibition • The new Optional Protocol is a procedural instrument that does not introduce new, nor expand existing rights and obligations to those already accepted by the States