



Human Rights Council resolution 22/32 on the right of the child to the enjoyment of the highest attainable standard of health

Full day meeting in March 2014 on “Access to justice for children”

Submission from the Global Initiative to End All Corporal Punishment of Children, to inform OHCHR’s report in preparation of the full day meeting (Peter Newell, Coordinator: peter@endcorporalpunishment.org; www.endcorporalpunishment.org)

A focus on achieving effective remedies for violations of children’s rights

Much of the welcome new debate on children’s access to justice has focussed on children involved in justice systems as victims, witnesses or alleged offenders. While these are vital issues and need human rights based consideration, surely the particular focus of the Human Rights Council and the Office of the High Commissioner – and of the 2014 children’s rights day debate – should be to highlight states’ obligations to provide children and their representatives with effective remedies for violations of the full range of their civil, political, economic, social and cultural rights, guaranteed by the almost universally ratified UNCRC and other instruments?

As the Committee on the Rights of the Child confirms in its General Comment No. 5: “For rights to have meaning, effective remedies must be available to redress violations....” (CRC/GC/2003/5, para. 24). The General Comment goes on to note: “Children’s special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. Where rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39.”

Given the current failure of many states to provide effective domestic remedies, the HRC and the OHCHR should also promote effective and accessible international mechanisms, able to challenge violations of children's rights when domestic remedies do not exist or are ineffective. And, as the Committee on the Rights of the Child emphasises, children's special and dependent status demands special consideration in this task too. There has been very little relevant use of the existing communications procedures and other mechanisms which could be used to challenge violations of children's rights.

The report which OHCHR has been requested to prepare and the 2014 full day meeting provide key opportunities for insisting on effective domestic and international remedies and encouraging stronger and more legalistic advocacy on children's rights.

In this submission, we highlight in particular one of the most common violations of children's civil rights: the perpetration of violent punishment against them, most frequently in their homes but also in day care, alternative care of all kinds, schools, penal systems and child labour. Violent punishment perpetrated on children varies in its intensity and impact but in every instance it violates the human dignity and physical integrity of the child. Its persisting legality in one or more settings in a majority of states violates millions of children's right to equal protection under the law. There is now a developed and clear human rights consensus that corporal punishment and other cruel or degrading forms of punishment of children should be prohibited in legislation and eliminated by linking law reform to awareness-raising and promotion of positive, non-violent forms of discipline.

The Committee on the Rights of the Child has consistently recommended prohibition since it started examining states parties reports in 1993 (by September 2013 it had recommended this to 174 states). In its General Comment No. 8 (CRC/GC/8, 2006) it provides detailed guidance to states on their "immediate obligation" to prohibit and eliminate all violent punishment. Other UN Treaty Bodies and regional human rights mechanisms in Africa, Europe and Latin America have echoed the jurisprudence and recommendations of the Committee on the Rights of the Child. In the Universal Periodic Review, the issue has been repeatedly raised, with recommendations to prohibit corporal punishment made to 113 states in the first 16 sessions.

Yet, despite the human rights consensus and the pressure from Treaty Bodies and in the UPR, there is still slow progress towards achieving an end to legalised violent punishment of children. This situation has to be seen as a failure both of states to fulfil their obligations under international law and of the UN human rights system to provide effective pressure on states to do so.

The reporting procedure under the CRC – and the involvement in it of UN agencies, national NGOs and human rights institutions – has made visible, in some cases for the first time, grave, systematic violations of children's rights – economic and social as well as civil and political. But, as the Committee in Geneva examines states for the second, third and fourth time, its concluding observations increasingly repeat the same concerns and recommendations, with added emphasis.

A significant number of states (28) have received three recommendations to prohibit corporal punishment from the Committee on the Rights of the Child and still have not reformed their legislation; 29 states have rejected recommendations to prohibit in the Universal Periodic Review. 25 states have not prohibited corporal punishment of children in any setting of their lives. In 40 states children can still be sentenced to corporal punishment – whipping, flogging, caning – in penal systems.

Millions of children are being subjected daily to violations of their rights to full respect of their human dignity and physical integrity and to equal protection under the law. How can we expect children to take human rights seriously if they do not have visible and accessible remedies to enable them and their representatives to challenge these violations effectively and immediately, in their own state and if necessary through regional or international human rights courts and other procedures?

Effective domestic remedies

We list below some of the key issues which should be addressed to ensure the development of effective domestic remedies to challenge these and many other grave and systematic violations of children's rights. The OHCHR report and the outcome of the children's rights day debate should promote and pursue effective action on these issues by:

- **states' governments** which should review and reform their laws and procedures to guarantee effective remedies for violations of the full range of children's rights;
- **UN treaty bodies and relevant special representatives and special procedures and also regional human rights bodies**, which must maintain and increase pressure on states to provide effective domestic remedies and also ensure that international and regional human rights communications and complaints mechanisms are accessible to children and their representatives, to enable them to challenge violations where domestic remedies do not exist or are ineffective;
- **UNICEF and other relevant UN and UN-related agencies, INGOs and national NGOs and national human rights institutions**, which should monitor the reality, advocate for effective remedies for children and use or encourage the use of existing remedies to challenge violations.

These are among the issues that should be highlighted:

The legal status of the child: Every state needs to review the legal status of the child and whether the child or their representatives can in reality challenge violations of their rights and when necessary go to court or use regional or international human rights mechanisms to challenge them. In some states it is clear that the child has no independent legal status, that there are age barriers on access to courts, or that parents are expected to act on behalf of children and must give consent to anyone else acting for the child.

Independent children's rights advocacy: In the overall context of implementation of the CRC there has been a welcome growth in national human rights institutions which include a focus on children's rights (including many independent children's ombudspeople) and in national NGOs focussed on children's rights advocacy. But children in many states still lack trained and proactive legal advocates of their rights, seeking out and challenging violations. The disempowered and dependent status of children means that very few will pursue violations for themselves and very many cannot. Who is acting, for example, on behalf of

the babies and very young children who are dying every week, denied their right to life through discriminatory access to health services, denial of their right to clean water, adequate food and so on?

The status of the Convention on the Rights of the Child in national law: Whether a state's practice is to incorporate international treaties including the CRC, or to ensure compliance in other ways, the Law on Treaties insists: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." It goes on: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty..." (articles 26 and 27). Where provisions of national law authorise or defend violations of children's rights, as for instance with the persisting legality of corporal punishment of children in a majority of states, it is clear that the state's obligations under the CRC are not being fulfilled. Courts should plainly have powers to apply the CRC in such cases. And given the special dependent status of children, it should be possible to challenge such violations without involving individual child victims (see below, similarly, the case for allowing collective communications/complaints without the identification of individual victims at international level).

Effective international remedies

Basic requirements to make international and regional human rights mechanisms accessible and effective for children and their representatives

Thomas Hammarberg, then Human Rights Commissioner for the Council of Europe, and Peter Newell drafted a list of basic requirements to ensure that these mechanisms are genuinely accessible to children and their representatives, and child-sensitive in the way they work, as a practical contribution to a Council of Europe conference on International Justice for Children in 2009:

- Children and those working with and for them need to know these mechanisms exist and that they are accessible to children.
- States which have accepted any of these mechanisms need to guarantee children unrestricted access to use them. For instance, they must ensure that there is no legal principle requiring parents' consent for such action (today, this is a real problem in several European countries, and others in all regions, where children cannot make individual applications to domestic courts, let alone to international mechanisms).
- Children should be able to apply at any age. When others are acting on behalf of children, there should be some process whereby the mechanism strives to ensure that the application is being pursued in the child's best interests and, where the child has capacity, with their consent. Also, it should be possible for groups of children to make complaints.
- The mechanisms must be genuinely accessible to children. Each mechanism should review all aspects of their procedures to ensure that this is the case. In particular:
 - Information about the mechanism should be disseminated in child-friendly language and in places where children and their representatives are – in particular, to children in schools (including as part of the regular curriculum), hospitals and other institutions, including where children may be detained.
 - Any "hurdles" on applying should be carefully reviewed from a children's perspective. For example, the common condition that applicants must have exhausted domestic remedies should be applied sensitively in the case of

children: mechanisms should be very careful not to reject applications unless they are really confident that domestic remedies are effective and genuinely available to children. Similarly, time limits on making an application should be treated flexibly in the case of child applicants who might not have access to information on the mechanism.

- Consideration should be given to fast tracking applications from or on behalf of children, with an understanding of children's sense of time and the urgency of remedying breaches of their rights while they still are in their childhood. Decisions should be arrived at as rapidly as possible, subject to the need for full consideration of the case. Any process for enforcement of the decision should also be speedy.
- If the procedure includes a hearing, all aspects of it should be reviewed to ensure it is child-sensitive (see UN Guidelines in Matters of Justice for Child Victims and Witnesses of Crime).
- The process should be able to guarantee the anonymity of the applicant when necessary and requested.
- Those involved in the mechanisms, as decision-makers or judges and as secretariat or support staff should receive special training. Training should also be available for lawyers and others representing children before the mechanisms.
- Summaries of decisions on applications concerning children should be issued in child-friendly language.

Why children (and other vulnerable groups) need collective communications/complaints procedures, without any requirement to identify individual victims

As the Committee on the Rights of the Child recognised (see above, page 1), it is obvious that children (alongside certain other vulnerable groups) face special difficulties in pursuing remedies for violations of their rights. Most of the existing Treaty Body communications procedures require the identification of individual victims or groups of victims. Finding, identifying and "using" individual child victims is challenging. This was why during the initial negotiations which led to the adoption of the third Optional Protocol (OP) to the CRC on a communications procedure, the draft OP included a provision allowing for "collective communications". Despite strong advocacy from the Committee on the Rights of the Child and other experts, a majority of states rejected the provision early in the negotiations. It would have allowed for communications concerning potential or actual violations of rights within the CRC (and/or its first two Optional Protocols) without the identification of specific cases involving a child victim or groups of victims.

In its comments on the draft OP (adopted in October 2010: A/HRC/WG.7/2/3), the Committee on the Rights of the Child strongly supported the inclusion of collective communications: "... A collective communication procedure will *inter alia* allow the Committee to better perform its own functions in ensuring compliance with Convention obligations by allowing it to address a problem affecting an indeterminate number of persons in a single procedure, rather than to engage in consideration of a series of similar communications arising out of the same situation".

When the Optional Protocols establishing communications procedures for CEDAW and ICESCR were being negotiated, the possibility of enabling the relevant Committees to consider collective communications was considered but did not receive sufficient support to be included in the text as adopted.

It should be emphasised that the principle of enabling Treaty Bodies to act on the basis of communications which do not identify individual victims has been accepted by States in the negotiation of various instruments. The provisions which establish the competence of Treaty Bodies to carry out inquiries and also provisions that allow for inter-state communications – enabling a state to submit information alleging that another state is not fulfilling its obligations under the relevant instrument - do not require the identification of individual victims or groups of victims.

Some of the advantages of allowing for collective communications are:

- Avoiding the need to involve in the process individual child victims or identified groups of child victims removes many of the concerns over the protection of children throughout the procedure. In the case of some violations of children’s rights – for example abuse of children through pornography – it may be difficult or impossible to identify the child victims. A collective communication can address the legal or policy issues allowing such violations: where it can be shown clearly that a state’s law or policy authorises or condones violations, why should the identification of individual child victims be necessary?
- Allowing collective communications provides the additional possibility of a focus on the prevention of violations: without this option, a communication could only be made by or on behalf of an identified victim of this exploitation.
- Allowing collective communications could avoid Treaty Bodies and other mechanisms having to consider large numbers of similar communications from individual child victims or groups. Collective communications could lead to changes in law, policy or practice which could affect many or all children in the state.
- In response to collective communications, these bodies would be able to develop interpretation of the provisions of the Convention in relation to national legislation or administrative frameworks or policies. This would be complementary to jurisprudence developed in response to communications about the particular circumstances of individual cases.

The UN system should give more serious consideration to allowing collective communications/complaints about violations of children’s rights, and in doing so it should look in particular at the Council of Europe’s collective complaints procedure under the European Social Charter (see below).

Council of Europe collective complaints procedure: An Additional Protocol to the European Social Charter provides for collective complaints and has been used effectively to pursue violations of children’s rights, including on child labour, special education, discrimination issues and violence against children, including corporal punishment (by mid-2013, 101 complaints have been registered; see http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp). The European Committee of Social Rights can consider communications made by organisations

approved for the purpose, alleging “unsatisfactory application” of the Charter. The Council of Europe has established a process for approving organisations for the purpose of submitting complaints. (see http://www.coe.int/t/dghl/monitoring/socialcharter/OrganisationsEntitled/OrganisationsIndex_en.asp). Under the Additional Protocol, a State can also declare that it recognises the right of national NGOs within its jurisdiction, having particular competence in the matters covered by the Charter, to lodge complaints against it.

Conclusion

We hope that the OHCHR Report, the HRC debate during the 2014 full day on children’s rights and its follow-up will:

- Focus primarily on achieving effective remedies for violations of children’s rights, highlighting states’ obligations to provide children and their representatives with effective remedies for violations of the full range of the civil, political, economic, social and cultural rights, guaranteed by the almost universally ratified UNCRC and other instruments;
- Encourage stronger and more legalistic advocacy on children’s rights;
- Take account of the key issues listed in this submission (page 3) which should be addressed to ensure the development of effective domestic remedies to challenge the many grave and systematic violations of children’s rights, including through the prevalence and legality of violent punishment of children;
- Identify what is required to make international and regional human rights mechanisms accessible and effective for children and their representatives seeking remedies for persisting violations (see page 4 et seq);
- Recognise that children (and other vulnerable groups) need collective communications and complaints procedures, without any requirement to identify individual victims, in addition to existing procedures;
- Encourage the UN human rights system to give serious consideration to allowing collective communications/complaints about violations of children’s rights, noting existing procedures (see pages 5 to 6).