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Report of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure*

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* Late submission.

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction.....	1–6	3
II. Organization of the session	7–15	4
A. Election of the Chairperson-Rapporteur	7	4
B. Attendance	8–12	4
C. Documentation.....	13	5
D. Organization of the debate	14–15	5
III. Debate on the proposal for a draft optional protocol prepared by the Chairperson-Rapporteur	16–97	5
A. Preamble	20–23	6
B. Competence of the Committee under the optional protocol	24–26	7
C. General principles guiding the functions of the Committee	27–28	8
D. Rules of procedure.....	29–30	8
E. Protection measures	31–33	9
F. Non-publication of identity.....	34–35	9
G. Individual communications.....	36–46	10
H. Collective communications.....	47–50	12
I. Admissibility	51–59	14
J. Communications not revealing a clear disadvantage	60–61	16
K. Interim measures.....	62–64	16
L. Transmission of communications to the State concerned	65–68	17
M. Friendly settlements.....	69–71	18
N. Consideration of the merits.....	72–77	19
O. Follow-up to the views of the Committee.....	78–80	20
P. Inquiry procedure for grave or systematic violations	81–87	21
Q. Follow-up to the inquiry procedure	88	22
R. Inter-State communications	89	22
S. International assistance and cooperation.....	90–91	22
T. Standard provisions	92–95	22
U. Reservations.....	96–97	23
IV. Closure of proceedings and adoption of the report	98–110	24

Annex

Draft optional protocol to the Convention on the Rights of the Child to provide a communications procedure	26
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I. Introduction

1. The Human Rights Council decided, in its resolution 11/1, to establish an open-ended working group to explore the possibility of elaborating an optional protocol to the Convention on the Rights of the Child to provide a communications procedure complementary to the reporting procedure under the Convention. Pursuant to that resolution, the Working Group met from 16 to 18 December 2009 and submitted its report (A/HRC/13/43) to the Council at its thirteenth session.

2. In its resolution 13/3, the Human Rights Council decided to extend the mandate of the Open-ended Working Group until its seventeenth session. It also decided to mandate the Working Group to elaborate an optional protocol to the Convention on the Rights of the Child to provide a communications procedure. In this regard, the Council requested the Chairperson of the Working Group to prepare a proposal for a draft optional protocol to be used as a basis for the negotiations, taking into account the views expressed and inputs provided during the first session of the Working Group and giving due regard to the views of the Committee on the Rights of the Child and, where appropriate, the views of relevant United Nations special procedures and other experts.

3. The second session of the Working Group was held in two parts: from 6 to 10 December 2010, and from 10 to 16 February 2011.¹

4. The session was opened by the United Nations High Commissioner for Human Rights, on 6 December 2010. The High Commissioner expressed her interest and that of her Office in the mandate of the Working Group. She firmly believed that litigation and the examination of communications from individuals at the regional and international levels could make a vital contribution to the understanding of the substantive content of international norms and lead to real change not only for the individuals directly concerned but for all those protected by the rights guaranteed in the treaties. She was convinced that regional and international remedies also provided a strong incentive for strengthening national protection mechanisms. The future optional protocol would serve the same purpose, thus improving access to remedies and relief for victims.

5. The High Commissioner informed the Working Group that, in support for its mandate and upon the initiative of the Chairperson of the Committee on the Rights of the Child, her Office had organized, in June 2010, an expert consultation, where most of the relevant issues regarding the optional protocol were discussed. For two days, experts on litigation on children issues shared their experience and expressed their views with regard to the possible content of the future optional protocol. While acknowledging the merits of existing communication procedures and their valuable contribution to the development of a rich body of international jurisprudence, experts were generally in favour of an optional protocol that was innovative, suited to the needs of children and that would take into account the main principles enshrined in the Convention. They considered, *inter alia*, that the communications procedure should be transparent and that measures should be taken to ensure wide dissemination among potential users. Consistent with the campaign for their universal ratification, the optional protocol should apply to the rights protected under the Convention and the two optional protocols thereto. Experts were generally in favour of including provisions allowing the Committee to examine both individual and collective communications, as well as of including a provision by which no reservation to the optional protocol would be allowed. They believed that the Committee should have the competence

¹ The Working Group was unable to meet on the morning of 14 February 2011 owing to lack of interpretation services, a situation regarding which the Chairperson expressed concern.

to request interim measures in cases pending before it, and that a call should be addressed to States to take action when such requests for interim measures were formulated. Experts were also in favour of including a procedure for friendly settlements between the parties in a communication, while ensuring that such a procedure would take fully into consideration the interests of the child.

6. The High Commissioner encouraged the Working Group to give due consideration to the suggestions made by the experts and to the comments on the proposal of the Chairperson prepared by the Committee on the Rights of the Child, as well as to relevant regional human rights instruments, such as the African Charter on the Rights and Welfare of the Child, which contained a communications and inquiry procedure.

II. Organization of the session

A. Election of the Chairperson-Rapporteur

7. At its first meeting, on 6 December 2010, the working group elected Drahoslav Štefánek (Slovakia) as its Chairperson-Rapporteur, by acclamation. Mr. Štefánek was nominated by the core group of States (Chile, Egypt, Finland, France, Kenya, Maldives, Slovakia, Slovenia, Thailand and Uruguay) supporting the initiative for a new optional protocol on a communications procedure under the Convention on the Rights of the Child. The representative of Egypt, speaking on behalf of the core group, stated that Mr. Štefánek had successfully accomplished his mandate during the negotiations and, in the preparation of the draft optional protocol, had led the process in a transparent and cooperative way and should continue to do so in order to ensure a consistent approach.

B. Attendance

8. Representatives of the following States Members of the Human Rights Council attended the working group meetings: Argentina, Bahrain, Bangladesh, Belgium, Brazil, Chile, China, Ecuador, France, Guatemala, Japan, the Libyan Arab Jamahiriya, Maldives, Mexico, Nigeria, Norway, Pakistan, Poland, Qatar, the Republic of Korea, the Russian Federation, Saudi Arabia, Slovakia, Spain, Switzerland, Thailand, Ukraine, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Uruguay.

9. The following States and observers also participated in the meetings of the Working Group: Algeria, Armenia, Australia, Austria, Bulgaria, Canada, Chad, Costa Rica, the Czech Republic, Denmark, Egypt, Finland, Germany, Greece, Haiti, the Holy See, Hungary, India, Indonesia, Iran (Islamic Republic of), Ireland, Italy, Liechtenstein, Lithuania, Mauritania, Morocco, the Netherlands, New Zealand, Paraguay, Peru, Portugal, Rwanda, San Marino, Serbia, Singapore, Slovenia, South Africa, Sweden, the Syrian Arab Republic, the former Yugoslav Republic of Macedonia, Tunisia, Turkey, Venezuela (Bolivarian Republic of) and Zimbabwe.

10. The United Nations Children's Fund (UNICEF) participated in the session.

11. The following non-governmental organizations in consultative status with the Economic and Social Council were represented by observers: Defence for Children International, the European Disability Forum, Good Neighbors International, the International Commission of Jurists, International Service for Human Rights, Kindernothilfe, the NGO Group for the Convention on the Rights of the Child, Plan International, Save the Children – Japan, Save the Children International, SOS Children's

Villages International, SOS Kinderdorf International, Terre des Hommes International Federation, the World Organization against Torture and World Vision International.

12. Pursuant to paragraphs 3 and 4 of Human Rights Council resolution 13/3, the Chairperson of the Committee on the Rights of the Child, Yanghee Lee, and the Vice-Chairperson, Jean Zermatten, also attended the session of the Working Group as resource persons. The Vice-President of the NGO Group for the Convention on the Rights of the Child and Chairman of the Council of the Child Rights Information Network, Peter Newell, also participated in the session in his capacity as expert. The European Network of Ombudspersons for Children, the Ombudsman for Children in Poland, the International Coordinating Committee for National Human Rights Institutions and the Norwegian Centre for Human Rights also took part in the session, as well as a member of the African Committee of Experts on the Rights and Welfare of the Child, Benyam Dawit Mezmur.

C. Documentation

13. The Working Group had before it the following documents:

A/HRC/WG.7/2/1	Provisional agenda
A/HRC/WG.7/2/2	Proposal for a draft optional protocol prepared by the Chairperson-Rapporteur of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure
A/HRC/WG.7/2/3	Comments by the Committee on the Rights of the Child on the proposal for a draft optional protocol prepared by the Chairperson-Rapporteur
A/HRC/WG.7/2/4	Revised proposal for a draft optional protocol prepared by the Chairperson-Rapporteur.
A/HRC/WG.7/2/CRP.2	Revised proposal for a draft optional protocol

D. Organization of the debate

14. At its first meeting, on 6 December 2010, the Working Group adopted its agenda for the session (A/HRC/WG.7/2/1). It also adopted its programme of work for the first part of the session. On 10 February 2011, the Working Group adopted its programme of work for the second part of the session.

15. The Working Group agreed to devote the first part of the session (6 to 10 December 2010) to a debate on the proposal for a draft optional protocol prepared by the Chairperson (A/HRC/WG.7/2/2). On the basis of the discussions, a revised text of the proposal was prepared by the Chairperson. The second part of the session (10 to 16 February 2011) was devoted to discussions on the revised proposal (A/HRC/WG.7/2/4).

III. Debate on the proposal for a draft optional protocol prepared by the Chairperson-Rapporteur

16. In his opening statement at the beginning of the second session, the Chairperson-Rapporteur underlined that, in preparing his proposal, he had sought consistency and coherence with existing communications procedures while taking into account the

specificities of the Convention on the Rights of the Child and the special needs of children. He expressed his intention not to lower the standards that had been set in the instruments establishing those procedures. Numerous delegations welcomed the proposal as a sound basis for the negotiations.

17. Between the first and second part of the second session, the Chairperson met all five regional groups in order to introduce the revised proposal and exchange preliminary views on it. As a result, the Chairperson suggested some amendments to the revised proposal, which were discussed during the second part of the session.

18. Upon resuming the session on 10 February 2011, the Chairperson explained that his aim was to finalize the negotiations on the optional protocol by the end of the session. In introducing his revised proposal, he stated, *inter alia*, that following suggestions made during the first part of the session, he had reorganized the text, which was now divided in four parts. Part I (arts. 1 – 5), contained general provisions considered relevant in connection with all procedures but that, in the initial proposal, were dispersed in different articles throughout the text. Part II (arts. 6 – 15) described the communications procedure for both individual and collective communications and inter-State communications. Part III (arts. 16 – 17) described the inquiry procedure for grave or systematic violations. Part IV (arts. 18 – 28) contained the final provisions.

19. Delegations expressed their gratitude to the Chairperson for his cooperative work with them between the two parts of the session and for the revised proposal. Most delegations were of the view that the revised proposal was a sound basis to reach consensus and expressed the wish that, by the end of the session on 16 February 2011, the Open-ended Working Group would finish its negotiations. Other delegations indicated that the Working Group might not be in a position to complete its mandate during the session.

A. Preamble

20. When discussing the text of the preamble contained in the initial proposal,² most States agreed that the non-discrimination clause contained in the second preambular paragraph should refer to ethnic origin and disability. There was also agreement that the preamble should make direct reference to the Convention on the Rights of the Child rather than to the Universal Declaration of Human Rights.

21. Most delegations were of the view that the overarching principle of the best interest of the child should be reflected in the preamble, as well as the status of the child as a subject of rights and as a human being with evolving capacities. The Committee and national human rights institutions recommended the inclusion of a reference to dignity (“a human being with dignity and with evolving capacities”). A majority of delegations also expressed the wish to reflect in the preamble the need for the States parties to offer children domestic remedies that offer child-sensitive procedures. Several delegations expressed the wish for a reference to the fact that children’s special and dependent status may constitute an obstacle to the pursuit of domestic remedies, recognizing the fact that it would not always be the case.

22. There was also agreement that the preamble should include a reference to the role of national human rights institutions in the promotion and protection of the rights of the child. State delegations also agreed that the complementary nature of the communications procedure *vis-à-vis* both national jurisdictions and regional mechanisms should be highlighted. It was found that the reference to access to effective remedies should only be

² A/HRC/WG.7/2/2.

directed to children (not including their representatives) as the ultimate and relevant beneficiaries of remedies. Delegations rejected having a direct reference to article 4 of the Convention in this section.

23. In addition to its complementary nature, the Working Group considered that the preamble should also highlight the purpose of the Optional Protocol to further enhance implementation of the Convention and its two substantive Optional Protocols. In this regard, most delegations favoured the inclusion of language such as “where applicable”, reflecting the principle that only those States that are parties to one or both of the two substantive Protocols would be bound thereto.

B. Competence of the Committee under the optional protocol³

24. Article 1 of the initial and revised proposals concerned the general competence of the Committee under the Optional Protocol. Some delegations suggested that this provision should refer explicitly only to the competence to receive and consider communications and not to the competence to conduct inquiries. Many delegations, however, preferred to include both procedures, even if the possibility to opt out of the inquiry procedure was ultimately maintained. As a compromise, most delegations supported referring to “the competence of the Committee as provided for by the present Protocol”. One delegation preferred to retain an explicit reference to the Committee’s competence “to receive and consider communications”.

25. Many States supported the inclusion of specific language that “the Committee shall not exercise its competence regarding a State party to the present Protocol on matters concerning violations of rights set out in an instrument to which that State is not a party”. This principle should be stated either in article 1 or in the articles bestowing a monitoring function on the Committee in order to avoid any ambiguity, as no other provision comprehensively addressed the Committee’s *ratione materiae* jurisdiction. There was also broad support for the inclusion of a provision to the effect that “no communication shall be received by the Committee if it concerns a State which is not a party to the present Protocol”. This was agreed language included in similar optional protocols. One delegation suggested placing this provision under the admissibility criteria for communications.

26. Other delegations considered, however, that the inclusion of the latter paragraphs was unnecessary in the light of the general principles of the Vienna Convention on the Law of Treaties. A consensus was reached to include the proposed paragraphs in article 1.

³ Article 1 of the revised proposal (A/HRC/WG.7/2/4):

- “1. A State party to the present Protocol recognizes the competence of the Committee to receive and consider communications and to conduct inquiries as provided for by the provisions of the present Protocol.
2. The Committee shall not exercise its competence regarding a State party to the present Protocol on matters concerning violations of rights set forth in an instrument to which that State is not a party.”

C. General principles guiding the functions of the Committee⁴

27. Many delegations and non-governmental organizations were in favour of including a provision requiring the Committee to exercise the functions conferred on it by the Optional Protocol “in a manner that respects the rights of the child, including the right to express their views freely in all matters affecting them” and referring to “the views of the child being given due weight in accordance with the age and maturity of the child”, as well as to the need to ensure “that the best interests of the child as a primary consideration in all actions concerning the child”. One delegation suggested placing the provision under the article dealing with the Committee’s competence. Several delegations criticized the use of obligations-based language to describe the Committee’s guiding principles and either asked for the provision to be deleted and reflected in the preamble or for it to be reworded, using agreed language from the Convention. One delegation suggested replacing “in all actions concerning the child” by “in its actions concerning the child” in order to distinguish actions of the Committee from those of States parties. Some delegations and experts considered it important to keep a reference to the best interests of the child in the operative part of the Protocol.

28. One expert indicated that the best interest principle should not be given precedence over the rights of the child and favoured the wording contained in article 2 of the Chairperson’s revised proposal.⁵

D. Rules of procedure

29. A proposal was made during the first part of the session to include a provision that would refer to procedural aspects and make reference to the Committee’s power to elaborate rules of procedure under the protocol.⁶ Those rules should include, for instance, the need to have child-friendly and child-sensitive procedures. Views were expressed on the distinction between these terms and which of them would be more appropriate in this context. Committee members indicated that, in the light of the new guidelines on child-friendly justice, the latter term would be appropriate.

30. One delegation suggested that States parties should be able to participate in the process of elaboration of the rules of procedure by the Committee. This position was shared by another delegation. Many delegations did not share this view. The Committee members recalled that article 43, paragraph 8, of the Convention provided for the adoption by the Committee of its rules of procedure, namely, with no external participation envisioned. Furthermore, that requirement would undermine the Committee’s independence and professionalism and would be without precedent in any other human rights treaty. One delegation supported the view that ongoing interaction between the Committee and States

⁴ Article 2 of the revised proposal read as follows: “The Committee shall exercise the functions conferred on it by the present Protocol in a manner that respects the rights of the child and the views of the child, and ensures that the best interests of the child are a primary consideration in all actions concerning the child.”

⁵ Article 2 of the revised proposal: “The Committee shall exercise the functions conferred on it by the present Protocol in a manner that respects the rights of the child and the views of the child, and ensures that the best interests of the child are a primary consideration in all actions concerning the child.”

⁶ As a result of the discussion, article 3 was introduced in the revised proposal, reading “The Committee shall adopt rules of procedure to be followed when exercising the functions conferred on it by the present Protocol. In doing so, it shall have regard, in particular, to article 2 of the present Protocol in order to guarantee child-sensitive procedures, where relevant.”

parties was desirable. The Chairperson-Rapporteur reminded delegations that the regular meetings of States parties and their participation in inter-committee meetings provided them with ample opportunities to table their views on the working methods of treaty bodies.

E. Protection measures

31. There was a consensus among delegations to support the inclusion of a provision allowing the Committee to request States parties to adopt protection measures to ensure that individuals under their jurisdiction are not subjected to any form of pressure for having submitted communications or information to the Committee under the Optional Protocol.⁷ Views were expressed that such measures should cover not only child victims but also children otherwise involved in a communication procedure, family members as well as their representatives bringing a communication before the Committee, including organizations.

32. The criteria for requesting protection measures were also debated. The initial proposal only contemplated situations of ill-treatment or intimidation. However, this was considered insufficient by a number of delegations and non-governmental organizations, which supported the inclusion of situations of human rights violations in general, in addition to ill-treatment or intimidation, which could also extend to those committed by non-State actors. One delegation proposed a more detailed formulation that would refer to threats, pressure, intimidation or sanctions.

33. Some delegations favoured strengthening the provision on protection measures by replacing “appropriate steps” by “necessary steps”. One delegation suggested replacing “shall take all appropriate steps to ensure” by “shall ensure”.

F. Non-publication of identity

34. Most delegations favoured the inclusion of a provision capturing the principle that the identity of the child submitting a communication would be revealed to the State party for the purpose of the communication, but would not otherwise be publicized, unless this was expressly consented to by those concerned.⁸ A broad description of beneficiaries was favoured by many delegations in order to cover not only children but also representatives potentially presenting a communication on their behalf.

35. Some suggested that the provision in question should make it clear that the identity of the individual or individuals concerned must be revealed to the State party. Others were of the view that, in exceptional situations, it might not be appropriate to reveal the identity to the State and that language should be added to that effect. A number of delegations suggested that this provision be merged with the article on protection measures. Some delegations preferred to keep the two provisions separate. One delegation considered that protection measures were directed at States parties, whereas the principle of non-publication of identity was directed at both States parties and the Committee. Some delegations disagreed with the title of the provision (“non-publication of identity”) and

⁷ Article 4 of the revised proposal: “A State party shall take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to any human rights violation, ill-treatment or intimidation as a consequence of communications or cooperation with the Committee pursuant to the present Protocol.”

⁸ Article 5 of the revised proposal: “The identity of any individual or group of individuals submitting a communication shall not be revealed publicly without the express consent of the individual or individuals concerned.”

proposed alternatives such as “confidentiality”. The decision was finally taken to deal with the matter in the provision on protection measures.

G. Individual communications⁹

36. A debate was held on whether the optional protocol should apply in connection with the Convention and its two existing Optional Protocols or whether States, when ratifying the protocol, could choose not to recognize the competence of the Committee to examine communications alleging violations of the rights set forth under either of the two existing Protocols. Many delegations, UNICEF, non-governmental organizations, experts, including members of the Committee on the Rights of the Child and the European Network of Ombudspersons for Children, indicated that no such distinction should be made because it would mean establishing a hierarchy of norms and different implementation regimes. Others welcomed the flexibility involved in opting or the expressed readiness to go along if needed to reach a maximum adhesion to the text. One delegation, supported by others, suggested that the Committee’s jurisdiction should extend to violations of any of the rights set forth in any of the above instruments to which the State party concerned is a party.

37. Some delegations suggested the inclusion of a provision clarifying the competence of the Committee in connection with States that were parties to the first two Optional Protocols but not to the Convention itself.

38. Numerous delegations and UNICEF held the view that the right to submit a communication should pertain to “individuals or groups of individuals”, which was more inclusive than the wording “children or groups of children” proposed by other delegations. The Chairperson withdrew his proposal, based on statements from some participants, to explicitly include individuals or groups of individuals claiming “to have been victims while they were children” of a violation. The proposal was rejected by most delegations as being either redundant or retroactive or incompatible with national statutes of limitations.

39. Some delegations were in favour of restricting the right to submit a communication to child victims or their legal representatives. The issue of representation of children and consent were the object of considerable discussion. A number of delegations recalled that,

⁹ Article 6 of the revised proposal:

- “1. Communications may be submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a State party, claiming to be victims or to have been victims while they were children, of a violation by that State party of any of the rights set forth in:
 - (a) The Convention;
 - (b) The Optional Protocol to the Convention on the sale of children, child prostitution and child pornography;
 - (c) The Optional Protocol to the Convention on the involvement of children in armed conflict.
- [2. A State party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in subparagraph 1 (b) and/or (c) of the present article.
3. Any State party having made a declaration in accordance with paragraph 2 of the present article may, at any time, amend or withdraw this declaration by notification to the Secretary-General of the United Nations.]
4. Where a communication is submitted on behalf of an individual or group of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.
5. Where the author of a communication is acting on behalf of a child as defined in article 1 of the Convention, or a group of children, the Committee shall determine whether it is in the best interests of the child or group of children concerned to consider the communication.
6. The Committee shall include in its rules of procedure safeguards to prevent the manipulation of children by those who represent them and to protect their rights under the present Protocol.”

according to their domestic law, children should not be directly involved in legal proceedings and that the optional protocol should similarly reflect the fact that it is only where they are represented by their parents, legal guardian or relevant third party that a communication on their behalf should be accepted by the Committee. Alternatively, one delegation suggested requiring legal representation for children below the age of 16. Other delegations stated that a child must be entitled to bring a communication on his or her own, and asked that a provision on assistance for children submitting communications on their own should be included in the optional protocol or in the Committee's rules of procedure. Some delegations stated that the optional protocol should refer to the relevant national legislation for identifying the persons and entities entitled to represent a child. One delegation warned that legal representatives were often among those responsible for violations of the rights of a child, if only by omission. Some delegations preferred to clearly state who was entitled to submit a communication on behalf of a child either in the optional protocol or in the Committee's rules of procedure. One delegation suggested referring to the representatives mentioned in article 5 of the Convention. Another delegation was against any closed definition of legal representatives. One delegation expressed the view that the appointment of a legal guardian would best protect the interests of the child, while another delegation favoured restricting the right to submit a communication to the child and the child's parents or legal guardians. Another delegation considered that the draft optional protocol should address situations where children, such as street children, have no legal guardian and where conflicts of interest may arise when a child is represented by the child's parents or legal guardians.

40. Some delegations suggested that the issue of legal representation should be dealt with in the Committee's rules of procedure and that the Committee should deal with this matter on a case-by-case basis. It was proposed that a provision should be included to the effect that the Committee should determine whether such representation was in the best interest of the child or group of children. Some delegations argued that the Committee should always determine whether or not the consideration of a communication was in the best interest of the child, irrespective of legal representation. Other delegations considered that the best interests of the child were sufficiently covered as a general principle in the optional protocol. One delegation preferred reflecting that principle in the article dealing with the modalities of consideration of communications. Several delegations supported reverting the wording of the proposal by stating that the Committee may decline considering a communication if such consideration was not in the best interests of the child. Another delegation suggested that the Committee's rules of procedure should contain criteria for defining the best interests of the child. Two delegations asked for deletion of any reference to the best interests of groups of children in the absence of a legally defined concept.

41. Experts, including Committee members, indicated that the optional protocol should uphold the legal personality of children and not reproduce hurdles of legal representation contained in domestic systems. They cautioned against an automatic assumption that the interests of parents are always identical with the best interests of the child and emphasized that the right of a child to participate in the proceedings must not be restricted.

42. Non-governmental organizations indicated that the notion of "legal capacity" existed at the national level, but not at the regional or international levels. Introducing this concept, or a reference to national legislation, or establishing a system of obligatory representation of child victims would reproduce the obstacles that children face at the national level and run contrary to the rationale of the optional protocol.

43. One delegation sought clarification as to when the author of a communication submitted on behalf of an individual or group of individuals could justify acting on their behalf without their consent.

44. Several delegations and non-governmental organizations supported the paragraph in the Chairperson's revised proposal providing that "the Committee shall include in its rules of procedure safeguards to prevent the manipulation of children by those who represent them and to protect their rights under the present Protocol." However, a number of delegations preferred deleting "and to protect their rights" to avoid the impression that the optional protocol creates new rights. Some delegations and UNICEF did not support the new paragraph because it would overload the Protocol. Others argued that the risk of manipulation could be better addressed by either requiring legal representation or by explicitly defining the legal representatives. A new compromise text replacing "the manipulation of children by those who represent them" by "the manipulation of the child by those acting on his/her behalf" and substituting "and to protect their rights under the present Protocol" by "and may decline to consider any communication where it appears to the Committee that the communication is not in the child's best interest" was supported by many States. One State suggested inserting "the consideration of" before "the communication". Another State criticized that "where it appears" was not sufficiently precise. Most delegations were in favour of moving the provision under the article on rules of procedure as a new paragraph 2. Others preferred keeping it in part II of the protocol dealing with communications.

45. The Chairperson-Rapporteur stated that the practical relevance of the question of legal representation was limited. He recalled that the Optional Protocol to the Convention on the Rights of Persons with Disabilities and the rules of procedure of the Committee on the Rights of Persons with Disabilities omitted specific provisions on legal representation despite the fact that persons with mental disabilities frequently required such representation.

46. In connection with the question of consent, a number of delegations, non-governmental organizations and experts, including members of the Committee on the Rights of the Child, indicated that the right of the child to be heard, which is one of the leading principles of the Convention, should be referred to in the optional protocol, as well as the child's status as a rights holder.

H. Collective communications¹⁰

47. The Chairperson-Rapporteur recalled that none of the international human rights treaties provided for a collective communications procedure, although such procedure existed at the regional level, under the African Charter on the Rights and Welfare of the

¹⁰ Article 7 of the revised proposal:

- "1. Each State party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it recognizes the competence of the Committee to receive and consider collective communications as provided for in the present article in respect of the rights set forth in some or all of the instruments listed in paragraph 2.
2. National human rights institutions and ombudsman institutions as well as non-governmental organizations, fulfilling the criteria established in the Committee's rules of procedure may submit collective communications alleging recurring violations affecting multiple individuals of any of the rights set forth in:
 - (a) The Convention;
 - (b) The Optional Protocol to the Convention on the sale of children, child prostitution and child pornography;
 - (c) The Optional Protocol to the Convention on the involvement of children in armed conflict.
3. Any State party having made a declaration in accordance with paragraph 1 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General of the United Nations."

Child and under the 1995 Additional Protocol to the European Social Charter. He also recalled that the inclusion of a collective communications procedure had been discussed but rejected during the negotiations on the Optional Protocols to the Convention on the Elimination of All Forms of Discrimination against Women and to the International Covenant on Economic, Social and Cultural Rights.

48. Numerous delegations declared that they were not in favour of including a provision in the optional protocol that would extend the competence of the Committee to the examination of collective communications. They said, *inter alia*, that such a provision was without precedent, represented no added value as no protection gap existed, that it overlapped with the inquiry procedure for grave or systematic violations and, to a large extent, with the reporting procedure, and that the provision on individual communications already envisaged the submission of communications by groups of individuals. Both the individual communication and the inquiry procedure could ultimately lead to the amendment of laws and policies. They saw more merit in keeping the inquiry procedure, which existed also in other instruments. Collective communications also posed difficulties in terms of exhaustion of domestic remedies, as victims could not be easily identified. They would result in abstract proceedings, undermine the right to response of States and, ultimately, the integrity of the communications procedure. Some argued that having to deal with collective communications would overstretch the Committee's limited time and resources. Questions were asked as to what should be understood by "grave and systematic". These delegations similarly highlighted the need to ensure broad adhesion to the draft optional protocol, which would not be favoured with the inclusion of a provision allowing collective communications. A problem exposed by many States was also the lack of clarity with regard to the fulfilment of the requirement of exhaustion of domestic remedies for collective complaints.

49. A number of delegations, experts, including members of the Committee on the Rights of the Child, national human rights institutions, UNICEF and non-governmental organizations, were in favour of such a provision, as they felt that it filled a gap in the protection mechanisms. They considered that collective communications could play a preventive role; prevent the Committee from having to examine identical individual communications separately and therefore reduce the caseload; eliminate the difficulty of identifying individual victims ready to submit their cases, and the re-victimization of the children authors of such communications; would be particularly appropriate in connection with children belonging to vulnerable groups, such as children in institutional settings, child victims of prostitution or child victims of traditional practices as it would, *inter alia*, reduce the risk of reprisals. They said that there was no overlap between the collective communications and the inquiry procedure, and stressed the positive impact they could have on the interpretation of the Convention by the Committee. These delegations proposed, *inter alia*, that the possibility of submitting collective communications should not be limited to non-governmental organizations with consultative status with the Economic and Social Council, but be open to non-governmental organizations constituted under the national legal systems. National human rights institutions welcomed the possibility for them to submit collective communications and suggested including a reference to the Paris Principles. Such a reference was considered too limitative by some delegations. It was suggested that collective communications should not be limited to cases of "grave or systematic violations" but to "recurring violations" or "violations of rights of multiple victims". Some suggested that the provision on collective communications should include an opt-in or an opt-out clause.

50. Some delegations supported the proposal presented by the Chairperson-Rapporteur allowing States to accept collective communications by opting in at the time of signature or ratification of or accession to the protocol and lowering the threshold to "recurring violations affecting multiple individuals". Others preferred an opt-out clause or at least

allowing States to opt in “at any time” and not just at the moment of ratification or accession. Some delegations, UNICEF, national human rights institutions and non-governmental organizations were against any optional clauses. Some considered that “recurring violations” was not a sufficiently defined concept. Numerous delegations maintained that they could not support a collective communications procedure, even as an opt-in provision.

I. Admissibility¹¹

51. Most delegations expressed the view that communications should be submitted to the Committee in writing. Others suggested that other forms of communication, such as videotapes, should be accepted, as many children were not in a position to make written submissions. Several delegations stated that the initial submission should be in writing in order to verify, *inter alia*, the author’s identity, the authorization to submit a communication on behalf of the victim and the authenticity of a communication; however, additional evidence should be admitted also in non-written formats. One delegation questioned whether the Committee had the necessary resources to ascertain the authenticity of non-written evidence.

52. Many delegations upheld the principle that complainants should have the possibility of submitting evidential material in a non-written form. While several delegations, non-governmental organizations and experts held the view that this principle should be stated in the protocol, other delegations proposed to leave it to the rules of procedure. In the view of one delegation, the provision according to which the Committee should consider communications “in the light of all documentation submitted to it” sufficiently covered the possibility of receiving non-written evidence. A few delegations wondered whether the Committee would hold oral hearings.

53. Experts, including Committee members, expected that the vast majority of communications would be received in writing. However, they observed that the Committee would not wish to close the door on other possible formats, as children without assistance might need more flexible accommodation. The Committee should therefore not be bound by a strict admissibility requirement of submission in writing. It was recalled that the

¹¹ Article 9 of the revised proposal:

“The Committee shall consider a communication inadmissible when:

- (a) The communication is anonymous;
- (b) The communication is not in writing. This is without prejudice to non written materials that could be submitted in support of the allegations contained in the communication;
- (c) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention and/or the Optional Protocols thereto;
- (d) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
- (e) All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to provide effective reparation. The Committee shall interpret the application of the remedies in a manner sensitive to the impact that delays may cause to a child’s well-being and development;
- (f) The communication is manifestly ill-founded or not sufficiently substantiated;
- (g) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State party concerned, unless those facts continued after that date.
- (h) The communication is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit.”

Optional Protocol to the Convention on the Rights of Persons with Disabilities did not require communications to be submitted in writing.

54. A majority of States also favoured the inclusion of a time limit between exhaustion of domestic remedies and the submission of a communication to the Committee. In the view of most delegations, this was necessary to allow States to investigate and provide a response on a communication. The majority of States agreed to a time limit of 12 months, following the precedent of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (art. 3(2)(a)). Some States, however, proposed a shorter time limit of six months since the last domestic decision. Many States in favour of the inclusion of such a time limit also proposed including an exception to the rule, where the author could demonstrate that it was not possible for him to submit a communication earlier (following article 3(2)(a) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights). Two delegations proposed the introduction of a time limit of one year, which would be triggered upon the age of majority if it was demonstrated that the child could not bring a complaint before. Two delegations pointed to an apparent contradiction between the Committee's ability to dispense with non-exhaustion of domestic remedies if they were unduly prolonged and the introduction of a strict time limit.

55. Non-governmental organizations and national human rights institutions stated that they did not consider it appropriate to apply time limits to the submission of communications following exhaustion of domestic remedies in the light of the particular status of children and the fact they lacked knowledge and understanding of the availability of the international communications procedures. While regional bodies were close to potential complainants and well-known by them, international communications procedures did not enjoy the same level of knowledge at the national level. This was not a standard requirement at the United Nations and ran counter to the expressed desire of many delegations to make this communication procedure child-sensitive and easily accessible to children. If a timeline was to be introduced, it would be preferable to follow the language under article 56 of the African Charter on Human and People's Rights, which referred to "within reasonable time".

56. With regard to the exhaustion of domestic remedies, some delegations did not support the idea that the rule would not apply when those remedies were regarded by the Committee as unlikely to provide effective relief, as the Committee could not be in a position to prejudge on the outcome of any internal remedy. A proposal to replace "unlikely to bring effective relief" by "unlikely to provide effective reparation" was not supported by most delegations, as it departed from the wording used in other instruments. For similar reasons, a proposal to provide that the Committee "shall interpret the application of the remedies in a manner sensitive to the impact that delays may cause to a child's well-being and development" did not find sufficient support.

57. One delegation was against extending the Committee's *ratione temporis* competence to facts that occurred prior to the entry into force of the optional protocol for the State party concerned but that continued after that date. Another delegation concurred with the Chairperson that continuing facts referred to situations such as disappeared children, not to historic claims.

58. Some delegations proposed the inclusion of language specifying that the Committee would declare inadmissible communications that had been or were being examined not only under another procedure of international investigation or settlement but also under another regional procedure. Other delegations, as well as non-governmental organizations and experts, including Committee members, were not in favour of this proposal. They recalled that regional bodies did not have competence to adjudicate many of the rights protected under the Convention or its optional protocols. Regional bodies could only apply their

respective instruments, which did not cover all provisions contained in the Convention and the optional protocols.

59. A few States proposed that the Committee should systematically decide on the admissibility of a communication before seeking the State party's observations on the merits. However, this proposal did not attract support from other delegations, which considered that this would delay the procedure considerably. The Chairperson recalled that the current practice of treaty bodies did not favour such an approach.

J. Communications not revealing a clear disadvantage

60. A number of States proposed the insertion either in the protocol or in the Committee's rules of procedure of a provision similar to article 4 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights providing the Committee with the possibility of declining to consider a communication where it did not reveal that the author had suffered a clear disadvantage.¹² Such a provision, which also exists in the European Convention on Human Rights, was perceived as a way to avoid a potential backlog to the Committee as well as to filter so-called petty complaints.

61. Other delegations and non-governmental organizations were not in favour of such a provision and considered that the problem raised could be dealt with by declaring such communications inadmissible because they were manifestly ill-founded, not sufficiently substantiated or an abuse of the right of submission. It was difficult to think of a situation where a child's rights had been violated but the child had suffered "no clear disadvantage". A disadvantage was a necessary and unavoidable consequence of a violation, even if harm cannot always be quantified.

K. Interim measures¹³

62. Many delegations expressed their support for the inclusion of an article providing the Committee with competence to request States parties to take interim measures to avoid irreparable harm to alleged victims. Many delegations requested the inclusion of wording similar to article 5 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, namely that such request would only be made in exceptional circumstances. Several delegations, non-governmental organizations and experts, including Committee members, considered that this threshold was excessive and argued that "irreparable harm" sufficiently reflected the exceptional nature of interim measures. One delegation suggested including a qualification on the non-binding nature of interim measures. Another delegation challenged the authority of the Committee to request interim measures and suggested including a timeline for their validity (which could be shorter than the duration of the proceedings before the Committee) and for the adoption of a decision by

¹² As a result, article 10 was introduced in the revised proposal, reading "The Committee may, if necessary, decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance."

¹³ Article 8 of the revised proposal:

- "1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State party concerned for its urgent consideration a request that the State party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violations.
2. Where the Committee exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the communication."

the Committee in cases where interim measures had been sought. Thus, such decisions should be adopted within six months of the receipt of the State party's observations, or no later than at the following session of the Committee, unless the request was lifted in the meantime. Another delegation was against introducing such time limits. Some delegations suggested the insertion of language by which the Committee would have to seek the State party's observations on the Committee's request for interim measures. Other delegations and non-governmental organizations argued that an additional layer of correspondence would only prolong the proceedings and was inconsistent with agreed language in other optional protocols.

63. Some delegations proposed requiring that a request for interim measures be transmitted to the State party for its urgent consideration and appropriate action. Another delegation stated that, while States parties had an obligation to consider interim measure requests in good faith, there was no obligation to take any action on such requests.

64. Other delegations and non-governmental organizations suggested that the protocol should include an obligation for the State concerned to comply with the request for interim measures. In this respect, non-governmental organizations stated that the authority of the Committee to issue requests for interim measures was an indispensable component of the dispute mechanism, and stressed the recognition of their obligatory nature. Experts, including Committee members, highlighted the essential role played by the Committee in issuing requests for interim measures, and the need for States to commit to respect such requests.

L. Transmission of communications to the State concerned¹⁴

65. Most delegations agreed with the principle of confidentiality of the procedure. Many delegations, however, were against the anonymous transmittal of a communication to the State party concerned, as they felt that States would not be in a position to consider it or to offer an adequate relief thereof. Most States favoured wording suggesting that the identity of the child or children was not public, and was revealed to the State party only for the purpose of the procedure.

66. Some non-governmental organizations supported the anonymous transmittal of communications to State parties as a necessary safeguard for the protection of the interests of children. Some, on the other hand, supported the suggestion, made by several States, to include the possibility of withholding the identity of the victim in exceptional circumstances. Experts drew a distinction between anonymity and confidentiality, and stressed that the transmittal should be confidential, that is, not public, which did not mean anonymous; however, anonymity could be used, if needed, in exceptional circumstances. They recalled the need to uphold the general principle of confidentiality, in accordance with article 16 of the Convention. The general rule should therefore be that the child's identity should be preserved; there may be situations, however, where publicizing certain cases may have a particular interest, to the extent that the children involved consent, for instance in order to persuade States to change their laws, policies or practices. As stated above, an

¹⁴ Article 11 of the revised proposal:

- "1. Unless the Committee considers a communication inadmissible without reference to the State party concerned, the Committee shall bring any communication submitted to it under the present Protocol confidentially to the attention of the State party concerned as soon as possible.
2. The State party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have provided. The State party shall endeavour to submit its response as soon as possible within six months."

agreement was reached, to include a separate provision indicating that the identity of the individuals concerned in a communication should not be revealed publicly without their express consent. Such a provision would apply in general and not only in connection with the transmission of the communication to the State concerned.

67. The majority of State delegations considered a three-month time limit for submission of their observations to the Committee too short, and preferred a six-month deadline, as provided for in most other communications procedures. Federal States drew particular attention to the difficulties they faced when compiling observations from provincial/State and federal jurisdictions. A few States proposed to uphold the general rule of a six-month time limit, unless the Committee, given the urgency of the situation, requested the State party to provide its observations within three months. A majority of States favoured stating that the State party should submit its response as soon as possible within six months. A few delegations did not support the inclusion of the words “as soon as possible”, which were perceived as lacking legal certainty. A proposal to require that a State party “shall endeavour” to submit its response within such time limit was considered too vague by most delegations and non-governmental organizations. The latter recalled that a three-month limit exists in the International Convention on the Elimination of All Forms of Racial Discrimination and saw no reason not to follow that precedent. One organization suggested replacing “as soon as possible within six months” by “no later than (within) six months”.

68. One delegation sought the inclusion of wording that provided that the communication was sent to the State party in its national language.

M. Friendly settlements¹⁵

69. Most delegations were in favour of including a provision regarding the possibility of dealing with communications through a friendly settlement between the parties in order to avoid re-victimization of children and to reduce the Committee’s workload. A few delegations supported changing the term “friendly settlement” to “amicable settlement”. A number of delegations held the view that the provision should be based on the language contained in article 7 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

70. The need for any friendly settlement to respect the obligations set forth in the Convention and its first two optional protocols was stressed. One delegation indicated that the optional protocol should require the Committee to encourage friendly settlements and asked until what stage of the proceedings friendly settlements could be reached. Another delegation considered it useful to allow for friendly settlements also after the merits stage had been reached.

71. A debate was held on whether a friendly settlement closed consideration of a case and whether the Committee should be able to monitor the implementation of friendly settlements. A proposal to state both in the protocol did not receive wide support. Some delegations held the view that the Committee should not have the power to reopen a case

¹⁵ Article 12 of the revised proposal:

- “1. The Committee shall make available its good offices to the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the obligations set forth in the Convention and/or the Optional Protocols thereto.
2. An agreement on a friendly settlement closes consideration of the communication under the present Protocol. However, the Committee may, within twelve months after a friendly settlement has been reached, follow-up its implementation.”

that had been the object of a friendly settlement between the parties, because such a scenario would run against legal predictability and certainty. One delegation proposed that the Committee be able to reopen a friendly settlement only if the relevant State party failed to honour its obligations under the deed of such a settlement. Other delegations considered that the Committee should be able to examine whether friendly settlements were consistent with the Convention and in the best interests of the child. Those proposals were supported by non-governmental organizations and experts, including Committee members, who stated that the consideration of a communication should not be closed until satisfactory implementation of a friendly settlement, and that such settlement must ensure respect for the rights set forth in the Convention. One delegation argued that the Committee should be able to invite a State party to submit further information about any measures taken to implement a friendly settlement, including in its subsequent reports under the Convention or its Optional Protocols, similar to the procedure for follow-up on the Committee's views. Several delegations preferred leaving the modalities of the follow-up on friendly settlements to the Committee's rules of procedure.

N. Consideration of the merits¹⁶

72. One delegation held the view that the optional protocol should allow for exceptions to the rule that the Committee should examine communications in closed meetings, when they were in the best interests of the child. One national institution considered that closed proceedings would result in lack of transparency and make *amicus curiae* interventions very difficult.

73. Several delegations and experts, including Committee members, were in favour of inserting a clause requiring the Committee to consider communications as quickly as possible, in particular in cases where it had requested interim measures. Some delegations considered such a clause redundant.

74. Many delegations were in favour of adding a provision similar to article 8, paragraph 4, of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with a view to limiting the Committee's scope of review when examining alleged violations of economic, social and cultural rights protected under the Convention to a reasonableness test and granting States parties discretion to "adopt a range of possible policy measures for the implementation of the economic, social and cultural rights in the Convention". Such an inclusion was perceived by many delegations as adequately reflecting the principle of progressive realization of economic, social and cultural rights as set forth in articles 4 and 28 of the Convention. A number of States, however, opposed the inclusion of such a provision, on the grounds that it would create a

¹⁶ Article 13 of the revised proposal:

- "1. The Committee shall hold closed meetings when examining communications received under the present Protocol.
2. The Committee shall consider communications received under the present Protocol as quickly as possible, in the light of all documentation submitted to it, provided that this documentation is transmitted to the parties concerned.
3. When examining a communication under the present Protocol, the Committee may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programmes and mechanisms, and other bodies, including from regional human rights systems, and any observations or comments by the State party concerned.
4. After examining a communication, the Committee shall, without delay, transmit its views on the communication, together with its recommendations, if any, to the parties concerned."

hierarchy of rights that would run counter to the principle of indivisibility and interdependence of all human rights.

75. Experts and non-governmental organizations were against such different treatment of economic, social and cultural rights, which had no precedent in the Optional Protocols to the Convention on the Elimination of All Forms of Discrimination against Women and to the Convention on the Rights of Persons with Disabilities. In their view, this would undermine the holistic nature of the Convention, the fact that, for all rights, there were obligations to respect, protect and fulfil and the principle that all rights covered in a treaty should be protected to the same degree. Communications may involve multiple violations arising out of the same situation – violations of civil and political rights as well as of economic social and cultural rights. The Convention rights were not severable from one another. Non-governmental organizations and experts considered the proviso that “the State party may adopt a range of possible policy measures for the implementation of economic, social and cultural rights in the Convention” a commentary rather than a principle, and one that undermined article 4 of the Convention, which required States parties to take all appropriate legislative, administrative and other measures, and not just policy measures, for the implementation of all Convention rights. There were situations where only one measure was possible: for example, when a State must cease a violation.

76. In response to the question posed by one delegation, the Committee members stated that the adoption of a communications procedure would not require additional sessions of the Committee. Rather, the Committee could handle its additional workload by establishing special working groups, redistributing tasks among its members and replacing consensus by vote, if need be.

77. With regard to the documentation to be consulted by the Committee when examining communications under the protocol, one delegation pointed out that such documentation may only emanate from United Nations entities “and other international organizations”.

O. Follow-up to the views of the Committee

78. In the light of the potentially far-reaching measures required to implement the Committee’s views, such as changes in domestic practice or legislation, numerous delegations were in favour of a six-month time limit for the submission of follow-up responses by States parties, rather than three months as originally stated in the Chairperson’s proposal. Several delegations favoured a more flexible approach, either by making six months the general rule and three months the exception in urgent cases, or by making three months the general rule and allowing for six months in exceptional circumstances. Experts, including Committee members, preferred the latter approach. One delegation and some non-governmental organizations held the view that the three-month time limit should be retained to avoid unnecessary delays and potential harm to victims. Several delegations, non-governmental organizations and experts did not support a proposal that the State party “shall endeavour to submit its response as soon as possible within six months” owing to the legal vagueness of the wording “shall endeavour” and “as soon as possible”. Non-governmental organizations and experts suggested replacing “as soon as possible within six months” by “no later than (within) six months”.

79. One delegation considered that the faculty of the Committee to invite States parties to submit further information in their subsequent reports about any follow-up measures taken should apply to reports under article 44 of the Convention “and, where appropriate,” to reports under articles 12 or 8, respectively, of the two Optional Protocols.

80. Some delegations proposed that States should not only report on measures taken in the light of the views and recommendations, but also on measures envisaged.

P. Inquiry procedure for grave or systematic violations

81. Most delegations reaffirmed the key importance of the inquiry procedure mechanism. However, some expressed concern at the risk of duplication. A proposal was made in that respect that would exclude the Committee's competence when the same situation was being considered under another similar international inquiry mechanism.

82. One delegation considered "grave or systematic violations" a vague threshold. Another delegation stated that the reference to the Convention and its two Optional Protocols for describing the Committee's *ratione materiae* competence should be worded similarly as for the other procedures under the protocol.

83. Representatives of national human rights institutions and experts suggested including an explicit reference to those institutions as sources of information.

84. One delegation stated that, together with its findings, the Committee should only transmit "relevant" comments and recommendations to the State party concerned.

85. Many delegations expressed concern over the brevity of a three-month time limit for States to provide their observations to the Committee, and preferred a six-month time limit instead. Different compromise proposals were made, including one to the effect that the State party concerned "shall, as soon as possible within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee". While one delegation welcomed the extension of the time frame from three to six months, another delegation suggested deleting "as soon as possible", as it was a legally uncertain concept. Some delegations stated that this time frame should be aligned with those stipulated for the other procedures under the protocol. It was also suggested that a State party's observations shall be reflected, in case that the State party agreed to include a summary account of the results of the inquiry in the Committee's annual report to the General Assembly.

86. Numerous delegations supported the inclusion of an opt-out provision with regard to the inquiry procedure to promote wider acceptance of the protocol. Apart from withdrawal, one delegation suggested allowing States to amend their opt-out declaration. Several delegations favoured replacing the opt-out by an opt-in clause, following the example of the inter-State procedure. Many delegations, non-governmental organizations and experts, including Committee members, argued that the Committee's competence to conduct inquiries into grave or systematic violations must not be optional and asked for the deletion of any possibility for States to opt-in or opt-out of this procedure. Another delegation suggested reformulating the provisions on the inquiry procedure based on articles 11 and 12 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

87. Responding to questions regarding the management of inquiries, Committee members noted that this procedure could be dealt with by a working group of the Committee. On questions regarding the concept of "reliable information" and the characterization of "grave or systematic violations", they responded that the criteria should be included in the rules of procedure and be based on the Committee's experience and jurisprudence on the matter.

Q. Follow-up to the inquiry procedure

88. A number of States expressed concern about a period of three-months for the State to report on follow-up measures and suggested a longer one. Some delegations suggested that the State should not only report on measures taken but also on those envisaged. Thus, it was proposed that the Committee “may, if necessary, after the end of the period of six months” given to the State party to submit its observations, “invite the State party concerned to inform it of the measures taken and envisaged in response to such an inquiry” or invite it to include such information in its reports under article 44 of the Convention, article 12 of the Optional Protocol on the sale of children or article 8 of the Optional Protocol on children in armed conflict, as appropriate. Some delegations favoured replacing the proposed text by the wording of the provision on follow-up to the Committee’s views. One State suggested inserting “and, where appropriate,” before referring to the Optional Protocols.

R. Inter-State communications

89. The Chairperson-Rapporteur indicated that this provision, as formulated in his initial proposal, was based on article 32 of the International Convention for the Protection of All Persons from Enforced Disappearance and recalled that, in practice, the inter-State communications procedure had, to date, never been used under any of the human rights treaties of the United Nations. Some delegations expressed doubts about whether this provision would serve any purpose, and one suggested the inclusion of an opt-out clause. Some delegations suggested including a good offices function of the Committee following the example of article 10 (d) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. Furthermore, like in article 10 of that Optional Protocol, the modalities of the inter-State procedure should be spelled out in more detail. These suggestions were reflected in the revised proposal. No further suggestions for amendment were made during the second part of the session.

S. International assistance and cooperation

90. A few delegations affirmed that they were not in favour of the creation of new funds to assist States in the implementation of recommendations under the optional protocol. Such a provision would weaken article 45 of the Convention and did not belong in a procedural instrument. UNICEF affirmed that it would extend its support concerning communications and inquiries, and stressed that new assistance mechanisms should not be needed.

91. Some States, however, alluded to the need, or were flexible to, the possibility of establishing a new mechanism/fund, especially for third-world countries.

T. Standard provisions

92. The Working Group held a debate on the standard provisions relating to the Committee’s report to the General Assembly; dissemination of the protocol and access to information relating to it; signature, ratification and accession by States; notification; entry into force; amendments; denunciation; and the languages of the optional protocol.

93. A number of remarks were made by delegations. For instance, some proposed the inclusion of a separate provision clarifying that communications could only be addressed

against a State that was a party to the instrument under which the communication was presented.

94. With regard to dissemination and information on the optional protocol, several delegations, non-governmental organizations and experts indicated that information about the protocol and the views and recommendations of the Committee be disseminated “by appropriate, accessible and active means to adults and children alike, including those with disabilities”. A suggestion to replace “including those with disabilities” with “irrespective of their personal skills, impairments and economic resources” was not supported. Numerous delegations were in favour of adding “and formats” after “active means”, in line with the Optional Protocols to the Convention on the Rights of Persons with Disabilities and to the International Covenant on Economic, Social and Cultural Rights. Some delegations suggested including a reference to child-friendly means. One delegation suggested adding “and other disadvantaged persons” at the end of the provision. Two delegations were in favour of adding an additional sentence providing that “States should strive, in particular, to facilitate access for children to information regarding the activities and the functioning of the Committee”.

95. A proposal was made to include an article limiting the Committee’s *ratione temporis* competence to violations occurring after the entry into force of the optional protocol for the State party concerned. Some delegations were in favour of this inclusion for the sake of clarity. Other delegations, non-governmental organizations and experts, including Committee members, considered, however, that such an article would be redundant, as this matter was sufficiently covered in the admissibility criteria and in the general provisions. Some stressed that it would even be contrary to the provision according to which the Committee could declare a communication inadmissible when the facts had occurred prior to the entry into force of the protocol for the State concerned unless those facts continued after that date. The proposed article potentially undermined the latter provision by not taking into account continuous or ongoing violations that started prior to the entry into force of the protocol.

U. Reservations¹⁷

96. Numerous delegations did not favour the inclusion of a provision stating that no reservations to the protocol should be permitted; they considered that such a provision would discourage many States from adhering to the protocol and that the reservations regime governed by the Vienna Convention on the Law of Treaties, which only prohibits reservations that are incompatible with the object and purpose of a treaty, was sufficient. A number of delegations, experts, including Committee members, and non-governmental organizations supported such a prohibition, as no reservations should be permissible to a procedural instrument that does not create any new substantive rights. They recalled that the Vienna Convention explicitly allowed for the prohibition of reservations in a treaty. It was also recalled that an explicit prohibition was in line with article 17 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and article 30 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In the case of those Optional Protocols, the prohibition of reservations had not adversely affected the number of ratifications. Reservations to procedural instruments were per se incompatible with their object and purpose.

¹⁷ Article 24 of the revised proposal: “No reservations to the present Protocol shall be permitted.”

97. One delegation challenged that all reservations to the Protocol would be impermissible. As a compromise, it suggested deleting all opt-in and opt-out clauses in return for the deletion of the proposed prohibition of reservations. Several delegations were against reducing the flexibility for States by deleting the opt-in and opt-out provisions.

IV. Closure of proceedings and adoption of the report

98. At the last meeting of the Working Group, on 16 February 2011, the Chairperson tabled for adoption a text of a draft optional protocol previously distributed to delegations. In introducing the draft, the Chairperson proposed oral amendments and indicated that the draft, as orally amended, reflected the result of the negotiations of the Working Group. The oral amendments proposed (a) the deletion of the provision allowing States parties not to recognize the competence of the Committee to consider communications under the first two Optional Protocols; (b) the deletion of the article allowing the Committee to consider collective communications; (c) the deletion of the article allowing the Committee to decline consideration of a communication that did not reveal a clear disadvantage; and (d) the deletion of the article regarding reservations.

99. After making his statement, the Chairperson noted that there was no objection to the transmission of the text, as orally amended, to the Human Rights Council for its consideration. He also noted that the text would be included in the report of the second session to be submitted to the Council.

100. The Working Group adopted the text of the draft optional protocol by consensus and thus completed its mandate.

101. Without prejudice to the consensus reached, the Russian Federation stated that it was essential to consider the inclusion in article 5 of the draft text of a definition of the persons who are able to represent a child in the proceedings before the Committee.

102. France welcomed the efforts to reach a consensus and recalled that it was now up to the Human Rights Council and the General Assembly to adopt the draft optional protocol.

103. Nigeria, on behalf of the African Group, stated that although it would not oppose the consensus, it still had objections to some articles. In particular, it would have preferred that the protocol allow a State to choose, when ratifying, not to recognize the competence of the Committee to examine communications alleging violations of either of the first two Optional Protocols to which that State was a party. Nigeria also underlined the right of each State to make reservations.

104. China did not oppose the consensus but, like the Russian Federation, expressed concern about the absence in article 5 of a definition of the persons able to represent a child.

105. Iran (Islamic Republic of) shared the view of Nigeria regarding the first two Optional Protocols (see paragraph 103 above). With regard to paragraph 2 of article 5, it should read: "Where a communication is submitted on behalf of an individual or group of individuals, this shall be with their consent".

106. Uruguay stated that the concessions were necessary for the sake of reaching consensus, but regretted that the innovative proposals that they had made had not been retained. It expressed the hope that the compromise text would be adopted by the Human Rights Council and the General Assembly.

107. The Chairperson of the Committee on the Rights of the Child, while welcoming the adoption of a draft optional protocol recognizing the right of children to submit

communications, expressed disappointment that the protection standards that it contained were not as high as expected.

108. The representative of the Office of the United Nations High Commissioner for Human Rights stated that it was in the nature of a compromise that the parties to it would not be fully pleased. Nevertheless, the adoption of the draft optional protocol was a historic moment in the progressive development of international human rights law. He hoped that, in the future, the Committee would be provided with sufficient resources to comply with its mandate under the optional protocol.

109. The International Commission of Jurists and the NGO Group for the Convention on the Rights of the Child took the view that the process of adoption had been too hasty, with not enough time to consider fully a number of complex legal issues. Further discussions might be necessary before the seventeenth session of the Human Rights Council.

110. At its final meeting, on 16 February 2011, the Working Group adopted the report on its second session ad referendum. The text of the draft optional protocol, as adopted by the Working Group, is annexed to the present report.

Annex

Draft optional protocol to the Convention on the Rights of the Child to provide a communications procedure

The States parties to the present Protocol,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Noting that the States parties to the Convention on the Rights of the Child (hereinafter referred to as the Convention) recognize the rights set forth in it to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status,

Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms,

Reaffirming also the status of the child as a subject of rights and as a human being with dignity and with evolving capacities,

Recognizing that children's special and dependent status may create real difficulties for them in pursuing remedies for violations of their rights,

Considering that the present Protocol will reinforce and complement national and regional mechanisms allowing children to submit complaints for violations of their rights,

Recognizing that the best interests of the child should be a primary consideration to be respected in pursuing remedies for violations of the rights of the child, and that such remedies should take into account the need for child-sensitive procedures at all levels,

Encouraging States parties to develop appropriate national mechanisms to enable a child whose rights have been violated to have access to effective remedies at the domestic level,

Recalling the important role that national human rights institutions and other relevant specialized institutions, mandated to promote and protect the rights of the child, can play in this regard,

Considering that, in order to reinforce and complement such national mechanisms and to further enhance the implementation of the Convention and, where applicable, the Optional Protocols thereto on the sale of children, child prostitution and child pornography and on the involvement of children in armed conflict, it would be appropriate to enable the Committee on the Rights of the Child (hereinafter referred to as the Committee) to carry out the functions provided for in the present Protocol,

Have agreed as follows:

Part I

General provisions

Article 1

Competence of the Committee on the Rights of the Child

1. A State party to the present Protocol recognizes the competence of the Committee as provided for by the present Protocol.
2. The Committee shall not exercise its competence regarding a State party to the present Protocol on matters concerning violations of rights set forth in an instrument to which that State is not a party.
3. No communication shall be received by the Committee if it concerns a State that is not a party to the present Protocol.

Article 2

General principles guiding the functions of the Committee

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. It shall also 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.

Article 3

Rules of procedure

1. The Committee shall adopt rules of procedure to be followed when exercising the functions conferred on it by the present Protocol. In doing so, it shall have regard, in particular, for article 2 of the present Protocol in order to guarantee child-sensitive procedures.
2. The Committee shall include in its rules of procedure safeguards to prevent the manipulation of the child by those acting on his or her behalf and may decline to examine any communication that it considers not to be in the child's best interests.

Article 4

Protection measures

1. A State party shall take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to any human rights violation, ill-treatment or intimidation as a consequence of communications or cooperation with the Committee pursuant to the present Protocol.
2. The identity of any individual or group of individuals concerned shall not be revealed publicly without their express consent.

Part II

Communications procedure

Article 5

Individual communications

1. Communications may be submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a State party, claiming to be victims of a violation by that State party of any of the rights set forth in any of the following instruments to which that State is a party:

- (a) The Convention;
- (b) The Optional Protocol to the Convention on the sale of children, child prostitution and child pornography;
- (c) The Optional Protocol to the Convention on the involvement of children in armed conflict.

2. Where a communication is submitted on behalf of an individual or group of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.

Article 6

Interim measures

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State party concerned for its urgent consideration a request that the State party take such interim measures as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations.

2. Where the Committee exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the communication.

Article 7

Admissibility

The Committee shall consider a communication inadmissible when:

- (a) The communication is anonymous;
- (b) The communication is not in writing;
- (c) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention and/or the Optional Protocols thereto;
- (d) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;

(e) All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief;

(f) The communication is manifestly ill-founded or not sufficiently substantiated;

(g) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State party concerned, unless those facts continued after that date;

(h) The communication is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit.

Article 8

Transmission of the communication

1. Unless the Committee considers a communication inadmissible without reference to the State party concerned, the Committee shall bring any communication submitted to it under the present Protocol confidentially to the attention of the State party concerned as soon as possible.

2. The State party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have provided. The State party shall submit its response as soon as possible and within six months.

Article 9

Friendly settlement

1. The Committee shall make available its good offices to the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the obligations set forth in the Convention and/or the Optional Protocols thereto.

2. An agreement on a friendly settlement reached under the auspices of the Committee closes consideration of the communication under the present Protocol.

Article 10

Consideration of communications

1. The Committee shall consider communications received under the present Protocol as quickly as possible, in the light of all documentation submitted to it, provided that this documentation is transmitted to the parties concerned.

2. The Committee shall hold closed meetings when examining communications received under the present Protocol.

3. Where the Committee has requested interim measures, it shall expedite the consideration of the communication.

4. When examining communications alleging violations of economic, social or cultural rights, the Committee shall consider the reasonableness of the steps taken by the State party in accordance with article 4 of the Convention. In doing so, the Committee shall bear in

mind that the State party may adopt a range of possible policy measures for the implementation of the economic, social and cultural rights in the Convention.

5. After examining a communication, the Committee shall, without delay, transmit its views on the communication, together with its recommendations, if any, to the parties concerned.

Article 11

Follow-up

1. The State party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee a written response, including information on any action taken and envisaged in the light of the views and recommendations of the Committee. The State party shall submit its response as soon as possible and within six months.

2. The Committee may invite the State party to submit further information about any measures the State party has taken in response to its views or recommendation or implementation of a friendly settlement agreement, if any, including as deemed appropriate by the Committee, in the State party's subsequent reports under article 44 of the Convention, article 12 of the Optional Protocol on the sale of children, child prostitution and child pornography or article 8 of the Optional Protocol on the involvement of children in armed conflict, where applicable.

Article 12

Inter-State communications

1. A State party to the present Protocol may, at any time, declare that it recognizes the competence of the Committee to receive and consider communications in which a State party claims that another State party is not fulfilling its obligations under any of the following instruments to which the State is a party:

- (a) The Convention;
- (b) The Optional Protocol to the Convention on the sale of children, child prostitution and child pornography;
- (c) The Optional Protocol to the Convention on the involvement of children in armed conflict.

2. The Committee shall not receive communications concerning a State party that has not made such a declaration or communications from a State party that has not made such a declaration.

3. The Committee shall make available its good offices to the States parties concerned with a view to a friendly solution of the matter on the basis of the respect for the obligations set forth in the Convention and the Optional Protocols thereto.

4. A declaration under paragraph 1 of the present article shall be deposited by the States parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under the present article; no further communications by any State party shall be received under the present article after the notification of withdrawal of the declaration has been

received by the Secretary-General, unless the State party concerned has made a new declaration.

Part III

Inquiry procedure

Article 13

Inquiry procedure for grave or systematic violations

1. If the Committee receives reliable information indicating grave or systematic violations by a State party of rights set forth in the Convention or in the Optional Protocols thereto on the sale of children, child prostitution and child pornography or on the involvement of children in armed conflict, the Committee shall invite the State party to cooperate in the examination of the information and, to this end, to submit observations without delay with regard to the information concerned.
2. Taking into account any observations that may have been submitted by the State party concerned, as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State party, the inquiry may include a visit to its territory.
3. Such an inquiry shall be conducted confidentially, and the cooperation of the State party shall be sought at all stages of the proceedings.
4. After examining the findings of such an inquiry, the Committee shall transmit without delay these findings to the State party concerned, together with any comments and recommendations.
5. The State party concerned shall, as soon as possible and within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.
6. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2 of the present article, the Committee may, after consultation with the State party concerned, decide to include a summary account of the results of the proceedings in its report provided for in article 16 of the present Protocol.
7. Each State party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in the present article in respect of the rights set forth in some or all of the instruments listed in paragraph 1.
8. Any State party having made a declaration in accordance with paragraph 7 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General of the United Nations.

Article 14

Follow-up to the inquiry procedure

1. The Committee may, if necessary, after the end of the period of six months referred to in article 13, paragraph 5, invite the State party concerned to inform it of the measures

taken and envisaged in response to an inquiry conducted under article 13 of the present Protocol.

2. The Committee may invite the State party to submit further information about any measures that the State party has taken in response to an inquiry conducted under article 13, including as deemed appropriate by the Committee, in the State's party subsequent reports under article 44 of the Convention, article 12 of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography or article 8 of the Optional Protocol to the Convention on the involvement of children in armed conflict, where applicable.

Part IV

Final provisions

Article 15

International assistance and cooperation

1. The Committee may transmit, with the consent of the State party concerned, to United Nations specialized agencies, funds and programmes and other competent bodies its views or recommendations concerning communications and inquiries that indicate a need for technical advice or assistance, together with the State party's observations and suggestions, if any, on these views or recommendations.

2. The Committee may also bring to the attention of such bodies, with the consent of the State party concerned, any matter arising out of communications considered under the present Protocol that may assist them in deciding, each within its field of competence, on the advisability of international measures likely to contribute to assisting States parties in achieving progress in the implementation of the rights recognized in the Convention and/or the Optional Protocols thereto.

Article 16

Report to the General Assembly

The Committee shall include in its report submitted every two years to the General Assembly in accordance with article 44 (5) of the Convention a summary of its activities under the present Protocol.

Article 17

Dissemination and information on the Optional Protocol

Each State party undertakes to make widely known and to disseminate the present Protocol and to facilitate access to information about the views and recommendations of the Committee, in particular with regard to matters involving the State party, by appropriate and active means and in accessible formats to adults and children alike, including those with disabilities.

Article 18

Signature, ratification and accession

1. The present Protocol is open for signature to any State that has signed, ratified or acceded to the Convention or either of the first two Optional Protocols thereto.
2. The present Protocol is subject to ratification by any State that has ratified or acceded to the Convention or either of the first two Optional Protocols thereto. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention or either of the first two Optional Protocols thereto.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General.

Article 19

Entry into force

1. The present Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or instrument of accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

Article 20

Violations occurring after the entry into force

1. The Committee shall have competence solely in respect of violations by the State party of any of the rights set forth in the Convention and/or the first two Optional Protocols thereto occurring after the entry into force of the present Protocol.
2. If a State becomes a party to the present Protocol after its entry into force, the obligations of that State vis-a-vis the Committee shall relate only to violations of the rights set forth in the Convention and/or the first two Optional Protocols thereto occurring after the entry into force of the present Protocol for the State concerned.

Article 21

Amendments

1. Any State party may propose an amendment to the present Protocol and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States parties with a request to be notified whether they favour a meeting of States parties for the purpose of considering and deciding upon the proposals. In the event that, within four months of the date of such communication, at least one third of the States parties favour such a meeting, the Secretary-General shall convene the meeting under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States parties present and voting shall be submitted by the Secretary-General to the General Assembly for approval and, thereafter, to all States parties for acceptance.

2. An amendment adopted and approved in accordance with paragraph 1 of the present article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States parties that have accepted it.

Article 22

Denunciation

1. Any State party may denounce the present Protocol at any time by written notification to the Secretary-General of the United Nations. The denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under articles 5 or 12 or any inquiry initiated under article 13 before the effective date of denunciation.

Article 23

Depositary and notification by the Secretary-General

1. The Secretary-General of the United Nations shall be the depositary of the present Protocol.
2. The Secretary-General shall inform all States of:
 - (a) Signatures, ratifications and accessions under the present Protocol;
 - (b) The date of entry into force of the present Protocol and of any amendment thereto under article 21;
 - (c) Any denunciation under article 22.

Article 24

Languages

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
 2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States.
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