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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

Summary

The present document is submitted in accordance with Human Rights Council resolution 13/3, 2010, in which the Council requested the Chairperson-Rapporteur of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to prepare a proposal for a draft optional protocol to be used as a basis for the forthcoming negotiations.

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I. Proposal for a draft optional protocol to the Convention on the Rights of the Child to provide a communications procedure

Preamble

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 Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights, and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

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

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

Encouraging States parties to develop appropriate legislative, administrative and other measures, in accordance with article 4 of the Convention on the Rights of the Child, to enable children and others acting on their behalf and in their best interests to have access to effective remedies for violations of their rights, including, where appropriate, through the establishment of national human rights institutions mandated to promote and safeguard the rights of children,

Considering that, in order to achieve further the purposes of the Convention on the Rights of the Child (hereinafter referred to as the Convention) and the implementation of its provisions, 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:

Article 1

Competence of the Committee on the Rights of the Child to receive and consider communications

1. A State party to the present Protocol recognizes the competence of the Committee to receive and consider communications as provided for by the provisions of the present Protocol.
2. The Committee shall exercise the functions conferred on it by the present Protocol in a manner that respects the rights of the child and ensures that the best interests of the child are a primary consideration in all actions concerning the child.

Article 2

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:

- (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.

Article 3

Collective communications

1. National human rights institutions and ombudsman institutions and non-governmental organizations in consultative status with the United Nations Economic and Social Council with particular competence in the matters covered by the Convention and the Optional Protocols thereto, which have been approved for that purpose by the Committee, may submit collective communications alleging grave or systematic violations 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. 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 subparagraph 1 (b) and/or (c) of the present article.

3. Any State party may also, at the time of ratification or accession to the present Protocol, or at any time thereafter, declare that it recognizes the right of any national non-governmental organization within its jurisdiction, which has particular competence in the

matters covered by the Convention and the Optional Protocols thereto, to submit collective communications as provided for in paragraph 1 of the present article.

Article 4

Admissibility

The Committee shall consider a communication inadmissible when:

- (a) The communication is anonymous;
- (b) 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;
- (c) 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;
- (d) 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. 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;
- (e) It is manifestly ill-founded or not sufficiently substantiated;
- (f) 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.

Article 5

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 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 6

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 identity of any individual or group of individuals concerned shall not be revealed to the State party or otherwise without the express consent of the individual or individuals concerned.

3. Within three months, the receiving State party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State party.

Article 7

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 the 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.

Article 8

Consideration of the merits

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 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.
5. The Committee shall develop and publish rules of procedure to be followed when exercising the functions conferred on it by the present Protocol. In doing so, it shall have regard to article 1 (2) of the present Protocol.

Article 9

Follow-up to the views of the Committee

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, within three months, a written response, including information on any action taken in the light of the views and recommendations of the Committee.
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 recommendations, 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.

Article 10

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, the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography or the Optional Protocol to the Convention 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, within three 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 consultations with the State party concerned, decide to include a summary account of the results of the proceedings in its report provided for in article 15 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.
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 11

Reporting on grave or systematic violations

1. The Committee may invite the State party concerned to include in its 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, as appropriate, details of any measures taken in response to an inquiry conducted under article 10 of the present Protocol.
2. The Committee may, if necessary, after the end of the period of three months referred to in article 10 (5), invite the State party concerned to inform it of the measures taken in response to such an inquiry.

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:

- (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, nor communications from a State party that has not made such a declaration.

Article 13

Protection measures

A State party shall take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol.

Article 14

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 15

Report to the General Assembly

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

Article 16

Publicity

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 to adults and children alike.

Article 17

Signature, ratification and accession

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

Article 18

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 its entry into force, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

Article 19

Reservations

No reservations to the present Protocol shall be permitted.

Article 20

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 21

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 2, 3 or 4 or any inquiry initiated under article 12 before the effective date of denunciation.

Article 22

Notification by the Secretary-General

The Secretary-General of the United Nations 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 under article 20;
- (c) Any denunciation under article 21.

Article 23

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.

II. Explanatory memorandum

Preamble

1. The wording is inspired by the preambles to the Convention on the Rights of the Child and the first Optional Protocol to the International Covenant on Civil and Political Rights, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. The Optional Protocol to the Convention on the Rights of Persons with Disabilities has no preamble.

2. This is the derivation of the paragraphs in the draft:

First preambular paragraph: First preambular paragraph of the Convention on the Rights of the Child and the first preambular paragraph of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights;

Second preambular paragraph: Second preambular paragraph of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (similar to the second preambular paragraph of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women);

Third preambular paragraph: Fourth preambular paragraph of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights;

Fourth preambular paragraph: Inspired by the Human Rights Council resolutions on the Optional Protocol to the Convention on the Rights of the Child to provide a communications procedure (fifth preambular paragraph of Council resolution 11/1 and the fourth preambular paragraph of resolution 13/3);

Fifth preambular paragraph: During the first session of the Open-ended Working Group on an Optional Protocol to the Convention on the Rights of the Child to provide a communications procedure in December 2009, the importance of encouraging the development of effective remedies for violations of children's rights at the national level was raised, including through the development of national human rights institutions for children, children's ombudspersons and similar institutions. This was also promoted in Council resolution 10/14 on the rights of the child, in particular in paragraphs 10 and 11;

Sixth preambular paragraph: Inspired by the first preambular paragraph of the first Optional Protocol to the International Covenant on Civil and Political Rights and the sixth preambular paragraph of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

Article 1

Competence of the Committee on the Rights of the Child to receive and consider communications

3. Paragraph 1 is a standard provision, included with slight variations in the four existing optional protocols and also in the provisions of four conventions that provide communications procedures.

4. Paragraph 2 responds to discussions at the Working Group's first session, when it was stressed by experts and State representatives that the communications procedure for the

Convention on the Rights of the Child needed to take account of the special status and rights of children and be “child-friendly”. Article 3 (1) of the Convention on the Rights of the Child had been identified by the Committee on the Rights of the Child as a principle (the best interest principle) of cross-cutting relevance to the whole Convention. Article 10 (5) of the present draft requires the Committee to “have regard” to article 1 (2) of the present draft in developing and publishing rules of procedure regarding the communications procedure.

Article 2

Individual communications

5. Similar provisions arise with slight variations in the four optional protocols and the Convention’s provisions. The provisions of the Optional Protocols to the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of Persons with Disabilities, and also the International Convention on the Elimination of All Forms of Racial Discrimination recognize that individuals and groups of individuals may submit communications. The first Optional Protocol to the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the International Convention for the Protection of All Persons from Enforced Disappearance refer to “individuals” who claim to be victims, which allows for more than one applicant; also, in practice, communications from more than one individual have been considered under the first Optional Protocol to the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. While the first Optional Protocol to the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination provisions do not refer to communications being made “on behalf of” individuals, in practice the relevant committees can consider such applications, and their rules of procedure make this clear (see the rules of the Human Rights Committee, rule 96 (b), and the rules of the Committee on the Elimination of All Forms of Discrimination, rule 91 (b), which for example states that:

as a general rule, the communication should be submitted by the individual himself or by his relatives or designated representatives; the Committee may however in exceptional cases accept to consider a communication submitted by others on behalf of an alleged victim when it appears that the victim is unable to submit the communication himself, and the author of the communication justifies his acting on the victim’s behalf).

6. Article 2 (4) of the present draft incorporates the following additional wording derived from the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (art. 2) and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (art. 2): “Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.”

7. During the first session of the Working Group, a number of States raised questions about how to ensure that victims who were children at the time of the violation but could not exhaust their domestic remedies before they reached the age of 18 would be able to submit communications. Therefore, the notion “individual” is used in article 2 (1), as it is in all the existing procedures, rather than “child”. To address States’ concerns about possible manipulation of child victims by those submitting communications on their behalf,

paragraph 5 is added to ensure that, in such cases, the Committee applies the best interest principle. This reflects the principle identified by the Committee in article 3 (1) of the Convention on the Rights of the Child. Another option could be to include this provision in the rules of procedure, which the Committee will develop regarding the communications procedure before the Protocol comes into use.

8. Extending the communications procedure to cover the provisions in the two existing Optional Protocols to the Convention on the Rights of the Child is consistent with the only existing parallel: the second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. It extends the competence of the Human Rights Committee to cover communications concerning its provisions (art. 5), unless States make a contrary statement on ratification or accession (article 5 of the second Optional Protocol to the International Covenant on Civil and Political Rights):

With respect to the States parties to the first Optional Protocol to the International Covenant on Civil and Political Rights adopted on 16 December 1966, the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction shall extend to the provisions of the present Protocol, unless the State party concerned has made a statement to the contrary at the moment of ratification or accession).

Article 3

Collective communications

9. Experts at the first session of the Working Group encouraged States to consider including provisions allowing “collective communications”, defined in this context as communications alleging grave or systematic violations of any of the rights set forth in the Convention and/or the Optional Protocols thereto, without the identification of individual victims. This was strongly advocated by experts consulted during the preparation of the present draft, in particular during the expert consultations in Geneva in June 2010.

10. The issue of collective communications is not totally new within the framework of the United Nations standard setting; it was already discussed during the negotiations on the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

11. In the present draft, it is suggested that the Committee should be able to consider collective communications from national human rights institutions or ombudsman institutions and non-governmental organizations in consultative status with the Economic and Social Council and from, with particular competence in the matters covered by the Convention and the Optional Protocols thereto, leaving it to the Committee to determine whether the body should be approved for this purpose. Further criteria for approval could be defined in the Committee’s rules of procedure.

12. Regional human rights mechanisms in Europe and Africa allow for the submission of collective complaints. In the Council of Europe, the Additional Protocol to the European Social Charter providing for a system of collective complaints was opened for signature in 1995 and came into force in 1998. It enables the European Committee of Social Rights to consider communications made by certain organizations approved for the purpose, alleging unsatisfactory application of the Charter. A State can also declare that it recognizes the right of national non-governmental organizations within its jurisdiction and that have particular competence in the matters governed by the Charter to lodge complaints against it.

13. The African Charter on the Rights and Welfare of the Child mandates the African Committee of Experts on the Rights and Welfare of the Child to receive communications “from any person, group or non-governmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by this Charter” (art. 44 (1)). The Committee’s guidelines for the consideration of communications provided for in article 44 state:

1. Communications may be presented by individuals, including the victimized child and/or his parents or legal representatives, witnesses, a group of individuals or non-governmental organizations recognized by the African Union, by a Member State or by any other institution of the United Nations system.

2. The Author of the communication shall specify either to have been a victim of violations of the rights spelt out in the Charter, or to act on behalf of a victim or of other eligible parties.

3. A Communication may be presented on behalf of a victim without his/her agreement on condition that the author is able to prove that his/her action is taken in the supreme interest of the child. The victimized child who is able to express his/her opinions shall be informed of the communications presented on his/her behalf

14. International complaints procedures established by the United Nations Educational, Scientific and Cultural Organization (UNESCO) and under the Constitution of the International Labour Organization (ILO) also allow for collective communications without identification of victims of violations. Individuals, groups of individuals and non-governmental organizations can submit a complaint to the UNESCO Committee on Conventions and Recommendations if they are direct victims or if they have a sufficient connection to the claimed violations. The procedure is confidential. It is the Committee’s responsibility to decide whether the affair in question is an individual and specific “case” concerning violation of human rights or a question of “massive, systematic or flagrant violations of human rights which result either from a policy contrary to human rights applied de jure or de facto by a State or from an accumulation of individual cases forming a consistent pattern”. The ILO complaint procedure is regulated by articles 26 to 34 of the ILO Constitution, under which a complaint alleging that a member State is not “securing the effective observance” of a convention to which it is a party can be filed by another member State, party to the same convention; any delegate to the ILO Conference; or by the ILO Governing Body. When a complaint is received, the Governing Body can appoint a commission of inquiry, composed of three independent members, to carry out an examination and formulate any recommendations.

Article 4

Admissibility

15. Article 4 is derived from article 2 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities. The only distinctive feature in the text is a reference to a child’s well-being and development in subparagraph (d).

16. Before considering the merits of a communication, the Committee needs to determine whether it meets certain criteria applying to all communications and is therefore “admissible”.

17. The existing procedures provide a number of standard reasons for rejecting communications (declaring them “inadmissible”). The following provisions relate to admissibility: articles 3 and 5 of the first Optional Protocol to the International Covenant on Civil and Political Rights; articles 3 and 4 of the Optional Protocol to the Convention on the

Elimination of All Forms of Discrimination against Women; article 3 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; article 2 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities; article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination; article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and article 31 of the International Convention for the Protection of All Persons from Enforced Disappearance.

Article 5

Interim measures

18. This is a standard provision in the Optional Protocols to the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of Persons with Disabilities, from which article 6 is derived, and also in the International Convention for the Protection of All Persons from Enforced Disappearance. It is provided for in the rules of procedure of the Human Rights Committee, the Committee on the Elimination of All Forms of Discrimination and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (for example, see Human Rights Committee rules of procedure). Given the developmental status and vulnerability of children, it was strongly argued at the first session of the Working Group for its inclusion in the new Optional Protocol to the Convention on the Rights of the Child.

19. Further details, including a child protection policy, could be included in the Committee's rules of procedure; this could be explicitly referred to in article 8 (5) of the present draft.

Article 6

Transmission of the communication

20. The existing procedures include various provisions defining the stages of consideration of communications. More detailed provisions have been included in the rules of procedure adopted by the respective committees. In the present draft, these stages are defined in articles 6, 7 and 8.

21. The general rule in article 6, paragraph 1, is that the Committee must bring the communication confidentially to the attention of the relevant State party. Paragraph 1 is a standard provision, although the parallel formulations in the existing instruments vary slightly (for example see article 6 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, article 4 of the first Optional Protocol to the International Covenant on Civil and Political Rights, article 6 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights or article 3 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities). Emphasis was placed during the first Working Group session on ensuring that communications concerning children, given their developmental status, are processed without delay. So article 6 requires the Committee on the Rights of the Child to bring the communication to the attention of the State "as soon as possible" and includes a time limit of three months for the State's response. Article 4 of the present draft requires that communications not be anonymous. Paragraph 2 of article 8 requires, however, that the identity of any individual petitioner must not be disclosed to the State party, or otherwise, without their consent. The provisions establishing some existing procedures together with

rules of procedure developed by treaty bodies appear to allow for the identity of petitioner(s) to be kept confidential from States and others. This is particularly important for children as vulnerable individuals (see article 14 (6) (a) of the International Convention on the Elimination of All Forms of Racial Discrimination).

Article 7

Friendly settlement

22. Article 7 is derived from agreed language in article 7 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; also in relation to inter-State communications, in article 10 (1) (d) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, article 41 (1) (e) of the International Covenant on Civil and Political Rights, article 21 (1) (e) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and article 76 (1) (d) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. This enables the Committee to play a proactive role in encouraging an agreed resolution of the issue raised in the communication, without a prolonged examination.

Article 8

Consideration of the merits

23. Paragraph 1 is a standard provision (for example, see article 5 of the first Optional Protocol to the International Covenant on Civil and Political Rights, article 7 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and article 8 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights).

24. Paragraph 2 is derived from agreed language in article 8 (1) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

25. Paragraph 3 is derived from agreed language in article 8 (3) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, allowing the Committee to consult a range of material from other United Nations and United Nations-related bodies and international bodies, including, for example, relevant decisions of regional human rights mechanisms, in addition of course to observations and comments from the State concerned. Similar provisions have been included in the rules of procedure for the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Committee on the Elimination of All Forms of Racial Discrimination. Paragraph 3 could be deleted and instead reflected in the rules of procedure to be adopted by the Committee. Rule 72 (2) of the rules of procedure of the Convention on the Elimination of All Forms of Discrimination against Women states:

The Committee or the working group set up by it to consider a communication may, at any time in the course of the examination, obtain through the Secretary-General any documentation from organizations in the United Nations system or other bodies that may assist in the disposal of the communication, provided that the Committee shall afford each party an opportunity to comment on such documentation or information within fixed time limits.

Similarly, Rule 112 (2) of the rules of procedure of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that: “The Committee,

the Working Group or the rapporteur may at any time in the course of the examination obtain any document from United Nations bodies, specialized agencies, or other sources that may assist in the consideration of the complaint.” See also Rule 95 (2) of the rules of procedure of the Committee on the Elimination of All Forms of Racial Discrimination.

26. Paragraph 4 is a standard provision, the language being derived from article 6 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, article 7 (2) of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and from similar language found in article 5 (4) of the first Optional Protocol to the International Covenant on Cultural and Political Rights, article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities, article 22 (7) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 77 (7) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and article 31 (5) of the International Convention for the Protection of All Persons from Enforced Disappearance, but with addition of “without delay” to emphasize again the need to process communications concerning children as quickly as possible.

27. Paragraph 5 requires the Committee to develop and publish rules of procedure, augmenting its existing rules and relating to its functions under the Optional Protocol. The language is derived from article 7 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, with the addition of a reference to article 1 (2) of the present draft, requiring the Committee to exercise the functions conferred on it by the present Protocol in a manner that respects the rights of the child, including the principle that, in all actions concerning children, the best interest of the child should be a primary consideration. The committees for all existing communications procedures in force have developed and published rules of procedure.

Article 9

Follow-up to the views of the Committee

28. Paragraph 1 uses agreed language from article 6 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (echoed in article 7 (4) of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women), but with a time limit of three rather than six months. Article 11 (1) of the International Convention on the Elimination of All Forms of Racial Discrimination requires the State concerned to respond within three months.

29. Paragraph 2 concerns one possible method of follow-up to the Committee’s views and recommendations (if any) adopted on a communication, derived from agreed language in article 7 (5) of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and article 9 (3) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. Various methods of follow-up have also been developed by committees in their rules of procedure (see HRI/ICM/2009/7).

Article 10

Inquiry procedure for grave or systematic violations

30. Articles 10 and 11 of the present draft concern the competence of the Committee to undertake inquiries when informed of grave or systematic violations of the Convention and/or its optional protocols. The Optional Protocols to the Convention on the Elimination

of All Forms of Discrimination against Women, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of Persons with Disabilities, as well as articles 20 and 28 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and article 33 of the International Convention for the Protection of All Persons from Enforced Disappearance include provisions allowing inquiries. The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Optional Protocol to the Convention on the Rights of Persons with Disabilities and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment allow a State to declare on ratification or accession that it does not recognize the competence of the Committee to carry out such inquiries. In the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the onus is on States to make a declaration at any time recognizing the competence of the Committee to undertake an inquiry.

31. The language of article 10 is identical to that in article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and article 6 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities, except that, as in other articles, to ensure a rapid procedure in the best interest of children, “without delay” has been added to paragraphs 1 and 4, and a time limit of three months, rather than six, inserted in paragraph 5. Article 10 follows article 10 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, article 8 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities and articles 20 and 28 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in that States not wishing to be bound by this provision must make a specific declaration in that respect.

Article 11

Reporting on grave or systematic violations

32. This follow-up procedure on inquiry is derived from agreed language in article 9 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, article 12 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and article 7 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

Article 12

Inter-State communications

33. Provisions allowing for inter-State communications are set out in article 10 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, where it is an optional procedure; articles 41 to 43 of the International Covenant on Civil and Political Rights and also in article 21 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 76 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and article 32 of the International Convention for the Protection of All Persons from Enforced Disappearance. It appears that there have been, as yet, no inter-State communications under any of the instruments. The wording of the present article is based on article 32 of the International Convention for the Protection of All Persons from Enforced Disappearance.

Article 13

Protection measures

34. At the first session of the Working Group, experts and State representatives raised concerns about the vulnerability of child petitioners and the importance of ensuring that their involvement in the communications procedure did not put them at risk. The possible vulnerability of petitioners has been considered in the elaboration of other protocols, and article 13 is derived from the agreed wording in article 13 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; article 11 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women omits the words “any form of”.

Article 14

International assistance and cooperation

35. This article derives from article 14 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which includes a unique and detailed procedure enabling the Committee, with the consent of the State party concerned, to inform United Nations agencies when communications and/or the Committee’s views and recommendations on them suggest a need for technical advice or assistance to States. The issue of international assistance in the context of the optional protocol was also raised by some delegations at the first session of the Working Group. The Chairperson of the Committee on the Rights of the Child recalled that the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights contained a provision to that effect and that the Optional Protocol to the Convention on the Rights of the Child could take a similar approach.

36. The Chairperson-Rapporteur will leave the issue of establishment of a special/trust fund (as it is the case in article 14 (2) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights) for consideration by Member States.

Article 15

Report to the General Assembly

37. This is a standard provision, similar to those in article 6 to the first Optional Protocol to the International Covenant on Civil and Political Rights, article 12 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and article 15 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

Article 16

Publicity

38. It has become a standard provision to require States parties to make respective instruments well known and to facilitate access about the views and recommendations of committees (article 13 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, article 16 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights). The requirement of “appropriate and active means” is by analogy based on article 42 of the Convention on the Rights of the Child, under which “States parties undertake to make the principles and

provisions of the Convention widely known, by appropriate and active means, to adults and children alike”. The importance of making such information accessible to children by child-friendly language was also stressed during the first session of the Working Group. Article 17 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities should be referred to in this regard as well: “The text of the present Protocol shall be made available in accessible formats.”

Article 17

Signature, ratification and accession

39. Article 17 uses agreed language derived from article 8 of the Optional Protocol providing communications procedures to the International Covenant on Civil and Political Rights, article 15 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and article 1 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

Article 18

Entry into force

40. Article 18 uses agreed wording from article 9 of the Optional Protocol providing communications procedures to the International Covenant on Civil and Political Rights, article 16 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, article 18 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and article 13 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

Article 19

Reservations

41. Article 19 follows article 17 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women in not permitting reservations to the Protocol. The Chairperson-Rapporteur wishes to underline the optional nature of the Optional Protocol, as well as the fact that its objective is not to create any new substantive rights; those are stipulated in the Convention on the Rights of the Child and the two existing substantive Optional Protocols to it.

Article 20

Amendments

42. This is a standard provision used with various changes of wording in article 11 of the Optional Protocol providing communications procedures to the International Covenant on Civil and Political Rights, article 18 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, article 19 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and article 15 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities. Article 20 is derived from the agreed wording in the more recent Optional Protocols to the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of Persons with Disabilities.

Article 21

Denunciation

43. Paragraph 1 is a standard provision used in the Optional Protocol providing communications procedures to the International Covenant on Civil and Political Rights and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of Persons with Disabilities. The period after which denunciation takes effect varies (three for the Optional Protocol providing communications procedures to the International Covenant on Civil and Political Rights; six months for the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; one year for the Optional Protocol to the Convention on the Rights of Persons with Disabilities). Article 21 follows the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

44. Paragraph 2 allows continued application of the provisions of the Protocol to any communications submitted to the Committee and any inquiry initiated by the Committee, prior to the date of denunciation.

Article 22

Notification by the Secretary-General

45. This is a standard provision used in article 13 of the Optional Protocol providing communications procedures to the International Covenant on Civil and Political Rights, article 20 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, article 21 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and article 9 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities. Article 21 follows the wording of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (the Optional Protocol providing communications procedures to the International Covenant on Civil and Political Rights and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights refer to provisions in the respective Covenants defining which States can sign and ratify; article 46 of the Convention on the Rights of the Child states, “The present Convention shall be open for signature by all States”, as does article 25 of the Convention on the Elimination of All Forms of Discrimination against Women. So “all States” is used in article 21).

Article 23

Languages

46. This is a standard provision used in article 14 of the Optional Protocol providing communications procedures to the International Covenant on Civil and Political Rights, article 21 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and article 22 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. Article 18 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities provides a shorter version: “The Arabic, Chinese, English, French, Russian and Spanish texts of the present Protocol shall be equally authentic.” “All States” is used in paragraph 2, as explained under article 21 above.

Annex

Letter from the Chairperson-Rapporteur of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child, Mr. Drahoslav Štefánek, to the members of the Working Group

The Human Rights Council, in its resolution 13/3 of 24 March 2010, decided to extend the mandate of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure until the seventeenth session of the Council, and at the same time, mandated the Open-ended Working Group to elaborate an optional protocol to the Convention on the Rights of the Child to provide a communications procedure.

In the above resolution, the Human Rights Council also requested the Chairperson-Rapporteur of the Open-ended Working Group to prepare a proposal for a draft optional protocol to be used as a basis for the forthcoming negotiations of the Open-ended Working Group. According to the resolution, the proposal for a draft optional protocol should be circulated by September 2010 in all the official languages of the United Nations.

It was specified in the resolution that the Chairperson-Rapporteur should take into account the views expressed and inputs provided during the first session of the Open-ended Working Group (16–18 December 2009), give due regard to the views of the Committee on the Rights of the Child and, where appropriate, to the views of relevant United Nations special procedures and other experts.

Ahead of the important task conferred upon me, I elaborated a non-paper containing possible elements of the draft optional protocol, which was circulated by the Office of the United Nations High Commissioner for Human Rights (OHCHR) to all the Permanent and Observer Missions in Geneva on 17 May 2010. The non-paper was discussed during the informal consultations with Member and Observer States of the United Nations and other stakeholders on 26 May 2010 in Geneva. I was listening carefully to comments presented at this meeting and received with appreciation additional ones in writing.

While preparing the proposal for a draft optional protocol, I profited also from the expert consultations in which I participated on 21 and 22 June 2010 in Geneva. The consultations on the optional protocol were organized by the Office of the United Nations High Commissioner for Human Rights in cooperation with the International Commission of Jurists. A number of United Nations and civil society experts on the rights of the child took part in the consultations, including the Chairperson and the Vice-Chairperson of the Committee on the Rights of the Child.

I have prepared the proposal in the light of the importance of ensuring consistency and coherence within the expanding range of international human rights instruments. Thus, wherever possible and appropriate, the draft uses agreed language from the optional protocols and/or provisions of the treaties, which have created the existing communications procedures under the core human rights treaties. The draft also takes into account the expert submissions and views expressed in the discussion during the first session of the Open-ended Working Group in December 2009.

The explanatory memorandum to the proposal for a draft optional protocol contains a rationale for each article of the proposal, for ease of orientation also with references to provisions of the existing instruments that have been used as inspiration.

I hope this proposal will provide a good basis for the deliberations at the second session of the Open-ended Working Group in December 2010, and that its early publication will allow sufficient time for a careful preparation for negotiations so that we can progress consistently and effectively.

Bratislava, 30 July 2010
