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Working Group on an optional protocol to the Convention on the Rights of the Child Second session

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Comments by the Committee on the Rights of the Child on the 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*

I. Background

1. In its resolution 13/3, the Human Rights Council decided to mandate the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communication procedure to elaborate an optional protocol. In this regard, it requested the Chairperson of the Working Group to prepare a proposal for a draft optional protocol, taking into account the views expressed and inputs provided during the first session of the Working Group in December 2009 and giving due regard to, inter alia, the views of the Committee on the Rights of the Child.
2. In accordance with resolution 13/3, the Office of the United Nations High Commissioner for Human Rights and the International Commission of Jurists organized an expert consultation in Geneva on 21 and 22 June 2010, under the chairmanship of Yanghee Lee and Jan Zermatten, respectively the Chairperson and the Vice-Chairperson of the Committee on the Rights of the Child. Participants were drawn from different regions and legal systems and had experience in litigating on children's issues at the national or international levels. The Chairperson-Rapporteur of the Open-ended Working Group, Drahoslav Stefanek, also participated in the consultation. The purpose of the consultation was to discuss the possible contents of the optional protocol and to facilitate the preparation of the contribution by the Committee to the Open-ended Working Group.
3. The ideas listed below were among those expressed by a majority of experts who participated in the consultation:

* Late submission.

(a) There is a need to establish an individual complaints procedure to complement the current functions of the Committee on the Rights of the Child;

(b) Children, whether as individuals or as part of a group, should be able to submit complaints directly to the Committee; issues regarding representation, possible conflicts of interest, quality of representation and confidentiality of the procedure versus publicity should be dealt with in the optional protocol;

(c) Experts were generally in favour of an optional protocol that is flexible, innovative, suited to the needs of children and takes into account the main principles enshrined in the Convention on the Rights of the Child;

(d) Experts were in favour of including the possibility of collective complaints in the optional protocol; different modalities could be envisaged, including the model of the European Social Charter;

(e) The procedure should be transparent and disseminated broadly among potential users;

(f) Consistent with the campaign for their universal ratification, the optional protocol should encompass the Convention and its two existing protocols;

(g) Regarding reservations, experts were generally in favour of following the model of the Convention on the Elimination of All Forms of Discrimination against Women, i.e., including a provision by which no reservations to the optional protocol would be allowed;

(h) The possibility that the Committee request interim measures should be contemplated, along with a call for States parties to take measures as a result of the request;

(i) Concerning the time limit for the submission of communications to the Committee after exhaustion of domestic remedies, no support for a fixed time limit was expressed;

(j) Any friendly settlement procedure must ensure that the interests of the child are taken fully into consideration;

(k) An inquiry procedure would strengthen the optional protocol and the Committee's jurisprudence;

(l) The optional protocol should reflect the fact that national institutions can play a positive role in the communication procedure, but due account should be taken of their diversity.

4. Following the expert consultation, the Chairperson-Rapporteur of the Open-ended Working Group, in compliance with resolution 13/3, prepared a proposal for the draft optional protocol to be used as a basis for the forthcoming negotiations (A/HRC/WG.7/2/2).

5. The Committee very much welcomes the proposal and its comprehensive approach. It commends the Chairperson-Rapporteur for his efforts, transparency and spirit of compromise in preparing it. The Committee also welcomes the fact that the proposal seeks to ensure consistency and coherence with respect to existing instruments and, to a great extent, uses agreed language from similar optional protocols and relevant provisions of existing human rights treaties. The Committee wishes nevertheless to comment on certain provisions of the draft with a view to contributing to the future discussions at the Open-ended Working Group.

II. Comments on the proposal

6. Regarding the preamble, the Committee considers that it should reflect the fact that the optional protocol must be a child-oriented instrument. It would therefore welcome language to the effect that the States parties take into due account the importance of the status of the child as subject of rights and as a human being with evolving capacities.

7. With regard to the second paragraph of the preamble, the Committee would welcome the inclusion of language by which the States parties would note that the Convention recognizes 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.

8. The preamble should also indicate that the existence of the protocol will reinforce and complement national and regional mechanisms, allowing children to submit complaints for violations of their rights.

9. Regarding article 1 (competence of the Committee on the Rights of the Child to receive and consider communications), the Committee suggests adding a paragraph indicating that, in all actions taken under the protocol, the Committee will favour the effective participation of the child and the fact that his or her views will be given due consideration. In view of the particular importance of time in matters relating to child protection, a further paragraph should be added indicating that the Committee will ensure the celerity of the procedure.

10. Regarding article 2 (individual communications), the Committee welcomes the comprehensive approach contemplated in the draft, including the extension of the communications procedure to any of the rights set forth in the Convention, the Optional Protocol on the sale of children, child prostitution and child pornography and the Optional Protocol on the involvement of children in armed conflict. In the Committee's view, it is essential that no right protected under these three instruments be excluded from the ambit of the communication procedure. These rights are interrelated, interdependent and indivisible; to exclude any right would risk creating a hierarchical relationship among them. For the same reason, the Committee considers that the opt-out clause contained in paragraph 2 would be inconsistent with the obligations accepted by the States parties who have voluntarily accepted to be parties to any of these three instruments. Accordingly, when ratifying the future optional protocol, States should not be given the option to exclude any of them from its scope.

11. The Committee considers that the child should be given a role in the submission of communications. Accordingly, paragraph 1 of article 2 could be completed as follows: "Communications may be submitted by or on behalf of a child or of children, or of an individual or group of individuals, within the jurisdiction of a State party, claiming to be victims, or to have been victims when child/children, of a violation by that State party of any of the rights set forth in (...)".

12. The Committee welcomes the inclusion in article 2 of subparagraph 5, which would require the Committee to make a determination as to whether consideration of a communication is in the best interests of the child when the author of the communication is acting on behalf of a child or group of children. However, it considers that such a determination should be limited to those situations in which, in the Committee's view, the consent of the child or children concerned has not been clearly established. The principle of "best interests of the child" would be construed necessarily as being a matter of the general application by the Committee in its consideration of communications under the optional protocol.

13. Regarding article 3 (collective communications), the Committee welcomes the inclusion of a collective communications procedure, as set forth in this provision. The Committee underscores the particular challenges that some children necessarily face in their access to justice, including the pursuit of remedies at the domestic level, and those challenges are necessarily compounded when approaching the more remote reaches of the Committee in Geneva. A collective communication procedure will, inter alia, allow the Committee to perform its own functions better in ensuring compliance with Convention obligations by allowing it to address a problem affecting an indeterminate number of persons in a single procedure, rather than to engage in consideration of a series of similar communications arising out of the same situation.

14. The Committee believes however, that the capacity of non-governmental organizations to submit collective communications should not be limited to those in consultative status with the Economic and Social Council. By doing so, the optional protocol may unduly constrain the flexibility that the Committee may need to exercise. The Committee would consider it appropriate to develop its own criteria for approving non-governmental organizations in order to ensure the effectiveness of the procedure.

15. Furthermore, the Committee considers it too restrictive to limit collective communications to situations of grave or systematic violations of the Convention. In its view, a clear distinction should be made between the procedure under article 3 and the one described in article 10 (inquiry procedure for grave or systematic violations). The specificity of the collective communication procedure should not be based on the nature of the alleged violation, but mainly on the fact that it concerns a group of alleged victims who cannot be all identified by name.

16. Lastly, the Committee is of the view that paragraph 2 of article 3 should be removed, for the same reasons as those indicated in paragraph 10 above.

17. Regarding article 5 (interim measures), the Committee would welcome the inclusion of additional language making explicit the obligation of States to take all necessary steps to comply with interim measures.

18. With respect to article 6 (transmission of the communication), the Committee considers that, for the State party to take action on a communication submitted to it, the identity of the alleged victim cannot be withheld. Accordingly, the following language is suggested for paragraph 2: "The identity of any individual or group of individuals concerned is not public and is revealed to the State party only for the purpose of the procedure. The communication remains confidential, unless the expressed consent of the individual or individuals concerned is given, until the Committee adopts its final decision on it."

19. Regarding article 7 (friendly settlement), the Committee would welcome the inclusion in the draft of language allowing it to develop a follow-up procedure to monitor the implementation of any friendly settlement and to allow for the possibility of reopening (by the Committee) or resubmitting (by the author) communications in cases of non-implementation or unsatisfactory implementation of the settlement. The Committee would also welcome the inclusion of language to the effect that the Committee will develop precise rules to provide adequate supervision for friendly settlement processes.

20. Regarding article 8 (consideration of the merits), taking into consideration that the child is an individual with the right to be heard, the Committee should have the possibility of hearing the child or children concerned when it examines the merits of a communication not submitted directly by the child or children. Accordingly, article 8 should indicate that, when appropriate, the Committee will seek and invite the child or children to express their views (orally or in writing) in a manner compatible with the necessary celerity of the procedure and the spirit of article 12 of the Convention.

21. Regarding article 10 (inquiry procedure), the Committee suggests that the competence of the Committee to initiate inquiries concern situations of “grave and repeated violations” rather than of “grave or systematic violations” of the Convention. The Committee considers the term “systematic” to be too restrictive, as it suggests the existence of a deliberate policy of the State aiming at violating children’s rights. Furthermore, a provision should be added to this article indicating that the Committee would develop rules defining criteria on “grave and repeated violations”.

22. The Committee notes the inclusion in article 10, paragraph 7 (inquiry procedure for grave or systematic violations) and article 12, paragraph 1 (inter-State communications) of clauses giving States parties the possibility of limiting the competence of the Committee in the exercise of its functions under the protocol. The Committee would encourage the removal of these clauses in order to ensure that it can provide the same protection to all children, irrespective of the country under whose jurisdiction they find themselves.

23. The draft should include a provision to the effect that the Committee will adopt rules of procedure and methods of work for the exercise of its functions under the optional protocol.

III. Final remarks

24. The Committee would like the Open-ended Working Group to take into consideration the above comments, and remains available for further consultations at all stages of the negotiation process. It hopes that the Working Group will fulfil its mandate expeditiously and that the drafting process and approval of the final text by the Human Rights Council and the General Assembly will be completed in 2011.
