2ND SESSION OF THE OPEN-ENDED WORKING GROUP ON AN OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD

WRITTEN COMMENTS RECEIVED FROM DELEGATIONS ON ARTICLE 4

AUSTRIA

Comments on Article 4:

- Need to be clear what exhaustion of remedies entails; we trust that rules of procedure will address this in detail.

- It would be desirable to introduce a time limit – complaints should not be allowed ad infinitum. For example, Art. 35 Paragraph 1 of the European Convention on Human Rights states that:
  The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken
  While a period of six months might be too tight in this case, setting a more generous limit e.g. 1 year may be appropriate:

  Therefore we would like to suggest the following wording:
  4d: All domestic remedies have been exhausted, ADD: <u>according to the generally recognized rules of international law, and within a period of one year from the date on which the final decision was taken, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit.</u> The Committee shall interpret the application of the remedies in a manner sensitive to the impact that delays may cause to a child's wellbeing and development.

- Equally, we suggest adding a provision to give the Committee the possibility to reject petty complaints along the lines of Art. 35 Paragraph 5 of the European Convention of Human Rights that states that The Court shall declare inadmissible any individual application (if) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.
  We make this proposal in view of the expected workload of the committee. We suggest using the wording of Art. 4 OP ICESCR for an article 4 bis.
  ADD:
  <u>Article 4 bis</u>
  <u>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.</u>

Belgian proposal for a modification of Article 4 of the draft Optional Protocol

Two admissibility criteria could be added in the following terms:

The Committee shall declare a communication inadmissible when:

( ) It is not submitted within one year after the exhaustion of domestic remedies. In cases where the author can demonstrate that it had not been possible to submit the communication within that time limit, this period of time shall start to run as of the time the victim has reached the age of majority;

( ) It is not in writing. The Committee shall determine the further modalities for the introduction of such communications in the Rules of Procedure taking into account that these communications could be introduced by children.

(From Chinese Delegation)

Article4 Admissibility

(1) Paragraph (a) should be amended as:"The communication is anonymous and not in writing";

(2) One paragraph should be added after Paragraph (d):

The communication is not submitted within 1 year after the exhaustion of domestic remedies.

Melanie Bejzyk, Canada

On Article 4 para (a), we support the suggestion by Poland and others, to adopt language that would require that "The Ctee shall consider a communication inadmissible when: "The communication is anonymous and not in writing"

We would appreciate clarification to help inform our view: Does Article 4 para , as currently worded in the draft Protocol, envision oral hearings?

We also support Time limits on submission of complaints as a new admissibility reqt:
such as six months or one year after the close of domestic proceedings relevant to the complaints. For example, the following language could be added to Article 4:

Where the communication is submitted by an adult victim or victims, it is not submitted within six months (or one year) after the exhaustion of domestic remedies, (support New Zealand addition) except in cases where the author can demonstrate that it was not possible to submit the communication within that time limit.

Ask delegates to consider adding a new para to Article 4. Canada believes it is in the interest of all to seek to ensure expedited decision-making in respect of children's rights, to the extent possible. Our experience has been that under our domestic privacy laws, the release of private information from third parties such as hospitals and police services, requires consent of the complainant. If a complaint has been filed with a UN treaty body, States require this information to engage and prepare their response to the complaint.

Whether it is in the text of the OP or perhaps, more appropriately, in the rules of procedure, Canada would ask delegations to consider adding language to the effect that consent to release the required personal info be provided along with the complaint to avoid delays at a later time.

FRANCE

Article 4
Recevabilité

Le Comité déclare irrecevable une communication lorsque:

d) Tous les recours internes disponibles n'ont pas été épuisés. Cette règle ne s'applique pas si la procédure de recours excède des délais raisonnables et s'il est peu probable que le ou les requérants obtiennent réparation par ce moyen ~~qu'elle donne satisfaction au requérant~~. Le Comité évalue la procédure de recours en tenant compte des incidences que les retards peuvent avoir sur le bien-être et le développement de l'enfant ;

d) bis La communication n'est pas présentée dans les douze mois suivant l'épuisement des recours internes, sauf dans les cas où l'auteur peut démontrer qu'il n'a pas été possible de présenter la communication dans ce délai; (nouveau).

Proposition de traduction :
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 if it is unlikely ~~to bring effective relief~~ for the petitioner(s) to obtain reparation through this process.
d) bis 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.

GERMANY

Art. 4

In line with many other delegations we think that Art. 4 should provide a time limit for complaints. We also think complaints should be in writing. Concerning Art. 4 d) in our opinion the wording on the exception of the exhaustion of legal remedies is not tight enough. We would suggest to lay down in Art. 4 d) that domestic legal remedies must be exhausted. This shall be a necessary condition if domestic legal remedies are sufficiently effective to deal with this matter.

Japan' s proposal Art4 (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 from the viewpoint of the child's well-being and development.

Proposals by the delegation of Liechtenstein

Article 4

New subparagraph in second place:

a bis) The communication is alleging the violation of a right set forth in an instrument the State party concerned has not ratified;

NEW ZEALAND

Article 4:

- 4(c) : add "*or regional*" after 'international' and before 'investigation'.
- New Article 4bis, where Article 4 of OP ICSECR would be inserted.
- We supported those delegations which proposed adding to Article 4 a provision establishing a twelve-month time limit in which a communication would have to be submitted after the exhaustion of domestic remedies, but if that wording were to be incorporated, we would see value in adding an exception as follows: "*unless the author can justify why this was not possible*".

POLAND

Article 4
The Committee shall consider a communication inadmissible when:

(a) The communication is anonymous [or not in writing];

[(a) (bis) It 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;]

REGERINGSKANSLIET

Memorandum

7 December 2010

Ministry for Foreign Affairs
Sweden

Department for International Law, Human Rights and Treaty Law

Swedish proposal for modification of Article 4, 5, 6, 7 and 8 of the draft Communications Procedure

Article 4 – Admissibility

Proposals for modifications:
The article should be amended to include the following additions (in bold):

The Committee shall declare a communication inadmissible when:

a) the communication is anonymous or not in writing

(f *bis*) It is not submitted within six months [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;

(f *bis*2) where it does not reveal that the child concerned has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance.

UK

Article 4

New sub-paragraph (a bis):

"the communication is not submitted within one year after the exhaustion of domestic remedies;"

In (c), add "or regional": "...another procedure of international or regional investigation or settlement;"

ngo group for the crc

Open-ended Working Group on an Optional Protocol to the Convention on the Rights of the Child, second session, 6-10 December 2010

NGO Joint oral statement on the second cluster: Articles 4 to 6

Delivered by the NGO Group for the Convention on the Rights of the Child

Thank you, Mr Chairman,
This statement is made on behalf of the 77 member organisations of the NGO Group for the CRC.

We strongly support Articles 4 and 6, as currently drafted in the proposal.

Regarding Article 4:

We would like to stress that it will be very important to make sure that all communications can reach the Committee without any time limit; especially in the case of children, who might encounter special obstacles in reaching this procedure and might not be aware of the existence of this international communications procedure within the time limits proposed by some delegations.

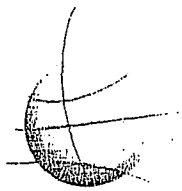
While regional courts, such as the European Court, are close to potential complainants and well-known by them, it is clear that international communications procedure do not enjoy the same level of knowledge at the national level.

We are thus concerned that time limits, as the one suggested by some delegations, would in practice limit the access to this communications procedure and would strongly suggest to avoid adding any such limits.

In addition, we would like to recall that regional courts do not have competence to adjudicate cases under the CRC or its OPs. Though regional courts may refer to those international instruments, they are not bound to apply their provisions and therefore, any decision taken by such bodies should not prevent complainants from using the communications procedure we are discussing now.

With regard to exceptions to exhaustion of domestic remedies:
It is the standard practice of other treaty bodies that domestic remedies need not to be exhausted if it can be shown that they are "not effective, not available or unduly prolonged".[1] Article 4 d only recalls those exceptions while recalling the duty of the Committee to interpret them in accordance with the complainant population concerned, that is to say, children.

With regard to the format of the communication, we support Brazil's approach of reserving this matter for the Committee's rules of procedures. If States were to decide to include that communications should be submitted in writing, we would like to stress that it will be important to not preclude the submission of other types of material.



INTERNATIONAL
COMMISSION
OF JURISTS

Statement to the Open-Ended Working Group on an Optional Protocol to the Convention on the Rights, 7 December 2010: Articles 4, 5, 6

On article 4, The ICJ does not consider it appropriate to apply time limitations to communications submitted following the exhaustion of remedies. Children may face particular obstacles in understanding the availability of and accessing international communication procedures. The proposals for a mere six months are especially ill-advised- even the most recent instrument on communications adopted, the OP to the Covenant on ESC Rights contained a one-year limit, with an exception clause where the period can be extended if the author can demonstrate that it had not been possible to submit the communication within that time limit- child victims surely should be granted a wider latitude

The Proposal for a new admissibility requirement whereby regional remedies would need to be exhausted was, we would recall, discussed extensively and rejected during the negotiations on the Optional Protocol to the CESCR. Such a requirement would create an imbalance between those states that have and those who do not have regional systems capable of adjudicating the Convention rights. But more critically, the particular obligations of the Convention are not justiciable in any regional system – analogous obligations in regional instruments legally cannot be considered a substitute.

The Proposal we have heard to add a new paragraph in relation to "communications not revealing a clear disadvantage" also should not be accepted. This importation from protocol 14 of the European Convention on Human Rights could add a wholly unnecessary and onerous hurdle to access to justice for children. Frivolous complaints are already covered under the admissibility requirements contained in paragraph 4(e), making inadmissible any communication manifestly ill-founded or not sufficiently substantiated. The meaning of the term "clear disadvantage" in this context remains to us a mystery. A violation by definition surely constitutes a clear disadvantage and there should not be any burden on the victim to meet this nebulous and indeterminate threshold.