

Preliminary Joint NGO Submission to the Open-ended Working Group on an Optional Protocol to the Convention on the Rights of the Child to provide a communications procedure

This submission is presented by the NGO Group for the CRC,¹ including Defence for Children International (DCI)*, Foundation ECPAT International (End Child Prostitution, Child Pornography and Trafficking in Children for Sexual Purposes)*, Human Rights Watch*, Save the Children*, Kindernothilfe*, Plan International, Inc.*, SOS Children's Villages International*, International Federation Terre des Hommes (IFTDH)*, World Vision International *, World Organisation Against Torture (OMCT)* and the Child Rights Information Network (CRIN), the Global Initiative to End Corporal Punishment, Youth Empowerment Alliance, Inc. ,

together with the following partner organisations:

International Commission of Jurists (ICJ)*, the Coalition to Stop the Use of Child Soldiers, International Disability Alliance (IDA)² and Mental Disability Advocacy Centre

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The NGO Group for the CRC and its partners generally welcome the revised draft Optional Protocol prepared by Mr. Drahoslav Štefánek, 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 (OEWG) circulated on 14 January 2011, and acknowledge the improvements that have been included to the text.

In reaction to the Chairperson-Rapporteur's revised draft, this joint submission provides some preliminary suggestions and comments concerning the following provisions:

- Protection measures – Art. 4
- Publicity – Art. 5
- Individual communications – Art. 6
- Collective communications – Art. 7
- Interim measures – Art. 8
- Admissibility – Art. 9
- Clear disadvantage – Art.10
- Time limits – Art. 11 and 14
- Friendly settlement – Art. 12
- Inquiry procedure – Art. 16
- Dissemination and information on the Optional Protocol – Article 20
- Art. 23
- Reservations – Art. 24

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¹The NGO Group for the CRC is a global network of 77 national and international NGOs. Its mission is to facilitate the promotion, implementation and monitoring of the Convention on the Rights of the Child.

² The IDA comprises : Disabled Peoples' International*, Down Syndrome International, International Federation of Hard of Hearing People*, Inclusion International*, World Blind Union*, World Federation of the Deaf*, World Federation of the DeafBlind*, World Network of Users and Survivors of Psychiatry*, Arab Organization of Disabled People, European Disability Forum*, Pacific Disability Forum, Red Latinoamericana de Organizaciones No Gubernamentales de Personas con Discapacidad y sus familias (RIADIS)

Protection measures – Article 4

We support the revised article, in particular the inclusion of “any human rights violation” and “as a consequence of communications or cooperation”.

This obligation will help to ensure effective protection of child victims and their representatives who submit communications to the Committee, including lawyers, NHRIs, children’s ombudspersons and representatives of NGOs, as well as those who generally cooperate with the Committee under the Protocol, including in the context of inquiries.

Publicity – Article 5

We support revised article 5 which will both protect victims from unwarranted or unwanted publicity and allow them to make their communications public if they so wish.

Individual communications – Article 6

We support the amendments to this article in paragraphs 6.1 and 6.6. It is important to ensure that child victims are not manipulated in the communications procedure and we therefore welcome paragraph 6.6. During the first part of the second session of the OEWG in December 2010, a few States proposed further limitations as to who could submit communications or who could represent children. We oppose these suggestions. Such limitations would not only be inconsistent with existing treaty body procedures, they would risk denying child victims access to justice under this Protocol.

We urge the deletion of bracketed paragraphs 6.2 and 6.3 as did many States in the December session. The new paragraph 2 of article 1 ensures that no communication can be considered on matters covered by an instrument to which the State is not a party. As the preambular language in the two existing Optional Protocols to the CRC makes clear, the Protocols are complementary to the Convention itself. The rights contained in the Protocols must not be demoted to a degraded status, by allowing a State Party to remove them from the scope of the communications procedure.

Article 6 reflects agreed language, with additional emphasis on preventing manipulation of children. We would strongly oppose any further limitations which would not only be discriminatory but potentially hamper the effectiveness of the procedure.

Collective communications – Article 7

We welcome the new language of paragraph 7.2, which demonstrates the distinction between individual communications, collective communications and the inquiry procedure. This language neatly defines the scope and added value of collective communications: they are communications which allege “recurring violations affecting multiple individuals” that result from a State law, policy or practice inconsistent with the CRC and/or its existing Optional Protocols.

Paragraph 7.2 also correctly leaves to the Committee eligibility determinations for submitting collective communications. The Committee is the international expert body in matters of children’s rights and so well situated to make such a determination.

The unique value of collective communications is avoiding the need to identify and “use” child victims. As stressed by the independent experts, the Committee on the Rights of the Child and a number of States in the December session, many serious and recurring violations of children’s

rights cannot or will not be redressed through the individual communications mechanism. Moreover, in many cases, NHRIs, ombudsman institutions and NGOs will know about recurring violations of children's rights, but will not be able to get these violations addressed in a quasi-judicial procedure because it would not be safe or it would be unethical to identify and "use" individual child victims. In some instances, such as for victims of child pornography, it will be detrimental for the identity of the victims to be revealed and the number of victims similarly situated may be too numerous for a communication by a "group of individuals" to be launched practicably.

Under a collective communications procedure, the requirement would remain that the communicant must provide the Committee with reliable evidence of violations. In addition, the communicant would still be required to exhaust domestic remedies, so long as they are effective and available at the national level. It would, however – as the Committee itself noted – promise to increase the Committee's efficiency and decrease its workload.

In considering a single collective communication, the Committee would be able to avoid a backlog from being asked to review hundreds of similar individual communications that relate to the same recurring violation.

A few states have identified potential duplication of a collective communications procedure with the inquiry procedure identified in article 16. However, such concern misconstrues the distinct functions and operation of the two procedures. The inquiry procedure is not intended primarily to redress individual violations, but rather to address grave or systematic situations in the state concerned.

We therefore believe that the effective protection of children's rights requires that the Committee have the competence to consider collective communications and therefore strongly urge the Working Group to delete paragraphs 7.1 and 7.3 and make the collective communications procedure a compulsory element of the Optional Protocol.

We generally oppose the concept of "opt in" provisions in an "Optional" Protocol. The requirement to enter a declaration to accept the provision conveys the signal that the provision is not an integral part of the treaty and renders it potentially tokenistic and ineffective.

To further improve the language of paragraph 2, we would suggest that "recurring" be changed to "systemic".

Interim measures - Article 8

We urge the inclusion of an additional provision that would affirm that States receiving a request for interim measures shall take appropriate measures to comply with that request. Such a proposal was endorsed by a number of states in the December session, yet does not appear in the present draft. Interim measures are a fundamental element of any communications procedures and are indispensable to preserve the rights of the victims until the communication can be considered on the merits. States, upon becoming party to the Optional Protocol, should be aware of this requirement to ensure that interim measures are effective in practice and that the right to an effective remedy is not voided of its substance.

For instance, if an interim measure regarding avoiding publicity for a trial concerning a child victim was disregarded, and the public trial were to go ahead, the damage to the child could be irreparable.

As stressed in paragraph 8.2, complying with interim measures "does not imply a determination on

admissibility or on the merits of the communication”, as they are only intended to avoid “irreparable damage to the victim” and thus preserve his/her right to a remedy, which is the object and purpose of this Optional Protocol.

Admissibility - Article 9

We strongly advise the deletion of the requirement in paragraph 9(h) that communications be submitted within one year after the exhaustion of domestic remedies. . A substantial number of child victims will not be in a position to submit a communication to this international procedure within a year, either because they are unaware of the existence of the procedure or because of the obstacles inherent in its access by children.

Not only is this not a standard requirement for most other treaty body communications procedures, it runs directly contrary to the expressed desire of many States to make this communication procedure child-sensitive and easily accessible to children.

Clear disadvantage - Article 10

We urge the deletion of article 10. It is not a standard provision, and remains contested and untested in the one procedure where it exists, the OP to the ICESCR, which is not yet in force. In the December session, this notion was supported, and only tenuously, by a small number of States; we believe it is entirely unnecessary. Concerns about abusing the right to submit communications are already covered under article 9 (c). In addition, including a clear disadvantage requirement would provide a preliminary examination of the merits, only further delaying the examination of the communication and increasing the Committee’s workload.

We have yet to hear of a real example of a situation where a child’s rights have been violated, but the child has suffered “no clear disadvantage”; a disadvantage is a necessary and unavoidable consequence of a violation, even if harm cannot always be quantified.

In addition, the wording implies that the “author”, who is not necessarily victim, should demonstrate a “clear disadvantage”; this construction is incompatible with the provisions on who can submit communications under articles 6 and 7.

Time limits – Articles 11 and 14

We strongly advise the reconsideration of the time limits for responding to a communication and following-up on the views of the Committee contained in articles 11.2 and 14.1. A three-month time limit is neither an unprecedented nor unrealistic time limit for States to respond to communications. In fact, States have already embraced a three-month limit in the Convention on the Elimination of All Forms of Racial Discrimination (CERD)³. There is no reason why the period for a State’s response should be any longer for a procedure concerning children. On the contrary, States have recognised the particular need to process communications regarding children’s rights as quickly as possible.

Alternatively, in lieu of specifying the time-limit for every communication in the Protocol, we would support the proposal of some States to leave this issue to the Committee’s Rules of procedure, as is the case in the Convention for the Protection of All Persons from Enforced Disappearance.

³ See Article 14.6(b) of CERD

With reference to article 14, follow-up to the views of the Committee should not be a lengthy process as it does not require further research into an individual case. Instead, it asks only for an update as to measures undertaken by a State since it received the Committee's views. In this context, a time limit of three months is not only reasonable, it would also serve to strengthen the effectiveness of the communications procedure by stressing the importance of implementing the views of the Committee.

Additionally, regardless of the time limit set, we strongly urge that the wording "shall endeavour" be changed simply to "shall". The construction "shall endeavour" is not only inconsistent with language existing in other procedures, it can serve to render the obligation entirely ineffective, since it only requires taking some minimal step towards complying, but not to achieve compliance.

Friendly settlement – Article 12

We call for modification in the language of this article. The new wording in paragraph 12.2 does not adequately address the concerns raised by States and others about friendly settlements at the December session.

Paragraph 2 as currently drafted enables the Committee to follow up implementation of a friendly settlement. But if as the provision states, agreement on a friendly settlement closes consideration of the communication, follow-up can only consist in monitoring the implementation of the settlement, regardless of its terms.

We therefore suggest revising paragraph 12.2 to read: "The Committee may continue examination of a communication if it considers that respect for the rights set forth in the Convention and/or its first two Optional Protocols so requires or the settlement has not otherwise been adequately implemented."⁴

Inquiry procedure – Article 16

We urge the deletion of bracketed paragraphs 16.7 and 16.8. Inquiry procedures are a key complementary tool to individual and collective communications, allowing for the Committee to address widespread or systemic situations.

It is essential that a procedure covering grave or systematic violations of children's rights be compulsory on State parties, following the best practice enshrined in article 33.1 of the Convention against Enforced Disappearances, which does not allow for any opt-in or opt-out but still requires the consent of the States concerned before organising any country visits.⁵

Dissemination and information on the Optional Protocol – Article 20

We welcome the amendments made to article 20 and the inclusion of adults and children with disabilities. However the new language remains incomplete as the concept of "accessible formats" is still lacking and is not covered by the phrase "accessible means".

We therefore recommend adding "and formats" after the word "means" to be consistent with the

4 This would mirror Articles 37 and 39 of the European Convention on Human Rights relating to the Court's power to continue examination of applications despite a friendly settlement, where respect for human rights requires this

5 Under the CED, the Committee, if it "receives reliable information indicating that a State party is seriously violating the provisions of [the] Convention", may, "after consultation with the State party concerned, request one or more of its members to undertake a visit" of the State.

language of other similar international instruments, namely article 17 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities and article 16 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

Article 23

We recommend the deletion of bracketed article 23, which contradicts and undermines article 9(g) by implying that ongoing violations which began prior to the entry into force of the Optional Protocol are not covered.

With respect to children, while the immediate conduct giving rise to a violation may have occurred earlier, the effects may be continuous and long-lasting, possibly not even fully realized until several years have passed. These situations must be accounted for, and hence article 23 should be deleted and the option provided under article 9(g) preserved.

Reservations – Article 24

We urge that article 24 be retained as it is currently drafted. There are no conceivable reservations that would not be incompatible with the object and purpose of this protocol. States will in any event remain free to enter interpretative declarations upon ratification or accession.